

Same-Sex Relationships, Law and Social Change

Conclusions

Frances Hamilton, Senior Lecturer in Law, Northumbria University

This edited collection has analysed the necessity for both legal and social change with regard to regulation of same-sex relationships and rainbow families, the status of civil partnership as a concept and the lived reality of equality for LGBTQ+ persons. The current treatment of LGBTQ+ persons and same-sex couples by the Council of Europe, the European Union and further internationally has been examined. Whilst same-sex marriage is legal in 28 jurisdictions worldwide, other states provide varying degree of civil partnership rights and still others refuse to recognise same-sex couples' rights or even criminalise same-sex relationships. The competing views of critically analytical rights based theorists and those developing queer and feminist theory, represented in this edited collection, expose that even for those jurisdictions who have legalised same-sex marriage, still further and continuous work needs to be done. Legal and social change need to work together on an evolving basis over time in order to contribute to future development. Incrementalism recommends a model of 'small change' but has been critiqued throughout this book.

Analysis

This book has involved a series of inter-locking themes, including (Part One) the role of the ECtHR and the EU in relation to the treatment of same-sex couples' relationships, (Part Two) differing paths towards legalisation of same-sex marriage, (Part Three) rainbow families, (Part Four) the importance of civil partnership in an era of same-sex marriage (Part Five) the heteronormative underpinnings of same-sex marriage and (Part Six) the interaction between social change and legal change. Many chapters in this work investigate the potential opportunities open to the EU in protecting the rights of LGBTQ+ persons and same-sex couples and the consequent potential impact of Brexit for these persons based in the UK.¹ Whilst traditionally the EU was even stricter than the ECtHR in recognising non-conventional family types,² Hamilton's chapter has demonstrated that EU law has potential to further advance LGBTQ+ persons and same-sex couples' rights.³ The EU concept of citizenship, which

¹ See chapters 1-3 and 8.

² Hamilton.

³ Hamilton.

proceeds on the basis of an ever-expanding array of practical rights, has recently stressed free movement and non-discrimination rights, offering many opportunities for the groups studied.⁴ Both the *Coman*⁵ and *MB*⁶ case studies included in Hamilton's chapter exemplify the importance of EU action.⁷ In *Coman*, subsidiarity concerns were over-ridden in preference for the principle of free movement.⁸ Similarly in *MB*, non-discrimination rights were given prominence as opposed to Member States' public policy concerns.⁹ Whilst the CJEU sought to confine both *Coman* and *MB* case strictly to their facts,¹⁰ these cases are symbolical important¹¹ and may signal further developments from the CJEU.

In contrast the ECtHR continues to stress concerns about a lack of consensus.¹² The Council of Europe 47 states are more divergent¹³ than the arguably more homogeneous currently EU28 (although differences should not be ignored here).¹⁴ The EU can rely on stronger enforcement mechanisms than the ECtHR through use of EU concepts of supremacy¹⁵ and state liability.¹⁶ If as anticipated, Brexit were to affect free movement of persons, UK LGBTQ+ persons and same-sex couples will have to rely on whatever rights their country of destination sees fit to grant them. Further if Brexit impacts on the remit of the CJEU, UK LGBTQ+ persons and same-sex couples will miss out on important developments in relation to expanding EU law.

Noto La Diega and Clayton-Helm grapple with conflicts of law questions concerning whether and how a foreign same-sex relationship will be recognised, following relocation of the couple to a new jurisdiction. Noto La Diega after conducting empirical research¹⁷ on the response to the *Coman* judgment¹⁸ concluded that European countries could be placed into three groups, which he terms

⁴ Hamilton.

⁵ Case C-673/16 *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* ECLI:EU:C:2018:2.

⁶ Case C-451/16 *MB v Secretary of State for Work and Pensions* ECLI:EU:C:2018:492.

⁷ Hamilton.

⁸ *Coman* (n 5).

⁹ *MB* (n 6).

¹⁰ *Coman* (n 5) and *MB* (n 6).

¹¹ Alina Tryfonidou, 'The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, Relu Adrian Coman Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne' (2019) *Feminist Legal Studies* 1.

¹² *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).

¹³ Including countries such as Russia where gay propaganda laws are still in force. See Paul Johnson, 'Homosexual Propaganda' in the Russian Federation: Are They in Violation of the European Convention on Human Rights?' (2015) 3 *Russian Law Journal* 37.

¹⁴ For instance, with Eastern European countries.

¹⁵ See Tryfonidou (n11) for discussion.

¹⁶ The state liability principle was established in Case C-6/60 and C-9/90 *Francovich v Italy* ECLI:EU:C:1991:428.

¹⁷ Noto La Diega carried out twenty semi-structured email interviews with lawyers representing LGBTQ+ persons, LGBTQ+ organisations and police officers.

¹⁸ *Coman* (n 5).

recognition, downgrading and erasure.¹⁹ Whilst some countries went further than required by *Coman* and recognised same-sex marriages as marriages for all purposes,²⁰ others in Noto La Diega's terminology 'downgraded' a foreign same-sex marriage and recognised this as a civil partnership only.²¹ Whilst Hayward analyses whether a civil partnership should be considered a 'downgrade',²² countries in Noto La Diega's second denoted group did not recognise foreign same-sex marriage in their original form.²³ Still other states contravened EU and ECtHR law entirely²⁴ by refusing to recognise foreign same-sex marriages at all thereby falling into Noto La Diega's erasure group.²⁵ This divergence of practical response serves to illustrate that legal change will never suffice, if in practice lack of social acceptance results in a lack of enforcement.

