Response to chapter 10 nullity reform

Redefining marriage

Response to Chapter 10

Nullity Reform: Redefining Marriage

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I. Introduction

As Alex Maine notes at the very start of chapter 10, marriage is in a time of transition. In the last 20 years, the legal recognition of adult relationships has become 'more inclusive and welcoming than ever',[1] with the introduction of same-sex civil partnership, same-sex marriage and different-sex civil partnership. Since 2006, Scotland has also recognised cohabitation in law, making provision for one partner to seek a financial award at the end of a cohabiting relationship to reflect any economic disadvantage suffered as a result of that cohabitation.[2] Most recently, in England and Wales (but not in Scotland), a wholly no-fault route to divorce and dissolution has been introduced.[3] The law generally is moving towards a more supportive framework, reflecting the needs of adults entering into and exiting a range of relationships, rather than trying to use family law to shape family forms by promoting different-sex marriage to the exclusion of all else. But while progress has been made, there remain corners of the law that still reflect historical beliefs and attitudes – and arguably this is clearest when one examines the doctrine of nullity of marriage, and specifically voidable marriage.

At the outset, it is important to draw a clear distinction between those factors that render a marriage void, so that it has never existed at all, and those that result in a voidable marriage, that is one which is legal and binding unless successfully challenged in court. One critical difference is that a void marriage does not technically need a court decree to recognise the marriage as null: it just never existed. However, as acknowledged by Clive in Scotland and Herring in England,

* I wish to thank Dr Lesley-Anne Barnes-Macfarlane and Dr Rob Clucas for their very helpful comments on an early draft of this response: all errors remain my own, despite their best efforts.

[1] Maine, ch 10 in this volume, section I.

[2] Family Law (Scotland) Act 2006. See also recommendations for further law reform in this area in: Scottish Law Commission, *Report on Cohabitation* (Scot Law Com No 261, 2022).

[3] Divorce, Dissolution and Separation Act 2020. The Divorce (Scotland) Act 1976 retains fault-based behaviours for divorce, namely, adultery and 'unreasonable behaviour' in s 1(2)(a) and (b).

a decree is often desirable, to provide certainty and resolve any financial issues.[4] Such a decree of nullity can be sought by *any* party with a legitimate interest.[5] In contrast, a voidable marriage is legally binding unless and until one party to the marriage challenges it – one immediate point of difference being the fact that only the parties to the marriage have title to seek a decree of nullity. This reflects one of the distinctions between void and voidable marriages: marriages that are void *ab initio* tend to be void on grounds of public policy, reflecting the state's interest in regulating who gets married; while the grounds for rendering a marriage voidable are typically personal to the parties themselves.

In this response to Maine's chapter, I wish to draw out the differences between the English law of nullity and that of Scotland. These are reflected in one stark statistic: whereas England and Wales sees just over 200 annulments per year,[6] in Scotland, there have been *nine* decrees of nullity in the course of the 10-year period from 2009–19.[7] This considerable disparity suggests a fundamental difference in the legal and social relevance of nullity north and south of the Border, and by identifying possible reasons for these differences, we can assess what reform, if any, is required. This also picks up Maine's analysis of the discriminatory impact of voidable marriages, in section 12 of the Matrimonial Causes Act 1973 (the '1973 Act' or 'MCA 1973'). Do any justifications suffice to outweigh the exclusionary and damaging impact of the grounds for voidable marriages? How best can we accommodate those grounds that continue to serve a useful function?

II. Scotland and England: Different Theory, Similar Results?

The grounds for voidable marriages in England and Wales are set out in section 12(1) of the 1973 Act, and Maine provides a detailed account of the eight bases: non-consummation due to incapacity; non-consummation due to wilful refusal; that either party did not validly consent; that either party was suffering from mental disorder so as to be unfitted for marriage; the respondent was suffering from a communicable venereal disease or was pregnant by another man at the time of the marriage; that an interim gender recognition certificate is issued after the date of the marriage; or that at the time of the marriage the respondent had acquired their

[4] EM Clive, *The Law of Husband and Wife in Scotland*, 4th edn (Edinburgh, SULI, 1997) para 7.004; J Herring, *Family Law*, 11th edn (London, Pearson, 2023) ch 3, 198, section C.

