

“Some time in the early years of the 20th century a British lawyer tried to demonstrate the absurdity of the principle of the "Sovereignty of Parliament", which allows the British Parliament to pass any law no matter how absurd, and no matter how perverse. Trying to illustrate his argument with an example of how absurd this principle is, he said: "If the Parliament wants to make a law which will turn women into men and men into women, it can pass such law. And that law will be valid until repealed by the Parliament itself".

“At the time this example was indeed an example of absurdity”¹. But today it could be argued that this absurdity should be seen as reality.

The question of defining a family has long been a source of contention in the courts. The theoretical thinking came in the form of stereotypical “ideals” of a husband, his wife and their children, based around marriage.

“It could ... be said that marriage effectively served to define the family, since it was the fact that a child’s parents were married which conferred on the child the status of legitimacy – in effect, recognition of the child’s family relationship.”²

The Rent Act 1977 (as amended) also used marriage as its base: -

- “2(1) The surviving spouse (if any) of the original tenant ... shall after the death be the statutory tenant ...
- 2(2) For the purposes of this paragraph, a person who was living with the original as his or her husband or wife shall be treated as the spouse of the original tenant.
- ...
- 3(1) Where paragraph 2 does not apply, but a person who was a member of the original tenants family was residing ... shall be entitled to an assured tenancy.”

The courts have adhered to a narrow approach in much the same way³. It was only in October 1999, in *Fitzpatrick v Sterling House Association*⁴ that the House of Lords made a positive step away from this stereotypical image, ruling that same-sex partnerships could be construed as family relationships for the purposes of housing succession cases.

Lord Slynn recognised that constructing a working definition of the family was: -

“...difficult largely because of preconceptions of a family as being a married couple and, if they have children, their children; difficult also because of the result in some of the earlier

¹ <http://www.truth-and-justice.info/gaymarriages.html>

² *Principles of Family Law*, 7th edition, Cretney S, Masson J, Bailey-Harris R, p1 A-001

³ See *Sefton Holdings v Cairns* [1988] 2 FLR 109, where it was held by Lloyd LJ that there must be a distinction drawn between someone living as a member of the family, and someone who is a member of the family.

⁴ [2001] 1 AC 27, House of Lords

cases when applying the law to the facts. It is, however, obvious that the word "family" is used in a number of different senses, some wider, some narrower"⁵.

Lord Slynn continued that to amount to being a member of the tenant's family a relationship needs to be established, but: -

"A transient superficial relationship will not do even if it is intimate. Mere cohabitation by friends as a matter of convenience will not do. There is, in any event, a minimum residence qualification"⁶.

It was Lord Nicholls in his speech who took the boldest step in ruling that: -

"Where sexual partners are involved, whether homosexual or heterosexual, there is scope for mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife"⁷.

In this judgement the House of Lords has recognised a change in attitudes between when the Rent Act was first introduced and the present day. They believed that it was the purpose of the Act for it to be interpreted in this way – that as a matter of law a homosexual partner of a deceased tenant can establish the necessary familial link. However, it was the Court of Appeal in *Mendoza v Ghaidan*⁸ that went a step further by viewing the legislation in the light of the Human Rights Act 1998 and changing the legislation accordingly.

The Court held that the phrase "as his or her wife" should read "as if they were his or her wife or husband". Buxton LJ explained that this wording suited the purpose required from it by the case in question without allowing lesser relationships that "do not enjoy marriage like characteristics" to take advantage of it.

While many organisations have welcomed this approach from the courts, it is questionable whether the problem has been solved. Talk of "commitment" and "marriage like characteristics" may seem ideal, but they are terms equally loose in definition as "family" because the characteristics and commitments are not specified. Lord Slynn in *Fitzpatrick* admitted that intimacy was not a deciding factor, while Lord Nicholls, as mentioned above, suggested that sexual partners were able to make a long-term commitment based on their intimacy. The law appears to be confused and as a result has left a gap that could allow couples to claim to be families without any type of initial intention on their part to be classed as such. Bearing in mind the difficulties the law has with explaining what is a family, the problems it has with marriage should be readily identifiable.

