SAME-SEX MARRIAGE, GLOBALISATION, THE RESPONSE OF PAN-EUROPEAN COURTS AND INTERNATIONAL IMPACT

FRANCES RACHEL HAMILTON

A commentary submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy by Published Work

October 2019

Abstract

This collection of work totalling over 85,000 words published over the period 2013 – 2018 addresses two separate but closely inter-related questions. '(1) What role can the European Court of Human Rights ('ECtHR') and the European Union ('EU') play in claims for the recognition of same-sex marriage? (2) What further impact do pan-European courts' approaches to same-sex marriage cases have internationally?' The publications have been produced at a time of rapid social and legal change worldwide concerning the recognition of same-sex relationships. When this work was begun in 2012 only six countries in Europe recognised same-sex marriage. At the time of writing (October 2019) this has increased to 16 countries. However, many jurisdictions within Europe continue to refuse to recognise same-sex marriage. The last couple of years has seen leading judgments from the ECtHR, the European Court of Justice (CJEU) and the Inter-American court. As yet the ECtHR does not require contracting states to legalise same-sex marriage. In an era of Brexit, together with discussions by certain political factions regarding leaving the Council of Europe, there are increasing difficulties for pan-European organisations to act. This is particularly the case in relation to the topic of same-sex marriage, which often incites social, moral and religious controversy. The pieces in this work document the challenges raised by same-sex marriage claimants, the judicial and legal responses and the reforms that have or may still take place. Unlike many prominent works in this area which are highly influenced

by feminist or queer theories, this PhD focuses on doctrinal and comparative law methodology.

These works make a novel and significant contribution to the prior knowledge base in a number of ways. (1) Originality is demonstrated by novel critiques of the Margin of Appreciation ('MoA') doctrine and by evaluating the strength of different legal arguments for proponents of same-sex marriage before the ECtHR. The detailed critical analysis in the publications highlights the importance of interpreting the non-discrimination rights (article 14 ECHR) together with a dynamic approach to the right to marriage (article 12) and further development of the family law aspect to article 8 ECHR. (2) Lack of consensus between contracting states is cited by the ECtHR as a reason for not requiring legalisation of same-sex marriage. A novel critique is set out concerning the lack of certainty over how consensus should be quantified or measured. (3) Other publications demonstrate originality by predicting the potential for EU involvement for same-sex couples, in relation to both expansion of free movement protections for non-EU national same-sex spouses and in the area of private international law. (4) A new choice of law theory is recommended for use in essential validity cases concerning same-sex couples. (5) Originality can also be seen by the published work providing an immediate and fresh insight into the possible impact of Brexit on same-sex couples. (6) The final section utilises comparative law methodology to recommend the use of the incrementalist theory in a strategic manner. The central conclusion reached, is that proponents of same-sex marriage should take

a new more holistic approach, taking into account all relevant factors. This should include consideration of the role of the ECtHR in advancing human rights and the ever expanding role of the EU and international comparative law to set out incremental steps for proponents of same-sex marriage.

Table of Contents

Declaration

I declare that no outputs submitted for this degree have been submitted for a research degree at any other institution. I also confirm that the work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this commentary has been approved. Approval has been sought and granted by the Faculty Ethics Committee on 1st November 2018.

I declare that the Word Count of this Commentary is 9952 words (excluding title pages, contents pages, acknowledgements, bibliography and referencing).

Name: Frances Hamilton

Date: 3 October 2019

Signature: F Hamilton

ACKNOWLEDGEMENTS

Thank you for all of the people who have supported and encouraged me in this project at Northumbria University. Special mention should be made of Professor Phil Thomas, research mentor 2013 - 2018, Professor Sue Farran my research mentor and PhD supervisor from 2018 – April 2019 and Professor Ray Arthur research mentor and PhD supervisor from April 2019. Thank you also to Professor Alan Reed for acting as my second PhD supervisor and reading and advising on much of this material outside of his subject area.

Written Commentary on the Cited Published Outputs

Introduction

England and Wales and Scotland legalised same-sex marriage in 2013 and 2014 respectively. In July 2019 the House of Commons voted to amend Northern Irish law, resulting in automatic legalisation of same-sex marriage on 21st October 2019, unless the Northern Ireland Parliament is no longer suspended.[1] Other countries have yet to take this step. Sixteen European states have legalised same-sex marriage.[2] Others provide civil partnership. The latter concept takes different forms, with the result that there are a varying degree of rights protected.[3] Certain Central and Eastern Europe states constitutionally define marriage as between a man and a woman only.[4] Russia (a Council of Europe state) continues to maintain gay propaganda laws in force.[5] Globally there have been far-reaching

[1] Northern Ireland (Executive Formation) Act 2019.

[2] Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

[3] See Waaldijk, K., 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' in Waaldijk, K., Van Den Brink, M., Burri S. and Goldshmidt, J., '*Equality and Human Rights: Nothing But Trouble – Liber Amicorum Titial Loenen'* (Netherlands Institute of Human Rights, 2016 Sim Special 38).

[4] 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.

[5] See Fenwick, H., '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 *EHRLR* 248 at 270. See also Johnson, P., 'Homosexual Propaganda in the Russian Federation: Are They in Violation of the European Convention on Human Rights?' (2015) 3(2) *Russ. LJ* 37.

judgments in favour of same-sex marriage in recent years.[6] However, over 70 countries worldwide continue to criminalise same-sex sexual relations.[7]

The publications collected together for this PhD consider what further action can be taken at a pan-European level by both the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('CJEU'). Although the ECtHR continues to emphasise the need for a consensus before it will require contracting states to legalise same-sex marriage,[8] it seems likely that at some stage the ECtHR will move forward on this issue.[9] The ECtHR has made recent statements observing the rapid introduction of same-sex marriage across contracting states.[10] The CJEU has also recently issued more favourable judgments to same-sex couples.[11] This includes allowing non-EU national same-sex spouses of EU citizens free movement and residency rights, even where the couple

---

[6] This can be seen from the United States Supreme Court judgment in *Obergefell v Hodges* 576 US (2015) from August 2015 which legalised same-sex marriage across the US and from the Inter-American Court *Obligaciones Estatales en Relacion Con El Cambio De Nombre, La Identidad de Genero, Y Los Derechos Derivados De Un Vinculo Entre Parejas Del Mismo Sexo*, Judgment of the Inter-American Court, 9 January 2018 which recognised same-sex marriage across South America. This ruling is binding on 19 other countries that are signatories to the American Convention on Human Rights, which at the time of the judgment did not allow same-sex couples to marry (several countries already did so, including Argentina, Brazil, Colombia and Uruguay).

[7] See ILGA Sexual Orientation Laws https://ilga.org/maps-sexual-orientation-laws.

[8] *Schalk and Kopf v Austria*, App No 30141/04 (ECtHR, 24 June 2010) at para 57, *Hämäläinen v Finland, no.37359/09 00)*24/01/16 at para 39 and *Chapin v France (App. No.40183/07)*, 09/06/2016.

[9] See *Oliari v Italy* Application Nos 18766/11 and 36030/11, 21 July 2015.

[10] See *Oliari v Italy* (n9) by the ECtHR at para 163.

[11] *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others* C-673/16 and *MB v Secretary of State for Work and Pensions* Case C-451/16 [2018] Pens. L.R. 17.

are relocating to a jurisdiction which does not recognise same-sex marriage.[12] This collection, published over a six-year period, critically considers from the perspective of proponents of same-sex marriage the advancement of this concept in three distinct areas of law. Part one analyses European human rights law. Part two critiques the position of EU law concentrating on the impact of EU citizenship, EU free movement provisions and EU possible involvement in conflicts of law treatment of same-sex couples. The third part explores the wider international implications of pan-European approaches utilising a comparative methodology.

Influence on Teaching, Engagement and Potential Impact

The published work in this PhD has influenced my teaching. I introduced the Gender Sexuality and the Law module on to Northumbria University's MLAW and LLB degrees and re-modified the Foundation Degree Law and Society course.[13] Many of these outputs have been assessed following anonymous peer review as internationally excellent in preparation for the Research Excellence Framework (REF 2021). My work has also been cited

[12] See *Coman* (n11).

[13] External examiners have commented on the Gender Sexuality and the Law course that it **:** '…provides students with the ability to develop independent research and analysis skills'' and that '[t]here was evidence of innovation relating to learning and assessment in the Gender Sexuality and Law module, through an oral presentation counting for a percentage of the final module mark. I was nominated for the Northumbria Student Led Teaching Awards in 2019 for the content of lectures and speaking clearly in an understandable manner for students.

in international literature including as far afield as the US, the National Chung Hsing University, Taiwan and Estonia.[14] Some of these pieces have been downloaded multiple times[15] Other pieces have been requested internationally.[16] Many of these publications are also the subject of conference papers given to many different international audiences including in Italy, Spain, US, Canada as well as across the UK.[17] Following invitation I have now agreed to act as a Visiting Professor at Pisa University in March – April 2020.[18]

Paths towards engagement include organising guest speakers at Northumbria University, as co-convenor of the Gender Sexuality and the Law Research Interest Group.[19] I have co-organised two conferences on this theme, one with a domestic reach and one with an international

[14] See Appendix 1 for a full list of citations.

[15] See Appendix 1 for example download information.

[16] Including requests from countries such as Spain, South Africa, Germany, Belgium, Poland, Ireland and Australia) through Northumbria University Library. A full list of citations and download information is available in Appendix 1.

[17] I have a record of speaking at international conferences on the subject of same-sex marriage and these include presentations at the 'Rights on the Move Conference' Trento, Italy, October 2014, with Lauren Clayton-Helm, 'Recognition vs Non-Recognition: The Perils of Crossing Lines for Same-Sex Couples' (2015) UACES 45th Annual Conference, Bilbao 7-9 September 2015, the Law and Society Conference, Toronto (Canada) (2017), the Law and Society Conference, Washington DC, USA (2019), the EPATH 2019 Inside Matters call in Rome, Italy in April the SLSA conferences in University of West of England (2010), Warwick (2013), York, (2015) and Newcastle (2017) and internal presentations at Northumbria 2010 ,2016 and 2019.

[18] It is proposed that I will be delivering research seminars on their International Comparative Law PhD programme and teach students Gender, Sexuality and the Law at Pisa University, Italy, March – April 2020.

[19] See Appendix 2.

reach.[20] As lead editor I have a book contract with Routledge under the working title of 'Same-Sex Relationships, Law and Society'[21] which will see publication of 14 international outputs[22] from Law and Sociology experts, from 5 different jurisdictions.[23] This collection explores the necessity for both legal and social change with regard to the 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. As set out further in my conclusion, I am working with multi-university partners,[24] to develop an impact case study which will include creating a free to access worldwide hub of LGBTQ+ legal rights specifically targeted at LGBTQ+ individuals connected with the STEM sector.[25]

[20] See Appendix 2.

[21] Dr Guido Noto La Diega, Northumbria University is co-editor.

[22] Many of these were originally presented at the 10th September 2018 conference entitled 'Same-Sex Relationships, A New Revolutionary Era and the Influence of Legal and Social Change'.

[23] Authors are from the UK, Italy, the Republic of Ireland, Australia and Canada.

[24] These include Dr Antonio Portas, Northumbria University (Engineering); Dr Eugenie Hunsicker, Senior Lecturer in Mathematics and Director of Equality, Diversity at the School of Sciences, Loughborough University; Emma Nichols, Public Engagement Manger in Physics and Astronomy, University of Manchester; Henry Li, Queen Mary University; Sarah Cosgriff, Gender Balance Officer at the Institute of Physics; Clara Barker, Department of Materials, Oxford University and Alfredo Carpineti, Co-Founder of Pride in STEM.

[25] It is anticipated that this would be hosted on the charity, Pride in STEM's webpage and would aim to change practice as to how LGBTQ+ individuals connected with the STEM sector access legal information.

Methodology

In recent years, much literature concerning same-sex relationships has concentrated on queer and feminist analysis.[26] In contrast the pieces in this PhD represent a doctrinal and comparative based approach to support proponents of same-sex marriage.[27] Some queer and feminist theorists have questioned the very need and appropriateness of same-sex marriage. In their view same-sex marriage is not a goal to be aspired to.[28] Marriage, an institution in which participation has been declining[29] is not seen as 'worthy of imitation.'[30] Feminist writers are reluctant to embrace marriage, due to its history of oppression of women. [31] On this view it is seen as 'inappropriate to the construction of egalitarian same-sex relationships.[32] Marriage was understood as 'at best problematic for, and at worst deeply

[26] Examples of leading feminist and queer theory scholars include Barker, N., '*Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage'* (Basingstoke, UK: Palgrave Macmillan), Duggan, L., 'Beyond Same-Sex Marriage' (2008) 9(2) *Studies in Gender and Sexuality* 155 and Auchmuty, R., (2004) 'Same Sex Marriage Revived; Feminist Critique and Legal Strategy' 14(1) *Feminist and Psychology* 101.

[27] Although not actively acknowledged throughout the publications, on reflection this represents a normative framework based on critical legal studies, as discussed further in text.

[28] *Duggan* (n26).

[29] *Auchmuty* (n26).

[30] Josephson, J., 'Citizenship, Same-Sex Marriage and Feminist Criitques of Marriage' (2005) 3(2) *Perspectives on Politics* 269, 273 referring to Weeks, J., Heaphy, B. and Donovan, C., *Same-sex intimacies: Families of Choice and other Life Experiments (*New York: Routledge, 2001).

[31] See for example Zylan, Y. 'States of Passion, Identity and Social Construction of Desire' (Oxford University Press, 2011) 204.

[32] *Auchmuty* (n26) 104.

oppressive to, women as a class'.[33] Some queer theorists would also reject same-sex marriage as a goal because of concerns that it is seeking to incorporate the LGBTQ+ movement into the mainstream,[34] which 'conflicts with the goal of queer sexual liberation.'[35] On this view LGBTQ+ people are considered 'not [to be] the marrying kind'.[36] Richardson for instance believes that same-sex marriage would lead to LGBTQ+ persons being domesticated and therefore de-sexualised.[37] This ties in closely with a concern about a loss of the LGBTQ+ identity[38] and a suspicion that same-sex marriage means that the 'dominative heteronormative assumptions' are not questioned.[39] Some queer theorists also believe there would be a danger that the advent of same-sex marriage would lead to this form of sexual relationship being 'privileged … above all others..'[40] In turn this would mean that different forms of sexuality could be excluded[41] and would

---

[33] *Id.*

[34] Richardson, D, (2005) 'Desisting Sameness? The Rise of Neoliberal Politics of Normalisation' 37 *Antipodes* 519.

[35] Josephson (n30) 273 referring to Warner, M. (1999), *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* (New York, Free Press, 1999).

[36] *Barker* (n26).

[37] *Richardson* (n34).

[38] *Duggan* (n26).

[39] Duggan, L., 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Nelson D. and Castronovo R. (Eds.) '*Materializing Democracy: Toward a Revitalized Cultural Politics'* (Duke University Press. 2002) 175.

[40] *Josephson* (n 30) 274.

[41] *Barker* (n 26) at 12.

result in the creation of 'sexual hierarchies.'[42] Josephson concludes, on this view (in direct contrast to the pieces included in this collection) that same-sex marriage would result in the citizenship of LGBTQ+ persons and women being hindered.[43] Instead queer theorists prefer a more 'thoroughgoing resistance to regimes of the normal.'[44] They reject labels and statuses such as same-sex marriage and civil partnership and argue that the multifarious ways in which LGBTQ+ persons have built their own relationships should be celebrated.[45]

The proposal of ever advancing models of family life is attractive in tone, and queer and feminist approaches have done much to make sure that '…entirely new ways of thinking about families and intimate life'[46] should always be considered. Yet, whilst many feminist and queer theorists advocate wholesale change in society, such critique is often academic in nature and it is unclear what practical steps need to be made. Feminist and queer theorists in rejecting same-sex marriage never proceed to analyse the socio-legal issues underpinning decisions of the ECtHR and CJEU. The doctrinal approach taken in this work ensures these issues are

[42] Heaphy, B., Smart, C., and Einarsdottir, A., (2013) *Same Sex Marriages: New Generations, New Relationships* (Palgrave MacMillan 2013) 132.

[43] *Josephson* (n30).

[44] Warner, M., ed. (1993) *Fear of a Queer Planet: Queer politics and Social Theory.* (1993, Minneapolis: University of Minnesota Press) 7.

[45] *Duggan* (n26).

[46] *Josephson* (n30) at 274.

thoroughly critiqued.[47] This work does not proceed on the basis of legal analysis alone, but in a similar manner to that set out by critical legal studies advocates, considers that written laws must be seen in the context of politics and other societal issues.[48] The idea that law is 'neutral and unbiased'[49] or that it yields 'determinant and predictable results'[50] is rejected. Instead the ultimate basis for a decision has to include a variety of factors. Throughout the work, I am concerned with legal analysis set in the context of a wider range of issues. Recurring themes include the influence of developing public opinion, what level of discretion international courts should award to contracting states and the debate surrounding the meaning of consensus.

Critical legal studies advocate Unger considered that liberalism was in fact 'an ideological cover for decisions governed by power and the maintenance of inequality…'[51] Critical legal scholars are motivated by a drive to 'create

---

[47] Williams, G., *Learning the Law* (2002, Sweet and Maxwell) at 206-207.

[48] Kairys, D., (1984) 'Law and Politics' 52 *Geo. Wash. L. Rev.* 243. See also Hunt, A., (1986) 'The Theory of Critical Legal Studies' 6(1) *Oxford Journal of Legal Studies* 1, at 4-5.

[49] See generally Kairys, D, (1982) in *'Legal Reasoning'* in Kairys, D., Ed., *The Politics of Law, The Polemics of Law, a Progressive Critique* (1987, Pantheon, New York) at 11-17.

[50] Hunt (n48) at 4.

[51] Unger, R.M., (1986) 'The Critical Legal Studies Movement' (Harvard University Press, Cambridge) at 128. See also K Scheppele, K. L., (1994) 20 A*nna Rev. Social* 383 who at 391 explains that 'liberal legalism is exposed in CLS writings as a justification machine that serve primarily to reproduce social inequality…'

a more humane, egalitarian and democratic society.'[52] Applied to this work, the drive to favour proponents of same-sex marriage is influenced by greater recognition of same-sex marriage across Western Europe,[53] opinion polls,[54] LGBTQ+ rights movements adopting a more positive view towards same-sex marriage[55] and the result of the Irish referendum.[56] For some proponents of same-sex marriage, this represents a symbolic 'gold standard.'[57] They see same-sex marriage as necessary for egalitarian treatment, the ultimate recognition of their same-sex partnership and a 'right central to citizenship.'[58] This approach sees the legalisation of same-sex marriage as allowing a choice for those who favour marriage. Marriage

[52] Kennedy, D., and Klare, K. E., (1984) ' A Bibliography of Critical Legal Studies' 94 *Yale Law Journa*l 461.

[53] See n2.

[54] See the Pew Research Centre at http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ on 'Changing Attitudes on Gay Marriage' who has surveyed public opinion on same-sex marriage since 2001 and documents increasing support.

[55] *See Zylan* (n31) 205 referring to Wolfson, E. 'Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique' (1994) 21 *N.Y.U. Rev. of L. and Social Change* 567, 611 and Aloni, E., 'Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage' (2010-2011) 18 *Duke J. Gender L. and Pol'y* 105, 156.

[56] In a referendum held on 22nd May 2015, with a 60% turnout, 62% voted in favour of same-sex marriage and 38% voted against.

[57] See petitioner Sue Wilkinson's witness statement in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) para 18.

[58] See Bamforth, N., 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) Int'l J. Const. L. 477; Weeks, J., 'The Sexual Citizen' (1998) 15 *Theory, Culture and Society* 38 and Bradley, D., (2003) 'Comparative Law, Family Law and Common Law' (2003) 33(1) *OJLS* 127 and Kochenov, D., 'On Options of Citizens and Moral choices of States: Gays and European Federalism' (2009) 33(1) *Fordham International Law Review* 156.

itself is also not a 'fixed and immutable institution'[59] and recent years have seen many changes in the nature of marriage, for example allowing inter-racial couples to marry and allowing married women an independent legal status.[60] If LGBTQ+ persons choose to enter a marriage, this means they have the opportunity to change the nature of marriage from within. The published work, especially publication 8, notes how the incrementalist theory allows change on a step by step basis.[61]

This work also utilises comparative legal methodology in order to tackle the practical next step issues which are never addressed in theoretical, historical and cultural perspectives. This method involves comparing the law of one country to that of another.[62] This can be broader to also encompass cultural comparisons. Writers comment on the difficulties of international comparisons in family law, because of important cultural,

---

[59] Van Ness, G. 'The Inevitability of Gay Marriage' (2003-2004) 38 *New Eng. L. Rev.* 563 at 564. See also Tobisman, C. 'Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families? (1997) 12 *Berkeley Women's L. J.* 112, 112 who explains that the 'institution of marriage is not monolithic and unchanging.'

[60] See for discussion *Tobisman* (n59). See also Loveland, I., 'A Right to Engage in Same-Sex Marriage in the United States' (2014) 1 *EHRLR* 10 and Leckey, R., 'Must Equal Mean Identical? Same-Sex Couples and Marriage' (2014) 10(1) *Int. J C L.* 5 at 11.

[61] This theory, also known as the theory of 'small change' was first advanced by Waaldijk, K., 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in *Legal Recognition of Same-Sex Partnerships: A Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Wintemute, R. and Andenaes, M (Eds) 437) (2001, Oxford) at 437 and subsequently developed by Eskridge, W. N., Jr. '*Equality Practices, Civil Unions and the Future of Gay Rights'* (2002) and Merin, Y., 'Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States' (2002).

[62] See for discussion, Eberle, E. J., (2009) The Method and Role of Comparative Law, 8(3) *Global Studies Law Review* 451.

moral and religious considerations in this area. [63] However proponents of same-sex marriage, acting in an era of globalisation[64] are at the forefront of a fast developing area of law. Reviewing how other nations have grappled with similar claims concerning discrimination and equal protection, allows an evaluation of use of other legal responses.[65] Foreign solutions are not adopted wholesale but rather that a 'variety of solutions' are studied.[66] Appropriate strategies for same-sex marriage proponents can then be planned.

Comparative law is most useful between legal systems which are similar when considering culture and demographics.[67] The choice of comparison is therefore particularly pertinent.[68] In this work, the main comparisons are between international courts such as the ECtHR and the EU. Comparison is also made with the Supreme Court of the USA, which allows comparison

---

[63] *Bradley* (n58). Other writers also comment on the difficulties of international comparisons as regards family law. See Zweigert, K., and Kotz, H., *An Introduction to Comparative Law* (1998, Clarendon Press, Oxford) *Clarendon Press* and Diduck and Raday, 2012).

[64] For discussion see Picker, C. B., (2011) Comparative Law Methodology and American Legal Culture: Obstacles and Opportunities 16 Roger Williams *U. L. Rev*. 86 and *Eberle* (n62) 451.

[65] *Josephson* (n30) at 272 and *Eskridge* (n61).

[66] *Hicks*, S. C., 'The Jurisprudence of *Comparative Legal* Systems' (1983) 6 *Loy. L.A. Int'l & Comp. L. Rev.* 83 at 88. Zweigert, and Kotz (n63) at 15 explain that '…comparative law can provide a much richer range of model solutions that a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by eve the most imaginative jurist…'

[67] *Eskridge* (n61).

[68] See *Eskridge* (n61) at 41 who states that '…on the reverse side of the coin incomparables cannot be usefully compared …'

to a federal system.[69] The US Supreme Court has also had to grapple with issues of disagreement between states. Traditionally the US Supreme Court has been reluctant to interfere with family law at a federal level.[70] However the Supreme Court determined on 26th June 2015, that all US states were required to license marriage between two people of the same sex and to recognise marriage performed out of state,[71] despite same-sex marriage being prohibited in twelve states at the time.[72] Another reason why comparative methodology is useful is because it allows consideration for the '…international unification of law…'[73] Although not all authors would consider EU involvement advisable,[74] one of the conclusions reached in

---

[69] Although differences between a federal system and parties to an international agreement have to be acknowledged. See *Aloni* (n55). The US Supreme Court does refer to judgments of the ECtHR See for example In *Lawrence v Texas* 539 U.S. 558 where Chief Justice Anthony Kennedy's opinion looked at constitutional precedents from abroad, referring to decisions from the ECtHR. For discussion see Eskridge, W. N. Jr. (2004) 'Development – United States: Lawrence v Texas and the Imperative of Comparative Constitutionalism' 2(3) *International Journal of Constitutional Law* 555-560 and Rehnquist, W. H. (1989) 'Constitutional Courts – Comparative Remarks' reprinted in Kirchhof P and Kornmers DP eds (1993) Germany and its Basic Law: Past, Present and Future – A German – American Symposium, (1993, Nomos).

[70] For discussion see *Aloni* (n55) at 141; Graham, K. T., 'Same-Sex Unions and Conflicts of Law: When 'I Do' May be Interpreted as 'No, You Didn't' (2004) 3 *Whittier J. Child and Fam. Advoc*. 23 and Rains, R. E., 'A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognise Them' (2012) *Utah L. Rev.* 393.

[71] *Obergefell et al v Hodges, Director, Ohio Department of Health* (n6).

[72] Prior to *Obergefell* (n6) the following states still banned same-sex marriage: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.

[73] *Zweigert and Kotz* (n63) at 24.

[74] There are legitimate concerns that a single European approach would result in unnecessary homogeneity and it is highly controversial as to whether it will be politically supported. For discussion, see Moir. G. and Beaumont, P., 'Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community' (1995) 20(3) *European Law Review* 268 at 280 and Shuibhne, N. N., 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 34(2) *European Law Review* 230 at 236 who remind us of the

this work is that the EU is one of the most important bodies to consider when reaching solutions regarding same-sex couples crossing borders.[75] This subsequently provokes further thought about the possible impact of Brexit on same-sex couples and is the subject of future publications.[76]

Literature Review

All eight pieces in this collection, together with this introduction and conclusion have extensive Bibliographies. Types of sources include both primary (legislation, EU legislation, international conventions, domestic case law, US case law, Canadian case law, EU and EctHR case law) and secondary materials. Often international peer reviewed articles have been my primary point of reference in igniting points of debate and development. These have been found on electronic databases subscribed to by Northumbria University where I have commonly used Nora pan-library searches.[77] I have also utilised HeinOnLine, Westlaw, Lexis Nexis, together with EU and ECHR databases[78] and the inter-library loan system.

---

importance of 'constitutional differences' referring to Weiler. J., 'Fundamental rights and fundamental boundaries" in *The Constitution of Europe* (Cambridge University Press, 1999).

[75] *Zweigert and Kotz* (n63) at 28 state that '[i]If barriers to trade within the European Union are to be overcome, legislation in the form of ratification of international treaties or Regulations or Directives is clearly indispensable in certain areas…'

[76] This includes my personal chapter in the upcoming edited collection due to be published by Routledge.

[77] Nora is Northumbria University library cross-university search engine.

[78] The EU database to which I have primarily utilised is https://eur-lex.europa.eu/homepage.html; and the European Convention on Human Rights utilised is https://hudoc.echr.coe.int/eng

Reference has also been made to Law Commission consultations and Hansard debates.[79] Some key authors have been particularly influential. Barbara Stark's article[80] provided me with the initial drive about the relevance of globalisation as an issue in family law. I then applied this to same-sex relationships. Unlike other work I have taken a holistic approach across EU law, ECtHR law and conflicts of law.

Part one of this PhD by publication contains a detailed critique of use of the Margin of Appreciation ('MoA') by the ECtHR. In this context, I found work by Donoho, Sweeney, Benvenisti, and Brauch to be useful in setting out the framing of this debate.[81] Donoho explains that a 'balance' has to be struck between universal rights on the one hand and 'the competing values of self-governance, autonomy, and diversity'[82] on the other. Sweeney and Benvenisti both expressed doubts about the overuse of regionalism[83] with

---

[79] For example the Home Office, 'Equal Civil Marriage Consultation' (now closed) available at https://www.gov.uk/government/consultations/equal-marriage-consultation referred to in Publication 1 and Jacqui Smith (then Deputy Minister for Women and Equality) who stated in the House of Commons that 'I recognise that Hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage' (See Hansard, HC, 12 October 2004, Col 177) referred to in Appendix 4 Additional Publication 1.

[80] Stark, B., 'When Globalization Hits Home: International Family Law Comes of Age' (2006) 36 *V and J. Transnat'l* 1551

[81] Donoho, D.L., 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 *Emory Int'l L Rev* 391; Sweeney, J.A., 'Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era (2005) 54 *Int'l and Comparative LQ* 459; Benvenisti, E., 'Margin of Appreciation, Consensus and Universal Standards (1998-99) 31 *NYUJ Int'L and Pol* 843; and Brauch, J.,'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights; Threat to the Rule of Law' (2004-2005) 15 *Emory Int'l L. Rev*. 391

[82] *Donoho* (n81) at 398.

[83] *Sweeney* (n81) at 461 he has commented on the view of some commentators about the 'rhetoric of cultural relativism [being] high jacked by political elites in order to repress their

Brauch considering that the 'doctrine of [MoA] significantly threatens the rule of law.[84] In publication one I applied these arguments in the context of the ECtHR consideration of same-sex marriage. Hodson's article, published shortly after the *Schalk and Kopf v Austria* judgment,[85] stated that it left the ECtHR **'**devoid of much to say about the nature of recent developments …' [86] I developed this point in Publication one to argue that utilisation of the MOA by the ECtHR means that contracting states are free to determine their own domestic legislative provision, and could be relying on erroneous or discriminatory reasons in refusing to sanction same-sex marriage. Publication 3 further analysed how ECtHR use of consensus should be quantified or measured.

Work in part one expanded pre-existing published material further to critique the ECtHR position regarding same-sex relationships. In this context articles written by Johnson have been particularly influential.[87] Johnson considered that the stress on privacy before the ECtHR limited

---

own population.' Benvenisti (n81) at 844 has discussed concerns about 'inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards…' and concerns that emphasis on 'universal values… may lead national institutions to resist external review altogether…'

[84] *Brauch* (n81) at 115 .

[85] *Schalk and Kopf v Austria* (n8).

[86] Hodson, L., 'A Marriage By Any Other Name? Schalk and Kopf v Austria' (2011) 11(1) *HRLR* 170 at 173.

[87] Johnson, P., 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *HLR Rev* 67; Johnson, P., 'The Choice of Wording Must be Regarded as Deliberate: Same-Sex Marriage and Article 12 of the European Convention on Human Right' (2016) 40(2) *Eur. L. Rev*. 207.

future development of case law,[88] and in relation to its use of Article 12 resulted in 'historical presentism.'[89] I have built on his work by suggesting a solution to these acknowledged problems. Publication 2 provides detailed analysis highlighting the importance of non-discrimination rights (article 14 ECHR) together with further development of family law aspect to article 8 ECHR and a dynamic approach to marriage (article 12 ECHR).

Stalford's writing was influential in relation to the advancement of same-sex couples' rights by the EU.[90] Stalford's article made a comparison between the EU the ECHR across a wider area of family law. I applied and adapted this methodology in publication 4 specifically focusing on same-sex relationships. In contrast to Stalford I conclude in publication 4, that it is the EU concept of citizenship which had most to offer same-sex couples. This is borne out by recent case law, as discussed in publication 6.[91] Publication 5 considers private international law treatment of same-sex couples and the potential for EU involvement in that regard. Much of the background detail is drawn from Reed's work[92] where he advanced the

[88] Johnson (2010) (n87) at 76.

[89] Johnson, P., 'The Choice of Wording Must be Regarded as Deliberate: Same-Sex Marriage and Article 12 of the European Convention on Human Rights (2015) 40(2) *Eur L Rev* 207.

[90] Stalford, H., 'Concepts of Family Under EU Law – Lessons from the ECHR' (2002) 16(3) *Inter J of L Policy and the Fam* 410.

[91] Recent CJEU case law in this context includes *Coman* (n11) and *MB* (n11).

[92] Reed, A., 'Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules' (2000) 20 *N Y School J of Inter and Comp* Law 387.

concepts of interest analysis[93] and dépeçage [94] in the wider context of essential validity of marriage.[95] In publication 5 my co-author and I explain how interest analysis and dépeçage principles could be set out in the new context of same-sex relationships and recommend a new choice of law theory.[96] We further advance the benefit of EU involvement in this area.

Part three of this work considers the wider international implications of the work set out in parts 1 and 2. I have built upon Walldijk's concept of incrementalist theory[97] to suggest how this could be applied practically by proponents of same-sex marriage. I find his theory attractive as it accords with my methodology, considering that legal developments must be considered in a political and social context.[98] Publication 8 considers that

[93] Interest analysis is the idea that the most applicable law is the one that has the most interest in being applied after consideration of public policy reasons and was originally founded in the USA and applied on a case-by-case basis. Interest analysis was founded by Brainerd Currie see Currie, B., *Selected Essays on the Conflict of Laws* (1963).

[94] The concept of dépeçage is a conflict of laws where different issues within a case may be governed by the laws of different states.

[95] Formal validity looks at the rules and requirements surrounding the actual ceremony, such as the requirement of witnesses and the vows that must be undertaken. This is usually uncontroversial and depends upon the *lex loci celebratioinis.* Essential validity on the other hand covers all aspects of a marriage which are not associated with formalities, the primary example being the capacity to marry. Reed (n92) at 388 sets out that the focus of his article was to consider in relation to the issue of validity of marriage how a 'new two-centred rationale, derived from interest analysis and depecage principles… ought to be applied to resolve difficulties when the laws of two or more interested jurisdictions present a conflict.' Competing policy concerns are then set out.

[96] This is termed the continued recognised relationship theory. It is suggested that the choice of law rule should be that of the country where the couple intends to reside, or if their marriage has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived.

[97] The incrementalist or step by step approach was first set out by *Waaldijk* (n61).

