Consummating in Court

Dr Alexander Maine

Introduction

Consummation is a peculiar element of marital law. Consummation refers to an act of sexual intercourse that 'completes' a marriage, securing and shoring up the bond between a newly married couple, confirming their intimacy. The legal concept stems from a time when it was expected that married partners on their first marriage (particularly women) would be virgins, and their first act of sexual intercourse would fulfil their duty and begin their procreative life as husband and wife together. The significance of consummation means that the lack thereof could render a marriage voidable in certain jurisdictions, and often led to 'bedding rituals' in historical contexts. It is even a prominent feature in modern popular fiction[1] and media. Consummation exists as a concept in many jurisdictions, across different cultural and religious backgrounds. It is particularly significant within Catholic, Hindu and Muslim marriages,[2] couched as a religious obligation within the sacrament of marriage.

In England and Wales, consummation still retains its legal significance within marriage law, as a legal concept that completes a marriage, and contributes to a heteronormative hierarchy of sexuality in the law.[3] This chapter will examine the role consummation plays in English and Welsh law and then assess the ways in which the concept has been interpreted by the courts. Since consummation has been defined via a process of judicial interpretation, case law imparts important information about the role that sexual intercourse plays in marriage and also about societal views of sex and sexuality. The English and Welsh courts have variously interpreted consummation to be a single act of heterosexual sex that determines if a marriage is sufficiently conjugal, which ostensibly applies great importance to a singular instance of sexual intimacy. The introduction of civil partnerships and same-sex marriage in the last two decades[4] omitted consummation provisions and instead preserved consummation as a heterosexual concept. Other common law states such as Australia[5] and most US states have removed the concept, while Canada still retains it.[6] This chapter will assess these decisions and consider the future of conjugality within the law, using case law concerning consummation to demonstrate its heteronormative origins, while also considering its role in the construction of marriage owing to section 12 of the Matrimonial Causes Act 1973. The Nullity of Marriage Act 1971 established grounds for nullity which were then subsumed by the 1973 legislation. In the House of Commons at the time, nullity was described as a way to 'define the area of marriage as we understand it in our society. It is

[1] For example, consummation and bedding ceremonies are an important feature of marriage in George RR Martin's *A Song of Ice and Fire* universe and HBO's *Game of Thrones* and *House of the Dragon* series: '"Your Grace," Lord Walder called out to Robb, "the septon has prayed his prayers, some words have been said, […] but they are not yet man and wife. A sword needs a sheath, heh, and a wedding needs a bedding."' George RR Martin, *A Storm of Swords* (Harper Voyager 2001, 3rd edn) 128. See also Nicholas Sagovsky, 'Hooker, Warburton, Coleridge and the "Quadruple Lock": State and Church in the Twenty-First Century' (2014) 16 Ecclesiastical Law Journal 140; Peter Edge, 'Lets Talk About a Divorce: Religious and Legal Wedding' in Joanna Miles, Perveez Mody and Rebecca Probert (eds), Marriage Rites and Rights (Hart, 2015), 265.

[2] Diksha Sanyal and Arijeet Ghosh, 'Abolishing consummation: the need to de- essentialise sex within marriage' (2022) 6 *Indian Law Review* 331, 335.

[3] Alexander Maine, 'Queer(y)ing consummation: an empirical reflection on the Marriage (Same Sex Couples) Act 2013 and the role of consummation' (2021) 2 CFLQ 143.

[4] Civil Partnership Act 2004 and Marriage (Same-Sex Couples) Act 2013.

[5] Section 51 Family Law Act 1975 (Australia).

[6] *S.Z. v X.J* 2020 BCSC 1336 (CanLII)

for that reason that the law of nullity has long been regarded by the Church as an acceptable way of disposing of a marriage—and I use the word "disposing" in a neutral sense'.[7]

The 1973 legislation consolidated the provisions of nullity, and for our purposes we will focus on section 12. This provision states that marriages shall be voidable if they have (a) not been consummated owing to the incapacity of either party to consummate it or; (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it. These statutory instructions on consummation tell us that a marriage is not seen to be fully formed until consummation has taken place, and that unconsummated marriages may be voidable in certain circumstances. As Herring states:

For opposite sex couples, once all the marriage rites are over and the couple drive off into the sunset, in legal terms the marriage is still in an inchoate state. Not until consummation does the marriage become a secure legal entity.[8]

The provisions relating to consummation are not time-barred, in contrast to other nullity provisions. As Lasok states, this means that an unconsummated marriage may be vulnerable to a decree of nullity at any time: 'as long as they acquiesce in their defective marriage, nullity hangs over their heads like the sword of Damocles but falls down immediately should a whim or a long-harboured grudge put the law into motion.'[9]

This chapter will seek to elucidate the role that consummation has in constructing the marital relationship while furthering understanding of judicial approaches to marital sexuality. The role that consummation plays in law and in a person's life tells us that 'the personal sphere is privileged, not licensed for irresponsibility.[10] As Black notes:

> Where the State accords legal consequences to the private acts of individuals, it shapes conduct by preferencing some private actions and correspondingly diminishing the significance of other actions. It tells us what society views as significant or meaningful. This is especially so in family law. Even where the actions have negative consequences – adultery leading to divorce, for example – the State's recognition of those actions legitimises them. The law's ongoing recognition of sexual intercourse as important tells us not only that sex is significant, but that some types of sexual activity are more relevant than others. It also potentially indicates that other non-sexual activities are not legally or socially meaningful.[11]

According legal consequences to sexual intimacy signifies an intervention into the traditional private realm of the family, offering an 'out' to those who feel cheated by their spouse's lack of sexual availability or to those suffering the loss of being able to 'carnally know' their spouse. Consummation has been defined by the courts as an opportunity to assert the virility of a husband's claim to his newly acquired spouse. Ultimately, this chapter seeks to reveal and evaluate the standards of socio-sexual normality that have been applied by the courts when determining what amounts to consummation, in order to question the heteronormative and cisnormative nature of law, and the uneasy situation of same-sex married couples, for whom consummation does not apply. Owing to this, Brooke has argued

[7] Alex Lyon HC Deb 29 January 1971 vol 810 cc1162-84.
[8] Jonathan Herring, 'Why Marriage Needs to be Less Sexy' in Miles et al (n **, 276.
[9] D Lasok, 'Approbation of Marriage in English Law and the Doctrine of Validation' (1963) 26 MLR 251, 250.
[10] John Eekelaar, *Family Law and Personal Life* (2nd ed, OUP 2017) 72.
[11] Gillian Black, 'Adult Relationships and the Ongoing Legal Significance of Sexual Intimacy' in Jens Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honour of John Eekelaar* (Intersentia 2022) 4.

that the rules and regulations pertaining to wedding and marriage, in particular the concept of consummation, have been rendered socially obsolete, and a zombie category of 'undead' law.[12]

First this chapter will look to the facts of the key case of *D-E v A-G* to assess the context in which the test for consummation was formulated. Secondly, it will show how the phrase 'ordinary and complete' has informed judicial decision-making on consummation. Thirdly, it will look to how the courts have determined what is partial and imperfect. Penultimately, the chapter will consider the contemporary role of consummation and its illogical application in different-sex and same-sex marriages and civil partnerships. Finally this chapter will ask why this standard is discriminatively applied, questioning why the state has an interest in the conjugal coupling of different-sex marriages, yet refuses to consider this in the context of same-sex marriages..

D-E v A-G – Victorian ideals

The current legal concept of consummation stems from the Victorian era and the key case of *D-E v A-G.*[13] In this case, Thomas D sought to annul his marriage to his wife Maria on the basis of her incapacity to consummate it 'by reason of the natural incurable malformation of her, the said Maria D'.[14] The marriage was in its third year and the couple lived together and shared a bed. However, although 'the said Thomas D. was apt and fit for and desirous of carnally knowing and endeavoured to know the said Maria A. and … the said Maria, endeavoured so to be carnally known, … the marriage was never consummated'.[15] Maria was subjected to scrutiny of her genitals in order to ascertain whether consummation was possible. It was found that her sexual organs were 'undeveloped' and 'imperfect', with her vagina forming 'an impervious cul de sac'.[16] The 'natural malconformation' of her sexual organs meant that it was not possible for her to be 'carnally known by a man' and that physicians at the time could not remedy the situation.

Having clarified that the question was simply whether she was capable of sexual intercourse ('or, if at present incapable, whether that incapacity can be removed'[17]), not whether she was capable of conceiving a child, Dr Lushington held that the marriage should be annulled. In doing so he commented that:

> I am of opinion that no man ought to be reduced to this state of quasi unnatural connexion and consequent temptation…. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another.[18]

This passage reveals the rationale of *D-E v A-G*, that a husband has a right during his marriage to carnally know his wife, and that to deprive him of such would be unnatural and therefore render the marriage incomplete. Ultimately, the case concludes that the wife's anatomical condition should not be enforced on a willing husband, and therefore he should no longer be legally bound to her. The gendered dynamics of this statement reveal the situation of women in the 19th Century, particularly married women, who were expected to bear children and remain firmly in the private sphere, while under the influence and legal subordination of their father or husband.[19] Owing to the doctrine of

[12] Heather Brooke, 'Zombie Law: Conjugality, Annulment, and the (Married) Living Dead' (2014) 22 FLS 49.
[13] (1845) 1 Rob Eccl 279.
[14] (1845) 1 Rob Eccl 279 (Consistory Court) 280.
[15] ibid.
[16] ibid 286.
[17] ibid 294.
[18] ibid 299.
[19] Joan Perkin, *Women and Marriage in Nineteenth-Century England* (Routledge, 1989); Stephanie Coontz, *Marriage, A History: From obedience to intimacy, or how love conquered marriage* (Viking, 2005).

coverture, the husband and wife were one person in law, her legal existence suspended, incorporated or consolidated into that of their husband's,[20] and similarly the married women's body belonged to her husband,[21] who could enforce this right against her. In being unable to receive her husband, and therefore unable to bear his children, the wife is not able to fulfil her role. While this constructs the wife as a passive participant[22] in intercourse, it further renders the husband as the masculine and active participant, reinforcing marriage's procreative and gendered nature.[23]

The most significant and oft-quoted passage of the judgment reads: 'Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse'.[24] This quote has come to form a key definition of consummation, in lieu of any statutory definition. 'Ordinary and complete' sexual intercourse has thus informed much of the law's recognition of legitimate sexuality, reliant on heterosexuality as a standard of legal validity. It is Dr Lushington's statement that has reaffirmed and conditioned the ableist, heteronormative and cisnormative construction of consummation.