Clayton-Helm's chapter considers the potential power of a unified conflicts of law system under an EU umbrella.²⁶ Clayton-Helm proceeds by comparative law analysis with the US following *Obergefell*.²⁷ Whilst following *Coman* the EU determined that same-sex marriages had to be recognised cross-border for the purpose of free movement and residency rights,²⁸ in *Obergefell* the US Supreme Court required full legalisation of same-sex marriage across the US.²⁹ US federal unity was achieved despite traditional lack of involvement by the Supreme Court in family law³⁰ and many divergent approaches between US states as to the status of legal recognition of same-sex marriage.³¹ Clayton-Helm argues that the US Supreme Court set a precedent³² for the EU and concludes that a unified federal approach is the 'only way to achieve certainty.'³³ This conclusion should be properly balanced against Noto La Diega's research which already demonstrates a more divergent response to *Coman* across the EU than is actually required by law. The historically narrow competence of the CJEU to deal with family law is also relevant.³⁴ However, Clayton-Helm's chapter does demonstrate the potential impact of EU law.³⁵

¹⁹ Noto La Diega.

²⁰ *Coman* (n 5) only requires the receiving country to recognise same-sex marriages for the purposes of free movement and residency, and does not require the receiving country to legalise same-sex marriage.

²¹ An example here is Italy.

²² Hayward.

²³ Noto La Diega.

²⁴ Noto La Diega.

²⁵ Example here is Hungary.

²⁶ Clayton-Helm.

²⁷ *Obergefell v Hodges* 576 US, 135 S Ct 2584 (2015).

²⁸ *Coman* (n 5).

²⁹ *Obergefell v Hodges* (n 27).

³⁰ Clayton-Helm.

³¹ Sheldon D Pollock, 'Same-Sex Marriage and the Conflict of Law: The "Other" Constitutional Issue' (2015) 13 *Georgetown Journal of Law and Public Policy* 477.

³² Clayton-Helm referring to *Obergefell* (n 27).

³³ Clayton-Helm.

³⁴ Aude Fiorini, 'Rome III – Choice of Law in Divorce: is the Europeanization of Family Law Going too Far?' (2008) 22 *International Journal of Law, Policy and the Family* 178.

³⁵ Clayton-Helm.

Once again, following the likely impact of Brexit, UK citizens would no longer be able to benefit from these potential further advances by EU law.

Further chapters analyse different methods of introducing same-sex marriage. Aloni explains that incrementalists³⁶ prefer legislative to judicial methods as they allow ‘public opinion to adapt and change gradually’³⁷ and mitigate the potential of a backlash following a far-reaching court judgment.³⁸ However Aloni argues that ‘grim’ concerns following *Obergefell* have largely been unfounded, and backlash has been weak.³⁹ Sperti’s chapter demonstrates that the ‘apparent contrast’ between legislative and court-based methods should not be exaggerated.⁴⁰ In fact she considers that the similarity in synergy between national legislators and constitutional courts needs to be acknowledged...⁴¹ Prior to the far-reaching judgments of United States and Canada who introduced same-sex marriage through constitutional courts by declaring violations of human rights,⁴² earlier work had already been done. Earlier case law had created important relationships between movements, government officials and citizens thereby developing public opinion.⁴³ European constitutional courts in deferring to national legislatures, should also not be depicted as overly deferent.⁴⁴ In fact Sperti argues that the strategy of European legislatures was not dissimilar to that of countries taking court based approaches. European legislatures were only able to act following earlier court cases which developed issues such as defining key terms such as family and challenging stereotypes about LGBTQ+ persons, thereby opening up public debate and allowing space for action.⁴⁵

Tobin and Richardson-Self et al analyse the introduction of same-sex marriage by means of votes from the population.⁴⁶ Whilst Tobin rightly acknowledges the ‘milestone’⁴⁷ achievement of same-sex marriage in the ROI, he considers that the referendum was only chosen as a method of legalisation due

³⁶ See Aloni referring to Kees Waaldijk, ‘Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands’ in Robert Wintermute and Mads Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of Nation, Europe, and International Law* (Hart Publishing 2001).

³⁷ Frances Hamilton, ‘Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change’ (2015-2016) 25 *Journal of Transnational Law & Policy* 121, 140-144.

³⁸ Aloni.

³⁹ Aloni referring to Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (NYU Press 2015).

⁴⁰ Sperti.

⁴¹ Sperti.

⁴² Sperti referring to *Obergefell v Hodges* (n 27) and Canadian examples such as *M v H* [1999] 2 SCR 3 (Canada).

⁴³ See Sperti referring to Reva B Siegel, ‘Community in Conflict: Same-Sex Marriage and Backlash’ (2017) 64 *UCLA L Rev* 1728.

⁴⁴ Sperti referring to examples from Spain, Portugal, France and Germany.

⁴⁵ Sperti.

⁴⁶ Tobin and Richardson-Self.

⁴⁷ Tobin referring to Omar Encarnacion, ‘There’s Something about Marriage’ (*Foreign Affairs*, 31 May 2015) <www.foreignaffairs.com/articles/ireland/2015-05-31/theres-something-about-marriage> accessed 11 Feb 2019.

to political expediency. His chapter relates ‘...on-going circuitousness’ between the Oireachtas (the Irish Parliament)⁴⁸ and the courts, neither of which wished to expressly support the cause of marriage equality for ‘...fear of backlash...’⁴⁹ Instead they selected to pass the matter to a constitutional convention (consisting of 33 Members of the Irish Parliament and 66 citizens representing a cross section of Irish society) who recommended a referendum. Although the referendum was ultimately successful by a huge margin,⁵⁰ Tobin considered this to be a high-risk strategy because of the history of failed referendums in the ROI.⁵¹

Richardson-Self et al’s analysis of the Australian non-compulsory Marriage Law Postal Survey demonstrates that this also followed a long drawn out history of debate and deadlock between conservatives and progressives in both major parties and following proposals for a referendum being blocked.⁵² There had been myriad attempts to introduce Bills at Federal level⁵³ and instances of backlash from federal government following advances by individual Australian states.⁵⁴ Ultimately 79.5% of the population voted with a high margin of 61.6% in favour of change. Richardson-Self et al’s analysis of data obtained through 9 qualitative interviews with LGBTQ+ Tasmanians working in government funded religious organisations and schools⁵⁵ demonstrates that the referendum also entailed negative consequences.⁵⁶ The NO campaign, unhampered by the ‘stringent advertising restrictions which apply to federal elections..’ consequently spread ‘deliberately misleading’ misinformation about the LGBTQ+ community⁵⁷ leading to ‘prejudicial public scrutiny’ and consequent pain and suffering to the LGBTQ+ community.’⁵⁸ Richardson-Self et al also critique the ‘YES’ campaign,⁵⁹ who proceeded

⁴⁸ Tobin.