[98] See reference to critical legal theorists such as Kairys (n48) and Hunt (n48) , more fully considered in my methodology section.

legislative approaches are preferable to judicial approaches as they allow action by democratically elected representatives. Public opinion and enforcement of laws are interwoven[99] and examples of correlation between public opinion and the enforcement of laws in the long term are cited.[100]

Advancement of the Field of Study and Structure

The published pieces of work in this PhD demonstrate that in an era of globalisation, proponents of same-sex marriage should take a new more holistic approach towards recognition of same-sex couples' rights. This should consider all relevant factors including legal and social rights, the role of the ECtHR in advancing human rights, the ever expanding role of the EU and the growing interplay between the two. In contrast to more recent theoretical literature, I have taken a doctrinal and comparative law approach. The social-legal issues underpinning decisions of the ECtHR and CJEU are thoroughly critiqued.[101] Law is studied in the context of political and societal issues[102] in support of proponents of same-sex marriage who consider that same-sex marriage is necessary for egalitarian treatment and a 'right central to citizenship.'[103] This work also utilises

[99] See Gonzalez, K (2010) Gay Marriage and Gay Union Law in the Americas, 16 *Law and Business Review America* 285.

[100] A change in the law alone will not result in public acceptance of same-sex couples and publication 8 gives South Africa as an example in this context. See also Pew Research Centre, 'Changing Attitudes on Gay Marriage at http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/

[101] For discussion of doctrinal approaches see *Williams* (n47) at 206-207.

[102] See Kairys (n48) and Hunt (n48) at 4 –5.

[103] See n58.

comparative legal methodology in order to tackle the practical next step issues which are seldom addressed in theoretical perspectives.[104] One of the main conclusions reached is the importance of EU action when considering solutions for same-sex couples crossing borders.[105]

Each published piece has its own specific point of originality recognised through the process of peer review. The publications in part one critically consider the position of the ECtHR. They contain a critique of the ECtHR's MoA doctrine and chart a way forward for the ECtHR utilising Article 14 ECHR (right to equality) in connection with new revitalised arguments under the family law aspect of Article 8 ECHR and a dynamic interpretation of Article 12 ECHR (right to marry). In addition it is argued that if the ECtHR continues to stress consensus in this area it should at least consider further how consensus is to be quantified or measured**.** Part two then considers the recognition of same-sex couples' rights before the EU. Although it is the ECtHR which has led the way in the protection of rights for LGBTQ+ persons and same-sex couples, publication 4 considered that it is the EU concept of citizenship together with a closer interplay with the ECtHR which offers greater support for those who favour same-sex marriage. As discussed in publication 6 this conclusion has been subsequently borne out

[104] Comparative legal methodology is the act of comparing the law of one country to that of another.' See *Eberle* (n62).

[105] Also see *Zweigert and Kotz* (n63) who comment at 28 on the need of international treaties or Regulations or Directives '(i)f barriers to trade within the European Union are to be overcome…'

by further case law.[106] Publication 5 sets out a novel choice of law theory to be applied to same-sex relationships which is termed the 'continued recognised relationship theory.'[107] Whilst the pieces in parts one and two consider the approaches of pan European courts including the ECtHR and the CJEU, part three utilises comparative legal methodology between different jurisdictions, to analyse the further potential impact of this work internationally for proponents of same-sex marriage.[108] The symbolic status of same-sex marriage is stressed as is the close relationship between public opinion and the enforcement of laws.[109] Incrementalism is applied in a strategic manner to argue that civil partnership can be seen as a 'stepping stone' on route to same-sex marriage and to advocate the legislative (as opposed to judicial) approach to legalisation of same-sex marriage.[110] Change continues to occur, with recent developments including heterosexual civil partnerships.[111]

---

[106] Most noticeably *Coman* (n11) and *MB* (n11).

[107] It is suggested that the choice of law rule should be that of the country where the couple intends to reside, or if their marriage has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived.

[108] Brenda Cossman also favours comparative approaches. See Cossman, B., 'Migrating Marriages and Comparative Constitutionalism, in Choudry S., (Ed.) *'The Migration of Constitutional Ideas'* (Cambridge University Press 2006) at 209.

[109] *Gonzalez* (n99) 285 explains that 'public opinion and enforcement of laws are 'interwoven… because the law has little meaning if it is not enforced.'

[110] Richards, D.A.J. in a 'Book Review [of] Stychin, C.F., 'Governing Sexuality: the Changing Politics of Citizenship and Law Reform' (Hart Publishing: Oxford and Portland, Oregon)' (2004) 2(3) *Int J Const L* 727 at 733 argues that 'recognition should happen democratically rather than judicially and argue for a democracy in which gay are mobilised a full citizens, demanding their rights…'

[111] The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 received royal assent on 26th March 2019, and came into force on 26th May 2019.

Commentary on cited Published Work contained in PART ONE: SAME-SEX MARRIAGE AND THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

(1) Hamilton, F., 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate' 1(2013) *European Human Rights Law Review* 47 -55.

(2) Hamilton, F., 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2017) *Journal of Homosexuality* 1-25.

(3) Hamilton, F., 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) 1 *European Human Rights Law Review* 33 – 45.

Publication one sets out the international context of this work which underpins all parts of this PhD. The demands of globalisation and the increasing numbers of international families can lead to difficulties when families relocate especially if their marital situation is not explicitly recognised.[112] Publication one (published January 2013) was particularly

[112] See *Stark* (n80).

timely in relation to domestic consideration of same-sex marriage. Following publication a Member of the House of Lords requested to read it (through their library) prior to the House of Lords' debate on the Marriage (Same-Sex Couples) Act 2013. Publications one to three look in detail at ECtHR treatment of same-sex marriage proponents. The leading case of *Schalk and Kopf v Austria*, determined that ECtHR contracting states are not obliged to legislate for same-sex marriage.[113] The ECtHR considers that a consensus between contracting states needs to develop first.[114] Recent cases confirm the position,[115] although now contracting states are obliged to provide legal protection for same-sex couples.[116] The publications in Part One consider a series of inter-linking themes, focusing on use of margin of appreciation (MoA), use of consensus analysis by the ECtHR and by considering new ways forward for the ECtHR.

Publication one offers an original critique of the concept of MoA , as used by the ECtHR in the context of same-sex marriage. The MoA or 'latitude of

[113] *Schalk and Kopf v Austria* (n8).

[114] Schalk and Kopf v Austria (n8) para 94.

[115] *Schalk and Kopf v Austria* (n8); *Hämäläinen v Finland* (n8) and *Chapin v France (n8).*

[116] Following *Oliari v Italy* (n9) the ECtHR now obliges contracting states to provide some level of legal protection, although each individual contracting state can decide what legal rights to attach to this status. However, in its judgement the ECtHR concentrated upon the difference between the lack of legal protection and the social reality thereby arguably trying to confine it to the facts existing on the ground in Western democracies. See also Fenwick. H., and Hayward, A., 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' [2017] *EHRLR* 544.

deference or error'[117] is when ECtHR international supervision should give way to contracting states' discretion. The MoA in relation to same-sex marriage is a wide one. The ECtHR utilises the MoA to balance the competing demands of universalism of human rights (one of the primary justifications of any human rights system)[118] and the concept of relativism, which requires international courts to be aware of different cultural, sociological and religious differences between contracting states. Relativism is arguably more appropriate in areas of social and moral controversy such as same-sex marriage where large 'blocs of … population(s) disagree.'[119] These concerns were even more stark in 2013 when only six countries in Europe recognised same-sex marriage.

Publication one after reinforcing well-known criticisms of the MoA doctrine namely that it lacks clarity[120] and that it is uncertain and vague,[121] goes further in arguing that utilisation of the MoA by the ECtHR means that the ECtHR does not examine the conduct of contracting states, leaving them

---

[117] Butler, P., 'Margin of Appreciation – A Note Towards a Solution in the Pacific (2008-2009) 39 *VULWR* 687 referring to Yourow, H.C., '*Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence'* (Leiden, Brill, 1996) at 13.

[118] For discussion see *Donoho* (n81).

[119] Shany, Y., 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16(5) *EJIL* 907 – 940.

[120] For comment see Lord Lester, "The European Convention in the New Architecture of Europe" (1996) *PL* 6.

[121] See *Brauch* (n81) 113 referring to Lavender, N., 'The Problem of the Margin of Appreciation', (1997) 4 *EHRLR* 380; Letsas, G., 'Two Concepts of the Margin of Appreciation', (2006) 26(4) OJLS 705; *Shany* (n120) and Hutchinson, M., 'The Margin of Appreciation Doctrine in the European Court of Human Rights', (1999) 48 *ICLQ* 638.

free to determine their own domestic legislative provisions. Publication one then makes the novel point that consequently use of the MoA means that contracting states could be relying on erroneous or discriminatory reasons in refusing to sanction same-sex marriage. There are numerous examples of erroneous reasons which could maintain influence in contracting states, but which have been discredited. Erroneous arguments include the 'slippery slope' argument, the definitional argument and the procreation argument. The slippery slope argument, that same-sex marriage would inevitably lead to polygamy or even bestiality has been discredited by the complete lack of public support for the latter concepts. Similarly the definitional argument[122] meaning that courts are bound by definitions set out years ago, contrasts to the ECtHR view in other cases that their role should be 'dynamic and evolutive.'[123] The procreation argument, that marriage should be about producing children has been widely discredited in leading international case law by the very fact that this would also bar the sick or elderly from marrying, as they also do not have the ability to procreate.[124]

---

[122] The definitional argument has been explained by Carpenter, D., 'Bad Arguments Against Gay Marriage' (2005-2006) 7 *Fla. Coastal L. Rev* 181.to mean that a homosexual couple can never marry as by definition they are not man and woman.

[123] See for example the ECtHR position in relation to trans-persons in the case of *Goodwin v UK* (App No.28957/95) (1996) 22 EHRR 123 at paragraph 74.

[124] For example see Justice Scalia in *Lawrence v Texas* (n70); *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40)[2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) per Sachs J and *Ghaidan v Godin –Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 All 411, [2004] 3 WLR 113 per Baroness Hale of Richmond.

Even more worryingly, use of the MoA doctrine means that contracting states could be acting on the basis of discriminatory reasons.[125] Publication one demonstrates that the ECtHR is well aware of the possibility of discrimination against LGBTQ+ persons, as shown by a series of cases where the ECtHR condemned homophobic practices of contracting states.[126] In other case law the ECtHR has found that discrimination against LGBTQ+ persons requires particularly strong justification.[127] Yet the use of the MoA in same-sex marriage cases, means that the ECtHR never investigates the reasons behind a contracting states' course of action. This means that discriminatory reasons could be influential.[128] Having identified difficulties with the current approach taken by the ECtHR in relation to same-sex marriage, publication two concentrates on identifying appropriate steps forward for proponents of same-sex marriage before the ECtHR.

---

[125] It should be noted that Article 14 Prohibition of discrimination is a conditional right. Article 14 provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status…' A claim can only be brought under Article 14, providing another alleged breach of the European Convention is put forward.

[126] See for example *Dudgeon v United Kingdom* (App. No. 7525/76) (1982) 4 EHRR 149; *Norris v Ireland* (App. No.10581/83) (1988) 13 EHRR 186; *ADT v UK* (App. No.35765/97) (2001) 31 EHRR 33; *L and V v Austria* (App. No.s39392/98 and 39829/98) (2003) 36 EHRR 1022; *SL v Austria* (App. No.45330/99) (2003) 37 EHRR 799; *Laskey, Jaggard and Brown v United Kingdom* (App. Nos.21627/93, 21628/93, 21974/93) (1997) 24 EHRR 39; *Smith and Grady v United Kingdom* (App. Nos.33985/96 and 33986/96) (2000) 29 EHRR 493 and *Salgueiro da Silva Mouta v Portugal* (App. No 33290/96).

[127] For example see *Karner v Austria*, Application No 40016/98, Judgment of 24 July 2003.

[128] See minority judge Rozakis, Spielmann and Jebens in *Schalk and Kopf v Austria* (n8) who in their joint dissenting opinion comment that having identified a 'relevantly similar situation' and emphasised that 'differences based on sexual orientation require particularly serious reasons by way of justification' that there should have been a violation of Article 14 found in conjunction with Article 8.

Publication 2 (November 2017) is published in the leading international inter-disciplinary Journal of Homosexuality.[129] By that date, thirteen Council of Europe members had legalised same-sex marriage.[130] Publication 2 is drafted for proponents of same-sex marriage and sets out the best strategy for success before the ECtHR. Whilst the ECtHR has played a major role in the advancement of LGBTQ+ rights,[131] traditionally, proponents in these cases have relied upon privacy arguments (under article 8 ECHR).[132] Privacy based claims are unhelpful when it comes to same-sex marriage claims. Lord Penzance stated in the leading case of *Hyde v Hyde* in 1866

---

[129] The Journal of Homosexuality is described on ResearchGate as being 'highly acclaimed [being] devloted to scholarly research on homosexuality, including sexual practices and gender roles and their cultural, hitorica, interpersonal and modern social contexts..' See https://www.researchgate.net/journal/0091-8369_Journal_of_Homosexuality last accessed August 2019.

[130] As at November 2017 the following ECtHR contracting state had enacted same-sex marriage laws: Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland).

[131] In practice the ECtHR has adopted a gradually increasing level of protections for LGBTQ+ persons and same-sex couples. This began with the decriminalisation of sodomy laws in *Dudgeon v United Kingdom* (n126) before moving on to equality in employment *Smith and Grady v UK* (n126) and *Lustig-Prean and Beckett v UK* (Apps 31417/96 and 32377/96) and tenancy conditions *Karner v Austria* (n127). *EB v France* (Application No. 43546/ 02 Judgement of 22nd January 2008) concerned adoption rights and *Vallianotos v Greece*, Application Nos 29381/09 and 32684/09, Judgment of 7 November 2013 concerned civil partnership rights where these have already been introduced for heterosexuals. In *Oliari v Italy* (n9) the ECtHR determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership. In *Orlandi v Italy* (Application no. 26431/12), Judgement of 14 December 2017, the ECtHR held that a failure to recognise a same-sex marriage conducted abroad contravened the European Convention.

[132] Other authors who also argue this point include Johnson, P., 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (n87); *Stark* (n80) and Danisi, C., 'How far can the European Court of Human Rights go in the Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' (2011) 9(4) *Inter J of Const. L* 793. This is reflected by case law before the ECtHR including for example *Dudgeon v UK* (n126) ; *Sutherland v UK,* Application No 25186/94, Judgment of 21 May 1996; *Smith and Grady v UK* (n126) and *Lustig-Prean and Beckett v UK* (n131).

that marriage is '…more than a contract'[133] as it is an institution and 'confers a status.'[134] It is a concept very much on the public stage. The stress on privacy before the ECtHR has resulted in a 'significant limitation… in respect of the 'evolution' of LGBTQ+ rights.'[135] In many cases the ECtHR stated that it did not need 'to rule on the merits' of Article 14 as the same complaint had already been examined under Article 8.'[136] However, publication 2 goes on to explain that in relation to same-sex marriage use of equality arguments is necessary. Marriage is seen by many as a key component of equal citizenship.[137] On this view denial of same-sex marriage to the LGBTQ+ community has been referred to as a 'domestic apartheid'[138] and a denial of 'full political standing'[139] for LGBTQ+ persons.

---

[133] Per Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130.

[134] Lord Penzance's statement in *Hyde v Hyde and Woodmansee* (n133).

[135] Johnson, P,, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) (n87) at 76. For further criticism see also Sedgewick, E., *Epistemology of the Closet* (Harmondsworth: Penguin, 1990) at 71 and Grigolo, M., 'Sexualities and the ECHR: Introducing the University Sexual Legal Subject' (2003) 14(5) *EJIL* 14(5) 1023 at 1040.

[136] See for example *Dudgeon v United Kingdom* (n126) at paragraph 69. *Grigolo* (n135) reports at 1030 that in this case the '[c]ourt did not find it necessary to examine the case under Article 14.' See also *ADT v UK* (n126) at paragraph 40, *Lustig-Prean and Beckett v UK* (n131) at paragraphs 107-109 and *Smith and Grady v UK* (n126) at paragraphs 114 – 116.

[137] See for discussion Harris, A., 'Loving Before and After the Law' (2007-2008) 76 *Fordham Inter L R* 2821; Bamforth (n58); Cott, N., '*Public Vows: A History of Marriage and the Nation (*Massachusetts*,* Harvard University Press, 2000); Cossman, B., *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging,* (California: Stanford University Press, 2007); *Kochenov* (n58) and Richardson, D., 'Sexuality and Citizenship' (1998) 32 *Sociology* 83.

[138] Dunlap, M., 'The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties' (1991) *Law and Sexuality Review Lesbian and Gay Legal Issues, 1 at* 63.

[139] Kornbluh, F., 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) *Law and Social Inquiry* 537.

Publication 2 therefore makes an important link to part two, which engages with the impact of citizenship in the context of the EU. Publication 2 also sets out the symbolic advantages of equality arguments (a theme taken up again by publication 7 in part three) and the record of success that the equality argument has had in same-sex marriage cases internationally.[140]

Publication two explains difficulties in the use of equality arguments. Firstly, Article 14 ECHR is a conditional right which can only be asserted where another alleged violation of the ECtHR is made simultaneously.[141] Secondly, in relation to equality claims made by proponents of same-sex marriage, a wide MoA is set because of a lack of consensus.[142] This contrasts to cases concerning privacy (Article 8) where a narrow MoA is seen as essential due to the importance of privacy concerns and the consideration of privacy to be a universally understood concept.[143] In

---

[140] For example in *Fourie* (n124) per Sachs J the South African Constitutional Court criticised privacy as a 'negative liberty' (para 46) contrasted to the strength of the equality argument which meant 'equal concern and respect across differences' (para 60). Equality arguments were also essential in Canada's recognition of same-sex marriage. For discussion see Wintemute, R., (2003-2004). 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2000) and Its Limits' (2003-2004) 49 *McGill L. J.(2003-2004)* 1143. US courts have also relied heavily on the equality argument. For which see Barrett, S.J., 'For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights' (2006-2008) 73 *Brooklyn L Rev* 695. The recent Supreme Court judgment of *Obergefell v Hodges* (n6) now requires all US states to issue marriage licences to same-sex couples and to recognise same-sex marriages validly performed in other jurisdictions. The main justification of the right to marry was 'derived from the Fourteenth Amendment's guarantee of equal protection' (at para 10).

[141] See for further explanation *Letsas* (n121) at 708.

[142] *Schalk and Kopf v Austria* (n8) at paragraph 105.

[143] See *Dudgeon v United Kingdom* (n126) at paragraph 52, *Lustig-Prean and Beckett v UK* (n131) at paragraph 82 and in *Smith and Grady* (n127) at paragraph 89 where the ECtHR discussed the fact that since these cases concerned 'a most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such

moving from the universally understood right of privacy as the main focus of LGBTQ+ rights to the more amorphous right of equality argument,[144] the ECtHR has potentially weakened protection for LGBTQ+ persons. Thirdly the equality argument is critiqued, because by its very nature this requires comparison between different groups. This in itself presupposes categorisation of individuals into certain specific boxes of sexual interest. This may not be desirable either because of the strengthening of any perceived heteronormative approach[145] or because of the difficulties of individuals in identifying with certain set categories.[146]

Publication 2 then explains that the weaknesses identified in the equality argument need to be strengthened by other new revitalised arguments. The family life aspect of Article 8 ECHR should play increasing importance in same-sex marriage claims. Historically, the ECtHR refused to recognise same-sex partners as having a 'family life',[147] considering such relationships as being generative of private life considerations only.[148]

---

interferences can satisfy the requirements of Article 8 paragraph 2 of the Convention.' See also *ADT v UK* (n126) at paragraph 38.

[144] See also *Donoho* (n81) at 416-417.

[145] See *Grigolo* (n135) on this practice.

[146] Queer theorists challenge the categorisation of relationships into homosexual and heterosexual and argue that categories should not be seen 'fixed and given.' See Kornbluh (n139).

[147] *X and Y v UK (A*pp. No. 21830/93, 22 April 1997)*, Simpson v UK* (App. No. 11716/85, 14 May 1986), *Kerkhoven and Hinke v The Netherlands* (App. No. 15666/89, 19 May 1992) and *Mata Estevez v Spain (*App. No. 56501/00, 10 May 2001.

[148] Cabellero, S.S., 'Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage? (2004-2005) 11 *Columbia J of Eur L* 151 at 152.

Although both aspects of Article 8, reliance on the privacy aspect attracted criticism that the ECHR was favouring the nuclear married heterosexual ideal.[149] As set out above reliance on privacy based claims also resulted in limitations on the expansion of LGBTQ+ rights before the ECtHR.[150] A breakthrough development[151] came when the ECtHR found that same-sex relationships are included within family life protections under Article 8.[152] Publication 2 argues that the family law aspect of Article 8 ECHR should have increasing importance going forwards. Lastly publication 2 calls for a new interpretation of Article 12 (right to marry).[153] Redundant historical text driven approaches[154] should be abandoned in favour of a dynamic interpretation of Article 12 to include same-sex couples. In setting out a strategy for success for proponents of same-sex marriage before the ECtHR, publication 2 therefore argues that the equality argument under

[149] *Stalford* (n90) at 411.

[150] Johnson, P,. 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) (n88) at 76. For further criticism see also Sedgewick (n130) at 1040.

[151] Danisi (n132) 804; O'Mahoney, C., 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families' (2012) 26(1) *Inter J of L Policy and the Fam* 31 at 38 and Sutherland, E. , 'A Step Closer to Same-Sex Marriage Throughout Europe (2011) 15 *Edin L Rev* 97.

[152] *Schalk and Kopf v Austria* (n8).

[153] Article 12 provides that '[m]en 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'.

[154] Such as that favoured by the ECtHR in *Schalk and Kopf v Austria* (n8) where the ECtHR noted that Article 12 only granted the right to marry to men and women' and where the reference to 'everyone' or 'no one and the 'historical context' were deemed as significant. The grammatical reading by the ECtHR also reflects the approach taken by the HRC in *Joslin v New Zealand* Communication No. 902/1999 U.N. DOC A/57/40 at 21.

Article 14 ECHR, can be strengthened by a continued evolution of right to a family life under Article 8 and a dynamic interpretation of Article 12 (right to marry). Publication 4 (in Part 2) has another useful conclusion in this regard, recommending that the free standing equality clause in the shape of Protocol 12, should be ratified by all contracting states (including the UK). This is in direct contrast to the International Covenant on Civil and Political Rights (ICCPR) which does provide a free-standing equality clause.[155]

Ultimately, the ECtHR stresses a lack of consensus between contracting states as a reason for the lack of movement on this issue.[156] Publication 2 concludes that the success of any future case law depends upon the ECtHR recognising a consensus. Analysis of the consensus standard, then forms the subject matter of publication 3 which was published in January 2018 in the leading peer-reviewed European Human Rights Law Review.[157] The ECtHR has to be conscious of social, economic and cultural differences, at a time when states are considering leaving the Council of Europe.[158]- The ECtHR is under increased pressure to recognise relativist

[155] ICCPR, art.26.

[156] See *Schalk and Kopf v Austria* (n8) para 57, *Hamalaninen v Finland* (n8) para 39 and *Chapin and Charpentier v France* (n8).

[157] This is described on Research Gate as providing '.. unrivalled coverage of key issues in human rights law…' see https://www.researchgate.net/journal/1361-1526_European_human_rights_law_review (last accessed August 2019).

[158] Bribosia, E., Rorive, I. and Van den Eynde, L., 'Same-sex Marriage: Building an Argument before the European Court of Human Rights in Light of the U.S. Experience. (2014) 32 Berkeley Journal of International Law 1.

concerns. The primary duty of guarding human rights is awarded to contracting states.[159] By 2018, a series of factors pointed towards a developing consensus in favour of recognition of same-sex marriage. Sixteen countries in Europe now recognise same-sex marriage.[160] The ECtHR has also made favourable statements about the 'rapidly developing European consensus.'[161] The *Oliari v Italy* case resulted in the ECtHR recognising a right to legal protection for same-sex couples.[162]

Publication 3 builds on some of publication 1's earlier critiques of the MoA doctrine and its primary factor of influence in these cases, namely consensus.[163] Publication 3 then offers a novel solution to the issues

---

[159] The doctrine of subsidiarity has recently been re-emphasised as can be seen from the Council of Europe, 'Brighton Declaration High Legal Conference on the Future of the ECtHR; http:www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (2012) B12 [Accessed 22 January 2018].

[160] See n2.

[161] *Oliari v Italy* (n9) para 163.

[162] See *Oliari v Italy* (n9). This could be subject to conditions being socially accepting of same-sex couples on the ground. See Fenwick and Hayward (n116).

[163] Publication 4 discusses the lack of consensus being utilised as a justification for a wide MoA. Reference is made to common criticisms of the consensus argument in that it ignores the interests of minority groups, and that reliance on consensus leads to a lack of legal analysis and no high level of scrutiny. See Fenwick (n5) and Dzehtsiarou, K., 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *PL* 534; *Hodson* (n86); *Sweeney* (n81); Lord Lester, 'The European Convention in the New Architecture of Europe' (n120); and *Benvenisti* (n81). See also Lewis, T., 'What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation' (2007) 56 *ICLQ* 395 at 414 who comments that the MoA should not be used as an 'intellectually lazy option of running for cover' and *Hutchinson* (n121) and *Brauch* (n81). Reference is made to publication one's argument that reliance on consensus means that Member State could be relying on erroneous or discriminatory reasons in refusing to sanction same-sex marriage, reasons which are not investigated by the court.

suggesting that if the ECtHR continues to stress the need for consensus in future judgments regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. On reflection this concern with a number needs further consideration, and the strength of this article resides on its critique as to the lack of certainty as to how a consensus is to be quantified or measured. Certainty is important. Publication 3 explains that as there are 'manifold constitutional, legal and symbolical implications of marriage, it is essential for a couple to know if their marriage will be legally recognised.'[164] The need for certainty regarding marriage recognition is also stressed by international case law[165] and international human rights covenants.[166] This links to publication 5 which deals with the same theme in the context of private international law. In summary part one has critiqued the position of the ECtHR in relying on MoA and a lack of consensus between contracting states in relation to same-sex marriage claims. Part one has then offered a way forward for the ECtHR. However, the ECtHR is only one actor at a European level and Part 2 moves on to consider the position before the EU.

---

[164] In *Estin v Estin 334 US 541, 553 (1948)* Robert Jackson J commented that 'one thing that people are entitled to know from the law is whether they are formally married.' See also *Stark* (n80), and McClain, L., 'Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage' (1997–1998) *Fordham L R* 1241.

[165] See, e.g. *Goodridge v Department of Public Health 798 NE 2d 941 (Mass., 2003)*; *Loving v Virginia 388 US 1 (1967)* and *Obergefell v Hodges* (n6).

[166] E.g. art.12 Right to Marry European Convention on Human Rights.

Published Work Contained in PART ONE: SAME-SEX MARRIAGE AND THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS

(1) Hamilton, F., 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate' 1(2013) *European Human Rights Law Review* 47 -55.

(2) Hamilton, F., 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2017) *Journal of Homosexuality* 1-25.

(3) Hamilton, F., 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) 1 *European Human Rights Law Review* 33 – 45

Publication One: Hamilton, F., 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate' 1(2013) European Human Rights Law Review 47 -55.

European Human Rights Law Review

2013

Why the margin of appreciation is not the answer to the gay marriage debate

Frances Hamilton

Subject: Human rights. **Other related subjects:** Family law. International law

Keywords: Discrimination; European Court of Human Rights; Margin of appreciation; Right to marry; Same sex partners

Legislation: European Convention on Human Rights 1950 art.8, art.12

Case: Schalk v Austria (30141/04) [2011] 2 F.C.R. 650 (ECHR)

*E.H.R.L.R. 47 Abstract

This article offers an argument as to why the margin of appreciation is not an answer to the gay marriage debate. This is both of domestic importance due to upcoming legislative proposals on the issue as well of European and international importance given the demands of globalisation and the growing number of international families. In the leading case of Schalk and Kopf v Austria the European Court of Human Rights relied on the concept of the margin of appreciation in refusing to find any violation of the European Convention on Human Rights where Austria had not provided for same-sex marriage. However, reliance on this concept is unhelpful as it lacks clarity, meaning that the European Court of Human Rights has not investigated the reasons behind States Parties' decisions on the issue of gay marriage. This article demonstrates by way of case analysis that this could mean that States Parties are acting both in relation to their legislation and their judicial supervision of statutes on the basis of erroneous or even discriminatory reasons.

Introduction

The European Court of Human Rights is aware of the possibilities of discrimination against homosexuals in States Parties to the European Convention on Human Rights (ECHR),[1] with homophobia being well documented.[2] Yet despite this, on the topic of gay marriage, the judgment of *Schalk and Kopf v Austria* has allowed ECHR contracting states a wide margin of appreciation in relation to both their legislation and judicial supervision of statutes on the basis that "there is no European consensus regarding same-sex marriage".[3] The margin of appreciation has been defined as the "latitude of deference or error … at which international supervision should give way to a ECHR contracting states party's discretion in enacting or enforcing its laws".[4]

Arguably allowing a wide margin of appreciation could lead to homosexuals being dangerously exposed to discriminatory legislation and judicial supervision, as the European Court of Human Rights, by using the doctrine of the margin of appreciation, does not examine the reasons behind why States have refused to sanction gay marriage. On the topic of gay marriage, all that is certain internationally is that there are ***E.H.R.L.R. 48** many different family law structures, from "traditionalist" to "modernist".[5] Eleven countries recognise gay marriage, of which seven of these are within the Council of Europe, whilst internationally a further 23 recognise some form of same-sex partnership.

The issue is topical in the United Kingdom following a consultation that revealed widespread support for gay marriage.[6] David Cameron promised that gay marriage,[7] in addition to civil partnership (which was introduced by the Civil Partnership Act 2004),[8] will be shortly introduced on to the statute books (following similar plans in Scotland).[9]

Writers have doubted the usefulness of international comparisons in family law,[10] which would suggest that the European Court of Human Rights as a transnational court should remain uninvolved, with the margin of appreciation being an appropriate line to follow. However, a further reason why the issue of same-sex marriage remains important is because it involves a "relationship not simply between two people but also with government".[11] Internationally the demands of globalisation and increasing numbers of international families can lead to difficulties when families relocate especially if their marital situation is not explicitly recognised.[12] Without legal recognition of same-sex relationships, this could deter couples relocating internationally. This can be demonstrated by the treatment of gay couples who relocate within the European Union and the United States.

Michele Grigolo states that in an EU context the treatment of married persons differs from other relationships.[13] Whilst spouses have a right to join citizens, unmarried partners have to rely upon proving a "duly attested relationship".[14] Cases from the United States demonstrate the difficulties which globalisation can create from a same-sex union. Some states within the United States recognise same-sex unions and others do not.[15]

The situation is acute within the federal United States where s.2 of the Defense of Marriage Act 1996 provides that no state within the United States need recognise a marriage considered legal in another state, and s.3 of the Defense of Marriage Act provides that "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[16] The Defense of Marriage Act 1996 remains controversial and is subject to ongoing litigation with appeals pending to the US Supreme Court.[17] The situation is complex and contrary to dicta ***E.H.R.L.R. 49*** from judges in cases such as *Estin v Estin*, where Robert Jackson J. commented that "one thing that people are entitled to know from the law is whether they are formally married".[18]

The issue is also symbolically important. Zvi Triger argues that marriage is used as a weapon against homosexuals and makes reference to anti-miscegenation laws in the United States and the Nazi-Nuremberg laws.[19] The Equality Network argues that "civil partnership was invented specifically to deny same-sex couples access to marriage, and is seen by many same-sex couples as a second-class status".[20] The developing doctrine of "comparative constitutionalism" is relevant as many landmark cases show that leading international courts have influence worldwide.[21]

This article does not rehearse arguments for and against gay marriage but demonstrates that despite other recent judgments from the European Court of Human Rights insisting on a wide margin of appreciation in other contexts, relying on the margin of appreciation lacks clarity and could be detrimental in that it allows States to rely on erroneous or discriminatory reasons in refusing to sanction gay marriage.

Other recent cases granting a wide margin of appreciation

In the recent case of *Lautsi v Italy*, which concerned the compulsory displaying of crucifixes in Italian state school classrooms, the European Court of Human Rights granted Italy a wide margin of appreciation in the context of Protocol 1 to art.2 of the ECHR (the right to educate children in accordance with one's religious and philosophical convictions).[22] The lack of European consensus on the presence of religious symbols was seen as decisive. Similarly, in *A v Ireland*, which considered Irish anti-abortion laws, the Court deferred to a

wide margin of appreciation in finding no right to abortion, in which case was considered in the context of art.8 of the ECHR (the right to a private and family life).[23] Interestingly, in *ABC v Ireland* however, there was a strong consensus among European States in favour of allowing abortions, so instead emphasis was placed upon the "relative importance of the interest at stake".[24] Paolo Ronchi has criticised this lack of consistency from the Court which he argues is "ready to abandon the notion of consensus where the issue is too political to be decided by Strasbourg".[25]

The Brighton Declaration 2012 also gave particular emphasis to the importance of the margin of appreciation, encouraging the prominence of the principles of subsidiarity and the margin of appreciation.[26]

The margin of appreciation lacks clarity

Despite use of the margin of appreciation in recent cases by the European Court, one of the risks of the margin of appreciation doctrine is that it leads to a lack of certainty. Lord Lester has commented that the margin of appreciation "has become as slippery and elusive as an eel".[27] This is particularly dangerous with reference to marriage as individuals need to know their marital status.