Ordinary and complete

Applying *D-E v A-G* , a court has to determine whether sufficient sexual intercourse has taken place when deciding whether to issue a decree of nullity. When determining the extent and relevance of sexual activity between the parties, *Dredge v Dredge* stipulated that sex taking place before the marriage was irrelevant,[25] and that the court only had jurisdiction to inspect sexual events taking place in marriage.

The courts' notions of what 'ordinary and complete' sexual intercourse is has changed over the years.

Penetration of the vagina with a penis has been integral to understandings of 'ordinary and complete' intercourse. In *Grimes (otherwise Edwards) v Grimes* ,[26] the husband practised *coitus interruptus*: that is, pulling out before ejaculation. This was against the wishes of the wife, who subsequently petitioned for a decree of nullity, on the ground that the marriage had not been consummated. In granting a decree of nullity the court stated that:

> The consummation of a marriage requires an act of sexual intercourse which is natural and complete. That requirement cannot be satisfied unless there is not only penetration but also emission within the body of the female.[27]

This requirement of ejaculation within the vagina reinforced the centrality of procreation to consummation, and affirmed marriage as the appropriate location for child-bearing. Ejaculation in this context 'completed' the ordinary intercourse, at once maintaining a procreative and male focus, and determined the wife as a recipient of the male orgasm as a completing factor. However, *Grimes* was not followed in *Cackett v (orse Trice) v Cackett*,[28] two years later and does not represent the current law. In *Cackett* it was held that although penetration was essential, emission within the body of the

[20] William Blackstone "Of husband and wife". *Commentaries on the Laws of England* (1765–1769).
[21] Perkin, (n 19), 24.
[22] Richard Collier, *Masculinity, Law and the Family* (Routledge, 1995) 97.
[23] Sally Sheldon, 'Reconceiving Masculinity: Imagining Men's Reproductive Bodies in Law' (1999) 26(2) JLS 129–49; Richard Collier, 'Masculinities and families: fragmenting law's 'family man'' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar 2020) 446.
[24] (1845) 1 Rob Eccl 279 (Consistory Court) 298.
[25] [1947] 1 All ER 29.
[26] [1948] P 323.
[27] [1948] P 323.
[28] [1950] P 243.

wife was not. It was nonetheless held that the practice of *coitus interruptus* may amount to cruelty. This again demonstrates the courts' phallocentric and allosexual[29] determination of consummation. Further clarification on the meaning of consummation was given in *Baxter v Baxter*:

> I take the view that in this legislation Parliament used the word "consummate" as that word is understood in common parlance and in light of social conditions known to exist, and that the proper occasion for considering the subjects raised by this appeal is when the sexual life of the spouses, and the responsibility of either or both for a childless home, form the background to some other claim for relief.[30]

According to the husband in *Baxter*, his wife was determined not to bear a child and refused sexual intercourse without a contraceptive sheath, contrary to his wishes to have sexual intercourse in the 'natural way'.[31] Ultimately, the appeal was dismissed and the marriage upheld on the basis that consummation had taken place and there had not been wilful refusal to consummate, but to procreate.

Wilful refusal has existed as a justification for the nullification of marriage since 1937. Before then, cases could only succeed if the facts yielded sufficient evidence for a finding of incapacity.[32] In *Horton v Horton* it was held that the words 'wilful refusal' here 'connote a settled and definite decision arrived at without just excuse' and that 'in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage'.[33]

While incapacity to engage in sexual intercourse may be physical or mental, and an individual may petition on the basis of their own incapacity, wilful refusal is based on the decisions made by the respondent. In *Kaur v Singh*, the husband refused to arrange the religious ceremony of marriage, and the court held that 'in failing to implement the marriage he wilfully refused to consummate it'.[34] In *Singh v Singh*,[35] the petitioner-wife's lack of desire was seen as indicating her own refusal rather than a lack of capacity. In that case, the wife had expected to marry a 'man of education' who was handsome, but in her view, he was neither. After an arranged civil ceremony, she refused to go through with a Sikh ceremony and contended that the marriage was not valid, owing to a lack of consent and a lack of consummation. The court deliberated on the nature of her refusal to consummate, owing, as stated below, to her repugnance to her husband:

> So far as concerns the allegation of invincible repugnance, it seems to me again that there is nothing to show that in this case. There is nothing to show that she suffered a physical repugnance to having intercourse with this man. It seems to me that, if anything, this was a case of wilful refusal. Invincible repugnance is a lack of capacity *quoad* this man. This is a case of unwillingness, and there is nothing to show that owing to some defect in her mental or physical make-up she was unable to have intercourse with him.[36]

In *D v D (Nullity: Statutory Bar)*,[37] the marriage between the parties in 1966 had never been consummated because the wife refused to undergo an operation which would have cured a physical

[29] Black (n 11) 4.
[30] [1948] AC 274.
[31] ibid 301.
[32] W Bishop, 'Choice of Law for Impotence and Wilful Refusal' (1978) 41(5) MLR 512, 513.
[33] [1947] 2 All ER 871.
[34] [1972] 1 WLR 105.
[35] [1971] P 226.
[36] [1971] P 226, per Davis J at 235. The court also held that this was not a case of duress.
[37] [1979] Fam 70.

impediment to sexual intercourse. It was held that if the impediment was curable by surgery, refusal to undergo such surgery would amount to wilful refusal to consummate. This outcome reveals that much of the onus remains on women to accommodate the consummative attempts of the virile man, from which the erectile capacity of a man acts as a normative standard.[38] The husband in *D v D* was noted to have gone through 'extreme sexual frustration' and committed adultery in order to 'prove' his capability to have sexual intercourse, firmly placing the responsibility to respond to sexual intercourse on the wife. This case contrasts with *Potter v Potter*,[39] another case concerning a natural impediment to sex that had been cured by surgery, but following which the wife still refused intercourse. In this case, the judge dismissed the petition on the ground that 'wilful' must mean without reasonable cause.The wife's loss of sexual ardour had occurred naturally and was not deliberate. Such reasoning may also lead to a conclusion that sexless marriages are always due an annulment. *Ford v Ford*[40] clarified that a respondent's conduct must show a determination not to consummate the marriage: in this case, the refusal did not originate from the husband's imprisonment, but instead originated in his clear determination never to consummate the marriage.

In *S v S (Otherwise C)*[41] it was similarly held that where both incapacity and wilful refusal were alleged, it was still necessary for the court to ascertain the cause of non-consummation and the question of incapacity and wilful refusal would be considered separately. In the case of unsuccessful attempts at consummation, where the wife was again biologically incapable, the court was willing to accept an artificially created or extended vagina as rendering a wife capable of consummation, but only in a biologically female body, again reaffirming the cisnormative nature of consummation, and denying a valid marital status to trans women. In this case, the court found that 'the husband has failed to satisfy [the court] that the marriage has not been consummated owing to the incapacity of the wife' due to his leaving of the matrimonial home and beginning a new relationship.[42]

Lord Denning clarified in *Ramsay-Fairfax (orse Scott-Gibson) v Ramsay-Fairfax* that consummation is seen as an essential element of a marriage's validity:

> No one can call a marriage a real marriage when it has not been consummated; and this is the same, no matter whether the want of consummation is due to incapacity or to wilful refusal. Let the theologians dispute as they will, so far as the lawyers are concerned, Parliament has made it quite plain that wilful refusal and incapacity stand together as grounds of nullity and not for dissolution […][43]

Thus, although there is a decreasing significance afforded to consummation, as will be discussed below, as Denning states, according to the legislation, consummation remains an essential element to a marriage if it is to avoid being voidable.

The various reaffirmations of *D-E v A-G*'s 'ordinary and complete' standard of sexual intercourse over the course of the 20th century demonstrate the law's fixed assumptions as to the appropriate and normal nature of sexual intercourse in marriage. The construction of consummation as ordinary and complete intercourse further informs our understanding of what a marriage *should* be like, not just how it should be formed in order to avoid being voidable. This approach was maintained even in the

[38] Collier (n 22), 156.
[39] (1975) 5 Fam Law 161.
[40] (1987) 17 Fam Law 232.
[41] [1954] 3 All ER 736.
[42] ibid 743.
[43] [1955] 3 WLR 849, Lord Denning, at 853.

early 21st century, as in *Sheffield City Council v E*,[44] the courts devised a mental capacity test for consent to marry in order to prevent a person who is unfit to marry from marrying. A party to a marriage must understand the nature, duties, and responsibility of a marriage, understand that spouses are to live together, and understand that spouses are meant to love each other to the exclusion of all others, *to have capacity for sexual intercourse*, to appreciate components of marriage. Munby J stated in *Sheffield* that this was a deliberately low threshold because of the fact there are people in society who may be of limited or borderline capacity but still have a right to marry. Even in this instance of consent and mental unsoundness, the court has placed a sexual component in marriage, and it was held that an individual would only have the capacity to marry if they understood the obligation, inter alia, 'to love each other as husband and wife to the exclusion of all others'.[45]

This approach was confirmed in *KC and NNC v City of Westminster Social and Community Services Department*, in which it was held that a severely disabled man's ability to 'consent to the marriage itself or to sexual intercourse … strikes at its root'.[46] *In D Borough Council v B*, Mostyn J stated that 'a sexual component or dimension is, generally speaking, an intrinsic part of marriage'[47] and went on to determine a test for capacity to sexual intercourse, concluding that capacity required not only understanding of the mechanics of the act but also '[t]hat there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; and that heterosexual sex may result in pregnancy.'[48] This test did not, however, require capacity to understand consent, the age of consent, or an understanding of the emotional consequences of sex. Therefore, marriage is understood broadly to include a sexual element, which must be understood by the parties entering into it, in order for the marriage to be ordinary and complete. While this case law informs our understanding of what has been considered to be ordinary and complete, we must also consider what the court has considered to be partial and imperfect.