⁴⁹ Tobin.

⁵⁰ In ROI the referendum was successful by 62.07% to 37.93%.

⁵¹ Tobin referring to Census 2011, *This is Ireland: Part 1* (CSO 2012).

⁵² Richardson-Self et al.

⁵³ Richardson-Self et al refers to Deirdre McKeown, ‘Chronology of Same-Sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide’ (*Parliament of Australia*, 15 February 2018). <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/SSMarriageBills> accessed 2 January 2019.

⁵⁴ Richardson-Self et al who refers to the example of Tasmania.

⁵⁵ Richardson-Self et al explains that ‘[t]he recruitment of employees from faith-based organisations was driven by the possibility that changes to *federal* legislation could mean that LGBTQ+ employees in Tasmanian religious organisations may be discriminated against in the future, if a right to discriminate on religious grounds is introduced. (This would not be the case in secular organisations.)

⁵⁶ Richardson-Self et al.

⁵⁷ Richardson-Self et al referring to Matt Connellan, “‘Deliberately Misleading’: First “Vote No” to Same-Sex Marriage Advertisement Aired’ (*SBS News*, 30 August 2017) <www.sbs.com.au/news/deliberately-misleading-first-vote-no-to-same-sex-marriage-advertisement-airs> accessed 4 January 2018

⁵⁸ Richardson-Self referring to Quinn Eades and Son Vivienne (eds), *Going Postal: More than ‘Yes’ or ‘No’. One Year On: Writings from the Marriage Equality Survey* (Brow Books 2018).

⁵⁹ Of which the most visible organisation was Australian Marriage Equality.

on the basis of advocacy which ‘emphasised sameness’⁶⁰ resulting in heteronormativity.⁶¹ This approach resonates with other campaigns across the Western World.⁶² Whilst it may ‘explain the high voter turnout’⁶³ the achievement of marriage ‘equality’ in Australia on this analysis was bought at a cost. Richardson-Self et al refer to other authors who suggest that marriage equality ‘privilege[s] the most ‘central’ member of the LGBTQ+ community—namely cisgender, white, middle- and upper-class gays and, to an extent, lesbians [but on the other hand]—it leaves its most vulnerable members’ concerns on the sidelines.’⁶⁴ Following marriage ‘equality’ in Australia, clear-cut conclusions have not been reached. Questions remain, particularly in the light of proposals from some faith-based organisations to introduce a ‘right discriminate’ on grounds of religious belief.⁶⁵

Burton’s chapter utilises examples from contemporary culture to outline a number of new legal questions raised by changes in society when considering same-sex couples and transpersons whose children form rainbow families. She highlights issues concerned with surrogacy⁶⁶ and the case of male transpersons who have retained their female reproductive organs and subsequently given birth to the children.⁶⁷ Burton’s chapter also serves to illustrate that legal change is far from complete and that social changes concerning rainbow families continue to challenge judges and legislators in a series of ever expanding and novel contexts.⁶⁸ Further complexities are brought into play by rainbow families who cross international borders. Tryfonidou critically analyses EU treatment of rainbow families and stresses the need for EU judges and institutions to ‘fashion rules and principles that reflect the reality of the lives of rainbow families, when such families move between EU Member States.’⁶⁹ Her chapter again exemplifies the continued need for legal development in this area, particularly on a pan EU level, given the diversity of treatment across EU states when considering same-sex couples’ parental rights⁷⁰ and limited access to surrogacy and medically assisted reproduction.⁷¹ Like Hamilton and Clayton-Helm’s chapters, Tryfonidou’s chapter demonstrates the opportunities for future development by the EU. Schuster considers the ECtHR’s notion of ‘family life’ as the cornerstone of a pan-European

⁶⁰ Richardson-Self et al.

⁶¹ Richardson-Self et al.

⁶² Richardson-Self et al referring to Louise Richardson-Self, *Justifying Same-Sex Marriage: A Philosophical Investigation* (Rowman and Littlefield International 2015). See also Donovan.

⁶³ Richardson-Self et al.

⁶⁴ Richardson-Self et al referring to Gorrie and Ison’s in Quinn Eades and Son Vivienne (n 58).

⁶⁵ Richardson-Self et al.

⁶⁶ Burton.

⁶⁷ Burton.

⁶⁸ Burton.

⁶⁹ Tryfonidou.

⁷⁰ Tryfonidou referring to ILGA Europe Rainbow Europe Package: Annual Review and Rainbow Europe Map 2019 available at <<https://rainbow-europe.org>> last accessed 13 May 2019.

⁷¹ Tryfonidou for further detail.

standard of family. Despite the EU not having competence to harmonise family law, it has enacted laws that refer to the concepts of spouse and child. He notes that EU law can self-define the notion of family life (Article 7 of the Charter of Fundamental Rights of the EU) as well as the rights to family and found a family. Their meaning and scope must be the same as the European Convention, although EU law can provide a stronger protection.⁷² Schuster argues that the EU standard of ‘family’ should not result from the commonalities between Member States; some of them are in breach of EU fundamental rights because of their narrow idea of family. Constitutional definitions of ‘family’ and ‘marriage’ shall not shape the EU relevant standard; indeed, European fundamental rights shall prevail also on national constitutional principles.⁷³ He concludes that the EU should not impose a EU-wide definition of family and that ‘[p]luralism and respect for the diversity of Europe’s family patterns is the only viable common standard to ensure free movement.’

