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The symbolic status of same-sex marriage

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same-sex marriage involve comparative law and socio-legal approaches as well as looking at human rights law and an EU free movement perspective.

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 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

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

- ¹ *Schalk and Kopf v Austria* (App No 30141/04) (2011) 53 EHRR 20 and *Chapin and Charpentier v France* (App No 40183/07) (ECtHR 9 June 2016).
- 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.
- ⁴ See Kees Waaldijk 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' in Kees Waaldijk, Marjolein Van Den Brink, Susanne Burri and Jenny Goldshmidt, *Equality and Human Rights: Nothing But Trouble – Liber Amicorum Tital Loenen* (Netherlands Institute of Human Rights, 2016 Sim Special 38).
- 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].

marriage.⁸ 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'⁹, the UK wide CPA enacted in 2004 led to near equality of legal rights.¹⁰ This is in contrast for example with the French *pacte civil de solidarité* ('PACS') which although providing a large range of rights nearly equivalent to marriage¹¹ did not include citizenship.¹² The CPA was enacted in 2004 following a consultation with 'stakeholders and the public at large'¹³. This survey found that the public were not prepared at that time for same-sex marriage.¹⁴ Speaking in the Second Reading of the Civil Partnership Bill in the House of Lords, Baroness Scotland linked the CPA firmly to issues surrounding religion stating that this was a 'secular solution'¹⁵. Even Stonewall (one of the leading gay rights organisations in the UK)

considered at that time that civil partnership was 'preferable to marriage'¹⁶.

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'¹⁷. Marriage was considered by many as the gold standard¹⁸ whilst civil partnership was compared to the treatment of blacks in the 'Jim Crow South'¹⁹. 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.²⁰ 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.²¹

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

8 Marriage (Same Sex Couples) Act 2013.

9 Erez Aloni, 'Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage' (2010–2011) 18 *Duke Journal of Gender Law and Policy* 105 at 111.

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 25.

12 See Eric Fassin, 'Same-Sex, Different Politics: 'Gay Marriage' Debates in France and the United States' (2001) 13(2) *Public Culture* 215 at 217.

13 *Wilkinson v Kitzinger* (n8) at para [51] referring to Baroness Scotland (Hansard, HL 22 April 2004, Col 388).

14 *Ibid* 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.

17 See Jonah M.A. Crane, 'Legislative and Constitutional Responses to *Goodridge v Department of Public Health*' (2003–2004) 7 *New York University Journal of Legislative and Public Policy* 465–485 at 471. See also Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 *Virginia Law Review* 1267.

18 See *Wilkinson v Kitzinger* (n8) at para [18]. See also Aloni (n) at 110 referring to Yuval Merin, *Equality for Same-Sex Couples The Legal Recognition of Gay Partnerships in Europe and the United States* (University of Chicago Press, Chicago, Illinois, US, 2002) at 55–56 who describes marriage as the 'privileged and preferred legal status in Europe and the United States.' See also George W. Dent Jr. 'The Defense of Traditional Marriage' (1999) 15 *Journal of Law and Politics* 581–644 at 617 who refers to marriage as bringing many 'intangible benefits' including 'honour, respect [and] the social stamp of approval.'

19 Elizabeth S Scott, 'A World Without Marriage' (2004–2008) 41 *Family Law Quarterly* 537–566 at 543. See also Richard . Lombino II, 'Gay Marriage: Equality Matters' (2004–2005) 14(1) *South California Review of Law and Women's Studies* 3 at 17.

20 See Frances Hamilton and Lauren Clayton-Helm, 'Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) *Journal of International and Comparative Law* 1.