Partial and imperfect

The courts have taken an equally strict approach in deciding what amounts to 'partial' or 'imperfect' sexual activity.[49] In determining the extent of sexual activity relevant to consummation, the court has in turn told us what they will not consider as relevant or valid intercourse, implicitly rewarding and validating heteronormative standards of relationship recognition. This can be seen in the high-profile case of *Corbett v Corbett*,[50] which concerned the validity of the marriage of April Ashley, a trans woman in a relationship with a cisgender man. *Corbett* held that marriage is a relationship between a man and woman, and that to determine sex for the purposes of marriage, the law should adopt the chromosomal, gonadal and genital tests. In doing so, the law ignored any operative intervention, therefore denying the identity of trans people, and consequently making the marriage void. In addition, Ashley was held to be incapable of consummating the marriage, 'as intercourse using the completely artificial cavity constructed could never be ordinary and complete intercourse'.[51] In the judgment, Ormrod J conflated transsexuality with homosexuality, and constructed Ashley's vagina as

[44] [2004] EWHC 2808 (Fam), [2005] Fam 326.
[45] Ibid.
[46] [2008] EWCA Civ 198, 220.
[47] *D Borough Council v B* [2011] EWHC 101 (Fam), [2012] Fam 36, [14], per Mostyn J.
[48] ibid per Mostyn J at para 42.
[49] *D-E v A-G* (1845) 1 Rob Eccl 279.
[50] [1971] P 83. For commentary, see Alex Sharpe, 'English Transgender Law Reform and the Spectre of *Corbett*' (2002) 10(1) FLS 65, 68; Richard Collier, *Masculinity, Law and the Family* (Routledge 1995); Katherine O'Donovan, *Family Law Matters* (Pluto, 1995); Stephen Gilmore, 'Corbett v Corbett: Once a Man, Always a Man?' in Stephen Gilmore, Jonathan Herring, and Rebecca Probert (eds) *Landmark Cases in Family Law* (Bloomsbury, 2016), Rebecca Probert, 'How would *Corbett* be decided today?' (2005) 35 *Family Law* 382.
[51] ibid 107.

'unnatural'.[52] This, he said, proved crucial to her inability to consummate a marriage, and therefore her failure to be considered female by the law at the time.

Thus, marriage was reinforced as being exclusionary and biologically deterministic. Drawing on this determinism, Sharpe has written:

> More significantly, however, all these decisions find unity in legal anxiety over the boundaries of the 'natural' and in the homophobia that generates it. It is legal concern over the 'natural' and the homophobia of law that structures these decisions. In this respect, resort to (bio)logic emerges as rhetorical trope.[53]

In *Corbett*, a distinction was found between a body which had been 'naturalised' (ie a cisgender woman whose vagina was malformed) and a body who had been born without a vagina but had one created by surgery (i.e. a post-operative transgender woman). A fear exists in the judgment that 'by over-refining and over-defining the limits of "normal", one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse'.[54] This approach therefore, has manifested as a determination of sex that rejects transgender people. The focus on sex that is partial and imperfect has been used simultaneously to determine what is legitimate and correct intercourse and what is not, excluding same-sex couples, trans people, and those who cannot perform sexually from the possibility of consummation, and in many cases, rendering a marriage voidable.

In the case of *B v B*,[55] the wife was born with male genitals and had undergone surgery to create her vagina. It was held that the artificiality of the organ meant that consummation was not possible. On the basis of analogous facts, the court in *SY v SY (orse W)* similarly held that 'the test of *vera copula* is not whether [the husband] derives sexual satisfaction but whether he substantially penetrates the vagina provided by nature for that purpose'.[56] Collier has described the decision in *SY* as relying on the 'anatomically normal woman'[57] as distinct from a trans woman, who would be incapable of 'normal' intercourse, even after gender reassignment. While sexual satisfaction was not relevant, the nature of the penetration was held to be an essential ingredient of natural consummation, reaffirming the *naturalness* of heterosexual penetration.