Hayward explores the status of civil partnership in an era of same-sex marriage. He refers to sources who describe marriage as a ‘cornerstone’⁷⁴ and emphasise the ‘historical role... ceremonial rites and ... symbolism’⁷⁵ associated with marriage. The status ascribed to civil partnership is less certain. In many nations, as Ryan corroborates in an ROI context,⁷⁶ civil partnership has been treated as a ‘stepping stone’ and is abolished following the introduction of same-sex marriage.⁷⁷ Noto La Diega’s analysis also considers civil partnership to be a ‘downgrade’, when on relocation a same-sex couples’ marriage is not recognised and they are instead provided with civil partnership as an alternative status.⁷⁸ In a UK context, at the time of the Civil Partnership Act 2004 leading gay rights movement Stonewall, considered civil partnership to be ‘preferable to marriage’.⁷⁹ However this contentment soon dissolved and Burton points out that the equal marriage campaign quickly stepped up its demand for same-sex marriage.⁸⁰ Yet the accuracy of seeing civil partnership as a ‘stepping-stone’ only or as inferior to marriage is debatable. Ryan explains that the reason the ROI abolished civil partnership as a status was because of government concerns that its continued existence, thereby allowing individuals a choice

⁷² Article 52(3) of the Charter.

⁷³ Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* ECLI:EU:C:2000:2.

⁷⁴ Hayward referring to Sebastian Poulter, ‘The Definition of Marriage in English Law’ (1979) 42 *Modern Law Review* 409 and Rebecca Probert, ‘Hyde v Hyde: Defining or Defending Marriage?’ [2007] *Child and Family Law Quarterly* 322.

⁷⁵ Hayward.

⁷⁶ Ryan.

⁷⁷ See referring to Jens M Scherpe and Andy Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia 2017).

⁷⁸ Noto La Diega.

⁷⁹ Erez Aloni, ‘Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage’ (2010-2011) 18 *Duke Journal of Gender Law & Policy* 105, 156 referring to Beccy Shipman and Carol Smart, ‘It’s Made a Huge Difference’: Recognition, Rights and the Personal Significance of Civil Partnership, 12 *Social Research Online* (2007) para 2.5.

⁸⁰ Burton.

between civil partnership and marriage, 'would undermine constitutional safeguards for marriage as some couples may favour civil partnership over marriage.'⁸¹ The ECtHR also considers civil partnership as having an 'intrinsic value.'⁸² Maine and Aloni's analysis also emphasises the importance of a 'a fresh new legal institution ...'⁸³ echoing sentiments expressed by the opposite-sex partners behind the *Steinfeld* litigation as presenting an opportunity to break free from the institution of marriage with its traditional religious and patriarchal connotations.⁸⁴ Hayward concludes optimistically that civil partnership has developed a 'nascent ideology'⁸⁵ which needs full consideration where the future of civil partnership is concerned.

Following analysis of twenty semi-structured interviews with LGBTQ+ persons aged 20 - 67 in Newcastle in 2016, Maine concludes that despite the legalisation of same-sex marriage, and the achievement of heterosexual civil partnership, relationship recognition in the UK still reinforces Rubin's sexual hierarchy.⁸⁶ The latter concept determines how '[m]odern Western societies appraise sex acts according to a hierarchical system of sexual value. Marital, reproductive, heterosexuals are alone at the top erotic pyramid.'⁸⁷ Maine's analysis demonstrates that heteronormativity is privileged and that the new regimes promote coupled, domestic same-sex and different-sex relationships. He concludes that this means that 'non-marital relationships... are still excluded...'⁸⁸ Individuals which do not fit the prism of monogamous relationships such as homoradicals (those participants who wish to engage in non-monogamous, kink or public sex) are side-lined and do not receive any legal protection, or even criminalised.⁸⁹ Donovan also attaches the caveat that whilst marriage is available to almost any adult couple in England and Wales this is providing 'they identify with a recognised binary gender identity.'⁹⁰ This provides another example demonstrating that legal change is not all encompassing, and the law needs to continually evaluate the needs of the population in its regulation of recognised relationship statuses.

Ryan interrogates the heteronormative underpinnings of marriage. He explains that until recent legalisation of same-sex marriage in some jurisdictions, throughout history marriage law was '...solely

⁸¹ Ryan referring to *Dáil Debates* Vol. 890, 23 September 2015.

⁸² See *Vallianatos v Greece* (2013) 59 EHRR 519, [81] and *Oliari and Others v Italy* (2015) 65 EHRR 957 [174].

⁸³ Aloni and Maine

⁸⁴ *R (Steinfeld and Keidan) v Secretary of State for International Development [2018] UKSC 32*.

⁸⁵ Hayward.

⁸⁶ Maine referring to Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1984) 151.

⁸⁷ See Rubin (n 86).

⁸⁸ Maine.

⁸⁹ Maine.