[5] Clive (n 4) para 7.005.

[6] Maine (n 1) suggested amendments to legislation, citing the 2021 ONS Census data: Office for National Statistics, *Divorces in England and Wales: 2021* (ONS, 2 November 2022) at www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2021.

[7] Scottish Civil Justice Statistics, published for 2018–19 at www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/pages/12/. Since 2019, these data have not been disaggregated.

gender under the Gender Recognition Act 2004. Two further points are worth emphasising: (i) the non-consummation bases are specifically excluded for same-sex marriages, under section 12(2) of the 1973 Act;[8] and (ii) section 13 of the 1973 Act provides for certain bars to seeking a declarator of nullity on these grounds, to protect the parties from the perpetual uncertainty of a future claim – for example, a declarator of nullity in relation to consent or pregnancy must be raised within three years.[9] There is therefore a limit to when the 'sword of Damocles' might fall.[10]

By contrast, in Scotland there is only one ground for a voidable marriage: 'if and only if, one of the parties is at the time of the marriage permanently and incurably impotent in relation to the other spouse'.[11] Impotence means an inability to have sexual intercourse – defined, as in England and Wales, as penetration of the vagina by the penis. It is therefore heteronormative and phallocentric, and it does not trouble same-sex marriage.[12] The only ground of voidability in Scots law is therefore immediately discriminatory, as it is only available to those in a different-sex marriage.[13] To this extent, impotence is comparable to non-consummation in England and Wales. However, in Scotland, the impotence must be due to physical or psychological causes:[14] wilful refusal does not suffice, although older case law has accepted that women may be impotent by virtue of their 'invincible repugnance' or 'repulsion' to sex,[15] such that the Court has concluded it was 'entitled to draw the inference that there was a practical incapacity on the part of the wife'.[16]

It would seem at first sight that Scottish spouses are ill-served when it comes to avoiding a marriage, being able to rely only one ground, and even then there must be a genuine incapacity to consummate the marriage, rather than a refusal to do so. Of course, one response might be that Scottish spouses are consequently spared those bases in section 12 that Maine rightly criticises as discriminatory and stigmatising,[17] derived from out-dated and inappropriate ideals. This is certainly the case in relation to (i) avoiding the marriage due to sexually transmitted infections; (ii) pregnancy; and (iii) full gender-recognition certificates: these would be legally irrelevant circumstances in Scots law.

[8] See Maine, ch 10 in this volume, section IV.A, 'Lack of Consummation'.

[9] See the various bars set out in s 13.

[10] See Maine, ch 10 in this volume, section IV, quoting Lasok.

[11] Clive (n 4) para 7.063. Note that Clive does also seem to hint that lack of capacity could result in a voidable marriage, if it does not suffice to make the marriage void, see ibid para 7.030.

[12] For a further discussion of the problems with impotence and non-consummation, see G Black, 'Adult relationships and the ongoing legal significance of sexual intimacy' in JM Scherpe and S Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Cambridge, Intersentia, 2022) 309; and A Maine, 'Queer(y)ing consummation: an empirical reflection on the Marriage (Same Sex Couples) Act 2013 and the role of consummation' (2021) 33(2) *Child and Family Law Quarterly* 143.

[13] It is not relevant for civil partnerships at all.

[14] Clive (n 4) para 7.064.

[15] *G v G* 1924 SC (HL) 42.

[16] *AB v CB* [1906] SLC 43_411, 416 per the Lord President.

[17] Maine (n 10).