While the Gender Recognition Act 2004 has altered this position for trans people, it is important to note that if a person does not have a gender recognition certificate, their gender is still determined using the test established in *Corbett*. As Probert notes, the GRA is silent on consummation[58] and may lead to a situation where, 'even after a person has undergone gender reassignment surgery, and has had their reassignment legally recognized under the Gender Reassignment Act, it is possible that his or her marriage could be annulled on a ground first devised by medieval canonists. Even if this is no more than a theoretical possibility, this is hardly satisfactory.'[59]

Despite many cases focussing on the ability of a wife to receive her husband, there are also cases based on a husband's impotence. In *G v M*, an impotent man was described as 'guilty of a most wicked

[52] ibid 49.
[53] Sharpe (n 50) 68.
[54] *Corbett*, ibid 50.
[55] [1955] P 42.
[56] [1963] P 37, 48.
[57] Collier (n 22) 97.
[58] Probert (n 50) 385.
[59] Ibid, 389.

and abominable act' in knowingly marrying.[60] In *Clarke v Clarke*,[61] despite a child being born within the marriage, consummation had not taken place as conception had occurred without penetration. Similarly, a collapsing erection during intercourse cannot render such intercourse ordinary or complete. In *W (orse K) v W*, the husband's erection quickly receded upon penetration of his wife resulting in no emission either inside or outside the wife, which was therefore insufficient to consummate the marriage.[62] In determining how the court has sought to identify wilful refusal, we can see how refusal to engage in sexual intercourse demonstrates the nature of consummation as a willing and intentional act. As Collier states, 'male sexuality and initiation are presumed and, indeed, advocated as psychological techniques to promote male virility are judicially endorsed.'[63]

The court, therefore, has influenced the construction of sexual intercourse, helping to create a desirable and idealised form of intercourse in order to constitute consummation. However, since 1973, there have been developments in marriage that not only call into question the validity of such determinations, particularly their exclusive and heteronormative nature, but also the need for determining consummation at all.

Consummation's decreasing significance

Consummation is a significant concept that legally completes a marriage, but to many[64] it is a legal irrelevance and intrusion of the state. The recognition of relationships has changed substantially since nullity and consummation were treated as being of national importance in the 1950s.[65] In the time since, civil partnerships,[66] same-sex marriage,[67] and the inclusion of different-sex couples into civil partnerships[68] call into question to the necessity of consummation. While these momentous family law reforms have changed society's understanding of 'family' and of who can have a recognised relationship, there has been little amendment of the clauses of the Matrimonial Causes Act 1973 regarding nullity, particularly the need for consummation. While no-fault divorce has changed the way we end relationships,[69] the formation of different-sex marital relationships still remains subject to the void and voidable provisions, in particular heterosexual consummation. In this final section, I will discuss the growing divergence of the courts and Parliament from the provisions of nullity and the ordinary and complete standards of sexual intercourse.

Munby J recognised in *X (A Child)*[70] that a sexual relationship is not a vital ingredient of a marriage and that, indeed, there are some sexless marriages that are valid, for instance death-bed marriages. The applicants in the case were married, but in a long-standing platonic, non-sexual relationship, as the husband was gay and the wife knew of this. The applicants sought a parental order for their 'much-loved child' in accordance with section 54 of the Human Fertilisation and Embryology Act 2008. However, section 54 specified that applicants must be husband and wife. Owing to their lack of a sexual relationship, the court commented on the nature of their marriage, insisting that despite being unconsummated, it remained a loving and valid relationship:

[60] [1885] AC 171, 207.
[61] *Clarke (Otherwise Talbot) v Clarke* [1943] 2 All ER 540.
[62] [1967] 1 WLR 1154.
[63] Collier, (n 22), 160. See also *S v S* [1954] P 736; *REL (Otherwise R) v REL* [1948] P 211.
[64] For empirical evidence and discussion, see Maine (n 3).
[65] *Morgan v Morgan* [1959] P 92.
[66] Civil Partnership Act 2004.
[67] Marriage (Same-Sex Couples) Act 2013.
[68] Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019.
[69] Divorce, Dissolution and Separation Act 2020.
[70] *In the matter of X (A Child)* [2018] EWFC 15, 15.

> The applicants were indeed, and remain, married to each other. Their relationship is deep and of long-standing. But, one of them is, as the other has always known, gay, and their relationship and marriage is thus, as Ms Fottrell puts it, platonic and not romantic. Does this in any way affect their ability to satisfy the requirement of section 54(2)(a)? The answer, in my judgment, is a plain and unequivocal, No.[71]

Munby demonstrates an approach to marriage that corresponds with a wealth of literature[72] indicating that the central aspect of familial relationships is not sexual intimacy, but a caring relationship. Munby's unequivocal statement that a married couple who do not have, and have not had a sexual relationship nevertheless do fulfil the requirement of husband and wife seems obvious. He goes on to state:

> The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State.[73]

This confirms that a marriage can be non-sexual and still be valid. He goes on to cite another case from the 19th century, *A v B*:[74]

> The truth is, *consensus non concubitus facit matrimonium* [consent not consummation makes a marriage]. The law has always recognised that a couple may take each other as wife and husband *tanquam soror vel tanquam frater* [as sister and brother].[75]