⁹⁰ Donovan.

with a heterosexual model of family life in mind.’⁹¹ Consequently, his chapter considers that as a result marriage law is ‘fundamentally heteronormative.’⁹² This ties in to Hayward’s reference to Norrie who considers that ‘[e]quality is granted, but only on heterosexual terms’.⁹³ Richardson-Self et al also refer to the further important factor of feminist, leftist, and queer criticisms of the marriage equality.⁹⁴ They refer to Daniel Thomas who considers that whilst issues with gender and sexual diversity are framed in ‘[cis]heteronormative terms... [this means] that it ultimately...positions gender and sexually diverse people within a hierarchically inferior position to [cis]heterosexuals.’⁹⁵ Donovan also considers that pursuit of equality is a flawed agenda raising concerns of other feminists and queer theorists about the sameness and difference debate, considering that legal equality may not be a desirable goal, because ‘...why should LGBTQ+ people want to achieve equality with what heterosexual people have when that ‘standard’ of normality might be fundamentally flawed.’⁹⁶ Whilst this criticisms of lack of real equality call for future and ongoing legal and social reform, in the context of this debate it should not be forgotten that some individuals are passionate believers in a right to enter into same-sex marriage. Hamilton referring to others argues that for some proponents of same-sex marriage this is seen as a ‘right central to citizenship.’⁹⁷ Recognition of same-sex marriage allows a choice for those such as petitioner Sue Wilkinson in the *Wilkinson v Kitzinger* case who considered marriage as a ‘gold-standard.’⁹⁸ This accords with research from Pew which demonstrates growing public opinion in favour of same-sex marriage across liberal democracies worldwide,⁹⁹ the result of the ROI referendum,¹⁰⁰

⁹¹ Ryan.

⁹² Ryan.

⁹³ Hayward referring to Kenneth McK Norrie, ‘Marriage is for heterosexuals – may the rest of us be saved from it’ [2000] *Child and Family Law Quarterly* 363.

⁹⁴ Louise Richardson-Self, ‘Questioning the Goal of Same-Sex Marriage’ (2012) 27 *Australian Feminist Studies* 205.

⁹⁵ Richardson Self et al. referring to Daniel Jay Thompson, ‘Your Parents Will Read This: Reading (as) Parents in Journalistic Coverage of the Safe Schools Coalition Australia Controversy’ (2018) *Journalism* <<https://journals.sagepub.com/doi/pdf/10.1177/1464884918755638>> accessed 30 June 2019.

⁹⁶ Donovan referring as an example to Rosemary Auchmuty. ‘What’s so special about marriage? The impact of *Wilkinson v Kitzinger*’ (2008) 20 *Child and Family Quarterly* 475.

⁹⁷ Hamilton referring as an example to example Nicholas Bamforth, ‘Sexuality and Citizenship in Contemporary Constitutional Argument’ (2012) 10 *International Journal of Constitutional Law* 477; Michel Rosenfeld, ‘Introduction: Gender, Sexual Orientation and Equal Citizenship’ (2012) 10 *International Journal of Constitutional Law* 340; David Bradley, ‘Comparative Law, Family Law and Common Law’ (2003) 33 *Oxford Journal of Legal Studies* 127.

⁹⁸ Sue Wilkinson in her Witness Statement contained in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) at para 6.

⁹⁹ See Pew Research Centre, ‘Attitudes on Same-Sex Marriage’ (14 May 2019) <www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> Accessed 16 September 2019. Pew Research Centre who has surveyed public opinion on same-sex marriage since 2001 and documents increasing support for this.

¹⁰⁰ In the ROI referendum noted at n 50 above.

leading cases¹⁰¹ and the changing position of gay rights movements to adopt a more positive view towards same-sex marriage.¹⁰²

Ryan uses examples from both England and Wales and the ROI to illustrate differences in legal regulation of same-sex relationships as opposed to heterosexual relationships, therefore on his analysis demonstrating the heteronormativity of marriage equality.¹⁰³ At present and until no-fault divorce legislation is re-introduced into Westminster, adultery is a ground for divorce for heterosexual couples in England and Wales but not for same-sex couples. The Matrimonial Causes Act 1973 states that '[o]nly conduct between the respondent and a person of the opposite sex may constitute adultery...'¹⁰⁴ In Irish law although the Marriage Act 2015 is technically silent on the point,¹⁰⁵ Ryan refers to Shatter's definition of adultery to include '.. some penetration of the female vagina by the male organ.'¹⁰⁶ There is also a difference in treatment between same-sex and opposite sex couples, in the law's treatment of whether the lack of ability consummate a marriage remains a ground for annulment. Law in the ROI, Northern Ireland,¹⁰⁷ and England and Wales,¹⁰⁸ allows a marriage to be voidable on those grounds for opposite sex couples.¹⁰⁹ However for same-sex couples the inability or refusal to consummate is not a ground for dissolution of English and Welsh civil partnerships¹¹⁰ or same-sex marriages.¹¹¹ With reference to the ROI, Ryan refers to consummation as being 'ordinary and complete' sexual intercourse after the solemnisation'¹¹² with the core question in such cases is whether there is the 'practical possibility of full penetration by the male into the female.'¹¹³

Ultimately, Ryan concludes that this difference in treatment leads to the '[t]he unmistakable implication that the law regards homosexual infidelity as less serious and pressing a concern..¹¹⁴ His analysis

¹⁰¹ See for example *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003); *Loving v Virginia*, 388 US 1 (1967) and *Obergefell v Hodges* (n 27).

¹⁰² See for example Yvonne Zylan, *States of Passion, Identity and Social Construction of Desire* (OUP 2011) 205 referring to Evan Wolfson, 'Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique' (1994) 21 *New York University Review of Law and Social Change* 567 at 611.

¹⁰³ Ryan.

¹⁰⁴ Ryan referring to section 1(6) of the Matrimonial Causes Act 1973.

¹⁰⁵ Ryan.

¹⁰⁶ Ryan referring to Alan Shatter, *Shatter's Family Law*, (4th edn. LexisNexis Butterworth's 1997) 345.

¹⁰⁷ Matrimonial Causes (Northern Ireland) Order 1978 (NI), Art.14(a)

¹⁰⁸ Matrimonial Causes Act 1973, s12(1)(a).

¹⁰⁹ Ryan explains that 'The consequence of this is that the marriage is 'voidable rather than void' meaning that the marriage is technically continuing, but providing a spouse the ability to avoid a marriage.'