A particular issue with cases concerning homosexuality is that it is "an essentially private manifestation of human personality".[28] This also leads to increased difficulties for international courts in trying to reconcile both universalist and relativist approaches. Douglas Lee Donoho describes this task by asking; ***E.H.R.L.R. 50*** "[h]ow can human rights be sufficiently universal to make them appropriate subjects for meaningful international regulation and yet consistent with, and appropriate to, the world's diversity?"[29]

Whilst universalism is attractive with its promise of universal standards for everyone,[30] it runs into criticism that it can lead to an "undesirable homogenisation of people and cultures" especially on such a central matter as protection of human rights.[31] However, many authors regard relativism as a necessity if the Convention "is not to become progressively ineffective with time"[32] and where large "blocs of the population disagree".[33]

A common criticism of the margin of appreciation is that it is vague.[34] Ultimately, Paul Mahoney states that the "European Court of Human Rights' ability to protect human rights is seriously threatened … by the doctrine of margin of appreciation".[35] Judges have stated that the doctrine should be abandoned.[36] Perhaps as Douglas Lee Donoho suggests, the margin of appreciation is used as a concept to allow the judiciary to ignore "the issues posed by diversity" or is used where courts prefer to obscure the basis on which their decision is made.[37]

In the context of gay marriage, the vagueness of margin of appreciation means that ECHR contracting states are free to introduce their own legislation (for example our own domestic legislative proposals)[38] and decide on judicial supervision of such legislation, without the reasons behind their decisions having to be examined by the Court. This means that litigation will also continue before the Court as the Equal Love Campaign demonstrates. In the Equal Love Campaign case the applicants allege that the current prohibition by UK legislation of same-sex civil marriage and opposite-sex civil partnership is a violation of the ECHR.[39]

Vagueness leads to further danger. ECHR contracting states could be relying on erroneous or discriminatory reasons in their refusal to sanction to gay marriage, which the Court does not investigate. The following sections provide examples of courts relying on erroneous and discriminatory reasons. ***E.H.R.L.R. 51***

Are states legislating on the basis of erroneous reasons?

Erroneous arguments include the definitional argument, the "slippery slope" argument, the procreation argument and discriminatory arguments against homosexuals. The term "erroneous" is used to describe arguments against gay marriage which have been proven to be redundant in their reasoning.

The definitional argument has been explained by Dale Carpenter to mean that a homosexual couple cannot marry as by definition they are not man and woman.[40] The lack of reasoning is seen as a fatal flaw to this argument as "traditions change [and] [d]ictionaries are not the law".[41]

Despite the widespread dismissal of the definitional argument as valid, the use of the margin of appreciation by the European Court of Human Rights means that the definitional argument continues to be widely used, as ECHR contracting states are not obliged to provide reasons for decisions reached. Indeed, in *Schalk and Kopf v Austria*, the Court relied upon the definitional argument, noting that art.12 only granted the right to marry to "men and women" and contrasted that article to others which referred to "everyone" or "no one" and cited the "historical context" as being important.[42] In the leading domestic case of *Wilkinson v Kritzinger*, Potter J. also followed a definitional approach by referring to the definition stated at s.11(c) of the Matrimonial Causes Act 1973 and noted the lack of intervention from the Court "where there is a wide variety of national and cultural traditions at play".[43] Similarly in the leading Irish case of *Zappone and Gilligan v Revenue Commissioners*, Dunne J. essentially relied upon the definitional argument.[44] At present, although the definitional argument can be seen to be redundant in its reasoning and therefore erroneous, this represents a perfectly legitimate approach for the purposes of the margin of appreciation because the European Court of Human Rights does not investigate the reasons for conclusions reached.

Indeed, countries such as South Africa that have adopted a progressive approach to gay marriage have specifically acknowledged that "ideas of justice and equity evolve, so do conceptions of rights take on new texture and meaning".[45] In similar style, when the European Court of Human Rights has departed from previous case-law it has done so on the basis that human rights should be rendered "dynamic and evolutive".[46]

Reliance on the margin of appreciation could allow other erroneous arguments to be applied. Authors have argued that if gay marriage were permitted this could lead to a slippery slope allowing other relationships being sanctioned, including polygamy and bestiality.[47] There is clearly a lack of political and public support for such policies. The result is the likelihood of such legislative change is virtually non-existent.[48] However, if the European Court of Human Rights does not examine the reasons why States are refusing to sanction gay marriage, this could mean that such arguments remain influential at State level.

Another erroneous position is the procreation argument. This approach proceeds on the basis that marriage should only be between a man and a woman as only they have the ability to procreate. This was ***E.H.R.L.R. 52*** the argument made by the state of Massachusetts to justify its ban on gay marriage.[49] Many high profile courts have dismissed the procreation argument on the basis that if procreation were necessary to validate a marriage, this would mean that neither the sterile nor the elderly could marry.[50] However, by the application of the margin of appreciation, the European Court of Human Rights does not examine the reasons why gay marriage is not sanctioned, resulting in such arguments maintaining influence. Even more worryingly, ECHR contracting States could be acting on the basis of discriminatory reasons.

Are states acting on the basis of discriminatory reasons?

Discrimination against homosexuals is well documented,[51] and condemned as unacceptable by the European Court. Discrimination against homosexuals does not always take an overt form and on occasion is expressed by way of a heterosexual norm with homosexuals still seen as part of a minority group.[52]

The difficulty with European Court of Human Rights case-law is that it allows a margin of appreciation in the area of gay marriage despite evidence that sexual orientation is an important ground of discrimination. Case-law provides that "differences in treatment require particularly serious reasons by way of justification".[53] Relying on the margin of appreciation also fails to protect minorities, which is often seen as one of the main justifications for an international system.[54]

The following case-law analysis demonstrates that the Court is aware that States could be acting on the basis of discriminatory reasons, yet confusingly continues to allow a wide margin of appreciation in gay marriage cases.

The earlier cases from the Court on the issue of homosexuality show that States successfully argued that discriminatory laws served legitimate aims, even if ultimately the legislation was found to violate the ECHR. For example in *Dudgeon v United Kingdom*, which concerned anti-sodomy laws, the European Court found that the preservation of "public order and decency [and] to protect the citizen from what is offensive and injurious" were legitimate aims.[55] The Court used the language of "an increased tolerance" of homosexuality which again reinforced the image of the heterosexual norm. Similarly in *Norris v Ireland*, after the Irish Supreme Court had upheld the anti-sodomy laws on the basis that "homosexuality was condemned in Christian teaching",[56] the European Court of Human Rights determined that the "interference has a legitimate aim, namely the protection of morals."[57] In *ADT v United Kingdom* which concerned the conviction of a man for gross indecency after he was involved in private consensual acts with up to four men, a legitimate aim was found in the "protection … of health or morals".[58] Although in these cases a violation of the Convention was found, George Letsas critiques the fact that the moralistic preferences of the majority were seen as being synonymous with "public morals" and "thus constituting a legitimate aim".[59] By recognising discriminatory laws as serving legitimate aims, even though ultimately finding ***E.H.R.L.R. 53*** violations of the ECHR, the European Court is perpetuating the image of the heterosexual norm and creating an image of tolerance rather than support for homosexuality.

Other authors have commented that this led to the "minorisation of homosexuals",[60] who had to assert their private law rights to be (let alone) leading to a negative appreciation of homosexual rights as something to hide from the general public. Nicole Moreham comments that "there can be no doubt that sexual orientation and activity concern an intimate aspect of private life".[61] Such an approach leads to homosexuals being given limited space to develop protection of their rights.

Other cases demonstrate an awareness of the Court of the perceived attitudes of the heterosexual majority. In the cases of *L v Austria* and *SL v Austria* the Court commented on the "predisposed bias on the part of a heterosexual majority against a homosexual minority".[62] Michele Grigolo critiqued the case of *Laskey v United Kingdom* for "subtly establish[ing] a universal (hetero)sexual normativity as the premise for the whole of the Court's reasoning".[63] For example, earlier in the case history, whilst still in the English Court of Appeal, Lord Lowry C.J. commented on the corruption of a youth K., and the fact that in his opinion "it is some comfort at least to be told, … that K., is now it seems settled into a normal heterosexual relationship".[64]

Other cases go further and can arguably demonstrate that domestic courts are acting in a discriminatory fashion towards homosexuals, although homophobia is never given by the State as the justifying reason. In the conjoined cases of *Smith v United Kingdom* and *Lustig-Prean v United Kingdom* the European Court of Human Rights held that the arguments raised by the UK government in relation to discriminatory treatment were "founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation".[65] In the case of *Salgueiro Da Silva Mouta v Portugal*, which concerned a custody dispute, there is an awareness by the Court of discrimination at a domestic level, although it is often disguised by euphemisms used by domestic courts.[66] In the judgment of the Court reference was made to the judgment of the Lisbon Court of Appeal, where it was stated that "given the dominant model in our society … [t]he child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife".[67]

The European Court of Human Rights found that the difference in treatment was "based on the applicant's sexual orientation".[68] This latter case is a good example of domestic courts using language which is dismissive of homosexual family units. Despite their awareness of discrimination against homosexuals at a State level, in the area of gay marriage the Court continues to maintain a wide margin of appreciation.

In *Frette v France*, which concerned adoption by a single openly gay parent, the Court stated that although the French authorities based their decisions on "lifestyle", the Court considered the "applicant's homosexuality the decisive factor".[69] Despite this direct finding the Court went on to find that due to lack of consensus the difference in treatment could be justified and there was no breach of the ECHR. This case demonstrates that where there is a wide margin of appreciation, national courts can continue to operate in a fashion which allows different treatment on the basis of the applicant's homosexuality. The joint ***E.H.R.L.R. 54*** partly dissenting opinion was critical of the majority conclusion arguing that it "is at variance with the Court's case law … and … liable to take the protection of fundamental rights backwards".[70] Michele Grigolo comments that the court chose to ignore relevant facts and over-relied on the consensus argument.[71]

EB v France also concerned adoption by a single openly gay parent. After examining the opinions of the psychologists, the Court came to an "inescapable conclusion … that sexual orientation was at the centre of the deliberations and omnipresent at every stage of administrative judicial proceedings".[72] The conclusion in *EB v France* was diametrically opposite to that in *Frette v France* leading to a violation of the ECHR being found. Authors have criticised the lack of "legal clarity" of the *EB v France* decision and "diversion" of approach since *Frette v France*.[73] The reasoning of the Court for justifying their difference in approach was put down to the importance of combating sexual orientation discrimination. The European Court of Human Rights stated,"[w]here sexual orientation is in issue, there is need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8".[74]

The case is interesting not only because of the weight placed upon combating sexual orientation discrimination, but also because of the Court's willingness to take a leading role internationally, which had not been seen since its *volte face* on the transgender case of *Goodwin v United Kingdom*.[75] In that case, the European Court established a precedent for departing from previous case-law in order to "render its rights practical and effective, not theoretical and illusory" and "maintain a dynamic and evolutive approach".[76] The Court in *Goodwin* was undeterred by a lack of consensus amongst the 43 contracting States.

Despite the Court noting concerns about sexual orientation discrimination in *Schalk*, a wide margin of appreciation on the issue of gay marriage was upheld. The Court observed that "marriage has deep rooted social and cultural connotations which may differ largely from

one society to another. The court re-iterates that it must not rush to substitute its own judgment in the place of national authorities".[77]

The Court again referred to the fact that there is an "emerging consensus towards the recognition of gay couples". After noting that this trend had accelerated over the past decade the Court concluded that "nevertheless not yet a majority of states provid[ed] for legal recognition of gay couples".[78]

Interestingly the Court was far from unanimous on this issue with three out of seven judges dissenting. In their joint dissenting opinion, Judges Rozakis, Spielmann and Jebens commented that having identified a "relevantly similar situation" and emphasised that "difference based on sexual orientation require particularly serious reasons by way of justification", the Court should have found a violation of art.14 taken in conjunction with art.8 of the ECHR.[79]

Loveday Hudson criticises *Schalk* and its deference to the ECHR contracting state's margin of appreciation as leaving the ***E.H.R.L.R. 55** "Court devoid of much to say about the nature of recent developments concerning that institution, thereby leaving same-sex couples out in the cold … and that this is clearly an unsatisfactory approach that leaves minorities vulnerable to majoritarian domination".[80]

Leading judgments from the Canadian Supreme Court have also commented on the fact that "not recognising same-sex relationships perpetuates disadvantage suffered by individuals in same-sex relationships and contributes to the erasure of their existence".[81]

Conclusion

This article has sought to show that due to the forces of globalisation an international approach towards gay marriage is necessary. The demands of the increasing number of international families mean that when such families relocate the legal status of a gay marriage or civil partnership and the legal consequences flowing from it, including any additional difficulties created by a subsequent break-up of the relationship, need to be addressed. The issue is also of symbolic importance because of the developing doctrine of comparative constitutionalism.

By relying upon the margin of appreciation in *Schalk*, the European Court of Human Rights has effectively abdicated its role in making a decision on gay marriage, allowing States free reign on this subject both in relation to their legislation and the judicial supervision of such legislation. This is despite the fact that ECHR contracting States "enjoy … a degree of homogeneity in cultural, political and religious orientations not shared by global human rights institutions".[82]

Numerous authors have commented on the fact that the margin of appreciation is too vague and difficult to understand how it is going to be applied in practice.[83] The reasoning behind States' practices is not investigated by the European Court of Human Rights. The result is that States could be acting on the basis of erroneous or discriminatory reasons. Erroneous arguments such as the definitional argument, the "slippery slope" argument and the procreation argument which have been widely discredited as redundant in their reasoning, may continue to maintain influence over States' legislation and judicial control. Even more worryingly, discriminatory practices can continue without interference, despite the European Court being aware of the existence of such practices.[84]

The margin of appreciation is not the answer to the gay marriage debate and previous authorities such as *Goodwin v UK* and *EB v France* prove that the Court could reverse a

previously established policy where necessary.[85] This article demonstrates that the use of the margin of appreciation in the context of gay marriage has left homosexuals vulnerable.

Frances Hamilton

Senior Law Lecturer

Northumbria University

E.H.R.L.R. 2013, 1, 47-55

1. See for example *Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47, *Frette v France* (2004) 38 E.H.R.R. 21 and *EB v France* (2008) 47 E.H.R.R. 21 which are explored in greater detail at the closing section of this piece

2. Zvi Triger, 'Fear of the Wandering Gay: some Reflections on Citizenship, Nationalism and Recognition in Same-Sex relationship', (2012) 8(2) *Int JLC* 268-282 referring to David Herring, *The Public Family: Exploring Its Role in Democratic Society* (Pittsburgh, University of Pittsburgh Press 2003) at 121

3. *Schalk v Austria (2011) 53 E.H.R.R. 20* at [58].

4. Petra Butler, "Margin of Appreciation—A Note Towards a Solution for the Pacific" (2008–09) 39 VUWLR 687 referring to *Howard Charles Yourow, Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Leiden: Brill, 1996), p.13*.

5. Alison Diduck and Frances Raday, Editorial: "Introduction: Family—An International Affair" (2012) 8(2) International Journal of Law in Context 187 and also see Nicholas Bala, "Context and Inclusivity in Canada's Evolving Definition of Family" (2002) 16(2) International Journal of Law, Policy and the Family 145 and in order to understand the many different international approaches taken see the *Permanent Bureau of the Hague Conference on Private International Law, "Note on Developments in Internal Law and Private International Law concerning Cohabitation outside Marriage, Including Registered Partnerships Preliminary Document No.11 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference"*, available at http://www.hcch.net [Accessed September 8, 2012].

6. *Home Office, "Equal Civil Marriage Consultation"*, available at http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil -marriage [Accessed September 8, 2012].

7. *Home Office, "Equal Civil Marriage Consultation"*, available at http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil -marriage [Accessed September 8, 2012].

8. *Home Office, "Equal Civil Marriage Consultation"*, available at http;//www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil -marriage [Accessed September 8, 2012].

9. The *Scottish Government, "Same Sex Marriage to be Legalised", July 25, 2012*, available at http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012 [Accessed September 8, 2012].

10. David Bradley, "Comparative Law, Family Law and Common Law" (2003) 33(1) O.J.L.S. 127; *Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law (Oxford: Clarendon Press, 1998), pp.59–61*; and Diduck and Raday, Editorial: "Introduction: Family—An International Affair" (2012) 8(2) International Journal of Law in Context 187.

11. Mary Dunlap, "The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties" (1991) 1 Law and Sexuality Rev. Lesbian and Gay Legal Issues 63.

12. See Barbara Stark, "When Globalization Hits Home: International Family Law Comes of Age" (2006) 36 V. and J. Transnat'l 1551; Martha Bailey, "Same Sex Relationships Across Borders" (2004) 49 McGill L.J. 100.

13. Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) E.J.I.L. 14(5) 1023.

14. EU Directive 2004/38 art.3(2)(b).

15. See for example Maimon Schwarzschild, "Marriage, Pluralism and Change: A Response to Professor Wax" (2005) 42 San Diego L. Rev. 1115.

16. United States Defense of Marriage Act 1996.

17. Defense of Marriage Act 2006: *Bipartisan Legal Advisory Group of the US House of Representatives v Gill* ; *Department of Health and Human Services v Massachusetts* ; *Office of Personnel Management v Golinski* ; *Windsor v US* listed on pending cases awaiting the Supreme Court available at the CNN website at http://edition.cnn.com/interactive/2012/10/politics/scotus.cases/?hpt=po_c2 [Accessed September 8, 2012].

18. *Estin v Estin [1948] 334 U.S. 541* at [553].

19. Triger, "Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships" (2012) 8(2) International Journal of Law in Context 268.

20. *Equality Network, "Equal Marriage: Report of the Equality Network Survey of LGBT People's Views on Marriage Equality" (2011)*.

21. See William Eskridge Jr, "Development—United States: Lawrence v Texas and the Imperative of Comparative Constitutionalism" (2004) 2(3) I.J.C.L. 555.

22. *Lautsi v Italy (2012) 54 E.H.R.R. 3*.

23. *A v Ireland (2011) 53 E.H.R.R. 13*.

24. *A v Ireland (2011) 53 E.H.R.R. 13* at [232].

25. Paolo Ronchi, "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy" (2011) 13(3) Ecc. L.J. 287.

26. Brighton Declaration, available at http://hub.coe.int/20120419-brighton-declaration at para.B12 [Accessed December 9, 2012].

27. Lord Lester, "The European Covnention in the New Architecture of Europe" (1996) 1 PL 6.

28. Paul Johnson, "An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights" (2010) 10(1) H.R.L. Rev. 67.

29. Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" (2001) 15 Emory Int'l L. Rev. 391.

30. See for example James A. Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era" (2005) 54 Int'l and Comp. L.Q. 459; Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–99) 31 N.Y.U.J. Int'l L. and Pol. 843.

31. Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights" (2001) 15 Emory Int'l L. Rev. 391; Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era" (2005) 54 Int'l and Comp. L.Q. 459; Raffaella Nigro, "The Margin of Appreciation Doctrine and the Case Law of the European Court of Human Rights on the Islamic Veil" (2010) 11 H.R.L. Rev. 531.

32. Jeffrey Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–05) 11 Colum. J. Eur. L. 113 referring to Paul Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 H.R.L.J. 57.

33. Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (2005) 16(5) E.J.I.L. 907.

34. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–05) 11 Colum. J. Eur. L. 113 referring to Nicholas Lavender, "The Problem of the Margin of Appreciation" (1997) 4 E.H.R.L.R. 380; George Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) 4 O.J.L.S. 705; Shany, "Toward a General Margin of Appreciation Doctrine in International Law" (2005) 16(5) E.J.I.L. 907; Michael Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 Int'l and Comp. L.Q. 638.

35. Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" (1990) 11 H.R.L.J. 57. Paul Mahoney is the new British judge at the European Court of Human Rights.

36. *Z v Finland (1997) 25 E.H.R.R. 371*, partly dissenting opinion of Judge de Meyer.

37. Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" (2001) 15 Emory Int'l L. Rev. 391.

38. For example see our own *Home Office "Equal Civil Marriage Consultation"* available at http://www.homeoffice.gov.uk/publications/about-us/consultations/equal-civil -marriage [Accessed September 8, 2012].

39. *Ferguson, Stretzel, French, Green, Hull, Watters, Maloney, Toresen, Doyle, Freeman, Garrett, Hilken, Goggin, Skarsholt, Munro, O'Neill and Ferguson v United Kingdom (App. No.8254/11)*.

40. Dale Carpenter, "Bad Arguments Against Gay Marriage" (2005–06) 7 Fla. Coastal L. Rev. 181.

41. Richard M. Lombino II, "Gay Marriage: Equality Matters" (2004–05) 14 S. Cal. Rev. L. and Women's Stud. 3; Carpenter, "Bad Arguments Against Gay Marriage" (2005–06) 7 Fla. Coastal L. Rev. 181 and see also Cindy Tobisman, "Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families?" (1997) 12 Berkeley Women's L.J. 112.

42. *Schalk (2011) 53 E.H.R.R. 20* at [52].

43. *Wilkinson v Kritzinger [2006] EWHC 835; [2006] 2 FCR 537* at [11], judgment referring to s.11(c) of the Matrimonial Causes Act 1973 which states that "[a] marriage … shall be void on the following grounds, that is to say … (c) [t]hat the parties are not respectively male and female" and *Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467* at [46].

44. *Zappone and Gilligan v Revenue Commissioners [2008] 2 I.R. 417* and see Brian Tobin, "Gay Marriage—A Bridge Too Far?" (2007) 15 I.S.L.R. 175 referring to *Judy Walsh and Fergus Ryan, The Rights of De Facto Couples (Irish Human Rights Commission, 2006)*.

45. *Minister of Home Affairs v Fourie (CCT 60/40) [2005] ZACC 19; [2006] (3) B.C.L.R. 355 (CC); [2006] (1) SA 524 (CC)* per Sachs J. at [102].

46. *Goodwin v United Kingdom (1996) 22 E.H.R.R. 123* at [74].

47. Jonathan Rauch, "Red Families, Blue Families, Gay Families and the Search for a New Normal" (2010) 28 Journal of Inequality 333; George Dent, "The Defense of Traditional Marriage" (1999) 15 Journal of Law and Politics 581.

48. See Nicholas Bala "Context and Inclusivity in Canada's Evolving Definition of the Family" (2002) 16(2) International Journal of Law, Policy and the Family 145 and Carpenter, "Bad Arguments Against Gay Marriage" (2005–06) 7 Fla. Coastal L. Rev. 181.

49. *Goodridge v Department of Public Health [2003] 798 N.E.2d 941 (Mass.)*.

50. See for example Justice Scalia in *Lawrence v Texas (02–102) 539 U.S. 558; (2003) 41 S.W. 3d 349*; *Fourie (CCT 60/40) [2005] Z.A.C.C. 19; [2006] (3) B.C.L.R. 355 (CC); [2006] (1) SA 524 (CC)* per Sachs J. and *Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All E.R. 411; [2004] 3 W.L.R.113* per Baroness Hale of Richmond.

51. See for example Triger, "Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships" (2012) 8(2) Int. J.L.C. 8(2) 268 referring to *David Herring, The Public Family: Exploring Its Role in Democratic Society (Pittsburgh: University of Pittsburgh Press, 2003), p.121* and *Harry Hay, Radically Gay, Gay Liberation in the Words of its Founder (Boston: Beacon Press, 1996), pp.164–165*.

52. See for example George Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) E.J.I.L. 509 and Helen Stalford, "Concepts of Family Under EU Law—Lessons from ECHR" (2002) 16(3) International Journal of Law, Policy and the Family 410.

53. *Karner v Austria (2004) 38 E.H.R.R. 24*.

54. See for example Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–99) 31 N.Y.U.J. Int'l L. and Pol. 843 and also Baroness Hale in *Ghaidan v Godin-Mendoza [2004] UKHL 30* at [143].

55. *Dudgeon v United Kingdom (1982) 4 E.H.R.R 149* at [44].

56. *Norris v Ireland (1988) 13 E.H.R.R. 186* at [24].

57. *Norris (1988) 13 E.H.R.R. 186* at [44].

58. *ADT v United Kingdom (2001) 31 E.H.R.R. 33*.

59. Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) E.J.I.L. 509.

60. Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) E.J.I.L. 1023.

61. Nicole Moreham, "The Right to Respect for Private and Family Life in the European Convention on Human Rights: A Re-Examination" (2008) E.H.R.L.R. 44.

62. *L v Austria (2003) 36 E.H.R.R. 1022* at [52] and *SL v Austria (2003) 37 E.H.R.R. 799* at [44].

63. Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) E.J.I.L. 1023 referring to *Laskey v United Kingdom (1997) 24 E.H.R.R. 39*

64. *R. v Brown [1994] 1 A.C. 212* per Lord Lowry.

65. *Smith and Grady v United Kingdom (2000) 29 E.H.R.R. 493* and *Lustig-Prean and Beckett v United Kingdom (2000) 29 E.H.R.R. 548*.

66. *Salgueiro (2001) 31 E.H.R.R. 47* at [14].

67. *Salgueiro (2001) 31 E.H.R.R. 47* at [28],

68. *Salgueiro (2001) 31 E.H.R.R. 47* at [28].

69. *Frette (2004) 38 E.H.R.R. 21* at [32].

70. *Frette (2004) 38 E.H.R.R. 21*, dissenting judgment of Judges Sir Nicolas Bratza, Fuhrmann and Tulkens.

71. Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) E.J.I.L. 1023.

72. *EB (2008) 47 E.H.R.R. 509* at [88].

73. Ian Curry-Sumner, "EB v France: A Missed Opportunity" [2009] 21(3) C.F.L.Q. 356.

74. *EB (2008) 47 E.H.R.R. 509* at [91].

75. *Goodwin (1996) 22 E.H.R.R. 123*.

76. *Goodwin (1996) 22 E.H.R.R. 123* at [74].

77. *Schalk (2011) 53 E.H.R.R 20* at [62].

78. *Schalk (2011) 53 E.H.R.R 20* at [105].

79. *Schalk (2011) 53 E.H.R.R. 20*, dissenting judgment of Judges Rozakis, Spielmann and Jebens at [8].

80. Loveday Hudson, "A Marriage by any Other Name? Schalk and Kopf v Austria" (2011) 11(1) H.R.L.R. 170.

81. *M v H [1999] 2 S.C.R. 3* at [7].

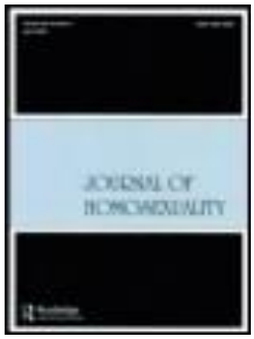
82. Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights" (2001) 15 Emory Int'l L. Rev. 391.

83. See Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–05) 11 Colum. J. Eur. L. 113 referring to Lavender, "The Problem of the Margin of Appreciation" (1997) 4 E.H.R.L.R. 380; Letsas, "Two Concepts of the Margin of Appreciation" (2006) 26(4) 4 O.J.L.S. 705; Shany, "Toward a General Margin of Appreciation Doctrine in International Law" (2005) 16(5) E.J.I.L. 907; and Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 Int'l and Comp. L.Q. 638.

84. See for example *Smith (2000) 29 E.H.R.R. 493* and *Lustig-Prean (2000) 29 E.H.R.R. 548*; *Salgueiro (2001) 31 E.H.R.R. 47* and *Frette (2004) 38 E.H.R.R. 21*.

85. *Goodwin (1996) 22 E.H.R.R. 123* and *EB (2008) 47 E.H.R.R. 509*.

Publication Two: Hamilton, F., 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2017) Journal of Homosexuality 1-25.



Journal of Homosexuality

ISSN: 0091-8369 (Print) 1540-3602 (Online) Journal homepage: http://www.tandfonline.com/loi/wjhm20

The Case for Same-Sex Marriage Before the European Court of Human Rights

Frances Hamilton

To cite this article: Frances Hamilton (2017): The Case for Same-Sex Marriage Before the European Court of Human Rights, Journal of Homosexuality, DOI: 10.1080/00918369.2017.1380991

To link to this article: https://doi.org/10.1080/00918369.2017.1380991

Accepted author version posted online: 26 Sep 2017.
Published online: 27 Oct 2017.

JOURNAL OF HOMOSEXUALITY
https://doi.org/10.1080/00918369.2017.1380991

The Case for Same-Sex Marriage Before the European Court of Human Rights

Frances Hamilton, MA, LLM

Faculty of Business and Law, Northumbria University, Newcastle upon Tyne, UK

CONTACT Frances Hamilton Frances.Hamilton@Northumbria.ac.uk
Faculty of Business and Law, City Campus East, Northumbria University, Newcastle upon Tyne NE1 8ST, UK.

ABSTRACT

For proponents of same-sex marriage, this essay sets forward a critical analysis of relevant arguments before the European Court of Human Rights. The privacy aspect of Article 8 European Convention of Human Rights will never be a successful argument with reference to marriage, which involves a public status. The equality argument (Article 14) is useful in addressing this issue with its close connections with citizenship, symbolic value, and proven record internationally. Difficulties remain with the equality argument; its conditional status, the width of the margin of appreciation allocated, and the need for an equality comparator. The equality argument needs reinforcement by use alongside a developing family law argument under Article 8 and a dynamically interpreted Article 12 (right to marry) argument. Ultimately, the success of any argument depends on convincingly influencing the European Court to consider that sufficient consensus has developed among Member States of the Council of Europe.

KEYWORDS

Same-sex marriage; privacy; equality; margin of appreciation; family law; dynamic interpretation; consensus

The European Convention of Human Rights was drafted following the atrocities of the Second World War (Foster, 2011). The Council of Europe currently has 47 member states, and the European Court of Human Rights can be described as the premier human rights court within Europe. Yet at a European Court level there continues to be no right to same-sex marriage (Schalk and Kopf v. Austria, para. 94). As recently confirmed in Chapin and Charpentier v. France, this is because the European Court considers that a consensus in favor of same-sex marriage between member states needs to develop before such a right can be recognized. The 2015 case of Oliari v. Italy determined that same-sex couples now have the right to form a civil union or registered partnership, which is recognized as an important step forward (Zago, 2015). However, the battle for equality with regard to civil partnerships is not finished. The case of Ferguson v. UK before the European Court argued that a UK law preventing heterosexuals entering into civil partnership was unfair because it treated couples differently depending on their sexual orientation[1] (see Barker, 2012). The case was dismissed by the European Court on the basis that it did not meet the admissibility criteria under Article 35 of the European Convention. Among other conditions, this requires applicants, first of all, to seek redress in their domestic courts by "exhaust[ing] domestic remedies." A different couple, Charles Keidan and Rebecca Steinfeld, have reintroduced the case of heterosexual access to civil partnerships to the English courts. The Court of Appeal dismissed their case in February 2017 with the majority (of two to one) determining that the UK government be given time to review the existing legislation (Steinfeld v. Secretary of State for Education, 2017). They are now appealing their matter to the Supreme Court.

As well as the fight for equality in relation to heterosexual couples and civil partnerships, there remains the ongoing battle for same-sex marriage at a European Court level, which is the focus of this piece. For many same-sex marriage campaigners, civil partnership will never be seen as sufficient recognition of their unions.[2] At present,

only 15 member states out of 47 provide for same-sex marriage.[3] Indeed, some member states constitutionally ban marriage between same-sex couples[4] (see Fenwick, 2016), and Russia, a member state, has certain homophobic policies (Fenwick, 2016; Johnson, 2015b).[5] The challenge remains to convince the European Court by persuasive arguments that sufficient consensus has been reached among the member states in relation to same-sex marriage.

Over the course of many years, history demonstrates that the European Court has developed a leading role in the protection of rights for gays and lesbians in Europe (Bribosia, Rorive, & Van den Eynde, 2014; Cooper, 2011; Helfer & Voeten, 2014). This is despite the fact that, because the European Convention was drafted in the 1950s, it contains no "general nondiscrimination clause" (Letsas, 2006, p. 708). Article 14 of the European Convention (right to nondiscrimination) is conditional only and depends on other human rights violations also being alleged simultaneously.[6] Protocol 12 of the European Convention, which contains a general nondiscrimination clause, remains unratified by many members of the Council of Europe.[7] As there are no specific protections preventing discrimination against gays, any arguments before the European Court have to rely on the "living instrument" doctrine. This allows the European Court to interpret the existing articles in the European Convention in a dynamic fashion to build on case law in order to accord with modern reality (see Tahmindjis, 2016).

Article 8 of the European Convention provides a right to respect for private and family life.[8] This is the article that has been of most use to gays and lesbians in expanding the protection of their rights under the European Convention. Utilizing a dynamic interpretation, violations of the European Convention Article 8 have been found in relation to laws that criminalized same-sex sexual activity (Dudgeon v. United Kingdom, 1981), required unequal ages for the age of consent for heterosexual and

homosexual couples (Sutherland v. UK, 1977), did not allow same-sex couples to inherit tenancy rights (Simpson v. UK, 1986; Karner v. Austria, 2003), prevented the employment of gays in the military (Lustig-Prean and Beckett v. UK, 1999; Smith and Grady v. UK, 1999), excluded same-sex couples from the definition of family (Kerkhoven and Hinke v. Netherlands, 1992; JRM v. The Netherlands, 2003; Schalk and Kopf v. Austria, 2010; X and Y v. UK, 1997), prevented gays from adopting (EB v. France, 2008; Frette v. France, 2002), and, most recently, prevented gays from entering into the right to form a civil partnership (Oliari v. Italy, 2015). In fact, the right to marry under Article 12[9] as applied to same-sex couples was first properly discussed by the European Court only in 2010 in the case of Schalk and Kopf v. Austria (2010). Under international law, decisions of the European Court are binding on member states who have accepted the jurisdiction of the European Court by signing the European Convention (see Foster, 2011, p. 56).[10] If a member state is found to have violated the European Convention, it is required to change its laws and practices and pay any just satisfaction damages to the victims concerned where these have been awarded by the European Court.

The argument can be made that, given the European Convention's Preamble's promise to "protect and enforce human rights... it is perplexing to see the [European] [C]ourt refrain from legalising same-sex marriage" (Poppelwell-Scevak, 2016, p. 1). Some commentators have argued that the European Court should have a leading, standard-setting, aspirational role (Bribosia et al., 2014; Dzehtsiarou, 2011). However, one of the central challenges for any international court, including the European Court, is to uphold the universal standard of human rights, while respecting regional differences. This is especially true in an area that is as politically, morally, and religiously sensitive as same-sex marriage (Teutonico, 2016–2017). Nicola Barker reminded us that it "would be understandable if [the European Court] were reluctant to impose same-sex marriage on all [member]

states, some of which have only relatively recently decriminalized sex between men" (Barker, 2012, pp. 548–549).