The definition of marriage can be found in *Hyde v Hyde*⁹ and is: -

⁵ *Supra* at page 34

⁶ *Supra* at page 40

⁷ *Ibid.* at page 44

⁸ [2003] 1 FLR 468

⁹ (1866) LR 1 P&D 130

“The voluntary union for life of one man and one woman to the exclusion of all others”.

S11(c) of the Matrimonial Clause Act 1973 provides that a marriage is void if the parties are not respectively male and female, and there is no doubt that English Law will not recognise a relationship between a couple of the same sex as constituting a valid marriage – the marriage will be void. Whether or not someone is male or female is a question of fact and very seldom did this produce any problems until recent years when the courts have had to consider the position of people affected with “gender identity dysphoria” (discontentment with the sex they were born and the gender role consistent with that sex), or transsexualism.

The traditional view of English law has been that a person’s sex is fixed for all time at birth “and cannot be changed, either by natural development of the organs of the opposite sex, or by medical or surgical means”¹⁰. Therefore the only relevant tests for determining sex are biological.

Ormerod J went on in *Corbett v Corbett*¹¹ that: -

“Sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of the opposite sex”.¹²

Obviously, this decision has serious implications for transsexuals as it means that they have no basis on which to form a secure, legal relationship. Recent judgements, especially the ones in *Bellinger v Bellinger* in the Court of Appeal¹³ and the House of Lords¹⁴ have upheld the *Corbett* interpretation of the law but have accepted the “profoundly unsatisfactory nature of the present position”. It appears that the existing law does therefore favour the heterosexual couple as the norm.

“But there will perhaps be many who find contrary to “reason and common humanity alike” the paradox that society is prepared to provide the drastic surgical and medical treatment of gender reassignment therapy for those who suffer from what is recognised as a serious and distressing medical problem whilst denying those concerned access to legal status which would enable them to function fully in their new gender”¹⁵.

¹⁰ *Cohabiting Couples*, M.E. Rogers, Student Law Review, Vol 39, Summer 2003, page 38 at page 84

¹¹ *Cohabiting Couples*, M.E. Rogers, Student Law Review, Vol 39, Summer 2003, page 38

¹² *Ibid.* at page 105

¹³ [2001] 2 FLR 1048

¹⁴ [2003] 1 FLR 1043

¹⁵ *Principles of Family Law*, 7th edition, Cretney S, Masson J, Bailey-Harris R, p50 2-021

Why should the State provide for a person to be treated for a “condition” but not recognise that person in Law for what the treatment has essentially made them? In effect the State is saying that it is prepared to recognise transexualism as a disease, but not as a way of life. A similar scenario to use by way of comparison is a person who develops a brain tumour. He can be cured of the disease, the same way someone suffering from gender identity dysphoria can be, yet as a result of his treatment, the person with the brain tumour may be left disabled and therefore permitted to claim benefit from the State. A transsexual does not get any recognition from the State for how the treatment as left him.

As was mentioned earlier, marriage was traditionally seen as defining the family because of the couple’s ability to have legitimate children of their own (barring any circumstance such as infertility). This is only the case where a heterosexual couple is concerned: -

“Marriage enjoys a privileged status in law because of the unique social benefits it offers. It is based on the different but complementary natures of men and women. To equate homosexual partnerships and heterosexual marriage is ridiculous because they are simply not the same”¹⁶.

While this statement can be said to be true to a point – homosexual and heterosexual partnerships are different – some would say that it is unfair not to allow some sort of legally based rights to cohabiting homosexual couples. This unfairness also applies to heterosexual couples who cohabit. It was once possible to view cohabitation as a type of trial marriage, but it is now the case that long-term cohabitation has become more frequent. Add this to the fact that marriage rates are falling and an increased rate of births outside marriage are being registered to cohabitants and it appears that far more people now than ever before are likely to remain unmarried.