¹¹⁰ Civil Partnership Act 2004 (UK), ss 50 and 174. See also s 107 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Ir).

¹¹¹ Matrimonial Causes Act 1973 (E&W), s.12(2) as inserted by the Marriage (Same-sex Couples) Act 2013 (E&W).

¹¹² Ryan referring to Shatter,(n 106) 209.

¹¹³ Ryan referring to Ibid. 210.

¹¹⁴ Ryan

demonstrates a continued lack of equality in the actual legal provisions in place in England and Wales and ROI. Ryan considers that care needs to be taken regarding risks that judges will apply ‘heterosexual norms.’¹¹⁵ He refers to Rundle in observing that ‘same-sex couples have very particular experiences and perspectives that may demand a somewhat different approach...’¹¹⁶ therefore requiring ‘flexibility’ to accommodate different couples.¹¹⁷ Once again the achievement of marriage ‘equality’ in England and Wales and ROI is not the end of the story.

Donovan’s chapter demonstrates that despite extensive legal reform and the introduction of same-sex marriage, there remains a distinct lack of equality for LGBTQ+ people experiencing domestic violence and abuse (DVA). LGBTQ+ person experiencing DVA, may not recognise it as such, may stay in DVA relationships for longer periods¹¹⁸ and still rarely report to formal, mainstream statutory (e.g. police) or third sector specialist domestic violence organisations.¹¹⁹ She considers that this lack of lived equality for LGBTQ+ persons experiencing DVA is a result of three main factors. Firstly, because of the historical portrayal of LGBTQ+ persons as ‘deviant’ having been ‘...socially constructed as criminals, pathological or morally questionable.’¹²⁰ Secondly because of the impact of ‘neoliberalism’¹²¹ on sexualities equalities policies and finally because of the social construction of DVA in a heteronormative fashion. This may result in vulnerable LGBTQ+ individuals experiencing DVA being disenfranchised.

Donovan referencing Richardson¹²² portrays citizenship as based on a ‘heteronormative, neoliberal agenda’¹²³ which promotes the ‘responsibilised citizen’ who can action their own rights.¹²⁴ This

¹¹⁵ Ryan

¹¹⁶ Ryan referring to Olivia Rundle, ‘Following the Legislative Leaders: Judicial Recognition of Same Sex Couples in Australia and New Zealand’ in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds) *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer-Verlag 2014) 136.

¹¹⁷ Ryan.

¹¹⁸ Donovan

¹¹⁹ Donovan referring to Catherine Donovan and Marianne Hester, ‘Seeking help from the enemy: help-seeking strategies of those in same-sex relationships who have experienced domestic abuse’ (2011) 23 *Child and Family Law Quarterly* 26 and Damien Riggs and others. ‘Domestic Violence Service Providers’ Capacity for Supporting Transgender Women: Findings from an Australian Workshop’ (2016) 46 *British Journal of Social Work* 2374.

¹²⁰ Donovan referring as an example to Catherine Donovan and Rebecca Barnes, ‘Being ‘ideal’ or falling short? The legitimacy of lesbian, gay, bisexual and/or transgender victims of domestic violence and hate crime’ in Marian Duggan (ed), *Revisiting The Ideal Victim Concept* (Policy Press 2018).

¹²¹ Donovan refers to ‘the neoliberal [concept of the] responsibilised citizen, responsible for their successes and failures is one such trend’ as further conceptualised by Diane Richardson, ‘Desiring sameness? The rise of a neoliberal politics of normalisation’ (2005) 37 *Antipode* 515; Diane Richardson, ‘Rethinking Sexual Citizenship’ (2017) 51 *Sociology* 208.

¹²² Donovan referring to Richardson (n 121) and Richardson (n 121).

¹²³ Donovan.

analysis of citizenship results in a divide between ‘good’ and ‘bad’ gays.’¹²⁵ The primary category comply with the ‘heteronormative social order’ including monogamy and family life.¹²⁶ The latter category either by choice or as a result of being socially excluded, become marginalised and despite myriad law reforms including same-sex relationships recognition and equal parenting opportunities become unable to access any legal rights, thereby impeding their citizenship.¹²⁷ This leads Donovan referencing others to state that ‘law has long been identified as one of the barriers to achieving sex/gender equality.’¹²⁸ On this view marriage ‘equality’ if seen as a conclusion, where this contributes to the creation of ‘sexual hierarchies’¹²⁹ and the marginalization of others, could actually prevents the citizenship of LGBTQ+ persons being fully realised.’¹³⁰

Equality goals are therefore questioned, and ‘legal equality’ cannot be seen as the end of the struggle.¹³¹ Hamilton referencing others considers that perhaps citizenship theorists should move away from ‘contested understandings of equality.’¹³² Instead wider conceptions of citizenship could be considered to include considerations of responsibilities towards the wider community and social processes through which individuals and social groups engage in claiming, expanding or losing rights.¹³³ This view of citizenship includes the drive to question what it means to be included and to belong.¹³⁴ This entails a sociologically informed definition of citizenship in which the emphasis is less on legal rules and more on normal practices, meanings and identities.¹³⁵ There would no longer be total reliance on the ‘formal relationship between the individual and the state’ but instead there should be ‘a more total relationship inflected by identity, social positioning, cultural assumptions, institutional practices and a sense of belonging’.¹³⁶ Hamilton considers that this accords with the EU’s aspiration to engage with citizens in

¹²⁴ Donovan.

¹²⁵ Donovan.

¹²⁶ Donovan referring to Matthew Todd, *Straight Jacket. How to be Gay and Happy* (Black Swann, 2018).

¹²⁷ Donovan.

¹²⁸ Donovan referring to for example, Carol Smart, *The Ties the Bind. Law, Marriage and the Reproduction of Patriarchal Relations*. (Routledge 1984).