Unlike the U.S. Supreme Court, the European Court is very much bound by the competing interests of its member states (Teutonico, 2016–2017). Under the European Convention, "primary responsibility" (McGoldrick, 2016, p. 32) is given to member states to secure human rights (Hutchinson, 1999). The role of the European Court is, in fact, secondary. Although the European Court's judgments are binding in international law, there is no enforcement mechanism, and the European Court depends on member states to change their legislation and practices (Wintemute, 2010). If the European Court were to force their views on all 47 countries, this could lead to a political backlash and could mean some governments threatening to leave the Council of Europe (Wintemute, 2010). The Margin of Appreciation (MoA) is one of the important tools used by the European Court to respect regional differences (Donoho, 2001, p. 451). The MoA can be described as the area of discretion awarded to member states (Butler, 2008–2009; Yourow, 1996). The European Court varies the width of the MoA depending on the strength of the right in question, the strength of the member states' defense(s) and also depending on the level of consensus found by the European Court to exist between member states. In areas concerning morals, a wide MoA is often found by the European Court, as in the case of same-sex marriage (Schalk and Kopf v. Austria, 2010. MoA has recently been re-emphasized (Council of Europe, 2012). The role of the MoA and developing consensus remains a "vital force" (Bribosia et al., 2014, p. 19) in relation to same-sex marriage cases before the European Court. However, there is reason to consider that the European Court will rule in favor of same-sex marriage at some stage. The European Court refers to an "emerging consensus in favor of the legal recognition of same-sex marriage" (Schalk and Kopf v. Austria, 2010, para. 105).[11] This article reviews thoroughly which arguments will

operate with the most force in order for the European Court to reconsider that a consensus has been reached. A critical analysis of Article 8 (right to a private and family life) now follows. The usefulness of Article 14 (freedom from discrimination) and Article 12 (right to marry) in relation to same-sex marriage is then considered.

The dominant influence of the privacy argument before the European Court in cases developing gay rights

The right to privacy has traditionally been defined as containing a focus on a right to be left alone. It is described by Mill as "a circle around every individual human being which no government ... ought to be permitted to overstep" (Mill, 1936, p. 943). Arguments based on privacy result in basic protections for gays, and arguably not same-sex marriage. However, traditionally, the right to respect for private life under Article 8 was dominant in relation to the expansion and development of gay rights. Several authors have stated that the large majority of the successful cases concerning the development of the European Court's protection of gays from discrimination have resulted from the use of Article 8 right to privacy (Cabellero, 2004–2005; Danisi, 2011; Johnson, 2010; Stark, 2006; Walker, 2001). The traditional focus on privacy can be seen from the earliest European Court cases, including Dudgeon v. UK (1981), whereby the UK was obliged to decriminalize sodomy in Northern Ireland. Although the case was ground breaking at the time for finding a violation of Article 8 (see Walker, 2001, p. 125), the European Court emphasized the fact that these concerned "private" acts (Dudgeon v. UK, 1981, para. 39; ADT v. UK, 2000; see also, Lustig-Prean and Beckett v. UK, 1999, para. 82; Smith and Grady v. UK, 1999; Sutherland v. UK, 1997). The traditional focus on privacy before the European Court is also reflected in UK domestic legislation that referred to privacy as the main reason for protecting gay rights (see Bradley, 2003, p. 142 on the Wolfenden Report, which was adopted in the Sexual Offences Act 1967).

Although these European Court cases and domestic legislation were significant achievements for gay rights campaigners at the time, commentators have argued that this has placed a limitation on the evolution of gay rights in Europe (Johnson, 2010; Sedgewick, 1990). As a result of the perceived nexus made by the European Court between private functions and homosexuality, there has been less chance to develop wider rights beyond that of sexual privacy. Grigolo also commented on the limits of the privacy argument, stating that this is just the start and not the end of sexual orientation rights (Grigolo, 2003). If cases concerning sexual orientation are going to continue to stress the private nature of such matters, it will not be as easy to bring forward arguments in relation to same-sex marriage. Marriage is a concept on the public stage. Marriage is celebrated in public in front of witnesses and has to comply with formal rules regarding state registration. Marriage has significant external legal consequences, although these do vary between countries (Waaldijk, 2005). In many jurisdictions this includes tax advantages, inheritance rights, protections in property law, post-divorce rights, right to name change, and the right to bring a wrongful death action. Children born during a marriage are presumed to be the children of the husband. Privacy arguments will never be successful in this context. It is argued next that Article 14 (equality) arguments are advantageous in addressing these issues.

The advantages of equality-based arguments for proponents of same-sex marriage

There is far more scope for "evolution" of an equality right. While privacy is a right to be left alone, in contrast equality is associated with citizenship and its public status. Marriage is seen by many as a key component of citizenship. (Bamforth, 2012; Cossman, 2007; Cott, 2000; Harris, 2007–2008; Kochenov, 2009; Richardson, 1998). Exclusion of gays from the status of marriage has been referred to as "domestic apartheid" (Dunlap, 1991, p. 63) and denial of "full political standing" for gays (Bamforth,

2012; Kornbluh, 2011, p. 537; Marshall, 1992, p. 18). Citizenship allows full participation in society. For those countries that are part of the EU, it also allows EU citizens and their family to relocate with associated employment rights around the EU territory (Treaty on the Functioning of the European Union, 2016, Article 23, Article 20[2]). Engagement of equality arguments in relation to same-sex marriage is therefore advantageous in achieving the associated benefits of citizenship. This is something that is never going to be achieved from a privacy argument alone.

Equality arguments also have symbolic value, which is a key attraction of marriage as opposed to civil partnership (Aloni, 2010–2011; Dorf, 2011; Isaak, 2008). Writers have referred to marriage as "fundamental" and "deeply rooted in our society" (Lombino, 2003) and as a "public tradition" (Dent, 1999). Others have described marriage as the "privileged and preferred legal status in Europe and the United States" (Aloni, 2010–2011, p. 110; Equality Network, 2011). Even after achieving civil partnership, which often involves similar legal rights to marriage, proponents of same-sex marriage continued striving for marriage as a goal due to its symbolic status (Dunlap, 1991). Other jurisdictions have also stressed the importance of equality arguments in relation to their judgments on same-sex marriage. In Minister of Home Affairs and Another v. Fourie the South African Constitutional Court criticized privacy as a "negative liberty" (Constitutional Court of South Africa, 2005, para. 46) in contrast to the strength of the equality argument, which meant "equal concern and respect across differences" (Constitutional Court of South Africa, para. 60). Equality arguments were also essential in Canada's recognition of same-sex marriage (Wintemute, 2003–2004). U.S. courts have also relied heavily on the equality argument (see Barrett, 2006–2008, p. 695 for discussion).[12] The recent Supreme Court judgment of Obergefell et al. v. Hodges, Director, Ohio Department of Health now requires all U.S. states to issue marriage licenses to same-sex couples and to recognize same-sex

marriages validly performed in other jurisdictions (Obergefell et al. v. Hodges, Director, Ohio Department of Health, 2015). The main justification of the right to marry was "derived from the Fourteenth Amendment's guarantee of equal protection" (Obergefell et al. v. Hodges, Director, Ohio Department of Health, 2015, p. 10). These examples demonstrate that, internationally, equality has been the most successful argument for those courts finding in favor of same-sex marriage. It is argued that it is advantageous for the European Court to engage with this argument in order to recognize same-sex marriage. At present, equality is given a subsidiary role in cases concerning gays before the European Court.

European court engagement with Article 14 (equality)

Throughout its earlier judgments, the European Court did not find it necessary to consider the arguments brought forward on the basis of Article 14. In Dudgeon v. UK, the European Court found that "there is no call to rule on the merits" of Article 14, as the same complaint had already been examined under Article 8 (Dudgeon v. United Kingdom, 1981, para. 69; see also Grigolo, 2003, p. 1030).[13] This set a trend for further cases that did not consider Article 14 (see ADT v. UK, 2000, para. 40; Lustig-Prean and Beckett v. UK, 1999, paras. 107–109; Smith and Grady v. UK, 1999, paras. 114–116). The traditional focus by the European Court on Article 8 privacy therefore remained. Grigolo asserted that, in relation to Dudgeon v. UK, a conclusion based on Article 14 would have "strengthened the (political) 'status' of homosexuality to an excessive extent" (Grigolo, 2003, p. 1030). Perhaps this was a concern about not proceeding too quickly with the development of gay rights at the time for fear of a backlash of public opinion, causing unnecessary polarization (Marshall, 2010; Reinhardt, 2005). However, since that date gay rights have advanced significantly. Step-by-step or incremental development has allowed recognition of gay rights and public acceptance of same-sex couples. More recently, the

European Court has been "increasingly sensitive to issues of non-discrimination" (Cartabia, 2011, p. 808; see also Waaldijk, 2016, p. 242). Significant case law emphasizing equality includes Karner v. Austria, where it was stated that "weighty reasons were needed to justify a difference in treatment" (Karner v. Austria, 2003, para. 37).[14] This dicta was used to great effect in later case law. For example, when Greece attempted to reserve civil partnerships to heterosexual couples only, this was found to violate Article 14 (right to equality) in conjunction with Article 8 (family law aspect) (Vallianatos v. Greece, 2013). Reliance on nondiscrimination principles under Article 14 was also successful in relation to same-sex couples' right to adopt (X and Others v. Austria, 2013).

Yet in Oliari v. Italy (2015) there was a reversal to this developing trend. The European Court determined that it was not necessary to consider the argument on the basis of Article 14. Instead, the right to civil partnership was deemed to be successful under Article 8, creating a positive obligation on member states to provide such a status to same-sex couples (Oliari v. Italy, 2015). Fenwick considered that approach "significant" (Fenwick, 2016, p. 263). If the case had been considered under Article 14, the European Court would have had to consider whether Italy was able to provide "weighty reasons" for its difference in treatment of same-sex couples. It is unlikely that Italy would have been able to do this successfully. The European Court therefore avoided having to consider whether the reasons given by Italy were discriminatory (see Hayward, 2016, p. 29). Such a precedent would have undoubtedly strengthened the case for same-sex marriage. Indeed, if the "weighty reasons" dicta were followed to its logical extent, this could result in the argument that there should be a right to same-sex marriage (Karner v. Austria, 2003). The dissenting judges in Schalk and Kopf v. Austria commented that having identified a "relevantly similar situation" that required "particularly serious reasons by way of justification" the European Court should have found a violation of Article 14 taken in conjunction with Article 8 (Schalk and Kopf v. Austria,

2003, para. 8). Arguably, it is only the concerns about lack of consensus between member states that have prevented the European Court utilizing equality arguments to their full extent. This situation is changing, and a consensus is slowly emerging in favor of the recognition of same-sex marriage (Schalk and Kopf v. Austria, 2003, para. 105).

An opportunity to have arguments based on Article 14 (equality) considered by the European Court in Ferguson v. UK (concerning heterosexual access to civil partnership in the UK) never materialized because the European Court did not have to engage with the merits of the claim (Ferguson v. UK, 2011). The case was dismissed on the basis of non-admissibility. Claimants are obliged to exhaust domestic remedies before taking a case to the European Court (Article 35 European Convention). Arguments on the basis of "total equality" are now being pursued through the UK courts in Steinfeld v. Secretary of State for Education (2017, para. 5). At the Court of Appeal level, these arguments gained ground, but, ultimately, the Court of Appeal determined that the matter should at present be left in the hands of the legislature (2017, para. 164). If the matter is not resolved, it is understood that the litigants in Steinfeld v. Secretary of State for Education will pursue the matter to the Supreme Court (Guardian, 2017).

A difficulty in the utilization of Article 14 by the European Court relates to concerns about trampling on legislative ground in the area of same-sex marriage, a view that is echoed by the UK Court of Appeal in Steinfeld v. Secretary of State for Education (2017, para. 164). As well as these political concerns, a further difficulty in the use of Article 14 by the European Convention is that it is a conditional right that can be asserted only where another alleged violation of the European Convention is made simultaneously (Letsas, 2006, p. 708). For member states such as the UK that have not ratified the freestanding Protocol 12 equality provisions, this means that Article 14 (equality) points have to be made in tandem with another alleged breach of the European Convention. Although it does remain

possible for the European Court in judgment to find a violation of Article 14 alone, this is provided that the applicant framed their case under the alleged breach of another treaty right (for discussion, see Letsas, 2006, p. 720). Wintemute (2004) argued that for member states that have not ratified Protocol 12, this results in a "gap" in protection. He argued that the position would be improved if more states ratified Protocol 12. The international examples drawn from South Africa and the United States demonstrate the strong influence of equality provisions in those constitutions (see Constitutional Court of South Africa, 2005; Obergefell et al. v. Hodges, Director, Ohio Department of Health, 2015). In contrast, Article 14 of European Convention in the 1950s only offers handicapped protection for equality, not as a free standing provision. As stated above, it is a conditional right that can be asserted only where another alleged violation of the European Convention is made simultaneously.

An important point to draw from this is that although this article advocates the greater use of the equality argument under Article 14, at present for those member states that have not ratified the freestanding Protocol 12, this has to be done by expanding the ambit of other articles. As explained above, cases made under Article 14 in tandem with the privacy branch of Article 8 would not be successful in relation to same-sex marriage. In this respect, attention is drawn to the developing notion of "family life" for same-sex couples under Article 8 and a recommended further development of Article 12 (right to marry). Both of these points are addressed in the final sections of this piece. Further difficulties for the European Court in seeking to engage with equality arguments are considered next. First, equality arguments have been allocated a wide MoA by the European Court, leading to a vaguer protection of rights. Second, an equality argument by its nature requires a categorization of groups into sexual interests to allow a comparison, thereby resulting in a re-emphasis of the heterosexual norm.

Differing widths of margin of appreciation

As stated in the introductory section, the MoA is the "amount of discretion... [Member States are offered] ... in fulfilling their obligations under the [European Convention]" (Butler, 2008–2009, p. 695; Yourow, 1996, p. 13). The purpose behind this concept is to accommodate diversity between nations "while enforcing effective implementation" of the European Convention (Donoho, 2001, p. 451). One of the central questions surrounding the MoA concerns the width of the discretion offered to the member states. As mentioned earlier, the MoA is itself variable and depends on a number of factors. These include the "the importance of the national interest at stake ought to be balanced against the nature of the individual's rights" (Shany, 2005, p. 927) and the degree of consensus. Debate rages around the importance of each of these factors. Some commentators have considered consensus to be the most prominent (Donoho, 2001, p. 452; Letsas, 2006; Wada, 2004). Butler also identified this as a factor in determining when national authorities were best placed to make a decision (Butler, 2008–2009, p. 701). There are also other important considerations that are relevant when it comes to determining the width of the MoA. These include the effect that the member state's conduct has had on an individual (Donoho, 2001, p. 452) and the aim of the interference (Hutchinson, 1999).

How the factors are to be weighed when determining the width of the MoA is unclear. Authors criticize the vagueness and lack of transparency of the MoA concept and its connecting ideas (Brauch, 2004–2005; Butler, 2008–2009; Hutchinson, 1999; Wada, 2004). Hutchinson argued that the "doctrine as it stands is not a great deal of help to the [European Court] in its decision-making processes" (Hutchinson, 1999, p. 649). There is also a separate criticism that the MoA opens the door to discrimination against minorities (Hamilton, 2013; Hodson, 2011; Lester, 1998; Letsas, 2006; Sweeney, 2005). The specific criticism made here relates to the varying widths given to the MoA in respect of different

human rights. It is worth examining how the width of the MoA is determined in relevant cases that have been brought before the European Court. In certain circumstances there is a recognized narrow MoA. This is exemplified where matters of personal autonomy and privacy are at stake (e.g., Dudgeon v. United Kingdom, 1981). In contrast in relation to equality cases the situation is less clear, and it is more likely that the European Court will determine there is a wider MoA.

The European Court spelled out in Dudgeon v. UK that in relation to privacy there is a narrow MoA as it concerned a "most intimate aspect of private life" (Dudgeon v. United Kingdom, 1981, para. 52). Subsequent cases brought under the privacy branch of Article 8 were also treated in the same way (L and V v. Austria, 2003; Lustig-Prean and Beckett v. UK, 1999; Smith and Grady v. UK, 1999). This was because of the high level of effect that such laws could have on the life of the individual applicants (Grigolo, 2003) and the fact that private conduct is less likely to cause harm than that done in public (Lewis, 2007; Mill, 1859). There was also seen to be a consensus in many member states, meaning that "such limitations were not necessary in a democratic society" (Dudgeon v. United Kingdom, 1981, para. 49; Hutchinson, 1999, p. 648). The certainty about the narrowness of the MoA in relation to the privacy aspect of Article 8 is not replicated in relation to cases brought under Article 14 equality. The width of the MoA that the European Court determines to exist in relation to equality cases is often variable. In Karner v. Austria the European Court stated that in cases of sexual orientation discrimination, the member states in question have to offer particularly convincing and weighty reasons to justify their conduct (See, e.g., Karner v. Austria, 2003; Kozak v. Poland, 2010). Although this would seem to point to a narrow MoA, this has not assisted in the area of same-sex marriage. The European Court continues to be influenced by the lack of consensus among member states (Chapin and Charpentier v. France, 2016; Hämäläinen v. Finland, 2014; Schalk and Kopf v. Austria, 2010). Areas

with lack of international consensus are likely to have a wider MoA (Hutchinson, 1999; Lewis, 2007; Nigro, 2010; Shuibhe, 2009; Wada, 2004), a point reiterated by the European Court on important cases on same-sex marriage referring to the wide MoA enjoyed (Chapin and Charpentier v. France, 2016; Hämäläinen v. Finland, 2014, para. 75; Schalk and Kopf v. Austria, 2010, para. 45). No clear ruling on the width of MoA in relation to equality cases can be deduced, and this remains highly circumstance dependent. Such a wide-ranging vague MoA has the danger of rendering any equality right "meaningless" (Cartabia, 2011, p. 814). However, the European Court is likely to move forward when a lack of consensus either can be explained or starts to emerge. This is why it is so essential to put forward the most convincing arguments before the European Court.

In reaching the limits of protection for gays that the right to privacy can offer, the argument has turned to equality as offering more scope for the evolution of rights. One of the disadvantages of the equality argument is that in contrast to privacy, the width of the MoA is much more variable and can be wider. In having a varying MoA for different types of rights, Donoho and other commentators have stated that, in essence, the European Court has created a "hierarchy among rights protected" by the European Convention (Butler, 2008–2009, p. 703; Donoho, 2001, p. 59). By moving from privacy to equality, the argument in favor of expansion of gay rights to include samesex marriage has moved down the hierarchy of protected rights, meaning less protection is offered to gays. This is another reason to utilize any equality right arguments alongside an expanded family law argument under Article 8 and a revitalized right to marry under Article 12 argument. The next section considers a further difficulty with the use of the equality argument by the European Court.

The equality argument requires categorization of individuals into classes of sexual orientation

Throughout its case law the European Court refers to gays as "homosexuals," creating a clear categorization of sexual interests. Evidence of the heteronormative model can be traced to the earliest cases concerning gays. In Dudgeon v. UK the applicant in question categorized himself as a "homosexual" at the outset of the case by stating that "on his own evidence, [he had] been consciously homosexual from the age of 14" (Dudgeon v. United Kingdom, 1981, para. 32). A similar approach was also taken in Sutherland v. UK (1997, para. 2). Grigolo argued that the European Court traditionally proceeded on the basis of toleration (Grigolo, 2003), stating in Dudgeon v. UK that "'[d]ecriminalisation' does not imply approval" (Grigolo, 2003, p. 1030). Interestingly, the typecasting of homosexuals as a group outside of normal society can also be seen from UK policy. Earlier in the judgment of Dudgeon v. UK the European Court quoted the Wolfenden report as demonstrating the need to protect society at large from "corruption" by such individuals (Dudgeon v. United Kingdom, 1981, para. 17). The European Court has also commonly given credence to arguments made by defendant governments that they were pursuing legitimate aims in seeking to regulate the sexual activities of gays (Lustig-Prean and Beckett v. UK, 1999, para. 67; Salgueiro da Silva Mouta v. Portugal, 1999, para. 30; Smith and Grady v. UK, 1999, para. 74). More recent European Court case law concerning the "family life of same-sex couples" arguably continues to be "inherently shaped by heteronormative standards" (Ammaturo, 2014, p. 178). The very fact that same-sex couples, although now recognized as having a "family life" but not entitled to access the married state,[66] arguably demonstrates a certain "privileging of marital families" (O'Mahoney, 2012, p. 34; Schalk and Kopf v. Austria, 2010; see also Ammaturo, 2014).

The categorization of individuals into classes of sexual orientation appears to have been the common practice of the European Court. Yet when the equality argument is deployed, it becomes a requirement to categorize individuals into classes of sexual orientation, as equality necessitates comparisons to be made between different groups. The categorization of individuals is harmful because it means that minority groups are asserting their "otherness" against the "heteronormal" group (Knop, 2001; Schwobel, 2012, p. 1129). This could lead to an identitarian crisis for those individuals who are forced to identify with a certain group to bring legal challenges. This erodes the true variety of identities to which individuals may ascribe (Grigolo, 2003). Queer theorists instead have argued that categories of homosexual and heterosexual should not be so "fixed and given" (Grigolo, 2003; Kornbluh, 2011). A further difficulty is highlighted by Grigolo, who argued that categorization into different sexual groups is disadvantageous because it "reinforces the dichotomy within which the 'other' ... is defined," meaning that the "position for the dominant (the heterosexual man) is confirmed and stabilised" (Grigolo, 2003, p. 1025). Categorization could mean that the minority groups are dominated by those in majority category (see also Rosenfeld, 2012, p. 344).

Criticism can also be made as to how the European Court has used the comparability test in practice. Arguably, it is evidence of the heteronormative model applied, which means that the European Court is keen to emphasize the entire lack of comparability between non-married and married couples (see Fenwick, 2016). Despite the fact that gays cannot access the married state, case law demonstrates that any case brought by gay couples on the basis of discrimination can only be brought by comparison to non-married heterosexual couples (Hämäläinen v. Finland, 2014; X and Others v. Austria, 2013). This can be seen, for example, by the joint adoption case law. Samesex couples could only bring their case specifically by reference to comparison with non-married couples (e.g., X and Others v Austria, 2013).

The European Court is reluctant to allow any comparison with non-married couples (see Johnson, 2015c). Again in the case of Hämäläinen v. Finland, which concerned the ability of a transgender person to remain married following a sex reassignment, any comparison with a heterosexual couple was viewed as "insufficiently similar" (Fenwick, 2016, p. 255, discussing Hämäläinen v. Finland, 2014). The lack of comparability asserted by the European Court is then used as a reason to refuse to consider Article 14 equality points at all. The European Court therefore never considers whether there is an "objective or reasonable justification for an impugned distinction" (Johnson, 2015c, p. 57). This led Waaldijk to describe the use of the comparability test by the European Court as "nothing but trouble" (Waaldijk, 2016, p. 243). The equality argument requires a comparison. Gays therefore have to assert their "otherness" against the heteronormative model. This emphasizes the heterosexual norm and potentially creates an identity crisis for those individuals who cannot so easily identify with one of the comparator categories. In addition, it appears that the heteronormative model of marriage is so emphasized by the European Court that they are not even be able to entertain any comparison with a non-married couple (see for example, (Hämäläinen v. Finland, 2014; X and Others v. Austria, 2013).

Categorization of individuals into groups of sexual interest does not create solutions and, in practice, can create further problems. Again this exposes a significant weakness in the equality argument. Other arguments are clearly needed to support this. The developing rights of gays to family life under Article 8 are now considered.

Developing "family life" arguments for same-sex partners

As Article 14 is a conditional right, it has to be deployed in conjunction with a case being brought forward under another article. One pathway to be utilized is the

expanded use of the family life argument under Article 8. Historically, the European Court refused to recognize same-sex partners as having a family life (Kerkhoven and Hinke v. The Netherlands, 1992; Mata Estevez v. Spain, 2001; Simpson v. UK, 1986; X and Y v. UK, 1997). Instead, such relationships were always considered "generative of private life rather than family life" (Cabellero, 2004–2005, p. 152). Critics argued that this was another example of the European Convention being "predicated on the nuclear, married, heterosexual ideal" (Stalford, 2002, p. 411). Gradually, the European Court has become more lenient over time with regard to the definition of family within Article 8. It has adopted a "realistic and flexible approach" (Cabellero, 2004–2005, p. 152). This includes protecting de facto situations, including unmarried couples and wider relations as well as single parents and divorced couples (Berrehab and Koster v. The Netherlands, 1988; Boughanemi v. France, 1996; Kroon v. Netherlands, 1994; Marckx v. Belgium, 1979).

This expansion of Article 8 European Convention has gradually been reflected in the more determined stance the European Court has taken toward cases involving gays and same-sex couples. In Karner v. Austria the European Court stated that "differences based on sexual orientation require particularly serious reasons by way of justification" (Karner v. Austria, 2003, para. 37). The European Court avoided having to consider the question under "private life" or "family life" as the applicant had brought his claim under the "right to respect for his home" (Karner v. Austria, 2003, para. 33). In Schalk and Kopf v. Austria (2010), the European Court finally recognized that, due to a "rapid evolution in social attitudes" (para. 93) it would be "artificial to maintain... that... a same-sex couple cannot enjoy 'family life'" (para. 94). It therefore concluded that a "cohabiting same-sex couple living in a stable partnership, fell within the notion of 'family life,' just as the relationship of different-sex couple in the same situation would" (para. 94). This has been seen by authors as a breakthrough case due to the shift in finally

recognizing same-sex partners as being protected under the right to a family life (Danisi, 2011; O'Mahoney, 2012; Sutherland, 2011). However, the difference between recognizing that a same-sex couple can form a de facto family is very different from giving that family de jure, or legal, rights. Although in Schalk and Kopf v. Austria a same-sex couple were for the first time recognized as a de facto family, their legal rights were denied. The European Court did not recognize same-sex marriage due to a lack of consensus on the issue among member states, preferring to allow national courts to decide this matter (Schalk and Kopf v. Austria, 2010, para. 62). Cooper argued that this situation is very contradictory (Cooper, 2011). Having recognized that a same-sex couple form a family, it can be argued that "states [should] have a positive obligation to legally recognize these different family models" (Bribosia et al., 2014, p. 12; see also Cooper, 2011, p. 1761). This point was also highlighted by the dissenting judges in Schalk and Kopf v. Austria, who argued that the majority in that case were being inconsistent in their use of logic (Cooper, 2011; Hodson, 2011).

The case law trajectory does point to an expansive approach toward the development of positive obligations placed on member states under Article 8 (Akandji-Kombe, 2007). Member states have a duty not to interfere with an individual's private life. They also have a positive obligation under Article 8 to ensure effective respect for private and family life, through law enforcement, legal and regulatory frameworks, and the provision of resources.[15] In certain areas, namely the right to sexual self-determination for transgender persons (see I v. United Kingdom, 2002; Christine Goodwin v. UK, 2002) and the right to know one's origins (for example, compelling a reluctant putative father to undergo a DNA test) (see Mikulic v. Croatia, 2002), this has led to far-reaching judgments by the European Court. Most recently, the European Court has relied on the positive obligations under Article 8 to recognize same-sex couples' rights to enter into a registered partnership/civil

partnership (Oliari v. Italy, 2015; see also, Hayward, 2016). Case law recognizing single gay individuals' right to adopt (EB v France, 2008) and same-sex couples' right to adopt outside of marriage (X and Others v. Austria, 2013) has also followed. This is an area that promises much for the future and can help assist with some of the deficiencies noted in the equality right argument under Article 14. If convincing arguments are utilized before the European Court, this may persuade them to find that sufficient consensus has been reached among member states. A final possibility that should be explored relates to Article 12 right to marry.

Article 12 right to marry

In Schalk and Kopf v. Austria (2010) the European Court had a disappointing treatment of the claim made under Article 12. The European Court noted that Article 12 only granted the right to marry "to men and women" (para. 52). This was contrasted to other articles that referred to "everyone" or "no one" and cited the "historical context" as being significant (para. 52). This follows the traditional approach of the European Court as seen by the case of Rees v. United Kingdom, where the European Court stated that "Article 12... is mainly concerned to protect marriage as the basis of the family" (Rees v. UK, 1986, para. 49). It also follows decisions made by domestic courts, which in same-sex marriage cases relied on traditional definitions of marriage set in legislation.[16] The grammatical reading by the European Court also reflects the approach taken by the Human Rights Council in Joslin v. New Zealand (2002). Even the Yogyakarta Principles, which can be regarded as more radical, do not allow a human right for same-sex couples to marry.[17] Once again, this decision has been recently reaffirmed by the European Court in the decision of Chapin and Charpentier v. France (2016), where it was found that there was no violation of Article 12 taken together with Article 14.

Despite these precedents, the text-driven traditional approach by the European Court was not, in fact, necessary. Arguably, any argument based on the intention of the drafters of the European Convention in the 1950s is erroneous. They had no "conscious ambition" to protect heterosexual marriage, since same-sex marriage would have been unthinkable at the time (Johnson, 2015a, p. 220). Fenwick disputed the strict interpretation of the words "men and women" because it could have been intended, instead of excluding same-sex couples, to exclude children from the status of marriage (Fenwick, 2016, p. 253). The definitional argument, therefore, does not offer in itself any justification for the European Court in refusing to extend marriage to same-sex couples.

The attitude of the European Court also contrasts with the decisions of progressive courts that acknowledge the necessity of law evolving over time as society changes (Constitutional Court of South Africa, 2005, para. 102) and that the concept of marriage should not be "stuck in ... permafrost" (Tobin, 2007). Such a definitional argument fails to take account of the social realities of same-sex couples living together in identical fashion to oppositesex couples (Tobin, 2007). It also contrasts with the "living instrument" doctrine the European Court has itself developed, on the basis that human rights should be rendered "dynamic and evolutive" (e.g., in relation to trans persons' rights, see Christine Goodwin v. UK, 2002, para. 74; see also Tahmindjis, 2016 for discussion). In justifying the use of a dynamic interpretation in many other cases, Letsas explained that over time the European Court has "settled on the view that lack of a clear intention on the part of the drafters is simply irrelevant when one is considering whether to recognise a right or not" (Letsas, 2010, p. 518). There are many precedents where the European Court has demonstrated that it is prepared to move away from previous case law where this no longer accords with modern reality. Hodson cited the case of Christine Goodwin v. UK, which shows the European Court using a transformative approach to Article 12 and its rigid language, by allowing a "trans person (in their

own gender) to marry a person of the opposite gender" (Hodson, 2011, p. 172; referring to Christine Goodwin v. UK, 2002). Interestingly, in the Christine Goodwin v. UK case the European Court was influenced by an "emerging consensus," and reference was also made to a "continuing international trend" (Christine Goodwin v. UK, 2002, para. 84; see also Tobin, 2007). In reality, over a 16-year period since the first case concerning trans persons' rights had been considered (Rees v. UK, 1996), there had been, in fact, very little progress in member states recognizing trans persons' rights (McGoldrick, 2016). Bribosia et al. commented that the European Court can rely on an emerging consensus rather than an "arithmetic rule" (Bribosia et al., 2014, p. 22). The trans person cases are an illustration of how the European Court has been prepared to find a consensus and move forward on an issue where the arguments are convincing and persuasive.

A separate justification for the restrictive approach taken by the European Court toward Article 12 (in contrast to the expansive approach under Article 8 right to respect for private and family life) is that marriage should be viewed as a separate category or "lex specialis" (Rees v. UK, 1996). The dictionary definition explains this to be a "law governing a specific matter." This means that the "doctrine states that the law governing a specific subject matter overrides a law that only governs general matters" (U.S. Legal Dictionary, n.d.) All other European Court case law concerning the equalization of family rights for gays and same-sex couples under the positive development of Article 8 family life has taken place outside of the consideration of marriage (see Waaldijk, 2016). Johnson also commented that the European Court has developed a "two-track approach" (Johnson, 2015c, p. 69). The jurisprudence on sexual orientation discrimination issues is regarded as "entirely distinct" to that of marriage (Johnson, 2015c, p. 69). Yet it is not explained thoroughly by the European Court why this should be the case.

One answer could mean that marriage is viewed by the European Court as having a special status, such that it cannot be subject to the usual detailed scrutiny. Hodson argued that marriage is being set apart from the other family rights and being treated as an "untouchable, almost sacred, category" (Hodson, 2011, p. 177; and see also Fenwick, 2016). In Oliari v. Italy the European Court refused to consider the case under Article 12 and declared the complaint on this point as "manifestly ill-founded" (Oliari v. Italy, 2015, para. 194; see also, Hayward, 2016). This can be seen as a "retrograde step" by the European Court and a strengthening of its attitude in refusing to consider any right to same-sex marriage (Fenwick, 2016; Hayward, 2016, p. 30). Again in Chapin and Charpentier v. France (2016) no violation of Article 12 was found. The approach of the European Court can be greatly criticized. As stated earlier the European Court appears to be continuing to promote a heterosexual view of marriage (see section titled "The Equality Argument Requires Categorization of Individuals Into Classes of Sexual Orientation"). At present in treating marriage as fundamentally different from the rest of the family law case law involving sexualities, Grigolo noted that a "structural problem has been created" (Grigolo, 2003, p. 2040). In relation to Article 8 there is a principle of "equality of familial choices" and yet in relation to Article 12 a "specific choice" is secured (Grigolo, 2003, p. 1040). By not even entertaining any comparisons to non-married couples, the European Court does not allow any immediate hope of a recognition of same-sex marriage under Article 12.