The use of this case demonstrates Munby's facilitative approach, emphasising a fraternal and compassionate approach to marriage. This was evidently the case in *X*, and was beneficial to the parties. However, their marriage *could* still be vulnerable to a decree of nullity. The non-sexual nature of marriage is only secure if one of the parties does not contest it. If the wife sought a decree of nullity owing to the fact that the gay husband had wilfully refused to consummate, they may be successful in ending the marriage by way of nullity but this petition may also be barred under s13(1).[76]

Consummation remains a peculiarity in the law, further confused by the introduction of new legislation and reform that have omitted or removed reference to and requirement of consummation. When introduced, the Civil Partnership Act 2004 was described by Stychin as an 'empty vessel'[77] due to its lacking of any ceremonial elements, such as the need to state any distinct vows or the requirement of consummation.[78] Parliament had originally intended to allow the courts to define

[71] ibid, per Sir James Munby, para 6.
[72] See, for instance, Jonathan Herring, *Caring and the Law* (Hart 2013); Eugenia Caracciolo di Torella & Annick Masselot, *Caring Responsibilities in European Law and Policy: Who Cares?* (Routledge 2020); Eugenia Caracciolo di Torella, 'Here we go again: the Court the value of care and traditional roles within the family' (2020) 57 *Common Market Law Review* 1-12.
[73] *X (A Child)* (above), per Sir James Munby, para 7.
[74] (1868) LR 1 P&D 559, 562.
[75] *X (A Child)* (above), per Sir James Munby, para 8.
[76] The court shall not make a nullity of marriage order on the ground that a marriage is voidable if the respondent satisfies the court—(a)that the applicant, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and (b)that it would be unjust to the respondent to make the order.
[77] Carl Stychin, 'Couplings: Civil Partnership in the United Kingdom' (2005) 8(2) NYCLR 543, 550.
[78] Civil Partnership Act 2004, s50.

same-sex consummation but, after struggling to determine how this concept could be applied in instances of same-sex intercourse, eventually deciding to omit consummation from civil partnership altogether.[79] As Barker has argued, this emptiness created possibilities for radical reform of relationship recognition, divorced from romantic mythologies and ideologies.[80] When different-sex civil partnerships were created following the *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development (in substitution for the Home Secretary and the Education Secretary)*[81] decision, the non-consummation provisions were similarly not included.[82] In omitting consummation from civil partnerships, the law indicated a turning point in the regulation of relationships that are not marriage, establishing civil partnerships as a sexless and functional institution.

Nonetheless, civil partnerships are constructed as implicitly sexual relationships between those in intimate, personal relationships.[83] This follows on from the construction of same-sex couples in *Fitzpatrick v Sterling Housing Association*, in which legal recognition was awarded to 'partners in a longstanding, close, loving and faithful, monogamous, homosexual relationship'.[84] The decision in *Fitzpatrick* offers implicit recognition of a sexual relationship between same-sex partners, though clearly stopped short of requiring or contemplating same-sex consummation. In *Ghaiden v Godin-Mendoza*,[85] a same-sex couple were held to have a relationship that was analogous to husband-and-wife partnerships, again implicitly recognising the sexual nature of their close and intimate personal relationship. In *Wilkinson v Kitzinger*,[86] civil partnerships were held to be a sufficient substitute in lieu of Parliament legislating for marriage. We can see in the courts' decision making that civil partnerships and homosexual relationships were simultaneously marriage-like and not marriage. As Stychin has noted: 'The legislation attempts to privilege the conjugal, cohabiting same-sex relationship (although neither conjugality nor cohabitation is a precondition to registration).'[87] Therefore, in the growing jurisprudence surrounding familial reform and the granting of rights to same-sex couples, the desexing of institutional recognition seems to confirm consummation as a historical oddity, owing to its inapplicability to modern family forms.

The creation of same-sex marriage in England and Wales in 2013 followed the example set by the Civil Partnership Act 2004 and upholds the 'ordinary and complete' standards of sexuality because the definition of consummation remains tied to this Victorian definition. Schedule 4, Part 3 of the Marriage (Same-Sex Couples) Act 2013 amends section 12 of the Matrimonial Causes Act 1973 to state that the provisions concerning wilful refusal and incapacity to consummate do not apply to same-sex couples, therefore omitting any reference to sexual intercourse from the landmark same-sex couple legislation.

[79] Hansard, HL Deb, vol 666, col 1479 (17 November 2004). Women and Equality Unit, Responses to Civil Partnership: A framework for legal recognition of same-sex couples (DTI, 2003): http://webarchive.nationalarchives.gov.uk/+/www.womenandequalityunit.gov.uk/publications/CP_responses.pdf (last accessed 11 July 2023). See also Maine (n 3).

[80] Nicola Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality?' (2006) 14 *Feminist Legal Studies* 241.

[81] [2018] UKSC 32.

[82] Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019.

[83] A Maine, 'The Hierarchy of Marriage and Civil Partnerships: Diversifying Relationship Recognition' in Hamilton F and Noto La Diega G (eds), *Same-Sex Relationships, Law and Social Change* (Routledge 2020) 209, 212.

[84] *Fitzpatrick v Sterling Housing Association* [1999] UKHL 42.

