The symbolic status of same-sex marriage

Frances Hamilton, Senior Law Lecturer at Northumbria University

Frances Hamilton is a Senior Lecturer at Northumbria University. She holds an MA in Law from the University of Cambridge together with an LLM from Trinity College Dublin. She is also a qualified solicitor. Her research interests on the topic of same-sex marriage involve comparative law and socio-legal approaches as well as looking at human rights law and an EU free movement perspective.

When the Civil Partnership Act 2004 (‘CPA’) was introduced in 2004 this was a major step forwards for same-sex couples. Despite offering near equalisation of rights with married couples, this piece argues that this was insufficient for those same-sex couples who favour same-sex marriage. This remains a current issue for jurisdictions which have not legalised same-sex marriage, including Northern Ireland and many European states. This piece argues that civil partnership is a useful concept allowing public mind-sets to adjust, en route to the legalisation of same-sex marriage. However, civil partnership remains tarred by the brush of ‘separate but equal.’ Aside from the rights granted by marriage itself, this article contains an important symbolical status and is necessary for the recognition of gays as equal citizens.

Why same-sex marriage remains an important issue

Although same-sex marriage was legalised in England and Wales in 2013 and Scotland in 2014, in Northern Ireland there remains only a right to civil partnership. Further, on a Council of Europe level there is no right to same-sex marriage.1 Today 13 countries in Europe have introduced same-sex marriage2 and an additional 15 Member States recognise some form of civil partnership.3 Yet the protections offered by the latter status vary widely.4 Some countries continue to maintain constitutional provisions defining marriage as between a man and a woman only.5 This remains an issue about which although the European Court of Human Rights (‘ECtHR’) explains that despite ‘major social change . . . there is no European consensus . . . ‘6

When the Civil Partnership Act 2004 (‘CPA’) was introduced this was a momentous occasion for same-sex couples. Civil partners were given very similar legal rights to married heterosexual couple, ‘with the exception of a form of ceremony and the actual name and status of marriage’.7 Yet less than a decade later, it was felt necessary to enact new legislation to legalise same-sex

2 Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland).
3 Andorra, Austria, Croatia, Cyprus, the Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Liechtenstein, Malta, Slovenia, Switzerland and San Marino.
5 Marriage is defined as a union solely between a man and a woman in the constitutions of Armenia, Bulgaria, Croatia, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia and Ukraine. See Helen Fenwick, ‘Same Sex Unions and the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court’s Authority Via Consensus Analysis’ (2016) 3 European Human Rights Law Review 248.
6 Schalk and Kopf v Austria (n2) para 58.
7 Wilkinson v Kitzinger [2006] EWHC 835 (Fam), [2006] 2 FLR 397 para [49].
This piece maintains that same-sex marriage remained a goal worth seeking because of the symbolic value of marriage. First it will be considered why the CPA was not sufficient for proponents of same-sex marriage, before going on to outline in further detail the symbolic value of marriage and the close connections between marriage and citizenship.

Why the CPA was not sufficient

Although ‘registered partnership take different forms in different countries’, the UK wide CPA enacted in 2004 led to near equality of legal rights. This is in contrast for example with the French pacte civil de solidarite (‘PACS’) which although providing a large range of rights nearly equivalent to marriage did not include citizenship. The CPA was enacted in 2004 following a consultation with ‘stakeholders and the public at large’. This survey found that the public were not prepared at that time for same-sex marriage. Speaking in the Second Reading of the Civil Partnerships Bill in the House of Lords, Baroness Scotland linked the CPA firmly to issues surrounding religion stating that this was a ‘secular solution’. Even Stonewall (one of the leading gay rights organisations in the UK) considered at that time that civil partnership was ‘preferable to marriage’.

Yet even with similar legal protections to marriage, for many same-sex couples civil partnership was insufficient. Civil partnership by its very existence as a separate status was often tarred with the brush of being ‘separate but equal’ and relegating same-sex couples to ‘second-class status’. Marriage was considered by many as the gold standard whilst civil partnership was compared to the treatment of blacks in the ‘Jim Crow South’. Practical differences also remained. Should a couple wish to relocate jurisdiction for instance, civil partnerships receive less protection from private international law and EU law than heterosexual marriage.