However, the other bases for avoiding a marriage in section 12 of the 1973 Act do have a place in Scots law, and are actually elevated to more fundamental conditions for marriage: failure to give genuine consent[18] and lack of capacity to consent[19] are both bases for a void marriage in Scotland, together with two further grounds, which also give rise to a void marriage in England and Wales: non-age (currently 16 in Scots law[20]), or being within the prohibited degrees of relationship.[21] Thus, a marriage formed under Scots law is void if one of the parties did not give consent, or lacked capacity, and these obstacles can be raised by any party with an interest: it is not the case that the marriage is voidable and will subsist until challenged. The grounds for a void marriage in Scotland reflect the fundamental conditions for marriage – age, consent, capacity – so that if any one is lacking, there is a public policy basis for not recognising the marriage at all. In respect of the voidable ground in English law, the grant of an interim gender-recognition certificate after the date of the marriage,[22] this finds an equivalent in section 1(1)(b) of the Divorce (Scotland) Act 1976, as one of the two grounds for divorce in Scots law (the other being the irretrievable breakdown of the marriage). Thus, spouses north and south of the Border have a route to exit the marriage based on largely the same factors, albeit they are not always categorised in the same way.

One possible reason for the difference in approach could be found in the differing availability of divorce in Scotland and in England, historically. Nullity, whether for void or voidable marriage, can be seen as a socially-sanctioned alternative to divorce, in an era when divorce was either not available, or carried heavy social and religious penalties. It is therefore of greater significance where divorce laws are more restrictive. In the period from 1560 until 1938,[23] divorce was available to any spouse in Scotland on one of two grounds: adultery[24] and desertion.[25] South of the border, however, divorce was more restricted for much of this period, being available (typically to the wealthy elite) only by way of a private Act of Parliament until the Matrimonial Causes Act 1857. This Act did introduce divorce as a general legal right, but it was available only for adultery, and very unequally: men simply had to show that their wives had had an adulterous relationship, while women had to show not merely adultery on the part of their husband but also some further harm, such as incest, bigamy or cruelty. Conditions that allowed a spouse to seek

[18] Marriage (Scotland) Act 1977, s 20A(2).

[19] Marriage (Scotland) Act 1977, s 20A(3).

[20] Marriage (Scotland) Act 1977, s 1. It is 18 in England and Wales, and is listed as a basis for a void marriage in s 11(a)(ii) of the Matrimonial Causes Act 1973.

[21] Marriage (Scotland) Act 1977, s 2 and sch 1; MCA 1973, s 11(a)(i).

[22] MCA 1973, s12(1)(g).

[23] In 1938, the Divorce (Scotland) Act introduced cruelty, incurable insanity, sodomy and bestiality as alternative grounds for divorce. As a result of the Divorce (Scotland) Act 1976, the sole ground for divorce is the irretrievable breakdown of the marriage, which can be evidenced through non-cohabitation for a period of one or two years, or adultery or 'unreasonable behaviour'.

[24] EM Clive and JG Wilson, *The Law of Husband and Wife in Scotland* (Edinburgh, SULI, 1974) 440.

[25] Act concerning Divorce for Desertion 1573, c 55; see: Clive and Wilson (n 24) 440.

a declarator of nullity were therefore of considerable importance. In an era of no-fault divorce, which England now enjoys, are the grounds of voidable marriage still required?

III. Justifications for Voidable Marriage: Religion and Deceit

One justification that is often advanced in favour of retaining voidable marriage, and which Maine explores, is the continuing need to allow an exit-route from marriage for those whose religious beliefs preclude divorce: 'Annulment may ease the anxiety that exists towards divorce, particularly from a religious perspective. Divorce remains a discouraged practice in some religions …'[26] The Law Commission of England and Wales supported the retention of voidable marriages, rather than relying on divorce, in part for religious reasons, in its 1970 Report, *Family Law: Nullity of Marriage*.[27] However, in 1992, the Scottish Law Commission reached a different conclusion, as part of its review of family law, recommending that there should be no role for impotence in Scots law and that religion did not offer a compelling justification:

> We do not believe, however, that the ordinary law of the land on the remedies available to all, for purely civil purposes, in cases of marriage breakdown ought to be determined by the views of any particular religion.[28]