[85] [2002] EWCA Civ 1533; [2004] UKHL 30.

[86] [2006] EWHC 2022 (Fam)

[87] Carl Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 FLS 79.

Same-sex marriage in England and Wales therefore rests on a contradiction, being a significant reform for people who are sexually and emotionally invested in a same-sex relationship and wish to enter into a traditional form of conjugality, but are prevented from having the sexual dimension of their relationship recognised in the same way as different-sex married couples. The omission of consummation from same-sex marriage rests on an assumption that homosexual sexual acts are not an *ordinary* or *complete* form of sexuality. As 'LGBTQ people's sexuality was seen, traditionally, as antithetical to marriage',[88] by omitting any reference to it in legislation, the law implicitly disregards the significance of a personal and important aspect of a queer person's sexuality, while heterosexual counterparts are subject to imposition of sexual standards of ordinariness and completeness.[89]

In removing consummation from same-sex marriage, the law invalidates forms of queer sexuality,[90] irrespective of the stance taken by the courts and Parliament in rejecting its necessity. Palazzo has described this as a form of discrimination,[91] while Chambers argues:

> the consummation requirement means that the state stipulates not merely that sex is a valuable part of many relationships, but also that a relationship that is in all other respects identical to marriage does not qualify for recognition and legal protection if it has not also included at least one act of sexual intercourse.[92]

Similarly, I have previously argued that the consummation aspect of marriage should be removed entirely, in order to bring a greater semblance of equality into the law.[93] By establishing throughout the case law that consummation is a heterosexual and exclusive concept, the law found itself in a bind when same-sex marriage was introduced, and therefore went with the arguably easier option of removing it altogether as a factor in same-sex marriage. This, according to Wicks, 'makes it all the more difficult to see the justification for its retention for other marriage'.[94]

Ultimately, since the introduction of civil partnerships and same-sex marriage, both of which lack an element of consummation, the law has deviated from the sexual standards established in case law. Despite the court's protracted determination of what is and isn't 'ordinary and complete', or 'partial and imperfect', we now find ourselves in a situation where the sexual lives of the majority (married heterosexuals) are potentially subject to the intrusion of the state, while the unmarried, civil partners, and married same-sex couples are not subject to the same scrutiny. This is ironic, seeing as queer people have been subject to sexual scrutiny for many years, but again calls into question the point of the law's requirement of a specific form of sexual intercourse to avoid the possibility of a decree of nullity. As Black states, 'putting sexual intimacy at the heart of family law means that the law promotes a heteronormative allosexual 'normality', to the detriment of other consensual lifestyle choices'.[95] By merely omitting consummation from same-sex marriage, Parliament did nothing to alter the concept but drew a distinguishing line between same-sex marriage and different-sex marriage. In doing so, Parliament failed to capitalise on the opportunity to enforce wider change to relationship recognition and the relationship between law and sexuality. Therefore, in order for marriage to

[88] A Maine, 'Queering Marriage: The Homoradical and Anti-Normativity' (2022) 11(1) *Laws* 1.
[89] See Maine (n 3); and (n 105).
[90] Maine (n 3).
[91] Nausica Palazzo, *Legal Recognition of Non-Conjugal Families* (Hart 2021) 107.
[92] Clare Chambers, *Against Marriage* (OUP 2017) 65.
[93] Maine (n 3).
[94] Elizabeth Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Hart 2016) 87.
[95] Black (n 11) 13.

modernise, it is time to reform the consummation provisions and move on from the ordinary and complete standards of sexuality imposed by the law.

An ordinary and complete conclusion

Consummation, in English and Welsh law, is a concept that is at once important and not important, relevant to the formation of marriage, and irrelevant to the everyday lives of married people. It is determined by an exclusive definition and relies on dated common law to determine the validity of an different-sex marriage. While Munby J in *X (A Child)*[96] stated that marriages can be entirely not sexual, it is still the case that until an different-sex marriage has been consummated it is an insecure legal entity, and vulnerable to a decree of nullity. The omission of consummation from civil partnerships and same-sex marriage further confuses the situation, and calls into question the intention behind the retention of consummation for marriage. Does it indicate that the law views heterosexuality as legitimate, and homosexuality as illegitimate? Does it indicate that same-sex marriage is viewed as a lesser form of marriage?[97] Unfortunately, that is the impression left by the law.

Further, by specifying that marriage is a sexual relationship, the law is failing to keep up with the caring rationale of marriage, and if we de-centre sex[98] from marriage 'we can start to place the focus on the important functions carried out by families through an assumption of responsibility, such as support, care and economic interdependence.'[99] Ultimately, the removal of consummation from marriage would not only lead to greater equality between same- and different-sex marriages, but it would also prevent the state from maintaining and applying normative and essentialist definitions of the ordinary and complete, not partial nor imperfect, forms of sexual intercourse.

[96] *In the matter of X (A Child)* [2018] EWFC 15.
[97] Maine (n 105).
[98] Sanyal and Ghosh (n 2) 335.
[99] Black (n 11) 16.