Over the course of a decade social attitudes evolved, and before enacting the 2013 Same-Sex Marriage Act, a government consultation found that 53% of the population supported same-sex marriage. Despite the criticisms of civil partnership, it can be argued that it did provide a useful staging post on the way to same-sex marriage. Whilst some authors may view

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8 Marriage (Same Sex Couples) Act 2013.
10 Ibid, at 122 which described the CPA as the ‘comprehensive model for registered partnerships.’
11 For further explanation see Macarena Saez, General Report ‘Same Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World; Why ‘Same’ is so Different’ (2011) 19 American University Journal of Gender Society and Policy 1 at 23.
13 Wilkinson v Kritzinger (n8) at para [51] referring to Baroness Scotland (Hansard, HL 22 April 2004, Col 388).
15 Baroness Scotland (Hansard, HL 22 April 2004, Col 388).
16 See Aloni (n10) at 156.
civil partnerships as stalling progress, in contrast this author considers that ‘civil partnerships are a useful building block on the road to the recognition of same-sex marriage’. This is because ‘[i]ntermediate stage legislation allows public opinion to adjust and develop’. Interestingly in this context, the ECtHR has noted the ‘intrinsic value’ of civil partnerships, ‘irrespective of the legal effects, however narrow or extensive’. The key point however, is that marriage has a symbolical value which civil partnership could never bestow. Closely connected with this are the citizenship rights which marriage, but not civil partnership entails. Each of these inter-connected concepts will be considered in the next couple of sections.

Symbolism of marriage

Marriage is the key social institution celebrated and recognised around the world. Marriage is given great constitutional importance and ‘assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy’. Marriage is also protected by international conventions and dicta in influential judgments has referred to marriage as a ‘vital social institution’ and one of the ‘basic civil rights of man’ fundamental to our very existence and survival. The majority of the US Supreme Court in the important 2015 judgment of Obergefell v Hodges, which licensed same-sex marriage across all states of the US, stressed that the right to marry as ‘fundamental’. Excluding gays from marriage is to exclude them from an important part of society. The South African Constitutional court in Fourie also saw similarities with laws preventing mixed race marriage and was keen to have a radical break form the past in recognising same-sex marriage. Grigolo also comments that until same-sex marriage is recognised, that it should be demanded as otherwise minority groups are allowing themselves to be ‘relegated to a second-rate position’.

The Wilkinson v Kritzinger case, which was determined before the Marriage (Same Sex Couples) Act 2013 was enacted, contained a witness statement by Sue Wilkinson, who was desperately pleading for her Canadian same-sex marriage to be recognised in England and Wales. For her, offering gays and lesbians the ‘“consolation prize” of a civil partnership . . . is offensive and demeaning’. For many same-sex couples marriage was seen as rendering their ‘existing relationship more real’ and that marriage would ‘create and make public a perception of lasting commitment among lesbians’. In conclusion, when marriage is compared to an extensive civil partnership rights giving regime, ‘the practical

importance of marriage is overshadowed by its symbolic importance. This suggests that the institution of marriage itself carries abstract weight that cannot be explained simply by the many benefits understood to be guaranteed through it.

Marriage and citizenship

An important part of the symbolism of marriage is its close connection with citizenship. The ability to form a marriage has great relevance to an individuals’ status as an equal citizen. The classic formulation for citizenship comes from Thomas Marshall who stressed the ‘equal . . . rights and duties with which the status is endowed’. The close connections between citizenship and equality are also stressed in the French and Irish constitutions. Baroness Hale in a leading case before the UK House of Lords also emphasised that ‘[d]emocracy is founded on the principle that each individual has equal value’. An important practical effect of the symbolism of equal marriage is therefore to advance the citizenship status of same-sex couples.

Same-sex couples who are excluded from marriage are not truly equal. They have not been accorded the full status of citizenship and are not seen as full members of society. It can be argued is because of the public nature of marriage. The personal commitment of two individuals through marriage, and the citizenship this entails, leads to many consequences for the couples ability to ‘participate . . . in the public order’. If the couple do not enter a civil partnership, and do not marry, they may lose out on many economic benefits including social security benefits, health insurances and the advantages of tax and immigration laws. In short, Brenda Cossman characterises citizenship as being ‘about the process of becoming recognised subjects, about the practices of inclusion and membership, both social and legal’. In a link back to the symbolic value of marriage, Grigolo explains that ‘only marriage [not civil partnership] can guarantee the symbolic benefits of full equality’.

Conclusion

Civil partnership provides a useful staging post, allowing ‘public opinion to adjust and develop’. Yet for many civil partnership was never going to be sufficient because of allegations that this was a ‘second-class status’. Marriage itself provides an important symbolic status and is protected by international conventions and important case law. Therefore excluding gays from marriage is to exclude them their ‘status as an equal citizen’.

38 See for example Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument (2012) 10(2) International Journal of Constitutional Law 477 at 478. See also Dorf (n).
43 See for example Bamforth (No 39) 484 referring to Diane Richardson, ‘Sexuality and Citizenship’ (1993) 32 Sexuality 83 at 88 (1998) who states that ‘it can be argued that lesbians and gay men are only partial citizens, in so far as they are excluded from certain of these rights.’ See also Angela P Harris ‘Loving Before and After the Law’ (2008) 76 Fordham International Law Review 2821.
45 See Aloni (No 10).
46 Bamforth (No 39) 481 referring to Cott (No 27) 1.
47 Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (Stanford University Press, 2007) 27–32.
48 Grigolo (No 33) 1041.
49 See Hamilton (No 24) 138.