It needs to be explored in further detail as to why marriage is given such a sacred special status by the European Court. One explanation could be that marriage is seen by the European Court as a moral or religious right, meaning that it should have a minimal role in regulation (Bradley, 2003; Miller, 2005). Brauch noted that "particularly in the area of morals" wide margins are given (Brauch, 2004–2005, p. 119). Even if it were correct to review marriage as primarily a religious right, it is not always easy to

pinpoint why the European Court need be so deferential in the area of religion (Lewis, 2007). There are also specific difficulties with the European Court regarding marriage as a religious right. Sachs J in the South African Constitutional Court case of Fourie explained that "[m]any may see a religious dimension to marriage, but this is not something that the law is concerned with" (Constitutional Court of South Africa, 2005, para. 102). Civil marriage is largely about a "set of legal protections and benefits" (Miller, 2005, p. 2186).[18] Civil marriage needs to be differentiated from the religious concept. Bradley also concluded that "in a secular society, it becomes increasingly difficult to justify restrictions on marital capacity, founded on Church doctrine" (Bradley, 2003, p. 130). If we move away from the religious or moral or religious reading of marriage, it becomes much more difficult to justify the wide MoA reserved to marriage.

Yet Article 12 as interpreted by the European Court at present seems to be an unpromising line to pursue. However, the developing equality concept (see section titled "ECtHR Engagement with Article 14) and the evolving nature of the family case law concerning same-sex couples under Article 8 (see section titled "Developing 'Family Life' Arguments for Same-Sex Partners") could lead to a dynamic interpretation of Article 12. In reality, the European Court can never divorce its legal jurisprudence from the actual realities of public attitudes across Europe. Ultimately, as Johnson stated, the "implicit motivating principle" in relation to the interpretation of Article 12 is that allowing same-sex couples to marry is currently regarded as a "step too far," bearing in mind the cultural conditions across Europe (Johnson, 2015c, p. 71). In Schalk and Kopf v. Austria (2010) the European Court was careful to refer to the "deep-rooted social and cultural connotations" of marriage, which national authorities are in the best place to assess. The European Court continues to emphasize lack of consensus in these cases (see Chapin and

Charpentier v. France, 2016; Schalk and Kopf v. Austria, 2010). Perhaps this is necessary to ensure that the European Court retains the respect of all its member states and ensures that its judgments are enforced. At the same time, however, the European Court has started to discuss an "emerging consensus" in relation to same-sex marriage between member states (Schalk and Kopf v. Austria, 2010). An incremental or step-by-step approach by the European Court is to be welcomed. It is more likely to result in lasting change, without any backlash in public opinion, which ultimately could retard the cause sought to be advanced. Ultimately, the most convincing arguments are needed to persuade the European Court that a consensus has developed. It is suggested that Article 14 (equality) should be utilized together with a progressive reading of the positive obligations under the family law aspect of Article 8 and a new dynamic interpretation of Article 12, right to marry.

Conclusion

The text of the European Convention does not include a specific sexual orientation non-discrimination clause. This lack of direct protect for gays and same-sex couples could be ameliorated if more member states signed the freestanding Protocol 12 (Wintemute, 2004). However at present, for proponents of same-sex marriage in member states that have not ratified Protocol 12, existing provisions of the European Convention and the case law of the European Court have to be adapted to suit their cause. This article has considered a critical analysis of the existing arguments before the European Court. The historical reliance on the Article 8 privacy right has difficulties when it comes to same-sex marriage, a right so clearly connected with an individual's public status. Concentration on an equality argument can address many of these issues. This is because of the close connections to citizenship, its symbolic status, and the success on the international stage that such arguments have had (Constitutional Court of South Africa, 2005; Obergefell et

al. v. Hodges, Director, Ohio Department of Health, 2015). However, difficulties with the equality argument remain, not least its conditional status under the European Convention of Human Rights. Even if the Protocol 12 were to be ratified by more member states, there are other concerns. These include the vagueness of a wide MoA and the need for categorization into sexual orientation categories that an equality argument requires. This may not be desirable either because of the strengthening of the heteronormative approach of the European Convention or because of the difficulties of individuals identifying with certain set categories. The equality argument alone therefore needs to be strengthened by new revitalized arguments concerning Articles 8 and 12.

In this respect, the developing family law argument under Article 8 is of use. Historically, the European Court refused to recognize same-sex partners as having a "family life" (see section titled "Developing 'Family Life' Arguments for Same-Sex Partners"). Yet over time case law has developed dramatically, and Article 8 has been interpreted flexibly (Cabellero, 2004–2005) to include a wide range of families, far removed from the traditional model. Finally, in 2010 gays were recognized as having a family life (Schalk and Kopf v. Austria, 2010, para. 94). In 2015 a reading of the positive obligations under Article 8 family life led to the European Court imposing a right for same-sex couples to enter into a registered partnership/ civil partnership (Oliari v. Italy, 2015). Yet again, there are currently limits to the extent of Article 8, as this does not entitle same-sex couples to enter into marriage (Oliari v. Italy, 2015). This exposes the difference between recognizing that a same-sex couple can form a de facto family and giving that family the legal right to marry. The current position is unsatisfactory and contradictory (Cooper, 2011; Bribosia et al., 2014; Hodson, 2011). Yet the trajectory of the European Court's judgments on family law under Article 8 is to further expand which families can fall under this protection (see section titled "Developing 'Family Life' Arguments for Same-Sex Partners"). It is argued that over time the fact

that the family life aspect of Article 8 has finally been interpreted to apply to same-sex couples (Schalk and Kopf v. Austria, 2010) will play increasing importance. This is an essential element in requiring a dynamic interpretation of Article 12.

Lastly, this article calls for a new interpretation of Article 12 (right to marry).[19] Disappointing treatment has been given to this article by the European Court to date (see section titled "Article 12 Right to Marry"). A textual reading has been made of Article 12 to grant this right only to "men and women" (Schalk and Kopf v. Austria, 2010). Yet such a limited approach is not necessary, given the European Court's widely developed dynamic interpretation techniques used in other cases involving Article 12 (Christine Goodwin v. UK, 2002). Many progressive courts consider it a necessity that law should change as society changes (Constitutional Court of South Africa, 2005, para. 102). In the case of Christine Goodwin v. UK (2002) the European Court was influenced by an "emerging consensus," and an overall arithmetic majority of member states recognizing trans persons' rights to marry in their own sex was not necessary (para. 84; see also, Tobin, 2007). It is clear that consensus plays an important role in relation to same-sex marriage. However, if the arguments portrayed in this piece are set out in the most convincing fashion, this could assist the European Court in determining that a sufficient consensus has arrived. The developing equality concept (see section titled "ECtHR Engagement with Article 14") and the evolving nature of the family case law concerning same-sex couples under Article 8 (see section titled "Developing 'Family Life' Arguments for Same-Sex Partners") could lead to a dynamic interpretation of Article 12.

Notes

1. Section 3(1)(a) of the Civil Partnership Act 2004 includes a bar on heterosexual access to civil partnership.
2. See Sue Wilkinson's Witness Statement in Wilkinson v. Kritzinger (2006).
3. The following member states have enacted same-sex marriage laws: Germany, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, and the UK (except Northern Ireland).
4. Same-sex marriage is not recognized in several European countries, and, in addition, 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 Fenwick (2016) for discussion.
5. Fenwick (2016, p. 270) explains that gay propaganda laws are still in force in Russia.
6. Article 14 provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
7. The Council of Europe Web site contains details on member states that have ratified Protocol 12 of the European Convention. See http://www.coe.int/en/web/conventions/ search-on-treaties/-/conventions/treaty/177/signatures?p_auth=0Kq9rtcm. As of 12 July 2017 Protocol 12 had been ratified by 20 out of 47 member states.
8. Article 8 of the ECHR provides that "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
9. 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.
10. Foster (2011) further explained that under Article 44 of the European Convention, a decision of the European Court becomes final three months after the decision, where both parties declare that they will not request a reference to the Grand Chamber, or when the Grand Chamber rejects such a request.
11. Stress was placed by the European Court in Oliari v. Italy (2015) on the "movement towards legal recognition" (para. 178) and the "continuing international trend of legal recognition of same-sex couples" (para. 112). This is discussed by Cooper (2011, p. 1748), who argued that there is reason to be "cautiously optimistic."
12. Barrett (2006–2008) discussed at p. 695 the Supreme Court of New Jersey in Lewis v. Harris (2006) and at the Supreme Court of Hawaii in Baehr v. Lewin. See also Lombino, 2003. See also Crane (2003–2004, p. 465) referring to Goodridge v. Department of Public Health (2004).
13. Grigolo (2003, p. 1030) stated that in this case the "[c]ourt did not find it necessary to examine the case under Article 14."
14. Other cases have also stressed the importance of the equality argument under Article 14 (see also, X and Others v. Austria, 2013; Vallianatos v. Greece, 2013; Hämäläinen v. Finland, 2014).
15. In Marckx v. Belgium (1979) para. 31 the ECtHR explained that Article 8 placed "positive obligations on the states in addition to the duty of non-interference in private and family life." See also Hayward (2016) and O'Mahoney (2012).
16. E.g., the English High Court in Wilkinson v. Kritzinger (2006) and the Irish High Court in Zappone and Gilligan v. Revenue Commissioners (2006).
17. Yogyakarata Principles 24E and 24F on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (http://www.yogyakarta principles.org/).
18. Miller (2005) referring to Namath (2004).
19. Article 12 provides that "[m]en 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."

References

ADT v. UK. (2000, July 31). App. no. 35765/97.

Akandji-Kombe, J. F. (2007). Positive obligations under the European Convention on Human Rights: A guide to the implementation of the ECHR. Human Rights Handbook No.7. Retrieved from http://www.echr.coe.int/LibraryDocs/dg2/hrhand/dg2-en-hrhand-07 (2007).pdf

Aloni, E. (2010–2011). Incrementalism, civil unions, and the possibility of predicting same-sex marriage. Duke Journal of Gender Law and Policy, 18, 105.

Ammaturo, F. (2014). The right to a privilege? Homonormativity and the recognition of same-sex couples in Europe. Social and Legal Studies, 23, 175. doi:10.1177/ 0964663914521651

Baehr v. Lewin. 852 P.2d 44.

Bamforth, N. (2012). Sexuality and citizenship in contemporary constitutional argument. International Journal of Constitutional Law, 10, 477. doi:10.1093/icon/mor065

Barker, N. (2012, May). Civil partnership: An alternative to marriage? Ferguson and others v. UK. Family Law, 42, 548.

Barrett, S. J. (2006–2008). For the sake of the children: A new approach to securing same-sex marriage rights. Brooklyn Law Review, 73, 695.

Berrehab and Koster v. The Netherlands. (1988, June 21). App. no. 10730/83.

Boughanemi v. France. (1996, April 24). App. no. 22070/93.

Bradley, D. (2003). Comparative law, family law, and common law. Oxford Journal of Legal Studies, 23, 127. doi:10.1093/ojls/23.1.127

Brauch, J. (2004–2005). The margin of appreciation and the jurisprudence of the European Court of Human Rights: Threat to the rule of law. Columbia Journal of European Law, 11, 113.

Bribosia, E., Rorive, I., & Van den Eynde, L. (2014). Same-sex marriage: Building an argument before the European Court of Human Rights in light of the U.S. experience. Berkeley Journal of International Law, 32, 1.

Butler, P. (2008–2009). Margin of appreciation: A note towards a solution for the Pacific. Victoria University Wellington Law Review, 39, 687.

Cabellero, S. S. (2004–2005). Unmarried cohabiting couples before the European Court of Human Rights: Parity with marriage? Columbia Journal of European Law, 11, 151.

Cartabia, M. (2011). The European Court of Human Rights: Judging non-discrimination. International Journal of Constitutional Law, 9, 808. doi:10.1093/icon/mor043 Chapin and Charpentier v. France. (2016, June 9). App. no. 40183/07.

Christine Goodwin v. UK. (2002, July 11). App. no. 28957/95.

Constitutional Court of South Africa. (2005). Minister of Home Affairs and Another v. Fourie and Another (CCT 60/40) [2005] ZACC 19, [2006] (3) BCLR 355 (CC), [2006] (1) SA 524 (CC). Retrieved from http://www.saflii.org.za/za/cases/ZACC/2005/19.html

Cooper, S. L. (2011). Marriage, family, discrimination, and contradiction: An evaluation of the legacy and the future of the European Court of human rights jurisprudence on LGBT rights. German Law Journal, 12, 1746.

Cossman, B. (2007). Sexual citizens: The legal and cultural regulation of sex and belonging. Palo Alto, CA: Stanford University Press.

Cott, N. (2000). Public vows: A history of marriage and the nation. Cambridge, MA: Harvard University Press.

Council of Europe. (2012). Brighton declaration high level conference on the future of the ECHR. Retrieved from http://www.echr.coe.int/Documents/2012_Brighton_ FinalDeclaration_ENG.pdf

Crane, J. (2003–2004). Legislative and constitutional responses to Goodridge v. Department of Public Health. New York University Journal of Legislation and Public Policy, 7, 465.

Danisi, C. (2011). How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence. International Journal of Constitutional Law, 9, 793. doi:10.1093/icon/mor044

Dent, G. (1999). The defense of traditional marriage. Journal of Law and Politics, 15, 581.
Donoho, D. L. (2001). Autonomy, self-governance, and the margin of appreciation: Developing a jurisprudence of diversity within universal human rights. Emory International Law Review, 15, 391.
Dorf, M. (2011). Same-sex marriage, second-class citizenship, and law's social meanings. Virginia Law Review, 97, 1267.
Dudgeon v. United Kingdom. (1981, October 22). App. no. 7525/76.
Dunlap, M. (1991). The lesbian and gay marriage debate: A microcosm of our hopes and troubles in the nineties. Law and Sexuality Review Lesbian and Gay Legal Issues, 1, 63.
Dzehtsiarou, K. (2011). Does consensus matter? The legitimacy of European consensus in the case law of the European Court of Human Rights. Public Law, 3, 534.
EB v. France. (2008, January 22). App. no. 43546/02.
Equality Network. (2011). Equal marriage: Report of the equality network survey of LGBT people's views on marriage equality. Retrieved from http://www.equality-network.org/wpcontent/uploads/2013/08/Equal-Marriage-Report-26.1.11.pdf
Fenwick, H. (2016). Same sex unions and the Strasbourg court in a divided Europe: Driving forward reform or protecting the Court's authority via consensus analysis. European Human Rights Law Review, 3, 248.
Ferguson v. UK. (2011, February 2). App. 8254 /11.
Foster, S. (2011). Human rights and civil liberties (3rd ed.). Essex, UK: Pearson Education.
Frette v. France. (2002, February 26). App. no. 36515/97.
Goodridge v. Department of Public Health. (2004). 440 Mass. 309, 798 N.E. 2d 941.
Grigolo, M. (2003). Sexualities and the ECHR: Introducing the universal sexual legal subject. European Journal of International Law, 14, 1023. doi:10.1093/ejil/14.5.1023
Guardian. (2017). We will keep fighting for civil partnerships for mixed-sex couples. Retrieved from https://www.theguardian.com/commentisfree/2017/feb/21/civil-partnerships-mixedsex-couples-court-of-appeal
Hämäläinen v. Finland. (2017, July 16). App. no. 37359/09.
Hamilton, F. (2013). Why margin of appreciation is not the answer to the gay marriage debate. European Human Rights Law Review, 1, 47.
Harris, A. (2007–2008). Loving before and after the law. Fordham International Law Review, 76, 2821.
Hayward, N. (2016). Same-sex registered partnerships: A right to be recognised? Cambridge Law Journal, 75, 27. doi:10.1017/S0008197316000179
Helfer, L., & Voeten, E. (2014). International courts as agents of legal change: Evidence from LGBT Rights in Europe. International Organization, 68(1), 77–110. doi:10.1017/ S0020818313000520
Hodson, L. (2011). A marriage by any other name? Schalk and Kopf v. Austria. Human Rights Law Review, 11, 170. doi:10.1093/hrlr/ngq054
Hutchinson, M. (1999). The margin of appreciation doctrine in the European Court of Human Rights. International and Comparative Law Quarterly, 48, 638. doi:10.1017/ S0020589300063478
I v. United Kingdom. (2002, July 11). App. no. 25680/94.
Isaak, M. (2008). What's in a name? Civil unions and the constitutional significance of marriage. University of Pennsylvania Journal of Constitutional Law, 10, 607.
Johnson, P. (2010). An essentially private manifestation of human personality: Constructions of homosexuality in the European Court of Human Rights. Human Rights Law Review, 10, 67. doi:10.1093/hrlr/ngp034
Johnson, P. (2015a). The choice of wording must be regarded as deliberate: Same-sex marriage and Article 12 of the European Convention on Human Rights. European Law Review, 40(2), 207.
Johnson, P. (2015b). Homosexual propaganda in the Russian Federation: Are they in violation of the European Convention on Human Rights? Russian Law Journal, 3(2), 37. doi:10.17589/2309-8678-2015-3-2-37-61
Johnson, P. (2015c). Marriage, heteronormativity and the European Court of Human Rights: A reappraisal. International Journal of Law Policy and the Family, 29, 56. doi:10.1093/ lawfam/ebu016
JRM v. The Netherlands. (2003, February 8). App. no. 16944/90.
Juliet Joslin et al. v. New Zealand. (2002). Communication no. 902/1999, U.N. Doc. A/57/40.
Karner v. Austria. (2003, July 24). App. no. 40016/98.

Kerkhoven and Hinke v. Netherlands. (1992, May 19). App. no. 15666/89 Judgment.
Knop, K. (2001). Citizenship, public and private. Law and Contemporary Problems, 71, 312.
Kochenov, D. (2009). On options of citizens and moral choices of states: Gays and European federalism. Fordham International Law Review, 33, 156.
Kornbluh, F. (2011). Queer legal history: A field grows up and comes out. Law and Social Inquiry, 36, 537. doi:10.1111/lsi.2011.36.issue-2
Kozak v. Poland. (2010, March 2). App. no. 13102/02.
Kroon v. Netherlands. (1994, October 27). App. no. 18535/91.
L and V v. Austria. (2003, January 9). App. nos. 39392/98 and 39829/98.
Lester, P. (1998). Universality versus subsidiarity: A reply. European Human Rights Law Review, 1, 73.
Letsas, G. (2006). Two concepts of the margin of appreciation. Oxford Journal of Legal Studies, 26, 705. doi:10.1093/ojls/gql030
Letsas, G. (2010). Strasbourg's interpretative ethic: Lessons for the international lawyer.
European Journal of International Law, 21, 509. doi:10.1093/ejil/chq056 Lewis v. Harris.
(2006). 908 A.2d 196, 224 (N.J. 2006).
Lewis, T. (2007). What not to wear: Religious rights, the European Court, and the margin of appreciation. International and Comparative Law Quarterly, 56, 395. doi:10.1093/iclq/ lei169
Lombino, R. M. II. (2003). Gay marriage: Equality matters. Southern California Review of Law and Women's Studies, 14, 3.
Lustig-Prean and Beckett v. UK. (1999, September 27). App. nos. 31417/96 and 32377/96.
Marckx v. Belgium. (1979, June 13). App. no. 6833/74.
Marshall, K. L. (2010). Strategic pragmatism or radical idealism? The same-sex marriage and civil rights movements juxtaposed. William and Mary Policy Review, 2, 194.
Marshall, T. (1992). Citizenship and social class. In T. Marshall & T. Bottomore (Eds.), Citizenship and social class. London, UK: Pluto Press.
Mata Estevez v. Spain. (2001, May 10). App. No. 56501/00.
McGoldrick, D. (2016). A defence of the margin of appreciation and an argument for its application by the Human Rights Committee. International and Comparative Law Quarterly, 65, 21. doi:10.1017/S0020589315000457
Mikulic v. Croatia. (2002, February 7). App. no. 53176/99.
Mill, J. S. (1859). On liberty. In S. Collini (Ed.), On liberty and other writings. Cambridge, UK: Cambridge University Press.
Mill, J. S. (1936). Principles of political economy. London, UK: Longmans Green.
Miller, A. A. (2005). Letting go of a national religion: Why the state should relinquish all control over marriage. Loyola of Los Angeles Law Review, 38, 2185–2218.
Namath, M. (2004, March 4). Statement at a press conference concerning the Federal Marriage Act on Capitol Hill, Washington, DC. Retrieved from http://rac.org/news/030304.html.
Nigro, R. (2010). The margin of appreciation doctrine and the case law of the European Court of Human Rights on the Islamic veil. Human Rights Law Review, 11, 531. doi:10.1007/s12142-010-0161-z
Obergefell et al. v. Hodges, Director, Ohio Department of Health. (2015). (Docket No. 14-556). Oliari v. Italy. (2015, July 31). App. nos. 18766/11 and 36030/11.
O'Mahoney, C. (2012). Irreconcilable differences? Article 8 ECHR and Irish law on non-traditional families. International Journal of Law Policy and the Family, 26, 31. doi:10.1093/lawfam/ebr024
Poppelwell-Scevak, C. A. R. L. (2016). The European Court of human rights and same-sex marriage: The consensus approach. Norwegian Open Research Archives (NORA).
Rees v. UK. (1986, October 17). App. no. 9532/81.
Reinhardt, S. (2005). Legal and political perspectives on the battle over same-sex marriage. Stanley Law and Policy Review, 16, 12.
Richardson, D. (1998). Sexualityand citizenship. Sociology, 32, 83. doi:10.1177/ 0038038598032001006
Rosenfeld, M. (2012). Introduction: Gender, sexual orientation and equal citizenship.
International Journal of Constitutional Law, 10, 340. doi:10.1093/icon/mos003 Salgueiro da Silva Mouta v. Portugal. (1999, December 21). App. no. 33290/96.
Schalk and Kopf v. Austria. (2010, June 24). App. no. 30141/04.

Schwobel, C. (2012). Whither the private in global governance. International Journal of Constitutional Law, 10, 1106–1133. doi:10.1093/icon/mos036
Sedgewick, E. (1990). Epistemology of the closet. Harmondsworth, UK: Penguin.
Shany, Y. (2005). Toward a general margin of appreciation doctrine in international law. European Journal of International Law, 16, 907. doi:10.1093/ejil/chi149
Shuibhe, N. N. (2009). Margins of appreciation; National values, fundamental rights and EC free movement law. European Law Review, 34, 230. Simpson v. UK. (1986, May 14). App. no. 11716/85.
Smith and Grady v. UK. (1999, September 27). App nos. 33985/96 and 33986/96.
Stalford, H. (2002). Concepts of family under EU law: Lessons from the ECHR. International Journal of Law, Policy, and the Family, 16, 410. doi:10.1093/lawfam/16.3.410
Stark, B. (2006). When globalization hits home: International family law comes of age. Vanderbilt Journal of Transnational Law, 36, 1551.
Steinfeld v. Secretary of State for Education. (2017). EWCA Civ 81.
Sutherland v. UK. (1997, July 1). App. no. 25186/94.
Sutherland, E. (2011). A step closer to same-sex marriage throughout Europe. Edinburgh Law Review, 15, 97.
Sweeney, J. A. (2005). Margin of appreciation: Cultural relativity and the European Court of Human Rights in the post–Cold War era. International and Comparative Law Quarterly, 54, 459. doi:10.1093/iclq/lei003
Tahmindjis, P. (2016). Sexuality and international human rights law. Journal of Homosexuality, 48(3), 9. doi:10.1300/J082v48n03_03
Teutonico, D. (2016–2017). Pajic v. Croatia. Tulane Journal of International and Comparative Law, 25, 461.
Tobin, B. (2007). Gay marriage: A bridge too far? Irish Student Law Review, 15, 175
Treaty on the Functioning of the European Union. (2016). OJ C 202 (2016). European Union. Retrieved from http://eur-lex.europa.eu/collection/eu-law/treaties.html.
U.S. Legal Dictionary. (n.d.) "Lex specialis." Retrieved from http://definitions.uslegal.com/l/ lex-specialis/.
Vallianatos v. Greece. (2013, November 7). App. nos. 29381/09 and 32684/09.
Waaldijk, K. (2005). More or less together: Levels of legal consequences of marriage, cohabitation, and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries (in cooperation with John Asland et al.). Documents de travail no. 125, Paris, France: Institut National d'Études Démographiques.
Waaldijk, K. (2016). Great diversity and some equality: Non-marital legal family formats for same-sex couples in Europe. In K. Waaldijk, M. Van Den Brink, S. Burri, & J. Goldshmidt (Eds.), Equality and human rights: Nothing but trouble – Liber Amicorum Titial Loenen. Utrecht, Netherlands: Netherlands Institute of Human Rights. 2016 Sim Special 38.
Wada, E. (2004). A pretty picture. The margin of appreciation and the right to assisted suicide. Loyola of Los Angeles International and Comparative Law Review, 27, 275.
Walker, K. (2001). Moving gaily forward? Lesbian, gay and transgender human rights in Europe. Melbourne Journal of International Law, 2, 122.
Wilkinson v. Kritzinger. (2006). EWHC 835.
Wilkinson v. Kritzinger. (2006). EWHC 2022 (Fam).
Wintemute, R. (2003–2004). Sexual orientation and the charter: The achievement of formal legal equality (1985–2000) and its limits. McGill Law Journal, 49, 1143.
Wintemute, R. (2004). "Within the ambit": How big is the "gap" in Article 14 European Convention on Human Rights?: Part 1. European Human Rights Law Review, 4, 366.
Wintemute, R. (2010, August 12). Consensus is the right approach for the European Court of Human Rights. Retrieved from https://www.theguardian.com/law/2010/aug/12/europeancourt-human-rights-consensus
X and Others v. Austria. (2013, February 19). App. no. 19010/07.
X and Y v. UK. (1997, April 22). App. no. 21830/93.
Yourow, H. C. (1996). Margin of appreciation doctrine in the dynamics of European human rights jurisprudence. Netherlands: Brill.

Zago, G. (2015). A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on Oliari v. Italy. Articolo 29 Leiden University, Leiden, Netherlands. Zappone and Gilligan v. Revenue Commissioners. (2006). IEHC 404.

Publication Three: Hamilton, F., 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) 1 European Human Rights Law Review 33 – 45.

European Human Rights Law Review

2018

Same-sex marriage, consensus, certainty and the European Court of Human Rights

Frances Hamilton

Subject: Human rights . **Other related subjects:**

Family law.

Keywords: European Court of Human Rights; Human rights; Margin of appreciation; Marriage; Right to marry; Same sex partners

*E.H.R.L.R. 33 Abstract

There remains no right to same-sex marriage before the European Court of Human Rights (the Court). Yet it seems likely that at some stage the Court will recognise same-sex marriage. Recent dicta stresses the movement towards legal recognition across Member States. It is only a lack of consensus, leading to a wide Margin of Appreciation, which prevents the Court recognising same-sex marriage. This article proposes that if the Court continues with this approach, they should at least outline in future judgments how many domestic legislatures need to legislate in favour of same-sex marriage, before they will determine that a consensus will exist. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a same-sex couple to know when their marriage will be legally recognised. If done in a consistent manner, this would increase the legitimacy of the Court and has the major advantages of transparency, certainty and predictability.

1. Introduction

There continues to be no right to same sex-marriage before the Court.[1] Following *Oliari v Italy*, Member States are obliged to provide same-sex couples with some form of civil partnership or registered partnership.[2] This is a breakthrough for same-sex partners[3] although in its judgment the Court concentrated upon the difference between the lack of legal and protections in Italy and the "social reality of the applicants" who were widely accepted.[4] Fenwick and Hayward argue that the Court by doing this "sought to relate its scope to circumstances arising locally, in Italy, and most likely to arise in Western European States".[5] In addition, although civil partnership is increasingly seen as having an intrinsic value in itself[6] this will also not satisfy those proponents of same-sex marriage who view marriage as the gold standard.[7]

However, recognition of same-sex marriage by the Court at some stage now seems likely. Stress was placed by the Court in *Oliari v Italy* on the "movement towards legal recognition" and the "continuing ***E.H.R.L.R. 34** international trend of legal recognition of same-sex couples".[8] The Court justifies the reason for not introducing same-sex marriage on the lack of consensus between Member States.[9]

This lack of consensus leads to a wide Margin of Appreciation (MoA), otherwise known as area of discretion,[10] given to Member States. Today, 15 Member States recognise same-sex marriage.[11] This accords with a "global movement to legalise same-sex marriage".[12] Reform is by no means complete, as certain Central and Eastern European states continue

to ban same-sex marriage and constitutionally define marriage as between a man and a woman.[13] Russia, a Council of Europe Member State, seems to be a long way away from considering protections for same-sex couples.[14] A claim is now being brought to the Court from three same-sex couples in Russia who are claiming a right to same-sex marriage.[15] As Russia has no form of legal protection for same-sex couples, the Court is considering the matter as a "claim for some means of formalising their relationship in Russia, via a form of registered partnership".[16] It remains to be seen whether the Court will confine *Oliari v Italy* to countries where same-sex couples are socially accepted, which is very different from the homophobia present in Russian society. What will be crucial in the Court's analysis here is the level of consensus deemed to exist between Member States on this issue.

It remains debateable whether the Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation to same-sex marriage. Commentators argue that placing such emphasis on consensus ignores the interests of the minority group.[17] They also argue that in cases that fall within the MoA doctrine due to there being no consensus, there is a lack of legal analysis[18] and no high level of scrutiny.[19] Instead, the consensus standards results in a fact-dependent ***E.H.R.L.R. 35*** approach, with "little, if any constraints on state power".[20] This author has written elsewhere that such an approach means that Member States could be relying on erroneous[21] or discriminatory reasons in refusing to sanction same-sex marriage, reasons which are not investigated by the Court.[22] This article sets out a novel approach by suggesting that if the Court continues to stress the need for consensus in future judgements regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know when their marriage will be legally recognised.[23] This is also stressed by international case-law[24] and international human rights covenants.[25] Marriage bestows many legal rights[26] and is often connected to citizenship.[27]

The suggested approach will increase the legitimacy of the Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of Member States. This is needed at a time when certain political factions are discussing leaving the Council of Europe.[28] The proposed reform also has the major advantages of transparency, certainty and predictability. The next section sets out the conundrum facing the Court in balancing the competing tensions of universalism and relativism in relation to same-sex marriage. Section 3 details a critique of the existing interpretation of consensus. Section 4 sets out case-law from the area of sexualities demonstrating the lack of certainty over how consensus is determined. Finally, section 5 considers the proposed reform in more detail and considers the advantages this would bring.

2. The compromise between universalism and relativism

One of the central challenges for the Court is to uphold the universal standard of human rights, whilst respecting regional differences. Fenwick and Hayward explain that in the context of rights to legal recognition of same-sex couples, there is much difficulty for the Court in "adjudicating in an increasingly nationalistic context"[29] where Eastern European countries take a much more conservative approach in this regard.[30] Yet this

approach by the Court attracts much criticism. Popplewell-Scevak argues that given the European Convention on Human Rights (European Convention) Preamble 's promise to "protect and enforce human rights … it is perplexing to see the court refrain from legalising same-sex marriage …". ***E.H.R.L.R. 36*** [31] Some commentators state that the Court should have a leading, standard setting, aspirational role.[32] Benvenisti, for example, argues that the Court has a "duty to set universal standards".[33] This would mean in relation to same-sex marriage that the Court should no longer rely on a lack of consensus leading to a wide MoA. Indeed, the Court is well aware that the European Convention cannot be "frozen in time".[34] Concepts such as "living instrument" allow the Court to operate "evolutive" and "dynamic" interpretative techniques so that the European Convention can be interpreted in the light of present-day conditions rather than what the drafters thought back in the 1950s.[35] Such techniques are used throughout the case-law which will be examined in the relevant area of sexualities and family law.[36]

However, in an area as sensitive as same-sex marriage, the Court wishes to avoid any charge that it is engaging in "judicial politics".[37] Unlike the role of the Supreme Court in the US for instance, the Court has to constantly adhere to the states' MoA.[38] There needs to be a compromise between the competing interests at stake. The MoA alongside consensus (which the latter is one of the key factors in determining the width of the MoA) are the "primary tools"[39] employed by the Court in its case-law on same-sex marriage in ensuring it does not overstep the "primary responsibility"[40] given under the European Convention to Member States to secure human rights.[41] The doctrine of subsidiarity[42] has been recently re-emphasised.[43] The role of the Court is in fact secondary. Its task is to "examine the domestic decision" and ensure compatibility with the European Convention.[44] This is all part of securing agreement and social cooperation in the face of moral pluralism,[45] which is particularly important in an area such as same-sex marriage. As set out above, it remains debateable whether the Court is following the correct approach in this regard.[46] However, as the Court currently determines that a lack of consensus is decisive in reaching a wide MoA,[47] this article argues that at least more clarity and guidance is needed as to when a consensus is deemed to have been reached. As stated above, there are constitutional, manifold legal and symbolic implications of marriage.[48] Couples are entitled to know when they will be able to enter into a same-sex marriage. ***E.H.R.L.R.37***

3. The consensus standard critiqued

Commentators argue that consensus, in relation to many human rights, is often the most important factor in determining the width of the MoA given to a Member State.[49] When considering same-sex marriage, it is clear that lack of consensus is the critical factor.[50] The MoA varies greatly depending on what rights are involved. [51] It can and frequently does evolve over time. Factors which are commonly cited in determining the width of the MoA include the importance of the right, the Member State interest involved and whether there is a consensus on an issue.[52] Certain rights are given a narrow MoA.[53] Equally, certain vulnerable groups, including gay people, are given extra protection.[54] Where discrimination concerns gay people, for example, the Member State will need to have "very weighty reasons for the restriction in question".[55] Logically, now that same-sex couples fall under the definition of family under art.8,[56] the "very weighty reasons" test should lead to a breach of art.12 (right to marriage) being found in relation to same-sex couples bar from marriage. Such was the view of the minority

judges in *Schalk v Austria*.[57] It is only because the Court determines there to be a wide MoA (due to a lack of consensus) in relation to marriage under art.12 which prevents the Court moving forward in this area.[58]

Many of the criticisms surrounding MoA and its key factor of consensus centre around the fact that it is very difficult to understand how it works and that it is lacking in predictability.[59] Some commentators even argue that it is not "consistent with the rule of law".[60] There is no certainty as to when the Court will determine that sufficient consensus has been reached to recognise same-sex marriage. Bribosia et al. reject the consensus argument on the basis that it is "fraught with methodological imprecision".[61] Confusion reigns with regards to the terminology used, and multiple terms are used including "common European standard", "common European approach", "emerging consensus" or "trend".[62] The Court also demonstrates no consistency in determining what sources are appropriate for establishing a consensus.[63] For example, on occasion emphasis has been placed on scientific reports, and this emphasis is later disregarded in similar ***E.H.R.L.R. 38*** cases.[64] There are also issues arising in relation to the thoroughness of the research on which the Court makes its decision.[65]

However, the emphasis placed on consensus as the determinative factor for the width of the MoA ensures that the Court is acting in concert with domestic authorities and within the dictates of subsidiarity.[66] Debate continues about the appropriateness of stressing consensus in relation to same-sex marriage.[67] This article suggests that if the Court in future judgments continues to concentrate on the need for consensus, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court, as it will link the Court's decision back to the democratic mandate of the Member States' legislatures. If applied in such a manner, the doctrine of consensus could be an important legitimising tool. This could give the Court's judgments in this area extra weight, which is useful at a time when certain political factions are discussing leaving the Council of Europe.[68] The next section examines the lack of certainty resulting from how the Court has applied the doctrine of consensus in its developing line of case-law concerning sexualities.