¹²⁹ Brian Heaphy, Carol Smart and Anna Einarsdottir (eds), *Same Sex Marriages: New Generations, New Relationships* (Palgrave MacMillan 2013) 132.

¹³⁰ As also discussed by Jyl Josephson, ‘Citizenship, Same-Sex Marriage and Feminist Critiques of Marriage’ (2005) 3 *Perspectives on Politics* 269.

¹³¹ Donovan also referring to Robert Leckey, *After Legal Equality. Family, Sex, Kinship* (Routledge 2015).

¹³² Hamilton.

¹³³ Hamilton referring to Ruth Lister, ‘Why Citizenship: Where, How and Why Children’ (2007) 8 *Theoretical Inquiries in Law* 693 and Engin F. Isin and Bryan S Turner, ‘Citizenship Studies: An Introduction’ in Engin F. Isin, and Bryan Turner (eds) *Handbook of Citizenship Studies* (Sage, 2002).

¹³⁴ Hamilton referring to Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press 2007).

¹³⁵ Hamilton referring to Lister (n 133).

¹³⁶ Pnina Werbner and Nira Yuval-Davis, ‘Introduction: Women and the New Discourse of Citizenship in Pnina Werbner and Nira Yuval-Davis (Eds) *Women, Citizenship and Difference* (Zed, 1999).

a 'more meaningful and direct way'¹³⁷ and for EU citizens to feel a sense of belonging to the EU.¹³⁸ This is arguably of essential importance for the EU in a Brexit era. Hamilton accords with authors who consider citizenship as an aspirational ideal which is '...less than complete.'¹³⁹ One of the driving forces of change is the need to accommodate new populations.¹⁴⁰ As this book has demonstrated a key question is to continually evaluate how to include otherwise 'disenfranchised' LGBTQ+ groups.¹⁴¹

Donovan reflects points made by Ryan, that ultimately legal change alone will not 'change the attitudes, assumptions and hostility that led to the legal inequalities in the first place.'¹⁴² Whilst legal change is credited in providing 'ideological messages...' it continues to raise concern about the possibility of 'backlash...' ¹⁴³ In considering the inter-relationship between public opinion and legal change, incrementalist scholars set out a step-by-step process, otherwise known as the theory of small change, which allows change over time¹⁴⁴ therefore 'permitting gradual adjustment of antigay mind-sets, slowly empower[ing]... gay right advocates and ...discredit[ing] antigay arguments'.¹⁴⁵ Proponents of this theory argue that this is supported by statistics which demonstrate the correlation between favourable public opinion and legal change in order to achieve long-term successful change.¹⁴⁶ Aloni comments that the 'incrementalist path is corroborated by the experience of many nations...' ¹⁴⁷ and advocates consider that it results in a 'policy which minimizes backlash.'¹⁴⁸ Many of the chapters in this book have endorsed an incrementalist method of change not least Clayton-Helm, Noto La Diega and Sperti.¹⁴⁹ Maine's data analysis demonstrates that his interviewees did '... posit civil partnerships as a stepping-

¹³⁷ Hamilton referring to Helen Stalford, 'Concepts of Family under EU Law – Lessons from the ECHR' (2002) 16 *International Journal of Law, Policy and the Family* 410, 413. See also Frances Hamilton, 'The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship' (2015) 2 *Journal of International and Comparative Law* 87.

¹³⁸ See Hamilton referring to Kate Nash, 'Between Citizenship and Human Rights' (2004) 43 *Sociology* 1067, 1068 and Craig Calhoun, *Nations Matter: Culture, History and the Cosmopolitan Dream* (Routledge 2007).

¹³⁹ Hamilton referring to Lydia Morris, 'Citizenship and Human Rights: Ideals and Actualities (2012) 63 *British Journal of Sociology* 39; David Lockwood, 'Civil Integration and Class Formation' (1996) 47 *British Journal of Sociology* 531, 536.

¹⁴⁰ Hamilton referring to Gershon Shafir and Alison Brysk, 'The Globalization of Rights: From Citizenship to Human Rights' (2006) 10 *Citizenship Studies* 275, 279; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995).

¹⁴¹ Shafir and Brysk (n 140) 279.

¹⁴² Donovan and Ryan.

¹⁴³ Donovan referring to Susan Faludi, *Backlash: The Undeclared War Against American Women* (Three Rivers Press 1991).

¹⁴⁴ Waaldijk (n 36) 437.

¹⁴⁵ William Eskridge Jr, *Equality Practice: Civil Unions and the Future of Gay Rights* (Routledge 2002).

¹⁴⁶ See David Masci and Drew Desilver, 'A Global Snapshot of Same-Sex Marriage' (Pew Research Center, 21 June 2019) <www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> accessed 16 September 2019. The Pew Research Center conducts surveys annually in 17 nations on this subject.

¹⁴⁷ Aloni.

¹⁴⁸ Aloni.

¹⁴⁹ Clayton-Helm, Noto La Diega and Sperti.

stone towards same-sex marriage’ arguably therefore supporting the incrementalist paradigm.¹⁵⁰ Yet Aloni critiques the actual steps set out in the incrementalist model.¹⁵¹ He argues that although the experience of most nations was to follow the incrementalist steps, high profile exceptions remain.¹⁵² He also raises questions about the time taken to move between stages. In a policy that prefers ‘compromise’ this could arguably ‘trivialize the harm of those who are harmed by the ban...’¹⁵³ He explains that the incrementalist model could help to explain the very slow progress made in Asia and Africa, where many nations still criminalise same-sex intimacy.¹⁵⁴ He refers to Badgett who explains that one of the problems here is that incrementalists ‘..offer no clear idea about how long each incremental step should take...’¹⁵⁵ He also argues that the focus on marriage equality as a goal is a false one as it means that attention is ‘explicitly or impliedly diver[ted] ... from other alternative and innovative innovation strategies that can advance substantive equality beyond marriage...’¹⁵⁶

