

Equal marriage—Law Society of Scotland & Scottish Transgender Alliance—12 October 2012

Two methods of arguing for and against

1. Rights based: ‘I have/do not have a right to marry’; derived from natural law.
2. Empirically based: ‘My marriage will harm no-one/x persons; look, here is the evidence’; derived from legal positivism.
3. I do not usually get drawn into civil liberties arguments. I am a boring commercial lawyer, off to a commercial firm. This is an exception.

Three major empirical arguments

1. *The argument from history, law and culture (or, we don’t want to go back to paganism!)*
 - (a) Globally (and historically), polygamy (polygyny) the most common form of marriage.
 - (b) Mandated procreation as a norm has origins in monotheism, not classical Roman law:

Marriage, or matrimony, is a joining together of a man and a woman, implying a united life-style (*individuum consuetudinem vitae continens*): D.23.2.1. [First century AD].

- (c) Link between passage of laws that discriminated against both women (status of women was high in pagan Rome) and gays:

When a man marries and is about to offer himself to men in womanly fashion (*quum vir nubit in feminam viris porrecturam*), what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment: Th. C. 9.8.3 [AD 381].

2. *The argument from science (or, what about the children?)*
 - (a) Social science research indicating that children raised in single-parent families have diminished outcomes compared to children raised by parents in ‘traditional marriages’ (heterosexual monogamy). There is some evidence to support this, but only if the single parent is both poor *and* uneducated.
 - (b) However, arguing that two same-sex parents will produce the same outcomes as a single parent of either sex is scientifically meaningless. Indeed, what evidence we do have indicates slightly better outcomes for children raised by same-sex couples. This is probably a selection effect.
3. *The ‘slippery slope’ (or, if we let the gays marry each other, the bloke next door will marry his dog!)*
 - (a) Accepting harmless equality demands has sometimes led to the accepting of harmful equality demands: multiculturalism good, *Sharia* bad.
 - (b) Use of *Human Rights Act* and *Equality Act* to override private religious practices/beliefs in the name of public civil rights. Problem is less dramatic north of the border, as marriage is part of Scots private law. It’s part of public law in England. Dramatic case: *Ladele v Islington Borough Council* [2010] 1 WLR 955, currently on appeal to Strasbourg.
 - (c) Scots private law is wholly devolved, not only pursuant to s 29 and Schedule 5 of the *Scotland Act* 1998, but also pursuant to the Acts of Union 1707.
4. *The peculiar situation of transgender people – ss 5, 5A; 5 (1)(b), 5A(1)(b) Gender Recognition Act 2004.*
 - (a) In order to make one’s interim gender recognition certificate ‘final’, if married, must divorce; if civilly partnered, must dissolve.
 - (b) Common requirement—not just in England and Scotland, but also Australia and New Zealand. Personal friend who went through this process—her website: <http://aebrain.blogspot.co.uk/>