4. Case-law demonstrating the lack of certainty over how consensus is determined

In the area of family law and sexualities, the Court has employed a dynamic interpretative technique. The Court has not been insistent on demonstrating consensus in order to move case-law forwards. Indeed, it has been prepared to depart from previous precedents in the areas of decriminalisation of same-sex sexual activity,[69] equalisation of the age of consent for same-sex couples,[70] same-sex couples' tenancy rights,[71] employment of gay people in the military,[72] definition of family concerning gay people,[73] gay persons' right to adopt[74] and most recently same-sex couples' rights to form civil partnerships,[75] all without demonstrating a consistent method as to how consensus is determined. All of this case-law has meant a progressive approach to the development of gay rights and has to be applauded as such. Fenwick and Hayward also argue that a further move towards an increasing consensus in relation to legal recognition of same-sex couples rights can be done by removing "asymmetry of access" to protected legal partnerships.[76] They explain asymmetry of access to arise when same-sex and opposite-sex couples

are given different legal statuses. Erasing asymmetry of access in the context of Western European countries this would mean removing inequalities where same-sex couples can only access registered partnerships and not marriage.[77] Such a course of action together with an increasing number of Eastern European countries introducing ***E.H.R.L.R. 39*** for the first time some level of registered partnership, would undoubtedly increase the pressure on the Court to recognise an increasing level of consensus. In turn this would make the position of Eastern European countries which afford same-sex couples no legal protections as being seen to be "starkly anomalous".[78] However, there would still remain doubt as to when the Court would deem there to be a sufficient level of consensus to recognise a right to same-sex marriage. There is an underlying problem in that the Court has shown no consistent application as to determine when consensus exists. The Court is insistent on consensus being the decisive factor here,[79] but its case-law leaves no clues as to when this will be determined to exist. Key cases are now examined in more detail.

The first in this important line of cases is *Dudgeon v United Kingdom*, which concerned criminalisation of sodomy in Northern Ireland. This was subsequently found to contravene art.8 (right to respect for private life) and has been lauded as "open[ing] the door for LGBTQI rights to be include under the [European] Convention".[80] A flaw in the judgment, for those seeking to understand when the Court will advance the case for same-sex marriage, is that the Court never thoroughly explained its departure from previous case-law. The reversal of precedent was done on the basis of a "better understanding, and in consequence an increased tolerance, of homosexual behaviour in the great majority of Member States".[81] Little guidance was given as to what was meant about a "better understanding".[82] The Court did consider other domestic laws[83] but never thoroughly documented how many other Member States' legislatures were required to have introduced legislation. Letsas criticises this as instance of the Court making a "moral" decision, rather than determining "some commonly accepted standards".[84] Confusing terminology such as "better understanding" does little to develop our understanding of when a sufficient consensus will be reached in relation to same-sex marriage.

Brauch also considers that case-law demonstrates that the Court utilises the concept of MoA, with its key factor of consensus, in a manner which results in the standard sometimes changing without warning.[85] The case he discusses concerned gay peoples' employment in the military.[86] Previously national security defences put forward by Member States were given a wide MoA.[87] In *Smith v United Kingdom*, the Court determined (despite the argument to the contrary by the UK government)[88] that no defence could be upheld on the basis of national security. This was because "particularly serious reasons" had to exist in relation to restrictions which concerned the "most intimate part of an individuals' private life".[89] Ultimately, the UK were not successful in their defence which the Court interpreted as "founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation".[90] Despite national security defences previously being given a wide MoA,[91] suddenly no MoA was given to the UK. Again, although advancing LGBT rights, the sudden shift in position by the Court was unpredictable. The UK had prepared ***E.H.R.L.R. 40*** its defence on the basis of a wide MoA and had no notice from the Court that this no longer existed, arguably meaning that the UK did not prepare its case to best effect.

The case of *Karner v Austria*,[92] considered the rights of a surviving same-sex partner to inherit a tenancy. The Court again departed from previous precedent[93] to find a breach of art.14 (equality) in conjunction with art.8 (privacy).[94] The issue of consensus was avoided. Although third party interveners brought up international examples of equal treatment of unmarried same-sex and opposite-sex couples,[95] these were not considered in the Court's judgment. Instead, the Court introduced a new dicta that "weighty reasons" were needed in justifying differences in treatment between opposite-sex and same-sex partners.[96] Whilst the case was obviously an advance for LGBT rights by making any Member States' discriminatory law against gay people subject to a heightened test, it did not address the issue concerning consensus. It offers no clues to be able to predict when a consensus will be deemed to exist in relation to same-sex marriage.

Another change from previous case-law occurred in the recognition of same-sex relationships under the "family" aspect of art.8. The Court had a long entrenched approach[97] to not recognising same-sex relationships under the family aspect of art.8.[98] Instead, such relationships were always considered under the private life aspect.[99] It was not until *Schalk v Austria (2010)* that same-sex couples were recognised as having family rights.[100] This has been described as "remarkable"[101] progress. The Court justified its extension of case-law on the basis of the "rapid evolution of social attitudes towards same-sex couples".[102] Again, although this case illustrates the dynamic interpretative techniques of the Court, there was no explanation as to how the Court gauged the change in social attitudes. There was consideration of the legislative status of same-sex couples internationally, but the Court stated this was insufficient to amount to a European consensus in relation to same-sex marriage.[103] Yet despite the lack of consensus in relation to same-sex marriage, the Court did transform previous case-law to recognise same-sex couples having a right to family life under art.8. This approach of the Court is confusing. A "rapid evolution of social attitudes" cannot be the same as consensus, as no consensus was determined to exist in relation to the right to marry.[104] It appears from *Schalk v Austria (2010)* that consensus is not needed for art.8 (right to a private and family life), but is required for art.12 (right to marry.) Yet again, however, there is no clue as to when consensus will be reached for the purpose of art.12. This article sets out a suggestion that the Court should clarify in future judgments when consensus will be deemed to have been reached.

The lack of clarity as to the weight given to consensus arguments in this area is further revealed by the most recent line of cases before the Court concerning civil partnership. In *Vallianatos v Greece* consensus played an important role in determining that there was a breach of art.14, taken in conjunction with art.8.[105] Where Greece had reserved civil partnership rights to opposite-sex couples only, an "evolving" or "minority" consensus[106] was deemed important as only two states which had introduced such statuses had reserved them specifically to opposite-sex couples. Confusingly this "minority" consensus was seen as ****E.H.R.L.R. 41*** more important than the fact that overall (at that stage) only a minority of Contracting States had introduced same-sex registered partnerships. This judgment shows that in some cases the Court looks at consensus within a selected group of Member States, rather than consensus across all Member States.

In *Oliari v Italy (2015)* consensus played an important role.[107] The Court performed an extensive survey of comparative law and found that for the

first time a "thin majority" of states recognised a right to some level of civil partnership.[108] This was an important reason for the Court's decision that art.8 had been breached. Yet in other cases the Court has taken no regard of consensus. In the recent case of *Ratzenbock v Austria*,[109] which concerned an opposite-sex couple wishing to enter into a civil partnership, on the grounds that this was a lighter form of recognition, the Court did not consider consensus at all. Instead, the majority of the Court considered that different-sex couples were not in a comparable situation to that of same-sex couples. This was because the "institutions of marriage and … registered partnership [were] essentially complementary in Austrian law".[110] As no comparator was found the Court did not go on to "assess the difference of treatment or the justification for the difference".[111] This seems at odds with previous decisions made in *Schalk v Austria* and *Vallianatos v Greece* where a comparison was made between same and opposite-sex couples and their access to legal statuses.[112] It also meant that the Court never considered a consensus analysis at all, despite this being seen as decisive in *Oliari v Italy*.[113] Interestingly, Fenwick and Hayward argue that a consensus could be found in this area, depending on how the question is framed.[114] If the Court had asked if following the introduction of same-sex partnerships, the majority of Member States had confined them to same-sex partners the answer would have been in the affirmative. However, if the Court had asked instead whether the majority of states following introduction of same-sex partnerships had "maintained asymmetry of access" the answer would have been in the negative, as most Member States following the introduction of registered partnerships had gone on to introduce same-sex marriage.[115] Austria is one of the few countries to have maintained registered partnerships for same-sex couples and marriage for opposite-sex couples. This further serves to highlight the confusing treatment of consensus by the Court.

In a similar manner to the transformation of the legal treatment of gay people before the Court, the treatment of transgender persons by the Court has also undergone a major change.[116] Early case-law resulted in a denial of transpersons' rights and a wide MoA, deemed necessary due to a lack of consensus.[117] Yet 16 years later transpersons' rights were recognised, including the right to marry in their new sex.[118] The Court made a clear commitment to a "dynamic and evolutive approach" in order to "render [the European Convention 's] rights practical and effective, not theoretical and illusory".[119] However, when reviewing the case-law before the Court, no clear explanation was given as to how the Court justified this change in ***E.H.R.L.R. 42*** approach. The first in the line of case-law did not deem it appropriate to consider the domestic law in Member States[120] and merely stated that the matter be kept "under review".[121] Further case-law did at least take note of international comparisons and established this as a valid methodology towards consensus building.[122] Eventually, 16 years later, the Court was swayed by an "emerging consensus"[123] and reference was also made to a "continuing international trend".[124] The variety of terminology used leads to confusion.[125] On the facts as well, over the 16-year period examined, there had been very little progress in the number of European countries recognising transpersons' rights.[126] To add to the confusion, the Court also examined states outside of Europe, including Australia and New Zealand. Brauch concludes that there are no legal standards to be found in such decisions, arguing that the Court was not "engaged in legal analysis, but in policy making".[127] It creates difficulties for those wishing to determine when a consensus will be determined to have been reached in relation to same-sex marriage. This leads to a lack of clarity and predictability as to when the Court will introduce same-sex marriage. The Court frequently reverses previous cases. Reliance is made

upon a consensus standard that is not thoroughly explained. Change is needed here. If the Court determines that a matter falls within the MoA due to a lack of consensus, as is the case for same-sex marriage, Member States should be able to predict when a sufficient consensus will be deemed to have been reached.

5. Proposed reform and the advantages this would bring

This article suggests that if the Court continues to stress the need for consensus in future judgments regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court and also has major advantages of transparency, certainty and predictability. Legitimacy is a particularly important at present with certain political factions threatening to leave the Council of Europe.[128] The "legitimacy of international law is usually attributed to the States' [original] consent".[129] This argument surely holds less weight 50 years after the originally signatures.[130] The question can also be raised as to how true the original consent argument holds in the face of the fact of the extensive interpretative techniques used by the Court. As demonstrated above, the case-law concerning sexualities has evolved rapidly over the course of the last few years.[131] A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)[132] to ensure enforcement of any judgment in this area. ***E.H.R.L.R. 43***

As Wintemute comments, forcing minority views on the rest of the countries would "risk a political backlash, which could cause some governments [to] threaten to leave the convention system".[133] The Court also faces "a substantial structural handicap"[134] in getting its decisions enforced, as this depends upon the actions of Member States.[135] Were the Court to take a leading role, too far in advance of public opinion, this could lead to a lack of enforcement. Examples of Member States failing to enforce decisions of the Court are easy to find.[136] Consensus remains an important argument and is "a vital force in judicial policy that the European Court uses when it fears that going against consensus will render its rulings ineffectual".[137] Several judges in the Court have also opined that they believe there is a link between consensus and enforcement and acceptance of judgments.[138] As an international court, the Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of Member States, this will increase the legitimacy of the Court's role. The proposed reform also has the major advantages of increasing legitimacy, transparency, certainty and predictability. The Court would be operating within the rule of law and not trespassing into a political role.

6. Conclusion

In recent years there has been a transformation in the treatment of LGBT rights. The Court now requires Member States to offer some form of legal protection to same-sex couples Europe-wide (although this could be confined to countries where same-sex couples are accepted socially),[139] but there continues to be no right to same-sex marriage.[140] This is because of the lack of consensus among Member States on the issue.[141] There remains a divide between the largely liberal Western states and the more conservative states of Central and Eastern Europe.[142] It seems likely, however, that at some stage the Court will determine that there is a right

to same-sex marriage.[143] The difficulty remains that currently proponents of same-sex marriage are left with little to guide them as to when the Court will determine this moment has arrived. Certainty is needed. This is due to the constitutional, manifold legal and symbolic implications of marriage. It is essential for a couple to know if they can legally marry.[144]

The issue of same-sex marriage recognition across Europe illustrates the difficult balance, which the Court has to make, between upholding the universal standard of human rights, whilst respecting regional differences. In relation to same-sex marriage, it remains debateable as to whether the Court is following the correct approach in considering lack of consensus, leading to a wide MoA, as determinative in relation ***E.H.R.L.R. 44*** to same-sex marriage. Critics argue that this ignores minorities[145] and results in a lack of legal analysis[146] and no high level of scrutiny.[147] However, in politically sensitive areas such as same-sex marriage, the Court wishes to avoid any charge that it is engaging in "judicial politics".[148] A wide MoA, due to the emphasis on lack of consensus ensures that the Court does not overstep the "primary responsibility"[149] given under the European Convention to Member States to secure human rights.[150] Despite the emphasis on consensus it is far from clear how the Court determines whether a consensus exists.[151] There are also confusions in relation to the terminology used around consensus, where numerous versions of the name are used.[152] Again, no consistency is demonstrated in determining what sources are appropriate for establishing a consensus.[153] Analysis of case-law relating to sexualities and family law reveals very little to aid our understanding. Despite advancing human rights protections for gay people and same-sex couples, case-law demonstrates a very inconsistent and confusing approach to the use of consensus.[154] Even worse, it results in the charge that the Court is not acting in accordance with the rule of law.[155]

This article sets out a novel approach by suggesting that if the Court continues to stress the need for consensus in future judgments regarding same-sex marriage, it should at least outline how many domestic legislatures need to legislate in favour of same-sex marriage, before it will determine that a consensus exists. This will increase the legitimacy of the Court as it would link any new decision on movement of consensus in relation to same-sex marriage back to a democratic mandate of the legislatures of the Member States concerned. This is needed at a time when certain political factions are discussing leaving the Council of Europe.[156] Case-law concerning sexualities has evolved rapidly over the last few years.[157] A challenge is therefore faced in Central and European states (whose people largely have a more conservative approach to these matters)[158] to ensure enforcement of any judgment in this area. The Court also faces "a substantial structural handicap"[159] in getting its decisions enforced, as this depends upon the actions of Member States.[160] Forcing minority views on countries which would otherwise be opposed could also result in a ***E.H.R.L.R. 45*** political backlash.[161]

Consensus therefore remains an important argument which many European judges opine is linked to enforcement and acceptance of judgements.[162] As an international court, the Court is never going to have a democratic mandate. However, if consensus can be linked back to the democratic legislatures of the Member States concerned this can increase the legitimacy of the Court's role. Consensus could therefore, if applied in the suggested more consistent manner, aid the legitimacy of judgments. The proposed reform would also improve transparency, certainty and

predictability as proponents of same-sex marriage would be able to judge when the necessary consensus had arrived.

Frances Hamilton

Senior Lecturer in Law at Northumbria University

E.H.R.L.R. 2018, 1, 33-45

1 *Schalk v Austria (App. No.30141/04), judgment of 24 June 2010*; *Hämäläinen v Finland (App. No.37359/09), judgment of 16 July 2014*; and *Chapin v France (App. No.40183/07), judgment of 9 June 2016*.

2 *Oliari v Italy (App. Nos 18766/11 and 36030/11), judgment of 31 July 2015*.

3 G. Zago, "A Victory for Italian Same-Sex Couples, a Victory for European Homosexuals? A Commentary on Oliari v Italy" (2015) Articolo 29 (Leiden University).

4 *Oliari v Italy (App. Nos 18766/11 and 36030/11)* at [73].

5 H. Fenwick and A. Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 551.

6 *Vallianatos v Greece (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013*; *Oliari v Italy (App. Nos 18766/11 and 36030/11)*; and Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544.

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

8. See *Oliari (App. Nos 18766/11 and 36030/11)*. E. Sutherland, "A Step Closer to Same-Sex Marriage Throughout Europe" (2011) 15 Edin. L. Rev. 97, 98 states that "[e]ven on the Court's reasoning, it is arguably only a matter of time (perhaps some time) until the right to marry becomes a reality for same-sex couples throughout Europe". Interestingly, the trend towards greater rights being given to same-sex couples is also reflected in the Yogyakarta Principles Plus 10 adopted on 10 November 2017 and available at http://yogyakartaprinciples.org/ [Accessed 22 January 2018]. They note in the Preamble that there "have been significant developments in international human rights law and jurisprudence on issues relating to sexual orientation, gender identity, gender expression and sex characteristics …" and that discrimination on these grounds can be compounded by discrimination on other grounds including that of amongst a lengthy list "marital or family status …". Although the Yogyakarta Principles Plus 10 contain nothing specifically in relation to same-sex marriage, they do include an Additional State Obligation relating to Equality and Non-Discrimination (Principle 2) which states that Contracting States should "[t]ake all appropriate steps to ensure that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics".

9 See *Schalk (App. No.30141/04)* at [57], *Hämäläinen (App. No.37359/09)* at [39] and *Chapin v France (App. No.40183/07)*.

10 See P. Butler, "Margin of Appreciation—A Note Towards a Solution for the Pacific (2008–2009) 39 Vic. U. Wellington L. Rev. 687 and *H.C. Yourow, Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Netherlands, Brill, 1996)*.

11 Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and United Kingdom (apart from Northern Ireland).

12 *C.A.R.L. Poppelwell-Scevak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach", Norwegian Open Research Archives (NORA), 2016*.

13 Same-sex marriage is not recognised in several European countries and, in addition, 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 H. 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] E.H.R.L.R. 248. See also Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544.

14 See 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] E.H.R.L.R. 248, 270 who explains that gay propaganda laws are still in force in Russia. See also Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544 who refer to the "state-based and social acceptance of homophobia". See also P. Johnson, "Homosexual Propaganda in the Russian Federation: Are They in Violation of the European Convention on Human Rights?" (2015) 3(2) Russ. L.J. 37.

15 *Fedetova and Shipitko v Russia, communicated on 2 May 2016*.

16 Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 557.

17 See 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] E.H.R.L.R. 248 and K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534; L. Hodson, "A Marriage by Any Other Name? Shalk and Kopf v Austria" (2011) 11(1) H.R.L.R. 170; J.A. Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era (2005) 54 I.C.L.Q. 459; Lord Lester, "The European Convention in the New Architecture of Europe" (1996) P.L. 6; and E. Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 NYUJ of Inter. L. and Politics 843.

18 T. Lewis, "What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation" (2007) 56 I.C.L.Q. 395, 414 comments that the MoA should not be used as an "intellectually lazy option of running for cover".

19 See for discussion M. Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638 and J. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113.

20 Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law" (2005) 16(5) Eur. J. of Inter. L. 907, 912

21 For example, Member States could be relying on discredited arguments such as the slippery slope argument (that same-sex marriage would lead to polygamy for example) as well as the definitional argument (that "traditions change and dictionaries are not the law" and the procreation argument (that marriage is for procreative purposes only).

22 F. Hamilton, "Why the Margin of Appreciation is not the Answer to the Gay Marriage Debate" [2013] E.H.R.L.R. 47.

23 In *Estin v Estin 334 US 541, 553 (1948)* Robert Jackson J commented that "one thing that people are entitled to know from the law is whether they are formally married". See also B. Stark, "When Globalization Hits Home: International Family Law Comes of Age" (2006) 36 Vanderbilt J. of Trans. L. 1551, and L. McClain, "Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage" (1997–1998) Fordham L.R. 1241.

24 See, e.g. *Goodridge v Department of Public Health 798 NE 2d 941 (Mass., 2003)*; *Loving vVirginia 388 US 1 (1967)*; and *Obergefell v Hodges 576 US (2015)*.

25 E.g. art.12 Right to Marry European Convention on Human Rights.

26 E.g. on intestacy, inheritance and tax purposes.

27 See N. Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (2012) 10(2) Inter. J. Const. L. 477; R. Frimston, "Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law" (2006) P.C.B. 352; and E. Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (2010–2011) 18 Duke J. of Gender L. and Pol'y 105.

28 E. Bribosia, I. Rorive and L. Van den Eynde, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1 referring to *R. Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*, https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus [Accessed 22 January 2018].

29 Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 545.

30 See Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 545 and fn.14.

31 *Poppelwell-Scevak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach", Norwegian Open Research Archives, p.1*.

32 See Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 540. Dzehtsiarou at 540 also refers to *Ronald Macdonald, "The Margin of Appreciation", in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), The European System for the Protection of Human Rights (Martin Nijhoff Publishers, 1993), p.24* who argues that consensus would mean the European Court would "forfeit its aspirational role". N. Shuibne, "Margins of Appreciation; National Values, Fundamental Rights and EC Free Movement Law" (2009) 34(2) Eur. L. Rev. 230, 256 also argues that when interpreting the role of the EU Charter in an EU context there is a "discrete supranational" purpose in advancing fundamental rights.

33 Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 843.

34 B. Tobin, "Gay Marriage—A Bridge Too Far?" (2007) 15 Ire. Stud. L. Rev. 175 referring to the Irish Supreme Court decision in *Zappone and Gilligan v Revenue Commissioners [2008] 2 IR 417*.

35 See G. Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) 21(3) E.J.I.L. 509 for further explanation.

36 E.g. transgender persons have transformed their position, to allow full recognition of rights in their new sex. See *Goodwin v United Kingdom (1996) 22 E.H.R.R. 123*. See Section 4.

37 Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 846.

38 See D. Teutonico, "Pajic v Croatia" (2016–2017) 25 Tulane J. of Inter. and Comp. L. 461.

39 D.L. Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right" (2001) 15 Em. Inter. L. Rev. 391, 451.

40 D. McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 32.

41 Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638.

42 Article 1 of the European Convention. 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] E.H.R.L.R. 248, 250 also emphasises the importance of "subsidiarity related devices".

43 *Council of Europe, "Brighton Declaration High Level Conference on the Future of the ECHR"*, http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (2012) B 12 [Accessed 22 January 2018].

44 Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638, 640.

45 McClain, "Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage" (1997–1998) Fordham L.R. 1241.

46 See Section 1 Introduction.

47 *Schalk (App. No.30141/04)* at [57], *Hämäläinen (App. No.37359/09)* at [39] and *Chapin (App. No.40183/07)*.

48 See Section 1 Introduction.

49 e.g. Lewis, "What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation" (2007) 56 I.C.L.Q. 395; E. Wada, "The Margin of Appreciation and the Right to Assisted Suicide" (2005) 27 Loy. of L.A. Inter. and Comp. L. Rev. 275; Butler, "Margin of Appreciation—A Note Towards a Solution for the Pacific" (2008–2009) 39 Vic. U. Wellington L. Rev. 687; R. Nigro, "The Margin of Appreciation Doctrine and the Case-Law of the European Court of Human Rights on the Islamic Veil" (2010) 11 H.R.L.R. 531; Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638; Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113; and McClain, "Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage" (1997–1998) Fordham L.R. 1241.

50 *Schalk v Austria (App. No.30141/04)* at [57], *Hämäläinen (App. No.37359/09)* at [39] and *Chapin (App. No.40183/07)*.

51 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] E.H.R.L.R. 248, 251 states that in practice "uncertainty arises in respect of every aspect of it". See also *Poppelwell-Scevak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016)*.

52 See Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing A Jurisprudence of Diversity Within Universal Human Right (2001) 15 Em. Inter. L. Rev. 391, for further explanation.

53 For example privacy and personal autonomy: *Dudgeon v United Kingdom (1982) 4 E.H.R.R. 149*.

54 *Dudgeon v United Kingdom (1982) 4 E.H.R.R. 149*. See McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 25.

55 *Karner v Austria (2003) 38 E.H.R.R. 528*.

56 *Schalk (App. No.30141/04)*.

57 *Schalk (App. No.30141/04)*. Dissenting Opinion of Judges Rozakis, Spielmann and Jebens at [8].

58 See, e.g. *Schalk (App. No.30141/04)*.

59 Wada, "The Margin of Appreciation and the Right to Assisted Suicide" (2005) 27 Loy. of L.A. Inter. and Comp. L. Rev. 275, 280; Butler "Margin of Appreciation—A Note Towards a Solution for the Pacific" (2008–2009) 39 Vic. U. Wellington L. Rev. 687, 702; Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638, 641; Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113, 121; Shany, "Toward a General Margin of Appreciation Doctrine in International Law" (2005) 16(5) Eur. J. of Inter. L. 907, 932; Benvenisti, "Margin of Appreciation, Consensus and Universal Standards (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 844; McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, and Lester, "The European Convention in the New Architecture of Europe" (1996) P.L. 6.

60 Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113, 138.

61 Bribosia et al., "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter L. 1, 18.

62*Popplewell-Scezak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016), p.39*.

63 Dzhetsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 544.

64 Look at adoption cases *Frette v France (2002) 38 E.H.R.R. 438* which placed emphasis on the division in the scientific community about the effect which individual gay adoption would have on the child. This approach was subsequently regarded as discriminatory: *X v Austria (2013) 57 E.H.R.R. 14*.

65 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 539.

66 McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 28 referring to *Nicolas Bratza, Evidence to UK Joint Committee on Human Rights, 13 March 2012, HC 873-iii Q140*, former President of the European Court, who saw this as a safeguard "to prevent any rapid and arbitrary development of the Convention". See also Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534.

67 See Section 1 Introduction.

68 See E. Bribosia, I. Rorive and L. Van den Eynde, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1 referring to *R. Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*.

69 *Dudgeon v United Kingdom (1982) 4 E.H.R.R. 149*.

70 *Sutherland v United Kingdom (1996) 22 E.H.R.R. CD182*.

71 *Simpson v United Kingdom (App. No.11716/85), judgment of 14 May 1986*, and *Karner v Austria (2003) 38 E.H.R.R. 528*.

72 *Smith and Grady v United Kingdom (1999) 29 E.H.R.R. 493*, and *Lustig-Prean and Beckett v United Kingdom (2001) 31 E.H.R.R. 601*.

73 *X and Y v United Kingdom (App. No.21830/93), judgment of 22 April 1997*; *Kerkhoven v Netherlands (App. No.15666/89), decision of 19 May 1992*); *JRM v Netherlands (App. No.16944/90), decision of 8 February 1993*; and *Schalk (App. No.30141/04)*.

74 *Frette v France (2002) 38 E.H.R.R. 438* and *EB v France (2008) 47 E.H.R.R. 21*.

75 *Oliari (App. Nos 18766/11 and 36030/11)*.

76 They define asymmetry of access to mean

77 Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544.

78 Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 563 define asymmetry of access to mean where different sex couples have "two options: cohabitation or marriage, while same-sex couples are confined to cohabitation only. But a form of asymmetry also arises in states which have introduced registered partnerships for same-sex couples, leaving availability of marriage only to different-sex couples".

79 *Schalk (App. No.30141/04)*; *Oliari (App. Nos 18766/11 and 36030/11)*; and *Chapin (AppNo.40183/07)*.

80 *Popplewell-Scezak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016), p.9*.

81 *Dudgeon (1982) 4 E.H.R.R. 149* at [60].

82 *Dudgeon (1982) 4 E.H.R.R. 149* at [60].

83 *Dudgeon (1982) 4 E.H.R.R. 149* at [60].

84 Letsas, "Strasbourg's Interpretative Ethic: Lessons for the International Lawyer" (2010) 21(3) E.J.I.L. 509, 531.

85 Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113, 137.

86 *Smith (1999) 29 E.H.R.R. 493*.

87 *Smith (1999) 29 E.H.R.R. 493* at [3], referring to *Leander v Sweden (1987) 9 E.H.R.R. 433* at [59] and *Engel v Netherlands (1976) 1 E.H.R.R. 647* at [57].

88 See *Smith (1999) 29 E.H.R.R. 493* at [61] where the UK Homosexuality Policy Assessment Team indicated a "military risk from a policy change…". See also [66] where the Parliamentary Select Committee Report dated 24 April 1991 stated that "the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness …".

89*Smith (1999) 29 E.H.R.R. 493* at [89].

90 *Smith (1999) 29 E.H.R.R. 493* at [96].

91 *Smith (1999) 29 E.H.R.R. 493* at [3] referring to *Leander (1987) 9 E.H.R.R. 433* at [59] and *Engel (1976) 1 E.H.R.R. 647* at [57].

92 *Karner v Austria (2003) 38 E.H.R.R. 528*.

93 *Simpson v United Kingdom (App. No.11716/85)*.

94 *Karner (2003) 38 E.H.R.R. 528*.

95 *Karner (2003) 38 E.H.R.R. 528* at [36]. The third party interveners were ILGA Europe, Liberty and Stonewall.

96 *Karner (2003) 38 E.H.R.R. 528* at [37].

97 S. Caballero, "Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?" (2004–2005) 11 Col. J. of Eur. L. 151, 166.

98 E.g. see *X v United Kingdom (App. No.21830/93)*;; *Simpson (App. No.11716/85)* and *Kerkhoven v Netherlands (App. No.15666/89)*.

99 Caballero, "Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with Marriage?" (2004–2005) 11 Col. J. of Eur. L. 151, 152.

100 *Schalk (App. No.30141/04)* at [94].

101 Hodson, "A Marriage by Any Other Name? Shalk and Kopf v Austria" (2011) 11(1) H.R.L.R. 170, 175. See also Bribosia et al., "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" (2014) 32(1) Berkeley J. of Inter. L. 1.

102 *Schalk (App. No.30141/04)* at [93].

103 *Schalk (App. No.30141/04)*.

104 *Schalk (App. No.30141/04)*.

105 *Vallianatos v Greece (App. Nos 29381/09 and 32684/09)*.

106 Fenwick and Hayward, "Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically" [2017] E.H.R.L.R. 544, 550, referring to [91] and [92].

107 *Oliari (App. Nos. 18766/11 and 36030/11)*.

108 *Oliari (App. Nos. 18766/11 and 36030/11)*.

109 *Ratzenbock v Austria (App. No.28475/12), judgment of 26 October 2017*.

110 *Ratzenbock (App. No.28475/12)* at [40].

111 *H. Fenwick and A. Hayward, "Equal Civil Partnerships: Implications of Strasbourg's Latest Ruling for Steinfeld and Keidan", UK Human Rights Blog, 21 November 2017*, https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/ [Accessed 22 January 2018].

112 *Schalk (App. No.30141/04)* and *Vallianatos (App. Nos 29381/09 and 32684/09)*.

113 *Oliari (App. Nos 18766/11 and 36030/11)*.

114 *H. Fenwick and A. Hayward, "Equal Civil Partnerships: Implications of Strasbourg's Latest Ruling for Steinfeld and Keidan", UK Human Rights Blog, 21 November 2017*, https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/ [Accessed 22 January 2018].

115 *H. Fenwick and A. Hayward, "Equal Civil Partnerships: Implications of Strasbourg's Latest Ruling for Steinfeld and Keidan", UK Human Rights Blog, 21 November 2017*, https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fenwick-andy-hayward/ [Accessed 22 January 2018].

116 See for comment M. Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) Eur. J. of Inter. L. 1023, 1025.

117 *Rees v UK (1987) 9 E.H.R.R. 56*. See also *Popplewell-Scezak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016)*, for comment.

118 *Goodwin (1996) 22 E.H.R.R. 123*.

119 *Goodwin (1996) 22 E.H.R.R. 123* at [74].

120 *Rees (1987) 9 E.H.R.R. 56* at [42].

121 *Rees (1987) 9 E.H.R.R. 56* at [47].

122 *Cossey v United Kingdom (1991) 13 E.H.R.R. 622*.

123 *Goodwin (1996) 22 E.H.R.R. 123* at [84]. See also Tobin, "Gay Marriage—A Bridge Too Far?" (2007) 15 Ire. Stud. L. Rev. 175.

124 *Goodwin (1996) 22 E.H.R.R. 123* at [84].

125 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 541. See also Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113.

126 McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21.

127 Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113, 147. See also *Popplewell-Scezak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016)*.

128 See E. Bribosia, I. Rorive and L. Van den Eynde, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1 referring to *R. Wintemute "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*.

129 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 536 referring to *Macdonald, "The Margin of Appreciation" (1993), p.123*, a former judge of the European Court, who states the whole system of European human rights protection "rests on the fragile foundations of the consent of the Contracting Parties".

130 Dzhetsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 536 referring to G. Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR" (2004) 15 Eur. J. of Inter. L. 279, 304

131 See Section 4.

132 See 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] E.H.R.L.R. 248.

133 See *Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*.

134 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 534.

135 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] E.H.R.L.R. 248 who explains that the European Court cannot "rely on coercion". This is in contrast to domestic legislatures who have their decisions enforced immediately. See also Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right (2001) 15 Em. Inter. L. Rev. 391, 422.

136 For example *Hirst v United Kingdom (No.2) (2004) 38 E.H.R.R. 825* removing the blanket ban on prisoners' voting rights has met with delayed enforcement in the UK. *A. Donald and P. Leach, Parliaments and the European Court of Human Rights (Oxford University Press, 2016), p.245* who comment on this as an important example for those who assert the primacy of Parliament.