The role of marriage in the family has become even less appropriate given the fact that the Family Law Reform Act 1987 and the Children Act 1989 have highlighted the importance of parentage in determining a child’s legal position.

Traditionally it can be said that the State has an interest in the legal relationship between couples, and so it is upto the State acting via the legal system to determine a set of rules by which the couple enter into the relationship, and also the consequences from the breakdown of that relationship. The law has made several attempts to devise a definition for cohabitation, such as s36 (1) (c) Family Law Act 1996, and the Supplementary Benefits Act 1977. These definitions do, however, only include traditional heterosexual and monogamous relationships.

Parliament had two attempts to consider the possibility of providing rights to unmarried and same-sex couples in the form of the Relationships (Civil Registration) Bill and the Civil Partnerships Bill both introduced into the Commons in 2001 and the House of Lords in 2002. Neither Bill got further than the second reading, but they

¹⁶ <http://www.christian.org.uk/Update%20Magazines/art18.htm>

indicated the need for Parliament to “direct more attention to these issues and create legislation, in some form or other, to create a regime of rights and responsibilities between cohabitantes”¹⁷.

“Hence, on 6th December 2002, Barbara Roche, Minister for Social Exclusion, announced that a consultation paper would be commenced with a view to implementing a civil partnership registration scheme, but, importantly, this would only relate to same-sex couples”¹⁸.

The Government’s Women and Equality Unit published the “Civil Partnership – A framework for the legal recognition of same-sex couples” in June 2003. The paper proposes the setting up of a civil partnership registration scheme that would enable same-sex couples to gain legal recognition of their relationship. The register would be an “opt-in” system, and couples who do register would acquire a package of rights and responsibilities that would reflect the commitment they made to each other.

Possible rights and responsibilities during the partnership could include income-related benefit, the ability to gain parental responsibility of each other’s children and the exemption of testifying against each other in court. The register would provide the couples with a formal dissolution procedure in the interest of fairness between the parties upon termination of the partnership as well as rights and responsibilities upon the death of a partner, such as succession rights and recognition under inheritance and intestacy rules.

The rationale for not extending this register to unmarried opposite-sex couples is that they already have a means through which to gain legal status – they can get married and so there is no perceived unfairness that needs remedying. This argument is quite strong, but is it really sufficient to dismiss calls for additional rights for heterosexual cohabiting couples? Most cohabiting heterosexual couples believe that they are “common-law spouses” and that they therefore have the same rights as a married couple.

“Is it now appropriate for the law to continue to ignore the reality of the couple’s situation and beliefs? Should the Mrs. Burns of this world continue to be left out in the cold, even though they have played the role of housewife and mother? Or should the state seek to educate the population to dismiss, once and for all, the concept of common law spousehood”¹⁹

The statistics point to a change in the view of society towards cohabitants and so a lack of knowledge from the cohabitants about their situation should not be an excuse for failing address these social changes. The Children Act 1999 has granted automatic parental responsibility to fathers who jointly register the birth of their child with the mother. The Act has therefore addressed the lack of knowledge in society in cases of child care since a proportion of biological fathers will have assumed that they had that responsibility automatically if they

¹⁷ *A Charter for Cohabitation?* Student Law Review, Vol. 36, Summer 2002, page 46

¹⁸ *Cohabiting Couples*, M.E. Rogers, Student Law Review, Vol 39, Summer 2003, page 38

¹⁹ *Supra*

registered the birth or lived with the mother. If legislation can be passed to cure lack of knowledge in one area, then it should be possible for the same to be done elsewhere.