21 HM Government, *Equal Treatment: The Government's Response* December 2012 at 11 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf

civil partnerships as stalling progress,²² in contrast this author considers that ‘civil partnerships are a useful building block on the road to the recognition of same-sex marriage’²³. This is because ‘[i]ntermediate stage legislation allows public opinion to adjust and develop’²⁴. Interestingly in this context, the ECtHR has noted the ‘intrinsic value’ of civil partnerships, ‘irrespective of the legal effects, however narrow or extensive’²⁵. 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’²⁶. Marriage is also protected by international conventions²⁷ and dicta in influential judgments has referred to marriage as a ‘vital social institution’²⁸ and one of the ‘basic civil rights of man’ fundamental to our very existence and survival.²⁹ The majority of the US Supreme

Court in the important 2015 judgment of *Obergefell v Hodges*,³⁰ which licensed same-sex marriage across all states of the US, stressed that the right to marry as ‘fundamental’.³¹

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 from 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’³². 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.³³ For her, offering gays and lesbians the ‘“consolation prize” of a civil partnership . . . is offensive and demeaning’.³⁴ For many same-sex couples marriage was seen as rendering their ‘existing relationship more real’³⁵ and that marriage would ‘create and make a public a perception of lasting commitment among lesbians’³⁶. In conclusion, when marriage is compared to an extensive civil partnership rights giving regime, ‘the practical

22 *Aloni* (No 10) at 105.

23 Frances Hamilton, ‘Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change’ (2016) 25 *Florida Journal of Transnational Law and Policy* 121 at 138

24 *Ibid* at 138.

25 *Oliari and Others v Italy*, App Nos. 18766/11 and 36030/11, 21 July 2015 at para 81.

26 See *Aloni* (No 10) at 141 referring to Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2002) at 1.

27 See for example Art 12 of the European Convention on Human Rights which states that ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’ Another example is Art 23(2) of the UN Covenant on Civil and Political Rights which states that ‘the right of men and women of marriageable age to marry and to found a family shall be recognized’.

28 See Crane (n18) at 469 referring to *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003) at para 948.

29 Yvonne Zylian, *States of Passion: Law Identity and Social Construction of Desire* (Oxford University Press, 2011) at 224 referring to *Loving v Virginia* 388 U.S. 1 (1967) at 12.

30 See *Obergefell et al v Hodges, Director, Ohio Department of Health* (2015) US 576.

31 *Ibid.* at 11

32 Michele Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14(5) *European Journal of International Law* 1023 at 1041.

33 See *Wilkinson v Kritzinger* (No 8).

34 *Wilkinson v Kritzinger* (No 8) para [18].

35 Julie Shulman, Gabrielle Gotta and Robert-Jay Green, ‘Will Marriage Matter? Effects of Marriage Anticipated by Same-Sex Couples?’ (2012) 33(2) *Journal of Family Issues* 158 at 162

36 Mary Dunlap, ‘The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties’ (1991) 1 *Law and Sexuality Review Lesbian and Gay Legal Issues* 63.

importance of marriage is overshadowed by its symbolic importance'.³⁷ 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.³⁸ The classic formulation for citizenship comes from Thomas Marshall who stressed the 'equal . . . rights and duties with which the status is endowed'.³⁹ The close connections between citizenship and equality are also stressed in the French⁴⁰ and Irish constitutions.⁴¹ 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'.⁴² 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 citizenship⁴³ and are not seen as full members of society.⁴⁴ This it can be argued is because of

the public nature of marriage.⁴⁵ 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'⁴⁶. 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'⁴⁷. 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'.⁴⁸

Conclusion

Civil partnership provides a useful staging post, allowing 'public opinion to adjust and develop'.⁴⁹ 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'.

37 *Schulman, Gotta and Green* (No 36) 177 referring to Corinne Reczek, Sinikka Elliott and Debra Umberson, (2009). Commitment Without Marriage: Union Formation Among Long Term Same-Sex Couples. (2009) 30 *Journal of Family Issues* 738 at 740

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).

39 *Ibid.* at 477-478 referring to Thomas H Marshall, 'Citizenship and Social Class' in Thomas H Marshall and Tom Bottomore (eds) *Citizenship and Social Class* (Pluto Press, 1992) 18.

40 See for discussion Michael Rosenfeld, 'Introduction: Gender, Sexual Orientation and Equal Citizenship' (2012) 10(2) *International Journal of Constitutional Law* 340.

41 Constitution of Ireland, Art 40(1). See for discussion Conor O'Mahoney, 'There Is No Such Thing as a Right to Dignity' (2012) 10(2) *International Journal of Constitutional Law* 551.

42 *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557[132] (Baroness Hale of Richmond).

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.

44 Richard Frimston, 'Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law' (2006) *Private Client Business* 352.

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.