137 Bribosia, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1, 19.

138 Dzhetsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] 3 Public Law 534, 544–545 referring to *K. Dzehtsiarou, Interview with Judge of the ECtHR Corneliu Birsan (European Court of Human Rights, Strasbourg, 2010)* and *K. Dzehtsiarou, Interview with Judge of the ECtHR Renate Jaeger (European Court of Human Rights, Strasbourg, 2010)*.

139 *Oliari (App. Nos 18766/11 and 36030/11)*.

140 *Schalk (App. No.30141/04)*.

141 *Schalk (App. No.30141/04)* at [57].

142 See 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] E.H.R.L.R. 248 for discussion.

143 *Schalk (App. No.30141/04)* at [105] and *Oliari (App. Nos 18766/11 and 36030/11)* at [178].

144 See Section 1.

145 See 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] E.H.R.L.R. 248, 270; Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, Hodson, "A Marriage by Any Other Name? Shalk and Kopf v Austria (2011) 11(1) H.R.L.R. 170; Sweeney, "Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era" (2005) 54 I.C.L.Q. 459; Lester, "The European Convention in the New Architecture of Europe" (1996) 1 Public Law 6; and Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 NYUJ of Inter. L. and Politics 843.

146 See Lewis, "What Not to Wear: Religious Rights, the European Court and the Margin of Appreciation" (2007) 56 I.C.L.Q. 395, 414.

147 See for discussion Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638 and Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113, 137.

148 Benvenisti, "Margin of Appreciation, Consensus and Universal Standards (1998–1999) 31 NYUJ of Inter. L. and Politics 843, 846.

149 McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" (2016) 65(1) I.C.L.Q. 21, 32.

150 Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 I.C.L.Q. 638.

151 Bribosia, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1.

152 *Popplewell-Scezak, "The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach" (2016)*.

153 Dzhetsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 544.

154 See Section 3.

155 See, e.g. Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" (2004–2005) 11 Columbia J. of Eur. Law 113.

156 Bribosia, Rorive and Van den Eynde, "Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience" 2014 32(1) Berkeley J. of Inter. L. 1 referring to *Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*, https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus [Accessed 22 January 2018].

157 See Section 4.

158 See 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] E.H.R.L.R. 248.

159 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534.

160 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] E.H.R.L.R. 248 and Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Right (2001) 15 Em. Inter. L. Rev. 391, 422

161 See *Wintemute, "Consensus is the right approach for the European Court of Human Rights" (12 August 2010), The Guardian*. See also *Y. Zylan, States of Passion: Law, Identity and Social Construction of Desire (Oxford University Press, 2011), p.214* and R. Verchick, "Same-Sex and the City" (2005) 37 Urban L. Rev. 191 who discuss backlash following the Massachusetts Supreme Court decision in *Goodridge v Department of Public Health (2003) 798 N.E. 2d 941*, to introduce same-sex marriage in that state in 2003 was widely linked to a backlash in public opinion across the US

162 See Dzhetsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" [2011] P.L. 534, 544–545 referring to *K. Dzehtsiarou, Interview with Judge of the ECtHR Corneliu Birsan (European Court of Human Rights, Strasbourg, 2010)* and *K. Dzehtsiarou, Interview with Judge of the ECtHR Renate Jaeger (Strasbourg, European Court of Human Rights, 2010)*.

Commentary on cited Published Work contained in PART TWO: SAME-SEX MARRIAGE, THE EU AND THE CAPACITY OF THE CONCEPT OF CITIZENSHIP TO EXTEND THE RIGHTS OF SAME-SEX COUPLES

(4) 'Hamilton, F., 'The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship' (2.1) (2015) *Journal of International and Comparative Law* 87-113.

(5) Hamilton, F., and Clayton-Helm, L., Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory' 3(1) (2016) *Journal of International and Comparative Law* 1 -31.

(6) Hamilton, F., The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders (2018) *Family Law* 693 - 696

A more holistic approach towards the recognition of same-sex couples' relationships, needs to consider not only the ECtHR position but also the ever-expanding role of the EU. This forms the subject matter of part 2. Publications 4 and 5 were published at a time before the Brexit vote and Publication 6 updates this to comment on recent influential CJEU case law and the possible position of UK same-sex couples' post-Brexit. Publications 4 and 5 both have positive conclusions about the possible role of the EU in this regard. Publication 4 stresses the potential of the EU concept of citizenship resulting in expanding free movement provisions and publication 5 recommends a unified conflicts of law system under an EU umbrella. Publication 6 critically analyses the recent *Coman* case which illustrates the CJEU providing extensive interpretations of citizenship rights (including rights of residence) to non-EU national same-sex spouses of EU

citizens, even where the receiving country does not recognise same-sex couples' relationships.[167]

Publication 4 expands the work set out in part one by taking a comparative approach between EU and ECtHR treatment of same-sex couples. Both organisations were initially reluctant to recognise unconventional types of 'family life.' Whilst the ECtHR has played a major role in the advancement of LGBTQ+ rights,[168] traditionally, proponents in these cases have relied upon privacy arguments (under article 8 ECHR).[169] As explained in part one, although the ECtHR now recognises same-sex couples as having a family life under Article 8 ECHR,[170] the ECtHR does not require contracting states to legalise same-sex marriage due to a lack of consensus.[171] At

[167] *Coman* (n11).

[168] In practice the ECtHR has adopted a gradually increasing level of protections for LGBTQ+ persons and same-sex couples. See n131.

[169] Other authors who also argue this point include Johnson, P., 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (n87); *Stark* (n80) and *Danisi* (n132). This is reflected by case law before the ECtHR including for example *Dudgeon v UK* (n126); *Sutherland v UK* (n132); *Smith and Grady v UK* (n126) and *Lustig-Prean and Beckett v UK* (n131).

[170] *Schalk and Kopf v Austria* (n8).

[171] *Schalk and Kopf v Austria* (n8).

the time publication 4 was published in 2015, the CJEU was even stricter than the ECtHR. Being excluded from the EU definition of 'family member' has wide ranging consequences. It is necessary to fall in this category in order to access wide ranging free-movement and EU citizenship rights.[172] The CJEU remained heavily influenced by a traditional and hierarchal view of family statuses. Heterosexual marriage received the clearest protection, but did not include same-sex

[172] Publication 4 refers to a 'plethora of benefits' (See *Stalford* (n90) at 427) accorded to EU citizens and their family members. The additional rights include a right of residence (Citizenship Directive 2004/ 38 article 14(1)), recourse to a member state's social assistance scheme (Citizenship Directive 2004/ 38 Article 14(3)), ensuring 'equal treatment with host-country nationals' (Citizenship Directive 2004/38 Article 24), allowing family members to take up employment or self-employment (Citizenship Directive 2004/38 Article 23), and a right of continuous legal residence after 5 years (Citizenship Directive 2004/38 Article 16). Family members of EU citizens also entitled to extensive schooling protection for children. (See Fairhurst, J., *Law of the European Union, Ninth Edition,* (Pearson Publishing 2012) at 405) who comments on the extensive protection in relation to the EU worker's children's rights to be admitted to 'primary and secondary schooling system, as well as to vocational courses in further and higher education, pursuant to art 12 Regulation 1612/68 referring to *Casagrande* (Case C-9/74) and *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99). Citizens are protected from discrimination under Article 18 TFEU which has led to far reaching results for non-economically active citizens, as in *Grzelcyk v Centre Public d'adide Sociale d'Ottignies Louvaine-la-Neuve* (Case C-184-99) which entitled the applicant French student to obtain access to minimum subsistence allowance (known as 'minimex') in Belgium. The EU now has far-reaching protections from discrimination on the basis of sexual orientation. Article 19 TFEU is the legal basis for the adoption of measures to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' The EU has also adopted the provision of the Charter of Fundamental Rights 2000/C 364/01 at art 21(1) which includes 'same-sex orientation' as ground for discrimination.

spouses. EU law stressed subsidiarity and allowed EU member states to determine their own policy in relation to same-sex marriage.[173] Although the EU listed registered partners as family members, this was strictly subject to subsidiarity.[174] Co-habitees were not (and still are not) included within the status of family members, instead having to prove that they have a relationship 'duly attested.'[175]

Building on original ideas from publication 2, publication 4 developed a contrast between the ECtHR traditional emphasis on 'private life'[176] (where LGBTQ+ persons are concerned) as compared with the potential of the EU concept of citizenship. As discussed above whilst the ECtHR has played an important role in advancing LGBTQ+ rights,[177] privacy based claims are unhelpful when it comes to same-sex marriage claims.[178] This

[173] At the time of writing publication 4 (pre *Coman* (n11)), although registered partners were listed in the family members protected this was strictly subject to subsidiarity as provided by then Citizenship Directive 2004/38 art 2(2)).

[174] See Ibid.

[175] Citizenship Directive 2004 /38 Article 3(2).

[176] See n132.

[177] In practice the ECtHR has adopted a gradually increasing level of protections for LGBTQ+ persons and same-sex couples. See n131.

[178] The stress on privacy before the ECtHR has resulted in what Johnson 'An Essentially Private Manifestation of Human Personality':

is because marriage is more than a private contract[179] and involves entering into an institution and conferring a status.[180] It is a concept very much on the public stage.[181] In contrast, EU emphasis on citizenship, publication 4 argues, contains much potential for proponents of same-sex marriage. EU citizenship has already led to an extensive array of rights,[182] including EU free movement of persons' protections.[183] In addition the concept of citizenship has a close connection to equality[184] and the participation in the public order which

---

Constructions of Homosexuality in the European Court of Human Rights' (2010) (n87) describes as a 'significant limitation… in respect of the 'evolution' of LGBTQ+ rights across Europe.'

[179] See Lord Penzance in *Hyde v Hyde and Woodmansee* (n133).

[180] See Lord Penzance in *Hyde v Hyde and Woodmansee* (n133).

[181] For discussion of the ECtHR emphasis on privacy see Johnson, P, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) (n87) at 76. For further criticism see also Sedgewick (n135) at 71 and *Grigolo* (n135) at 1040.

[182] See n172.

[183] O'Neill, A., 'Recognition of Same-Sex Marriage in the European Community: the European Court of Justice's Ability to Dictate Social Policy' (2004) 37 *Cornell Int'l L. J.* 199 at 201 who argued that the EU concept of free movement required protection of the right of same-sex couples to move from one state to another.

[184] *Bamforth* (n58) at 478 references Marshall, T. H., 'Citizenship and Social Class' in Marshall, T. H. and Bottomore, T., (eds) (1992) *Citizenship and Social Class* at 18 whose classic definition of equal citizenship states that 'all who possess the status are equal with respect to the rights and duties with which the status is endowed.'

theorists argue citizenship involves.[185] Brenda Cossman for instance, characterises citizenship as being 'about the process of becoming recognised subjects, about the practices of inclusion and membership, both social and legal.'[186] Publication 4's analysis concludes that in comparing EU and ECtHR dual and differing treatment of same-sex couples, that it is the EU which offers the most potential for future development. Of importance here is the EU concept of citizenship, expansion of EU free movement provisions, and growing interplay between the EU and the ECtHR.[187] In

[185] For discussion see Rosenfeld, M., 'Introduction: Gender, Sexual Orientation and Equal Citizenship' (2012) 10(2) *IJCL* 340 at 340 and *O'Mahoney* (n151) at 554-555. See also Baroness Hale in *Ghaidan v Godin-Mendoza* (n124) per Baroness Hale of Richmond at para 132 where she stated that '[d]emocracy is founded upon the principle that each individual has equal value…'

[186] Cossman, B., *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (n137).

[187] The EU plans to accede to the ECHR and there are growing instances of comparative constitutionalism' or 'judicial borrowing' between the institutions. EU accession criteria also demands compliance with human rights. The European Parliamentary Assembly, (1999) 'Building Greater Europe without Dividing Lines' (Opinion on the Report of the Committee of Wise Persons) 15 Opinion No. 208 considers the two institutions to be 'natural partners' and Joris T. and Vandenberghe, J.,'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' (2008-2009) 15 *Colum J Eur L* 1,3 argue that they are 'increasingly active in the same fields' and should therefore, according to the European Parliament Assembly, not 'waste resources see European Parliamentary Assembly, (2002) 'The Council of Europe and the New Issues Involved in Building Europe', Recommendation No. 1578 at para 4.)

contrast the traditional emphasis on privacy by the ECtHR as demonstrated in part one is never going to be sufficient in this regard. This prediction is borne out by subsequent CJEU case law (analysed in publication 6).[188]

Publication 5 continues with the theme of EU involvement. This publication (co-written with Dr Lauren Clayton-Helm) looks at how private international law treats same-sex couples whose marriage involves more than one nationality or who cross international boundaries. In situations where several different jurisdictions' laws are involved, it is necessary to determine which country's laws apply. Work in this area is necessary as it is essential for a couple to know if their marriage will be recognised following an international relocation. [189] Publication 5 was published in 2016, prior to the *Coman* case.[190] At that time EU law emphasised subsidiarity. Non-EU same-sex spouses or registered partners could not

[188] See *Coman* (n11) and *MB* (n11)

[189] In *Estin v Estin* (n164) Robert Jackson J commented that 'one thing that people are entitled to know from the law is whether they are formally married.' See also *Stark* (n80) and Smart, P. St. J., 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 *Anglo-American L Rev* 225, 225 who has commented that the need to settle this question is underlined by the 'unparalleled importance of marriage.'

[190] See *Coman* (n11).

exercise the right of free movement to move with their EU citizen spouse to a new EU state, where the receiving state did not recognise same-sex marriage. In reality there were 'meagre right(s)…' afforded to same-sex couples.[191] Publication 5 therefore advocated EU involvement in a unified conflicts of law system, to bring beneficial and consistent results. The *Coman* case has now radically altered the position. Non-EU same-sex spouses of EU citizens will be granted citizenship rights (including rights of permanant residence) when their EU citizen same-sex spouse relocates to a different state in the EU. This is even the case, where as on the facts of *Coman*, the couple relocated to Romania, an EU jurisdiction, which does not allow their own citizens to enter into same-sex marriages, or registered partnerships.

Publication 5 contains a detailed analysis of which choice of law rule[192] should be applied to all same-sex relationships in terms of essential validity and considers that EU level action

[191] Cox, B., 'Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are we still Married when we return home?' (1994) *Wisconsin L. Rev.* 1033 at 1040.

[192] A Choice of law rule is the mechanism which determines which jurisdiction's laws should be applied to a legal matter.

will lead to more consistent results. Formal validity looks at the rules and requirements surrounding the actual ceremony, such as the requirement of witnesses and the vows that must be undertaken. This is usually uncontroversial and depends upon the *lex loci celebratioinis.* Essential validity on the other hand covers all aspects of a marriage which are not associated with formalities, the primary example being the capacity to marry. Choice of law rules are significant as they determine which jurisdictions' laws should be applied to a legal matter. In the case of same-sex marriage this will ultimately determine if it will be recognised, which is of obvious importance to the couple involved.[193] Concerning essential validity of any marriage, the domestic standpoint recognises little agreement.[194] This is clearly unsatisfactory. Commentators

[193] Recognition of a marriage not only involves symbolical importance but also manifold legal rights.

[194] See part 2 of Publication 5 which analyses in depth the different traditional competing choice of law theories, all of which have flaws. In brief the dual domicile theory considers that if either parties' pre-nuptial domicile would invalidate the marriage, this would result in non-recognition. In contrast the intended matrimonial home theory turns to the law of the husband's domicile unless the couple intend to set up home in another country. Other options include the real and substantial connection test, which focuses on the country which will be most affected by the marriage as opposed to considerations about the people involved in the marriage. The elective dual domicile test would apply the domiciliary law of either party. Another option is that of the *lex loci celebrationis* which applies the law of the jurisdiction where the marriage was celebrated.

agree that the current law is 'baffling'[195] and in need of 'reformulat[ion]…'[196] Publication 5 reviewed the position in light of the necessity of dealing with same-sex relationships.[197] Application of interest analysis[198] allows consideration of the public policy reasons behind a choice of law rule. Whilst this is designed to promote fairness,[199] interest analysis has been critised as resulting in 'confusion, lack of consistency and limited predictability.'[200] US experience of interest analysis in

[195] Juenger, F., 'Conflict of Laws; A Critique of Interest Analysis' (1984) 32 *American J of Comp Law* 1, at 1 referring to Cardozo, B. N., *The Paradoxes of Legal Science* (Columbia University Press, 1928) at 67.

[196] Reed (n92) at 450. See also Davie, M., 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 *Anglo-American L Rev* 32.

[197] This term is used in this context to refer to both same-sex marriages and all types of civil partnerships and registered unions.

[198] Interest analysis is the idea that the most applicable law is the one that has the most interest in being applied after consideration of public policy reasons and was originally founded in the USA and applied on a case-by-case basis. Interest analysis was founded by *Currie* (n93) (1863).

[199] Supporters of interest analysis argue that it produces fair solutions in each of the different cases it is used in because of its flexibility. Juenger (n195) at 48 states that this is what supporters of interest analysis claim, although he strongly disagrees with interest analysis arguing at 49 '[t]hus Currie's methodology supplies subterfuge to promote the very result-orientation that he deplored.'

[200] See *Juenger* (n195) at 1 referring to Cardozo (n195) at 27 who turn refers to comments from Chief Judge *Fule in Neumier v Kuehner* 31 NY 2d 121 at 127 (1972) acknowledging lack of consistency in the US context.' See also Brilmayer, L., 'Interest Analysis and the Myth of Legislative Intent' (1980) 78 *Michigan L Rev* 392 and Wrign, J. S., 'The Federal Courts and Nature and Quality of State Law' (1967) 13 *Wayne L. Rev.* 317 at 334.

the fields of contract and tort has according to critics resulted in an 'ad hoc case-by-case approach.'[201] Commentators conclude that other jurisdictions should not follow the same approach, especially when considering marriage where certainty is essential.[202] In order to tackle the lack of consistency a system of dépeçage [203] is applied to interest analysis. Choice of law is determined not on a case by case basis but on an issue by issue basis. In relation to essential validity of marriage, each of the incapacities to marry[204] would be governed by its own choice of law rule. This can be criticised for complicating an already 'complex methodology' by further 'issue splitting.'[205] Advantages include allowing

[201] *Tooker v Lopez* (1969) 24 N. Y. 2d 569, 584.

[202] Davie (n196) at 43. See also Fruehwald, S., "Choice of Law and Same-Sex Marriage" (1999) 51 *Florida Law Review* 799.

[203] The concept of dépeçage in a conflict of laws context, means that different issues within a case may be governed by the laws of different states

[204] The other incapacities to marry include age, consanguinity and affinity, polygamy, consent and marriage after divorce. Publication 5 considers what choice of law should be applied same-sex relationships.

[205] See *Juenger* (n195) at 41.

greater certainty[206] whilst continuing to maintain public policy reasons as crucial to the choice of law.

In determining the choice of law to be applied to same-sex relationships, publication 5 sets out all of the public policy factors to be applied. Of general relevance to all cases of essential validity of marriage, are concerns about the importance of validating a marriage,[207] simplicity,[208] EU uniformity internationally,[209] protecting the parties to a marriage[210] and 'sociological, religious and moral' considerations.[211] When focusing on same-sex relationships,

[206] Reed (n92) suggests that a rules based theory should avoid 'excessive judicial particularistic intuitionism' at 390.

[207] See *Ibid.* and *Cox* (n191).

[208] This is important for all staff such as marriage registrars, immigration officers and social security staff who are not necessarily legally trained but are involved with important tasks concerning the validity of a marriage.

[209] *Reed* (n92) at 391. See *Cox* (n191) and Leflar, R., 'Choice Influencing Considerations in Conflicts Law' (1966) 41 *NYU L. Rev.* 267.

[210] Examples of protecting the parties to a marriage can be seen in relation to minimum age restrictions or concerns relating to consent such as fraud, duress or mistake. *Eg, Davie* (n196) 54 stated that in relation to lack of consent that the 'purpose behind the law will generally be to protect the person from the consequences of their misapprehension or weakness.'

[211] In this context there are rules prohibiting consanguinity (which concerns a blood relationship between the parties) and affinity (which concerns parties who are already related through marriage).

publication 5 draws on other public policy considersations, analysed elsewhere in this work and argues that concerns about citizenship, equality and symbolism all call for a more extended choice of law rule for same-sex relationships. Equal citizenship is ofter referred as having a 'constitutional character' due to the number of public rights concerned.[212] Publication 5 therefore sees citizenship as a strong public policy factor in favour of having a more extensive choice of law rule. Arguments on the basis of equality are very important for same-sex marriage proponents.[213] In many international cases which have been successful in relation to same-sex marriage, equality arguments have often been an important factor.[214] Publication 7 considers in detail the symbolism of

[212] For discussion see Cossman, B., *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (n137) p.27. See also n172 for further detail as to the number of rights associated with EU citizenship.

[213] For discussion see Marshall, K. L., 'Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed' (2010) 2 *Wm. & Mary Pol'y Rev.* at 199-200 and Dunlap (n139).

[214] See cases from the US Supreme Court such as *Goodridge* (n165) as discussed by Jonah Crane "Legislative and Constitutional Responses to Goodridge v Department of Public Health" (2003-2004) 7 New York University Journal of Legislation and Public Policy 465 and *Obergefell* (n6). As well as leading cases from Canada, such as *Halpern v Canada (Attorney General)* (65 OR (3d) 161 (Ont CA) (2003) as discussed by L'Heureux-Dube, C (2003) 1(1) *International Journal of Constitutional Law* 35 and South Africa such as *Minister of Home Affairs and Another v Fourie and Another* (n124).

marriage.[215] On this view to be denied the status of a marriage is to be demoted to a second-class status. The strength of the symbolism argument can also be seen by same-sex couples in the UK, France and Denmark continuing to fight for same-sex marriage, even after being given many legal rights through the institution of civil partnership. Symbolism is another strong public policy argument favouring a more extensive choice of law rule.

Publication 5 goes on to set out a novel choice of law mechanism, which is termed the continued recognised relationship theory. The applicable choice of law rule should be that of the country where the couple intend to reside, or if their marriage has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived. This goes beyond traditional choice of law theories as it considers both the law of the country of future domicile

[215] Other authors such as Triger , Z.,'Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships (2012) 8(2) International Journal of Law in Context 268 and Dorf, M.C., 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 *Virginia L. Rev.* 1267 also consider that marriage has a symbolic status.

together with the law where the couple previously resided.[216] At the same time respect is given to individual countries' domestic policies as there is nothing in this suggested choice of law rule which requires individual countries to allow same-sex marriage to take place within their own jurisdiction. Publication 5 advocates the involvement of the EU in order to avoid limping marriages,[217] and 'divergences between Member States.'[218] Publication 5 concludes that the EU system needed to act on this topic because of the imperative of free movement for EU citizens. EU citizens are unlikely to relocate across the EU if their family members cannot move with them.

Both publications 4 and 5 stressed the important role which could be played by the EU in this area. These predictions have been borne out by recent CJEU case law including the *Coman*

[216] As set out above a more extensive choice of law is justified because of the additional public policy reasons which apply to same-sex relationships, namely the concerns of citizenship, symbolism and equality.

[217] For example where a marriage is recognised in one country but not another.

[218] For discussion see Moir and Beaumont (n74) at 269.

case[219] and the *MB* case.[220] Publication 6 was written at the request of Family Law Editor Liz Walsh. It analyses Advocate General Melchior Wathelet's Opinion, which has subsequently been endorsed by the CJEU in *Coman*.[221] Following the decision from the CJEU, whilst Member States can determine whether to introduce same-sex marriage or civil partnership on a domestic level they must recognise the free movement of EU citizens and their families and therefore grant permanent residence rights to non-EU spouses of same-sex marriages conducted abroad. Publication 6 explains that this reverses years of EU concentration on subsidiarity and represents a further development of EU citizenship and the ever expanding notion of who is a family member. A further recent CJEU case *MB* considers the situation of trans persons who (prior to the legalisation of same-sex marriage in 2013) were under the UK Gender Recognition Act 2004 required to annul their already exisiting marriages in order to be recognised in their new sex.[222] If they did not do this, they could not access other state

[219] *Coman* (n11).

[220] *MB* (n11).

[221] *Coman* (n11).

[222] *MB* (n11).

benefits such as state pensions from the age of 60 for women (prior to pension reform). This was found by the CJEU to be direct discrimation contrary to Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of sex as regards social security.[223] It also represents another example of the expanding nature of EU family law and far reaching interventions from the CJEU. With an estimated publication date of 30th March 2020, my chapter in the forthcoming edited book collection[224] will set forth in further detail a chapter analysing the potential of the EU, through manifold influences of the EU concept of citizenship, extensive free movement provisions and non-discrimination requirements and strengthening ties between the EU and the Council of Europe to further advance LGBTQ+ persons and same-sex couples' rights.

[223] See *MB* (n11) paragraph 29.

[224] Contract agreed with Routledge, with myself as lead editor (Dr Guido Noto La Diega as co-editor) under the working title 'Same-Sex Relationships, Law and Society.'

Published Work contained in PART TWO: SAME-SEX MARRIAGE , THE EU AND THE CAPACITY OF THE CONCEPT OF CITIZENSHIP TO EXTEND THE RIGHTS OF SAME-SEX COUPLES

(4) 'Hamilton, F., 'The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship' (2.1) (2015) *Journal of International and Comparative Law* 87-113.

(5) Hamilton, F., and Clayton-Helm, L., Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory' 3(1) (2016) *Journal of International and Comparative Law* 1 -31.

(6) Hamilton, F., The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive

Impact this has for Same-Sex Couples Relocating Across Borders (2018) *Family Law* 693 – 696

Publication Four: Hamilton, F., 'The Differing Treatment of Same Sex Couples by European Union Law and the European Convention on Human Rights: The European Union Concept of Citizenship' (2.1) (2015) ***Journal of International and Comparative Law*** **87-113.**

DIFFERING TREATMENT OF SAME SEX COUPLES BY EUROPEAN UNION LAW AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE EUROPEAN UNION CONCEPT OF CITIZENSHIP

Frances Hamilton*

Abstract: Same-sex couples' rights when it comes to marriage can be best advanced through equal enjoyment of citizenship status. Protections through the concept of private life will be of limited effect in this context. Comparison of the jurisprudence of the European Union (EU) and the European Convention on Human Rights (ECHR) demonstrates the contrasting approaches to the treatment of same-sex couples and highlights the preferable path. Both systems have traditionally had restrictive roles in the legal protections offered to gays and same-sex couples. Differences in treatment remain despite the fact that the two systems have started to converge and offer more generous protections. The European Court of Human Rights has led the way in the protection of rights for gays and same-sex couples. The EU concept of citizenship together with a closer interplay with the ECHR may offer the greater support for those who favour same-sex marriage.

Keywords: *discrimination; same-sex marriage; European Union; citizenship; margin of appreciation.*

I. Introduction

At the European level despite many links between the European Union (EU) and the European Court of Human Rights (ECtHR),[1] there has been dual and differing treatment of same-sex couples by these institutions. The treaties have different purposes. The ECtHR is of course a specialist court in the area of human rights and is recognised as a world leader in that area. Historically the EU concentrated entirely on economic measures. More recently with the Citizenship Directive 2004/38 and other key legislation[2] there has been a focus on human rights.[3] The

* Senior Lecturer in Law, Northumbria University.

1 EU states make up 28 of the Council of Europe's 47 member states. Following the Lisbon Treaty, the EU has also agreed to accede to the ECHR. Treaty on European Union (TEU) art 6(2) provides that "[t]he Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

2 Other recent EU legislation includes the Charter of Fundamental Rights of the European Union 2000/C 364/01, the EU Employment Work Directive for Equal Treatment in Employment and Occupation 2000/78/EC of 27 November 2000.

3 For example, *see* the Charter of Fundamental Rights of the European Union 2000/C 364/01.

EU currently has 28 member states. All EU states are members of the European Convention on Human Rights (ECHR) and the EU is committed to accede to the ECHR.[4] In contrast the ECHR system has a much wider range in membership and includes 47 countries of more divergent backgrounds.[5] The ECHR system does not have the law-making functions assigned to the EU and therefore proceeds on a case-law basis.

This article will explore the divergence in approach which has grown between the EU and the ECtHR in their treatment of gays and same-sex couples. The purpose of this analysis is to offer the best positive way forward in this area and to stress the need for greater interaction between these organisations. Three themes are explored that illustrate the strategies used by the EU and ECtHR in attempting to eliminate discrimination in this area. First, the treaties are constructed to achieve different purposes and have used varying interpretative methods. The ECtHR has used an incremental case-based approach driven by an evolutive and dynamic protection of human rights, which has led to an expansion of the rights offered to gays and same-sex couples.[6] This is limited by the margin of appreciation. Through legislative expansion, the EU has developed a keener focus on human rights which has also expanded the rights offered to gays and same-sex couples.[7] The EU has to operate strictly within its competences and is also limited by the doctrine of subsidiarity.

Second, the European Court of Justice (ECJ) and ECtHR have taken different approaches with reference to recognition of non-conformist types of "family life". While both were initially reluctant to recognise unconventional types of "family life" traditionally, the ECtHR has been more receptive.[8] In *Schalk and Kopf v Austria*, the ECtHR finally recognised co-habiting same-sex couples as having a right to family life.[9] The ECJ remains influenced by a hierarchal structure of family statuses,[10] but it is the EU concept of citizenship which offers greater potential for those who favour same-sex marriage.

Third, a contrast is drawn between the ECtHR emphasis on "private life" to protect gays[11] as compared with the EU concentration on citizenship which is a concept very much on the public stage. The ECHR emphasis on private life has limitations when it comes to asserting rights in public, such as marriage, which has

4 *See* (n.1).

5 *See* the Council of Europe's website, available at http://www.coe.int/en/web/portal/country-profiles.

6 *See* pp.89–90 of the text of this article for further explanation.

7 For example, the Citizenship Directive 2004/38 and the Charter of Fundamental Rights of the European Union 2000/C 364/01.

8 *See* pp.92–95 of the text of this article for further explanation.

9 Application No 30141/04 (Judgment of 24 June 2010) 94.

10 *See* pp.95–96 of the text of this article for further explanation.

11 *See*, eg, *Dudgeon v UK*, Application No 7525/76 (Judgment of 22 October 1981); *Modinos v Cyprus*, Application No 15070/89 (Judgment of 22 April 1993); *Norris v Ireland*, Application No 10581/83 (Judgment of 26 October 1983); *Sutherland v UK*, Application No 25186/94 (Judgment of 21 May 1996); *Smith and Grady v UK*, Application Nos 33985/96 and 33986/96 (Judgment of 27 September 1999) and *Lustig-Prean and Beckett v UK*, Application Nos 31417/96 and 32377/96 (Judgment of 27 September 1999).

a close connection with citizenship.[12] An understanding of the concept of citizenship shows the potential for its further development regarding gays and same-sex couples. Several authors emphasise the connection between citizenship and equality enacted on a public stage,[13] which in turn leads to a strong symbolic and practical argument for gays wishing to advance the cause of same-sex marriage. Equality arguments are useful in making a successful case for same-sex marriage. This can be seen by international courts in relying upon equality arguments to recognise same-sex marriage.[14] Authors have commented on the concepts of "sexual citizenship" and the legal rights of same-sex couples to enter marriage forming a "constitutional character in many jurisdictions".[15] There is a connection between citizenship and marriage with Angela Harris viewing this as a "right central to citizenship".[16] By granting EU nationals' citizenship status this not only governs what type of family member can move with an EU citizen when exercising the right of free movement between states but also shows the potential to give extensive protections to same-sex couples. Same-sex couples' rights when it comes to marriage can be best protected through equal enjoyment of citizenship status. Protecting same-sex couples' right to a private life will be of limited effect in this context.

Finally a positive conclusion will be drawn. Same-sex couples' rights can best be advanced by equal enjoyment of EU citizenship status. In this context, it is essential that the EU works in combination with the ECHR. Currently, the ECHR is limited by both the margin of appreciation doctrine and the emphasis on privacy. As public opinion evolves, a consensus in favour of same-sex marriage across the Europe may emerge[17] at which point it will be possible for the ECtHR to recognise same-sex marriage. Furthermore, while the ECtHR has developed protections

12 *See*, eg, Angela Harris, "Loving before and after the Law" (2007–2008) 76 Fordham International Law Review 2821; Nicholas Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument Fordham International Law R." (2012) 10(2) International Journal of Constitutional Law 477 and Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007) 27.

13 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Michael Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (2012) 10(2) International Journal of Constitutional Law 340 and Conor O'Mahoney, "There Is No Such Thing As a Right to Dignity" (2012) 10(2) International Journal of Constitutional Law 551.

14 *See*, eg, the South African Constitutional Court in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) (1 December 2005); the Supreme Court of New Jersey in *Lewis v Harris* 908 A 2d 196, 224 (NJ 2006) and the Supreme Court of Hawaii in *Baehr v Lewin* 852 P 2d 44.

15 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Jeffrey Weeks, "The Sexual Citizen" (1998) 15 Theory, Culture and Society 38 and David Bradley, "Comparative Law, Family Law and Common Law" (2003) 33(1) Oxford Journal of Legal Studies 127.

16 *See*, eg, Harris, "Loving before and after the Law" (n.12) 2821, 2822. Angela Harris argues that "[t]he right to marry … is a right central to citizenship; or, more precisely, legal exclusion from the right to marry the partner(s) of one's choice is understood both by those excluded and the excluders as a denial of full citizenship".

for same-sex couples under the ambit of private life,[18] recent cases have stressed equality arguments.[19] If Protocol 12 of ECHR, which is a free-standing equality clause, were to be ratified by more contracting states,[20] this would also greatly strengthen the position of the ECtHR. The EU concept of citizenship, combined with the growing interplay with the ECtHR, means that the EU is in the strongest position for those who favour same-sex rights.

The next section considers the dynamic case law-driven interpretative methods developed by the ECtHR, coupled by the limiting factor of a continued emphasis on the margin of appreciation.[21] This is contrasted to the legislation-driven approach of the EU which historically concentrated on economic rights, although more recently there has been a focus on human rights.[22] It is argued that it is the concept of EU citizenship which could offer the best way forward for those gays supporting same-sex marriage. The fact that both systems are now prepared to operate more closely together is a positive development.