Clive also argues (at least in Scotland) that the belief that nullity is required as a remedy for religious reasons is mistaken: a civil declarator of nullity is no better than a civil divorce for religious purposes, as 'the Canon law does not recognise the competence of the civil courts in relation to the religious effects of marriage'.[29] Ultimately, I would contend that religious beliefs should not operate to shore up bases of voidability that are so flawed: as Maine has argued elsewhere in respect of non-consummation, 'establishing the legitimacy of marriage on the basis of a sexual act is a peculiarly reductive endeavour, going against the notion that marriage is essentially a caring and mutual relationship'.[30]

Is there any other rationale for maintaining voidable marriage for personal 'traits' such as non-consummation or impotence, pregnancy or a sexually transmitted infection? One argument could be that allowing one party to avoid a marriage because of impotence/non-consummation, or for any of the section 12

[26] Maine, ch 10 in this volume, section II.

[27] Law Commission, *Family Law: Nullity of Marriage* (Law Com No 33, 1970). Religious concerns and the views of the Church were considered at para 24. The draft Nullity of Marriage Bill appended to the Report was never enacted, but the individual clauses can be found in the MCA 1973. For example, cls 1 and 2 map onto ss 11 and 12 of the 1973 Act.

[28] Scottish Law Commission, *Report on Family Law* (Scot Law Com, No 135, 1992) para 8.28.

[29] Clive (n 4) para 07.063.

[30] Maine (n 12) 159.

grounds, has an important value in exposing the lie or deception at the heart of the marriage. In these cases, the person seeking the decree of nullity is saying that they were deceived as to some aspect of the person they married: that deceit should be exposed through judicial recognition and a declarator of nullity. The significance of intimate deception has been explored by Kennedy[31] and by Hasday.[32] If a marriage cannot be annulled because of the section 12 grounds, so that the marriage is considered entirely valid, then the law is failing to protect innocent parties where there has been deception, and failing to provide an incentive for openness and honesty in intimate relationships.[33] However, Hasday also points to the (many) deceitful situations where the courts have declined to annul a marriage, illustrating that deceit alone does not routinely operate as a basis for avoiding a marriage.[34]

Using legal routes to seek exposure of or catharsis for wrongs in intimate relationships is not always helpful – and it is certainly an expensive, sometimes uncertain and often public means of doing so. Exiting from a marriage swiftly and cleanly will generally be the most constructive way forward for parties who find themselves married to someone who, deceptively or otherwise, does not meet their expectations: no-fault divorce offers this, and also avoids the discrimination and historical baggage that undoubtedly attaches to the current law of voidable marriage. Moreover, voidability (unlike fault-based divorce) can in some cases[35] be sought by the very person who gives rise to the claim: in which case, it does not help the 'innocent' party to seek redress for the 'deceitful' conduct if the declarator of nullity is sought by the party who is impotent or lacks capacity.

IV. Polyamory and Polygamy

Although my focus has been primarily on the voidable grounds in section 12 of the 1973 Act, I want to reflect on the reform proposed by Maine in relation to a section 11 void ground. He argues for a 'bolder iteration of marriage'[36] through extending marriage to polyamorous couples. This could be achieved by reclassifying section 11(b), which states that a marriage is void where either party to it is already married, from a void to a voidable ground.[37] This would allow people to enter into multiple marriages if they wished, recognising polygamy as legal in

[31] C Kennedy, *Inducing Intimacy: Deception, Consent and the Law* (Cambridge, Cambridge University Press, forthcoming).

[32] JE Hasday, *Intimate Lies and the Law* (Oxford, Oxford University Press, 2021).

[33] ibid 156.

[34] ibid 160–63.

[35] Thus, a person can rely on their own impotence/non-consummation to seek to avoid the marriage. However, s 12 of the 1973 Act confirms that only the other party can seek to avoid the marriage for venereal disease, pregnancy, or a full gender recognition certificate: s 12(e), (f) and (h).

[36] Maine, ch 10 in this volume, section III.D.

