Marriage in the United Kingdom: History and Legal History

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Subject of Talk

• Not theology or morality of same-sex marriage
• Not customs of marriage
• Instead, marriage law as it has developed in the UK
  • Why we have laws about marriage
  • What historical problems those laws have been designed to address
  • How they have changed over the years
• This raises questions
  • How should the UK state address marriage?
  • What is the relationship between legal marriage and religious marriage?
Three Facts

• The UK is made up of four nations: Scotland, Ireland, Wales and England; each has its own history.

• Normally, the law of England and Wales is different from the law of Scotland.

• The Church of England is established in only one of these nations. It was disestablished in Ireland in 1871; in Wales in 1920. Never established in Scotland, although James I and VI and Charles I tried.
Two Postulates (These are Generalizations)

Royal weddings are potentially dangerous

Men can be jerks

Kirk o’ Field, 1567

Richardson, Pamela 1742
Loose Regulations and a Problem

• Ecclesiatical law of marriage before the reformation had roughly five steps
  • A written contract between the parents specifying financial arrangements
  • A formal exchange of oral promises (*de futuro*): spousals, hand-fasting, betrothal
  • Public proclamation of the intent to marry on three Sundays in Church
  • A church wedding with words *de praesenti*
  • Sexual consummation (necessary)
• These could be collapsed or take place in a different order (Henry VIII and Anne Boleyn)
• But this complexity caused problems...
• And (again) Scotland is different
Marriage Law has Differed (esp. in Scotland)

• Lord Hardwicke’s Act, 1753
  • Requires parental permission for those under 21
  • Requires banns to be read
  • Marriage only in the Church of England (except for Quakers and Jews)
  • Tightens up record-keeping
  • Abolishes enforceable promises to marry

• No similar law in Scotland, although Lord Hardwicke tried

Philip Yorke, first earl Hardwicke (1690-1764)
Divorce has Differed, too

- Scotland from 1573:
  - Allows divorce for adultery, ‘wilful desertion’
  - Remarriage for ‘innocent party’

- England before 1857:
  - Ecclesiastical courts
  - Three-step divorce (w/remarriage)
  - Divorce from bed and board (no remarriage)
  - Private agreements (no remarriage)

- England after 1857:
  - Central divorce court in London
  - Grounds for divorce differ:
    - Men can divorce for adultery
    - Women must show ‘aggravated circumstances’
  - Reduces the cost of divorce
  - Clergy exempt from re-marrying divorcees

- Different laws in different lands:
  - R. v. Lolley (1812)
  - Warrender v. Warrender (1835)
More Recently

- Divorce Equalized for Men and Women (1937)
  - Also broadens grounds for divorce
  - Maintains exemption for clergy
- Matrimonial Causes Act 1973
  - Irretrievable breakdown as a basis
  - But facts must still bear it out
    - Adultery
    - Desertion (two years)
    - Separation (two years w/consent)
    - Separation (five years)

Or, ‘that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.’
Consequences for Marriage

• England: location-based weddings, either churches (Church of England or licensed places of worship) or licensed premises

• Scotland: greater emphasis on who performs the ceremony (true of the US, too)

• Quakers and Jews still different
  • Quakers and Jews still need no license for places of worship
  • Quakers and Jews still maintain their own registers of marriage, independent of the state

• Muslims: Another category of difficulties

• Differences still exist between English and Scottish laws of marriage (although now mostly technical ones)
Solution and Possible Scenarios

**Quadruple Lock**
- Denominations like the Church of England must opt-in to same-sex marriage
- Until they do so, any same-sex marriages celebrated by clergy will be void
- Even if they do, then individual clergy will have the right to refuse to do so
- Equality law will not be used to force them to participate in such marriages

**Other Routes**
- **European Method**
  - Separates Civil and Religious Marriage
  - Supported by C.S. Lewis
  - Now supported by Ephraim Radner Christopher Seitz and others
- Is the quadruple lock a step in this direction?
Conclusions

• Laws of Marriage are Political
  • Depend upon political circumstances
  • Depend upon compromise, insincere arguments and pressure from different groups (politics is messy!)
  • Cannot simply follow the religious doctrine of one group or another

• Circumstances Change
  • Rapid change in attitudes toward homosexuality has led to rapid changes in the law (decriminalization, 1967; authorization of same-sex marriage, 2013 in England and Wales and 2014 in Scotland)

• Church of England (and other denominations and religions) need not recognize change but cannot stop changes in the law

• Key underlying value for legal marriage is predictability: what structure offers the best security so that parties know their legal rights and responsibilities
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