Conclusion

Although 28 states worldwide now recognise same-sex marriage¹⁵⁷ and others some level of civil partnership, many countries continue to ‘other’ same-sex relationships either by leaving them unrecognized or by criminalising them.¹⁵⁸ At a pan- European level both the CJEU and the ECtHR are at a cross roads with regards to future development. Whilst different European countries have had varying responses to advances in EU law, many of the chapters in this book are optimistic about the potential role of the EU in expanding rights for LGBTQ+ persons, same-sex couples and rainbow families.¹⁵⁹ The EU concept of citizenship offers an ever-expanding array of practical rights offering opportunities for new groups in society including LGBTQ+ persons and same-sex couples. Of prominence within the expanding group of rights include those of free movement and non-discrimination rights. Further the EU offers the possibility of a unified conflicts of law system. A consequent effect of Brexit could also mean that UK LGBTQ+ persons and same-sex couples will not benefit from these expanding rights. When considering the road of individual countries to recognising same-sex legal relationships, the methods of court based, legislative and public vote analysed within

¹⁵⁰ Maine.

¹⁵¹ Aloni.

¹⁵² Aloni.

¹⁵³ Aloni.

¹⁵⁴ Aloni.

¹⁵⁵ Aloni referring to M V Lee Badgett, ‘Predicting Partnership Rights: Applying the European Experience in the United States’ (2005) 17 *Yale Journal of Law & Feminism* 71, 75.

¹⁵⁶ Aloni referring to Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 104.

¹⁵⁷ See introduction n 2.

¹⁵⁸ See, ‘72 Countries where homosexuality is illegal’ (76 *Crimes*, 11 June 2019) <<https://76crimes.com/76-countries-where-homosexuality-is-illegal/>> Accessed 16 Sep 2019

¹⁵⁹ See Hamilton, Noto La Diega, Clayton-Helm, Tryfonidou and Schuster.

this edited collection all entail the necessity of both legal and social change to ensure the long-term success and acceptance of same-sex relationships. Differences between court based and legislative methods should not be overstated as prior to leading court judgments, earlier work had already been done in advancing public opinion and creating the ‘necessary relationships between movements, governments officials and citizens.’¹⁶⁰ Whilst legalisation of same-sex marriage by means of a public vote in ROI and Australia, perhaps entailed the ultimate attempt at public engagement, both these instances have been critiqued by the authors in the collection on the basis that they only took place due to deadlock between different branches of government.¹⁶¹ The status of civil partnership is disputed between those who see it as having an ‘intrinsic status’¹⁶² and those who see it as a ‘downgrade.’¹⁶³ In any event further reform of civil partnership should not be without necessary consultation.¹⁶⁴

However, even for those countries which have achieved same-sex marriage, many of the chapters in this edited collection demonstrate that this is not a conclusion in itself. Legal and social change need to work together with regard to future development of legal regulation of same-sex relationships and rainbow families, the status of civil partnership and the lived reality of equality of LGBTQ+ persons. Whilst incrementalism allows a model of ‘small change’¹⁶⁵ this is subject to critique.¹⁶⁶ There remain ongoing issues for LGBTQ+ persons who do not fit into the monogamous categories which are given legal protection.¹⁶⁷ Other marginalized individuals, such as LGBTQ+ individuals experiencing DVA, may simply not be able to bring forwards claims to rights if they are disconnected from appropriate social groups and without support in a society which values individualism and characterizes DVA in heteronormative terms.¹⁶⁸ Other issues include the contested status of LGBTQ+ education in schools and continued high levels of homo-bi transphobia¹⁶⁹ and the high level of homophobic hate crime.¹⁷⁰ New challenges constantly need to be considered not least the issue of certain Australian states bringing

¹⁶⁰ Sperti referring to Siegel (n 43) 1731.

¹⁶¹ Tobin and Richardson-Self et al.

¹⁶² ECtHR in *Oliari v Italy* (n 82).

¹⁶³ Noto La Diega

¹⁶⁴ Hayward.

¹⁶⁵ Waaldijk (n 36).

¹⁶⁶ Aloni.

¹⁶⁷ Maine and Donovan.

¹⁶⁸ Donovan.

¹⁶⁹ Donovan referring to Metro, *Youth Chances: Integrated Report* (Metro Charity 2016)

<[https://metrocharity.org.uk/sites/default/files/2017-](https://metrocharity.org.uk/sites/default/files/2017-04/National%20Youth%20Chances%20Intergrated%20Report%202016.pdf)

[04/National%20Youth%20Chances%20Intergrated%20Report%202016.pdf](https://metrocharity.org.uk/sites/default/files/2017-04/National%20Youth%20Chances%20Intergrated%20Report%202016.pdf)> accessed 20 July 2019.

¹⁷⁰ Donovan referring to Adam Lusher, ‘Homophobic attacks rose 147 per cent after the Brexit vote’ *The Independent* (London, October 9 2016) <www.independent.co.uk/news/uk/home-news/brexit-hate-crime-hatred-homophobia-lgbt-147-per-cent-rise-double-attacks-on-gays-lesbians-a7352411.html> accessed 20 July 2019.

forward right to discriminate on religious grounds.¹⁷¹ For proponents of same-sex marriage the legalisation of same-sex marriage in 28 jurisdictions should be represented in an optimistic light. Perhaps this could result in a ‘beneficial reappraisal of the role of marriage in society...’¹⁷² for everyone regardless of sexual orientation. There remains much work to be done to be a truly globally LGBTQ+ inclusive society.

¹⁷¹ Richardson-Self et al referring to New South Wales currently considering the Anti-Discrimination Amendment (Religious Freedoms) Bill 2018 (NSW), ‘which would allow broad ranging discrimination on the basis of religious belief.

¹⁷² Hayward referring to *Obergefell v Hodges* (n 27).