[37] In Scotland, s 5(4) of the Marriage (Scotland) Act 1977 states it is a legal impediment to marriage if one or both parties is already married or in a civil partnership, while s 24 makes it an offence for a person to enter into a marriage if they are already in a marriage or civil partnership.

England and Wales, while allowing either or both the marriages to subsist or to be brought to an end. The voidability provision would avoid one spouse's taking advantage of the other. Maine rightly notes the need for openness and consent to a polygamous marriage,[38] so that a party who agrees to enter into one could not then rely on the voidable provisions to bring it to an end: their only exit route would be divorce.[39] This helps mitigate the risks of deception in multiple-partner marriages,[40] although how this consent to a polygamous marriage (separate to consent to marriage *per se*) would be legally evidenced remains to be seen. Moreover, the consent to a polygamous marriage would only be relevant at the point of entering into the second or subsequent marriage: it could not apply or be evidenced when the first marriage was entered into, which (by definition) would not at that stage be polygamous.

Putting the practicalities to one side, the question remains whether we should move towards recognising formalised polyamorous relationships. As Sutherland asks, should our legal system 'abandon its attachment to mononormativity [and] respect freedom of choice' by recognising polygamous marriage?[41] While polyamorous relationships are growing in open recognition, and marriage is no longer legally monogamous,[42] facilitating polygamy requires very careful consideration, to ensure that women, in particular, are not exposed to an exploitative or subservient relationship.[43] The risk of exploitation and oppression in polygamy is not inevitable of course – and indeed it is arguably potentially present in any marriage: 'It is quite possible to imagine a version of polygamy, open to men and women equally and in whatever gender combination the parties choose, that is no more or less oppressive than any other kind of marriage.'[44] Nevertheless, reclassifying polygamous marriage from void to voidable would require us to tread very carefully, to ensure we avoid that peril of all law-reform projects, the unintended consequence.

V. Conclusion

To echo Maine's conclusion, modernising nullity and removing outdated grounds are essential. We agree that there is no role in the twenty-first century

[38] Maine refers to them as 'polyamorous marriages' but I have chosen to use 'polygamous': a marriage at present could be polyamorous, where two spouses agree to have an open marriage and (non-formalised) relationships with other people. The specific nature of formalised multiple-partner marriage is therefore more accurately referred to as polygamous marriage.

[39] Maine (n 36).

[40] Hasday discusses the legal regulation of bigamy, and notes that men constitute almost all bigamy defendants, revealing a deeply troubling gendered aspect to deceptive marriage practices: Hasday (n 32) 163.

[41] E Sutherland, 'Scots child and family law: liberty, equality and protection revisited' (2019) 33 *Juridical Review* 41.

[42] Maine (n 36).

[43] J Herring, *Family Law: A Very Short Introduction* (Oxford, Oxford University Press, 2014) 11–12.

[44] Sutherland (n 41) 41.

for non-consummation, or impotence in Scotland, together with the grounds of venereal disease, pregnancy or interim/full gender-recognition certificates. Sections 12(1)(a), (b), (e), (f), (g) and (h) of the 1973 Act should be repealed, along with the abolition of the common law doctrine of impotence in Scotland. (Divorce law in Scotland would also benefit from reform, to introduce no-fault divorce.) Such reform would bring both jurisdictions into alignment. Where we diverge is as to the two remaining section 12 grounds: consent or incapacity (in section 12(1)(c) and (d)). While Maine favours keeping those as grounds for avoiding a marriage, I would argue that consent and capacity to consent to marriage are so fundamentally important that lack of consent or capacity should render the marriage void.[45] Thus, these section 12 grounds should be relocated to section 11, to place them at the heart of marriage. Such a package of reforms would ensure that the legal definition of marriage moves away from its current discriminatory standards,[46] to a more equal and inclusive institution.

[45] I note that the Law Commission of England and Wales favoured keeping them as voidable grounds: Law Commission (n 27) paras 11–15.

[46] Maine, ch 10 in this volume, section VI.