There appears to be a difference of opinion within the law, but there are signs that the current legal positions are changing. Recent cases have found that same sex couples can be classed as family, at least for the benefit of housing succession. In marriage the current position, while admitted to being unsatisfactory, still does not allow same sex couples to marry. With regard to cohabitation, there is currently no legal recognition of cohabitants irrespective of the type of relationship they are in, but the reform proposals found in the Civil Partnerships Framework are moving towards a recognition of only of same-sex couples.

Problems of policy appear when the law's association with the unmarried couple is considered. There are arguments for and against an increased recognition by the law of relationships outside marriage. Rebecca Bailey-Harris²⁰ recognises that the need for these policy issues to be addressed means first identifying the proper function of the law in family regulation.

The first of these roles is remedial. The aim of the law in the area of financial provision should be to achieve fair distribution of assets between the former couple based on the true value of their contributions to the relationship. On this basis there is no justification for distinguishing between certain factors in the relationship, such as the sexual orientation of the partners. Classification of the relationship has no significance.

The second role of family law is protective – that is to protect family members from abuse by other family members. There can be no argument that the law's protection of people from violence within the family unit should be given irrespective of the legal status of the relationship.

Thirdly, family law should promote the welfare of children in all aspects of their lives – the welfare should not be affiliated just to physical and mental abuse. While this general principle cannot be questioned, the practise of such as principle leads to questions of competing moral values highlighted by the current law regarding the acquisition of parental responsibility by the unmarried father of the child and also in the area of adoption where there is a strong presumption in favour of married couples.

It follows from these principles that any couple, whatever their sexual orientation, should be able to enter into any form of commitment they so wish. Despite the arguments for considering same-sex couples only when it comes to civil partnership registration, it would not appear too unreasonable to permit opposite-sex couples to “opt-in” to the scheme, should they indeed choose to regulate their relationship.

“In today's society the reliance on the mantra of supporting the institution of marriage is outdated; society has moved on. Refusing to consider legal reform [with regard to

²⁰ *Law and the Married Couple – Oppression or Liberation?* Child and Family Law Quarterly Vol 8 No 2 1996

opposite-sex couples] will not push individuals into marriage, it will merely perpetuate the unfairness felt ... and lead to increasingly complex litigation”²¹.

If the law did want to protect marriage, this could arguably be the best way of doing it. By providing couples who are uncertain whether they want to go through with making what is arguably the largest promise they could make to each other in front of their families and the public with an alternative, without the tag of “married” being attached, could lead to a decrease in divorce. Providing this option to transsexuals means that the law also gets its way in offering marriage only to heterosexual couples. The argument that registration of civil partnerships “devalues” marriage does carry weight. Indeed, the best way of ensuring that true equality is reached between any type of couple is to level the playing field and ensure that civil partnerships are recognised as being equal to marriage. However, the reason cohabitants may not wish to get married is because of what marriage is still perceived by many in society to be. The very thought of marriage evokes ideas of great commitment and responsibility, perhaps even the most superior commitment and responsibility possible between two people. Those ideas will remain in the people who do choose to get married – they will still see their commitment as being meaningful and maybe even superior to that between two people in a civil relationship.

The only problem with providing civil partnership registration is where to draw the line. The law has had difficulty in pinpointing the defining factor of what constitutes a family relationship. Until this factor is decided the courts may be faced with a never-ending line of cases to be judged on their own merits from two people who want to be allowed entry onto the register. Whatever stance is taken with regard to this “factor”, it is unlikely that this specific problem will be solved.

The law is moving away from the principle of favouring heterosexual couples as the norm. To say that it is turning women into men and men into women is far fetched. What the law is doing is allowing two people the freedom of choice. The Law is doing what could be said to be “the honourable thing” in affording couples the right to choose whether they want their commitment to be recognised, and in so doing providing them with protection. Should the Government’s framework proposals for civil partnership registration become a reality, it would simply allow the Law to do its job in providing a safe environment for all whatever their class, race, status or sexual orientation.

²¹ *Cohabiting Couples*, M.E. Rogers, Student Law Review, Vol 39, Summer 2003, page 38