II. Differing Purposes and Interpretative Methods of the EU and ECHR

The EU and ECHR are working more closely together. All EU states are part of the ECHR and there are growing instances of "comparative constitutionalism" or "judicial borrowing" between the institutions.[23] This more recent drive towards co-ordination has not eradicated the contrasting approaches between the two institutions. The differing purposes and interpretative methods of the EU and ECHR have resulted in varying approaches towards the development of gay rights. First, the impact of the ECtHR case-driven innovative methods of interpretation will be considered looking at far-reaching interpretative techniques such as "living instrument", "practical and effective rights" and "autonomous concepts". Second, the limiting effect of the ECtHR concept of

18 *See*, eg, *Dudgeon v UK* (n.11); *Modinos v Cyprus* (n.11); *Norris v Ireland* (n.11); *Sutherland v UK* (n.11); *Smith and Grady v UK* (n.11) and *Lustig-Prean and Beckett v UK* (n.11).

19 For example in *Karner v Austria,* Application No 40016/98 (Judgment of 24 July 2003); *EB v France,* Application No 43546/02 (Judgment of 22 January 2008); *Schalk and Kopf v Austria,* (n.10) and *X v Austria*, Application No 19010/07 (Judgment of 19 February 2013).

20 Currently 18 out of 47 contracting states have ratified Protocol 12 of ECHR, available at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=25/02/2015&CL=ENG.

21 *See Schalk and Kopf v Austria* (n.9).

22 Recent EU legislation includes the Charter of Fundamental Rights of the European Union 2000/C 364/01 and the EU Employment Work Directive for Equal Treatment in Employment and Occupation 2000/78/EC of 27 November 2000.

23 *See*, eg, Janneke Gerards, "The Prism of Fundamental Rights" (2012) 8 European Constitutional Law Review 173, 192 and George Letsas, "Strasbourg's Interpretive Ethic, Lessons for the International Lawyer" (2010) 21(3) European Journal of International Law 509, 521 referring to *Bosphorus Hava Yollari Turizm v Ticaret Anonim Sirketi v Ireland*, Application No 45036/98 (Judgment of 30 June 2005).

"margin of appreciation" will be examined. Third, a question will be raised as regards EU competence in this area, given the fact that the original purpose of the EU was purely economic in nature. Fourth, this will be balanced against the more recent engagement of the EU with human rights and the expanding rights granted to EU citizens.

A. ECtHR innovative interpretative techniques

The Vienna Convention on the Law of Treaties sets out how international treaties should be interpreted.[24] These traditional provisions, which include looking back at the "object and purpose" of the treaty,[25] have played a "minor" role in ECHR jurisprudence.[26] Instead the ECtHR has developed far-reaching interpretative techniques such as "living instrument", "practical and effective rights" and "autonomous concepts". Douglas Lee Donoho describes the ECtHR as having a "dynamic and teleological view of interpretation … [to] favour an expansive view of rights".[27] This approach is limited by the margin of appreciation doctrine which is a serious constraint on the ability of the ECtHR to act.

The doctrine of "living instrument" in George Letsas' words "captures the Court's interpretative ethic",[28] showing that the ECtHR is not bound by the text of the ECHR drafted in the 1950s.[29] The ECtHR has also introduced the doctrine of "autonomous concepts" which encouraged greater flexibility, meaning that concepts should not be interpreted in a "conventionalist way".[30] The expanding nature of the ECtHR case law in relation to gays can be seen by the ECtHR finding breaches of art.8, the right to a private and family life.[31] At a later stage in the case law, violations of the ECHR were found on the basis of art.8 (right to privacy)

---

24 Article 31 Vienna Convention on the Law of Treaties 1969 entered into force on 27 January 1980, UN Treaty Series 1155, 331.

25 *Ibid.*

26 Letsas, "Strasbourg's Interpretive Ethic, Lessons for the International Lawyer" (n.23) 509–541, 513.

27 Douglas L Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights" (2001) 15 Emory International Law Review 391, 462.

28 Letsas, "Strasbourg's Interpretive Ethic, Lessons for the International Lawyer" (n.23) 527.

29 *See*, eg, *Dudgeon v UK* (n.11), [60], where the ECHR explained that case law must develop as society changes.

30 Letsas, "Strasbourg's Interpretive Ethic, Lessons for the International Lawyer", (n.23) 527 quoting Judge Van Dijk Dissenting in *Sheffield and Horsham v UK*, Application No 13816/1018 (Judgment of 30 July 1998).

31 Article 8 of the ECHR provides as follows: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2)There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Cases include, eg, *Dudgeon v UK* (n.11); *Sutherland v UK* (n.11); *Smith and Grady v UK* (n.11) and *Lustig-Prean and Beckett v UK* (n.11).

in tandem with art.14 (equality).[32] It is argued here, that the privacy argument under art.8 continues to dominate the ECtHR's reasoning, not least because art.14 (equality) is a conditional right. The text of the ECHR provides a specific limitation with respect to bringing equality claims as these have to fall within the ambit of another substantive right.[33] This is explained by the ECtHR in *EB v France* where the ECtHR stated that "[w]ith regard to Article 14 … the Court reiterates that it only complements the other substantive provisions of the Convention …. It has no independent existence …"[34] The usefulness of art.14 would be greatly extended were it a free-standing right. By direct contrast, the International Covenant on Civil and Political Rights (ICCPR) does provide a free-standing equality clause.[35] The ECHR has introduced a free-standing equality clause in the shape of Protocol 12, but this has not been ratified by all contracting states to the ECHR.[36] Notably, the UK is among the contracting states that has not yet ratified this additional protocol.

B. ECtHR concept of margin of appreciation

It should be remembered that the dynamic and teleological interpretation of the ECtHR is coupled with a margin of appreciation,[37] which is a limiting factor on the ECHR's ability to act. Howard Yourow defines the margin of appreciation as "[t]he latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies"[38] the purpose of which

32 For example, in *Karner v Austria* (n.19) [37] (which concerned inheritance of a tenancy from a deceased same-sex partner), the ECtHR said that "a difference in treatment is discriminatory if it has no objective and reasonable justification" and that "weighty reasons were needed to justify a difference in treatment". *Salgueiro da Silva Mouta v Portugal,* Application No 33290/96 (Judgment of 21 December 1999) (which concerned gay custody rights to a daughter borne in a previous relationship) and *Lardner v Austria,* Application No 18297/03 (Judgment of 3 February 2005) (which concerned the prosecution of the appellant for engaging in homosexual acts with 4 different adolescents where the age of consent was higher for gays than heterosexuals) saw violations of art.14 (equality) in conjunction with art.8 being found. *EB v France* (n.19) concerned single-parent adoption in France. Reversing the decision in the previous case of *Frette v France*, Application No 36515/97 (Judgment of 26 February 2002), the ECtHR found a violation of art.8 in conjunction with art.14 on the basis of an "inescapable conclusion that sexual orientation was at the centre of the deliberations and omnipresent at every stage of administrative judicial proceedings". *X v Austria* (n.19) sees the ECtHR stating that "[s]exual orientation is a concept covered by Article 14".

33 Article 14 Prohibition on Discrimination states that there can be no discrimination in relation to the "[e]njoyment of the rights and freedoms set forth in this Convention".

34 *EB v France* (n.19) [47].

35 ICCPR, art.26.

36 *See* (n.20).

37 For further criticism of the margin of appreciation doctrine, *see* the following: Letsas, "Strasbourg's Interpretive Ethic, Lessons for the International Lawyer" (n.23); Brian Tobin, "Gay Marriage — a Bridge Too Far?" (2007) 15 Irish Student Law Review 175; Eyal Benvenisiti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 New York University Journal of International Law and Policy 843, 850; Tom Lewis, "What Not to Wear: Religious Rights, the European Court and Margin of Appreciation" (2006) 56(2) International and Comparative Law Quarterly 395.

38 Petra Butler, "Margin of Appreciation — a Note towards a Solution for the Pacific" (2008–2009) 39 Victoria University of Wellington Law Review 687 referring to Howard C Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill, 1996) 13.

is to accommodate cultural diversity "while enforcing effective implementation of rights under the European Convention".[39] Despite expanding protection for gays as demonstrated by case law,[40] same-sex couples continue to experience difficulties before the ECtHR when making their arguments in relation to same-sex marriage.

This is shown in *Schalk and Kopf v Austria* where the ECtHR refused to recognise same-sex marriage.[41] This case was important because co-habiting same-sex couples were found for the first time to fall within the definition of "family life".[42] Their right to same-sex marriage was not recognised due to the ECtHR relying upon a wide margin of appreciation following a finding of lack of consensus between contracting states.[43] Michael Hutchinson also expresses concerns about the "possibility of arbitrary decision-making".[44]

In determining the width of the margin of appreciation, the ECtHR will consider (among other factors) the level of consensus between contracting states. In *Schalk and Kopf v Austria*, for example, the ECtHR carefully reviewed how many contracting states recognised same-sex marriage.[45] In determining that only six contracting states recognised same-sex marriage at that date, the ECtHR deemed that a wide margin of appreciation was needed due to a lack of consensus.[46] This effectively results in individual contracting states being able to determine their own policy with reference to same-sex marriage. This position remains unchanged by the more recent case of *Vallianatos v Greece*.[47] The exclusion of same-sex couples from civil partnerships was held to violate art.14 (equality) in conjunction with art.8 (the right to private life).[48] The ECtHR did however clarify that it was not considering in the abstract whether there was a general positive obligation on the respondent state to provide legal recognition of same-sex partnerships.[49]

Even worse is the possibility that the margin of appreciation opens the door to discrimination against minorities, with Loveday Hudson arguing that it leaves "minorities vulnerable to majoritarian domination".[50] The author argued elsewhere that the margin of appreciation has left open the door for contracting states to continue

39 Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation" (n.27) 451.

40 For example, *see Dudgeon v UK* (n.11); *Sutherland v UK* (n.11); *Smith and Grady v UK* (n.11); *Lustig-Prean and Beckett v UK* (n.11); *Karner v Austria* (n.19); *Salgueiro da Silva Mouta v Portugal* (n.32); *Lardner v Austria* (n.32) and *X v Austria* (n.19).

41 *Schalk and Kopf v Austria* (n.9).

42 *Ibid.*, 94.

43 *Ibid.*, [105].

44 Michael Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights" (1999) 48 International and Comparative Law Quarterly 638, 641.

45 *Schalk and Kopf v Austria* (n.9) 27.

46 *Ibid.*, [58].

47 Application Nos 29381/09 and 32684/09 (Judgment of 7 November 2013).

48 *Ibid.*

49 *Ibid.*, [75].

50 Loveday Hudson, "A Marriage by Any Other Name? *Shalk and Kopf v Austria*" 11(1) HRLR 170. *See* also Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (n.37) and Letsas, "Strasbourg's Interpretative Ethic" (n.23).

to refuse to legislate on the basis of homophobic or other bad reasons.[51] The ECtHR has condemned discrimination against gays as unacceptable and that "differences in treatment require particularly serious reasons by way of justification". [52] Despite this, discrimination against gays is well known.[53] Russia is a member of the Council of Europe and homophobic attitudes have been well documented in the press.[54]

Example cases also demonstrate the ECtHR's awareness that contracting states could be acting on the basis of discriminatory reasons.[55] For the purposes of illustrating this point, a couple of cases are explored in further detail. The conjoined cases of *Smith and Grady v UK* and *Lustig-Prean and Beckett v UK* involved the dismissal of gays from the armed forces for reason of their sexual orientation alone.[56] The ECtHR found that the arguments raised by the UK government in relation to discriminatory treatment were "founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation".[57] *Salgueiro Da Silva Mouta v Portugal* concerned a custody dispute.[58] The ECtHR found that the difference in treatment of the gay father by the domestic court was based upon the "applicant's sexual orientation".[59] In support of this finding, the ECtHR referred to the judgment of the Lisbon Court of Appeal where it was stated that "given the dominant model in our society … The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife".[60] Yet by allowing a large margin of appreciation in the area of same-sex marriage, this continues to open the door to such practices. The ECtHR in *Schalk and Kopf v Austria* decided the issue by a majority of four judges to three. The minority argued that since "difference based on sexual orientation requires particularly serious reasons by way of justification", the ECtHR should have found a violation of art.14 taken in conjunction with art.8. [61] Ultimately the emphasis on the margin of appreciation could undermine the usefulness of the dynamic and

51 Frances Hamilton, "Why Margin of Appreciation Is Not the Answer to the Gay Marriage Debate" 2013(1) European Human Rights Law Review 47–55.

52 *Karner v Austria* (2004) 38 EHRR 24.

53 *See*, eg, Zvi Triger, "Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships" (2012) 8(2) International Journal of Law in Context 268–282 referring to David Herring, *The Public Family: Exploring Its Role in Democratic Society* (University of Pittsburgh Press, 2003) 121 and Harry Hay, *Radically Gay, Gay Liberation in the Words of Its Founder* (Beacon Press, 1996) 164–165.

54 For example, *see* Amnesty International reports, available at www.amnesty.org.

55 In the following cases, the ECHR has found that contracting states were acting for discriminatory reasons due to sexual orientation. *Smith and Grady v UK* (n.11), *Lustig-Prean and Beckett v UK* (n.11); *Salgueiro da Silva Mouta v Portugal* (n.32); *Frette v France* (n.32) and *EB v France* (n.19).

56 *Smith and Grady v UK* (n.11) and *Lustig-Prean and Beckett v UK* (n.11).

57 *Ibid.*, [96].

58 *Salgueiro da Silva Mouta v Portugal* (n.32).

59 *Ibid.*, [28].

60 *Ibid.*, [28].

61 *Schalk and Kopf v Austria* (n.9), Dissenting judgment of Judges Rozakis, Spielmann and Jebens at para.8.

teleological interpretation offered by the ECtHR to gays and same-sex couples. As more countries move to recognise same-sex marriage across Europe,[62] consensus may start to favour recognition of same-sex marriage. Margin of appreciation would then no longer be a barrier in the way of recognition.

C. *EU economic roots*

Case law and academic material show that the EU remains influenced by its economic roots. This is exemplified by a number of cases which consider the meaning of family members where the ECJ concentrated on "facilitating the mobility" of prospective migrant workers.[63] The previously restrictive approach of EU legislation towards gays and same-sex couples can be seen in a case concerning the administrative discharge of a lesbian and three gay men from the armed forces following the discovery of their sexual orientation.[64] The Court of Appeal held that the then existing EU Directive[65] only applied to gender and did not cover sexual orientation discrimination.[66] This case was followed by *Grant v South West Trains.*[67] Again the ECJ held that the legislation applied to discrimination based upon gender and not sexual identity or orientation.[68] This case was criticised as "do[ing] the [ECJ] little credit as a constitutional court".[69]

Several further cases also saw restrictive interpretations of "sex" discrimination, where the ECJ determined that this phrase did not extend to cover discrimination on the basis of a person's sexual orientation.[70] This approach has led to restrictions as to which family members can accompany an EU citizen who moves to a different EU country in exercise of their EU rights of freedom of movement. Although registered partners are now in the list of family members protected, this is strictly subject to subsidiarity.[71] If the new host member state does not recognise same-sex

62 *See* (n.17).

63 Helen Stalford, "Concepts of Family under EU Law — Lessons from the ECHR" (2002)16(3) International Journal of Law Policy and the Family 410, 411. *See* also *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] 3 CMLR 39; *Lawrie-Blum v Land Baden Wurttemberg* (Case C-66/85) [1987] 3 CMLR 389 and *R v Immigration Appeal Tribunal, ex p Antonissen* (Case C-292/89) [1991] 2 CMLR 373.

64 *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257.

65 Then existing Council Directive (EEC) 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment.

66 *R v Ministry of Defence, ex p Smith* (n.64).

67 (Case C-249/96) [1998] 1 CMLR 993.

68 *Ibid.*

69 Dimitri Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33(1) Fordham International Law Review 156, 175 referring to Nicholas Bamforth, "Sexual Orientation Discrimination after *Grant v South-West Trains*" (2000) 63 Modern Law Review 694–720, 720. *See* also G Scappucci and P Cabral, "Is the Court of Justice Refusal to 'Think Pink' a Missed Opportunity?" (1998) 5 EU Focus 2.

70 *Advocate-General for Scotland v MacDonald* [2004] 1 All ER 339; *Pearce v Governing Body of Mayfield School* [2000] ICR 920.

71 Directive 2004/38, art.2(2).

partnership rights, they do not have to admit a non-EU national same-sex spouse or registered partner, even if they are legally married or in a civil partnership in the country they are moving from.

D. EU engagement with human rights

The approach of the ECJ to same-sex couples has altered, as the EU legislation itself changed. EU legislation has widened the protections offered to gays and same-sex couples.[72] The EU has enacted the EU Charter of Fundamental Rights which specifically provides that sexual orientation is a protected ground of discrimination.[73] Writers have commented that the EU Charter of Fundamental Rights, therefore, guarantees more extensive protection than the ECHR,[74] "creating a completely new crosscutting fundamental right".[75] The EU law's recent emphasis on citizenship can also be seen by the introduction of the Citizenship Directive 2004/38.[76] Case law before the ECJ has offered expansive interpretations of protection for discrimination under art.18 of Treaty on the Functioning of the European Union (TFEU) including non-economically active citizens.[77]

Some writers even go so far as to comment upon the EU engaging in a "rights revolution".[78] Andrea Eriksson argues that more recent cases show that the ECJ is inclined "to extend protection against discrimination"[79] but not every commentator agrees with this perspective due to the ECJ's continued emphasis on subsidiarity.[80] The EU has become increasingly influenced by the ECtHR. EU states make up some 28 of the Council of Europe's 47 member states. Following the Lisbon Treaty, the EU has agreed to accede to the ECHR.[81] In addition, the

---

72 For example, the Citizenship Directive 2004/38 and the Charter of Fundamental Rights of the European Union 2000/C 364/01.

73 The Charter of Fundamental Rights of the European Union 2000/C 364/01 art.21(1) provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

74 Stalford, "Concepts of Family under EU Law — Lessons from the ECHR" (n.63).

75 Jakob Cornides, "Three Case Studies on 'Anti-Discrimination'" (2012) 23 European Journal of International Law 517, 531.

76 Citizenship Directive 2004/38.

77 *Grzelczyk v Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve* (Case C-184-99).

78 Mark Dawson, E Muir and M Claes, "Enforcing the EU's Rights Revolution; the Case of Equality" (2012) 3 European Human Rights Law Review 276.

79 Andrea Eriksson, "European Justice: Broadening the Scope of European Non-Discrimination Law" (2009) 7(4) International Journal of Constitutional Law 731, 733 referring to *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* (Case C-267/06) [2008] 2 CMLR 32 [63] and *Jurgen Romer v Freie und Hansestadt Hamburg* (Case C-147/08) and *Coleman v Attridge Law and Steve Law* (Case C-303/06).

80 Cornides, "Three Case Studies on 'Anti-Discrimination'" (n.75) 522. *See* also Kochenov, "On Options of Citizens and Moral Choices of States" (n.69) 188 referring to Gabriel Von Toggenburg, "'LGBT' Go Luxembourg: On the Stance of Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice" (2008) European Law Reporter 174,181.

81 TEU art.6(2) provides that "[t]he Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

fundamental rights of the ECHR are incorporated into the EU Charter, which from 1 December 2009 has the same legal status as the treaties.[82] EU accession criteria also demands compliance with human rights.[83] Academics and other organisations including the European Parliamentary Assembly have argued that the two institutions are "natural partners"[84] and "increasingly active in the same fields"[85] and should therefore, according to the European Parliament Assembly, not "waste resources".[86]

There are examples of the EU and ECHR working together. This is demonstrated by the Memorandum of Understanding agreed in 2005 which instructs the "two organisations to strengthen their relations in areas of common interest such as human rights, democracy and the rule of law, culture, education and social cohesion".[87] There is also a growing number of cases of comparative constitutionalism or "judicial borrowing".[88] Interestingly, Carmelo Danisis and Marata Cartabia both separately comment upon the fact that all European institutions are now focusing on non-discrimination giving the EU and ECHR a common goal.[89] All of these points demonstrate the growing interplay between the EU and the ECHR.

Despite this growing impetus to work together, the ECHR and the EU continue to take different approaches to the treatment of same-sex couples. It is argued here that it is the EU concept of citizenship which has most potential for those gays supporting same-sex marriage. This is because of the constitutional nature of citizenship,[90] the close connections between citizenship and marriage[91] and between

82 Charter of Fundamental Rights of the European Union 2000/C 364/01.

83 *See* the European Commission website at http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm. For further discussion of these criteria, *see* also Helen Grabbe, "'Citizens' Europe: Crowded Out by Economic Focus" (2012) 5 Intereconomics 268, 268.

84 European Parliamentary Assembly, "Building Greater Europe without Dividing Lines" (Opinion on the Report of the Committee of Wise Persons, 1999) 15 Opinion No 208.

85 T Joris and J Vandenberghe, "The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?" (2008–2009) 15 Columbia Journal of European Law 1, 3.

86 European Parliamentary Assembly, "The Council of Europe and the New Issues Involved in Building Europe", Recommendation No 1578 (2002) para.4.

87 "Memorandum of Understanding between the Council of Europe and the European Union" (2007) CM 74 (10 May 2007) prepared at the 117th Session of the Committee of Ministers (Strasbourg), available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)74&Language=lanEnglish.

88 Gerards, "The Prism of Fundamental Rights" (n.23) 192.

89 Carmelo Danisis, "How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Non-Discrimination Jurisprudence" (2011) 9(4) International Journal of Constitutional Law 793; Marta Cartabia, "The European Court of Human Rights: Judging Non-Discrimination" (2011) 9(4) International Journal of Constitutional Law 808.

90 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Weeks, "The Sexual Citizen" (n.15) and Bradley, "Comparative Law, Family Law and Common Law" (n.15).

91 *See, eg,* Harris, "Loving before and after the Law" (n.12) 2821–2822. Angela Harris argues that "[t]he right to marry … is a right central to citizenship; or, more precisely, legal exclusion from the right to marry the partner(s) of one's choice is understood both by those excluded and the excluders as a denial of full citizenship".

citizenship and equality.[92] These connections lead to much stronger practical and symbolic arguments in favour of marriage.

The ECHR system driven by case-law developments and dynamic interpretative methods does have the advantage of flexibility, but it also has flaws. Given the current lack of consensus among the member states with regards to same-sex marriage,[93] techniques such as the margin of appreciation weaken the protection of human rights by the ECHR. Through the adoption of legislative measures such as the Citizenship Directive 2004/38 and the EU Charter, the EU is engaging with protection of gays and human rights.[94] The final section of this piece will demonstrate that the EU concept of citizenship shows the potential for further development for those who favour same-sex marriage. Equal citizenship is a strong argument in this respect as there is a clear connection between citizenship and marriage.[95] There is potential for the EU concept of citizenship in combination with EU free movement provisions to give extensive protections for same-sex couples to move around Europe. The position of the EU is strengthened by the growing interplay with the ECtHR. The next section considers the contrasting concepts of family life developed by the ECJ and the ECtHR.

III. The Contrasting Concepts of Family Life Developed by the ECJ and ECtHR

Family life is an important concept for both the EU and the ECHR institutions.[96] It is necessary to fall under the EU definition of "family member" in order to relocate internationally with the EU citizen across different member states and to access the "plethora of benefits"[97] to which EU citizens and their family members are entitled. Being a "family member" is also a requirement to access the protections provided by art.8 of ECHR for "family life" (which are echoed in art.7 of the EU Charter).[98] Despite the overlapping factual scenarios which many cases concern and the overlap in contracting states and terminology employed, there are differences between the definition of family life before EU and the ECHR institutions. The approaches taken by the EU and ECHR concerning the treatment of same-sex couples are examined. It is argued that the traditional ECtHR reliance

92 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (n.13) and O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13).

93 *See* (n.17).

94 Citizenship Directive 2004/38 and Charter of Fundamental Rights of the European Union 2000/C 364/01.

95 *See*, eg, Harris, "Loving before and after the Law" (n.12) 2821–2822.

96 Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) European Journal of International Law 1023, 1041 referring to John Rawls, *A Theory of Justice* (1971).

97 Stalford, "Concepts of Family under EU Law — Lessons from the ECHR" (n.63) 427.

98 The European Convention on Human Rights, art.8(1) provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence".

on the concept of "private life", which still continues to be of relevance in recent cases,[99] is a limiting factor in the development of ECHtR protection for same-sex couples. In contrast, the EU concept of citizenship with its close connections to marriage offers a greater chance for development for those who favour same-sex marriage.

A. ECtHR definition of family life

In the past the ECtHR refused to recognise same-sex partners as having a "family life".[100] Instead, the ECHR offered legal protection to gays under the concept of private life.[101] The ECtHR has gradually expanded the rights of same-sex partners. *Karner v Austria* signalled a more inclusive approach, with the ECtHR concluding that "differences based on sexual orientation require particularly serious reasons by way of justification".[102] The judgment was itself limited, as the applicant had framed his claim under the "right to respect for his home" and it was therefore not necessary "to determine the notions of 'private life' or 'family life'".[103] More recent cases see the ECtHR taking a more inclusive approach, and same-sex couples are now included in the definition of "family life".[104] The ECtHR has also developed wider protections for heterosexual non-married couples.[105] The ECHR has progressed from simply protecting the nuclear family of married parents and biological children to a position of greater flexibility that encompasses a wider range of family relationships.[106]

The treatment of co-habitees is particularly important in relation to same-sex couples who in certain European states have limited or no access to the status of either marriage or registered partner. In *Schalk and Kopf v Austria*, the ECtHR finally recognised that a "cohabiting same-sex couple living in a stable partnership, fell within the notion of 'family life', just as the relationship of different-sex couple

99 *See* (nn.31 and 32).

100 For example, *see Simpson v United Kingdom*, Application No 11716/85 (Judgement of 14 May 1986); *Kerkhoven and Hinke v The Netherlands*, Application No 15666/89 (Judgment of 19 May 1992) and *Mata Estevez v Spain*, Application No 56501/00 (Judgment of 10 May 2001).

101 *See* (nn.31 and 32).

102 *Karner v Austria* (n.19), [37].

103 *Ibid.*, [33].

104 *Schalk and Kopf* (n.9), [94], where the ECtHR stated that "it is artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would".

105 For examples of cases involving non-married heterosexual couples, *see Berrehab and Koster v The Netherlands*, Application No 10730/84 (Judgment of 21 June 1988); *Marckx v Belgium*, Application No 06833/74 (Judgment of 13 June 1979); *Keegan v Ireland*, Application No 16969/90 (Judgment of 26 May 1994) and *Kroon v The Netherlands*, Application No 18535/91 (Judgment of 27 October 1994).

106 For further discussion, *see* Stalford, "Concepts of Family under EU Law — Lessons from the ECHR" (n.63) 410–411.

in the same situation would".[107] Accordingly, different treatment based on sexual orientation required particularly serious reasons by way of justification.[108] As the case involved marriage, the ECtHR stated that they would not be willing to substitute their opinion for that of the national courts due to the fact that "marriage has deep rooted social and cultural connotations which may differ largely from one society to another".[109] Ultimately, therefore, the ECtHR stopped short of recognising same-sex marriage due to the margin of appreciation.[110] Despite this conclusion, authors have commented upon this judgment as a "landmark" in the evolution of ECtHR case law, due to the recognition of same-sex couples within the definition of family member.[111]

Even though the ECtHR has more recently engaged with art.14 (equality) arguments, the ECtHR continues to pay credence to the traditional line of cases which relied upon the "privacy" argument.[112] This is partly due to the drafting of the ECHR. Article 14 (equality) is a conditional right which can only be asserted simultaneously with another alleged violation of the ECHR.[113] The possibility of the ECtHR to protect same-sex couples would be greatly extended were art.14 is a free standing right. Protocol 12 of ECHR does provide for this but has only currently been ratified by 18 out of 47 contracting states.[114] This demonstrates the current status and limitation of ECHR jurisprudence in protecting same-sex couples. The concept of margin of appreciation, combined with the traditional reliance upon the privacy argument, provides obstacles in the way of the ECtHR in further development of rights for gays and same-sex couples. These difficulties may lessen over time as more countries recognise same-sex marriage and ratify the free-standing equality provisions of Protocol 12 of ECHR. It is argued that the EU concept of citizenship combined with a growing interplay with the ECHR which may offer greater support for those who favour same-sex marriage.

B. EU definition of family life

Previously, the EU had offered limited rights for same-sex couples and, although registered partners are now included in the list of family members protected, this is

107 *Schalk and Kopf v Austria* (n.9), [94].

108 *Ibid.*, [97].

109 *Schalk and Kopf v Austria* (n.9), [62].

110 *Ibid.*

111 Conor O'Mahoney, "Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families" (2012) 26(1) International Journal of Law Policy and the Family 31, 38. *See* also Danisi, "How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Non-Discrimination Jurisprudence" (n.89) 804.

112 *See* (n.31).

113 Article 14 Prohibition on Discrimination states that there can be no discrimination in relation to the "[e]njoyment of the rights and freedoms set forth in this Convention". *See* pp.91–92 of the text of this article for further explanation.

114 *See* (n.20).

strictly subject to subsidiarity.[115] In EU law, there is a hierarchy of family statuses that are protected, with heterosexual marriage receiving the clearest protection and co-habitees not being included within the status of family members, instead having to prove that they have a relationship "duly attested".[116] Through legislative reforms, EU protection of same-sex couples has improved, but difficulties with restrictive treatment of same-sex couples remains. EU law historically required a connection between a family member and an economically active worker.

In addition, EU legislation continues to distinguish between different categories of partnership. This involves a hierarchy of protection for spouses, registered partnerships and co-habitees. The necessity to be a family member of a "worker" under legislation has now been reformed with the introduction of citizenship rights but a divide between economically active and non-economically active citizens remains. Non-economically active citizens are only given weaker rights (up to three months stay),[117] unless they can prove they are of independent means or are a job seeker.[118] This contrasts to economically active citizens who can remain while they are working.[119] The hierarchical difference in marital statuses also remains with clearer protection given to spouses or registered partners (although even here subject to subsidiarity) than to co-habitees.[120] While these different categories of protection remain, there are always going to be difficulties for same-sex couples seeking to take advantage of EU law in exercising their rights of free movement. It is proposed that despite these difficulties, the EU concept of citizenship offers the greatest potential for those who favour same-sex marriage. The ECHR system has to grapple with the obstacle of its traditional development of gay rights through the concept of privacy. This will never be a successful argument to advance same-sex marriage, which is a right very much on the public stage.

EU law states that spouses are included in the category of family members[121] and indeed before the introduction of the Citizenship Directive, only spouses (and not registered partners) could receive protection as family members.[122] *Reed v The Netherlands* determined that "'spouse' only included an individual in a marital relationship".[123] Despite arguments made by commentators that since the word

115 Directive 2004/38, art.2(2).

116 *Ibid.*, art.3(2).

117 Citizenship Directive 2004/38, arts.6 and 7.

118 *R v Immigration Appeal Tribunal, ex p Antonissen* (n.63).

119 Citizenship Directive 2004/38, arts.6 and 7.

120 *Ibid.*, arts.2(2) and 3(2).

121 *Ibid.*, art.2(2)(a).

122 Article 10, Regulation 1612/68 defines worker's families. "The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age or 21 or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse".

123 (Case C-59/85) [1987] 2 CMLR 448. *See*, for further explanation, Allison O'Neill, "Recognition of Same-Sex Marriage in the European Community, the European Court of Justice's Ability to Dictate Social Policy" (2004) 37 Cornell International Law Journal 199.

"spouse" is gender-neutral it should include same-sex partners,[124] it is clear that the EU system does not recognise same-sex marriages contracted in other states and the specific provisions of EU law protect subsidiarity and allow member states to determine their own policy in relation to same-sex marriage.[125] This will be less of a problem going forward as more states across Europe are now recognising same-sex marriage.[126]

Under previous EU legislation, there was no specific provision for registered partners.[127] This made it "harder for members of unconventional families … to enjoy family reunion".[128] The Citizenship Directive expressly includes registered partners as family members under art.2(2), but this is only "if the legislation of the host Member State treats registered partnerships as equivalent to marriage".[129] Subsidiarity is therefore strongly re-asserted. While the current legislation has gone some way to improving the situation,[130] the fact remains that it is dependent upon the host member state treating registered partnerships as equivalent to marriage.[131] Dimitri Kochenov comments that "[t]his wording is problematic … [as] it brings the application of EU law in total dependence on the national law of the member states" and it is unlikely that the wording of the EU Citizenship Directive is going to be struck down by the ECJ.[132] It is clear that even the reformed EU system (following the introduction of the Citizenship Directive 2004/38) gives different protection to family members, dependent upon whether they are spouses or registered partners, thereby continuing to preserve a hierarchy of statuses. This remains a hurdle to be overcome. As more states are gradually moving from recognising registered partnerships to protecting same-sex marriage, this will be less of an important topic in the future.[133]

---

124 Kochenov, "On Options of Citizens and Moral Choices of States" (n.69) 190 referring to M Bell, "EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process" (2005) ILGA Europe, The European Region of the International Lesbian and Gay Association, available at www.ilga-europe.org/content/download/1448/9061/file/freedom.pdf.

125 The Commentary on art.9 of the Charter of Fundamental Rights of the European Union provides that "[t]here is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples". Also art.2(2) of Directive 2004/38 provides that "'family member' means (a) spouse, (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State".

126 *See* (n.17).

127 Then Regulation 1612/68, art.10(2) provided that "Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes".

128 Grigolo, "Sexualities and the ECHR" (n.96) 1044.

129 Directive 2004/38, art.2(2)(b).

130 John Fairhurst, *Law of the European Union* (Pearson Publishing, 9th ed., 2012) 368 commented upon the "broader scope than the former definition".

131 Kochenov, "On Options of Citizens and Moral Choices of States" (n.69) 197.

132 *Ibid.*, p.198 referring to *Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* (n.79).

133 *See* (n.17).

In this context it is useful to examine the protection provided for co-habiting couples. Given that some EU and ECHR contracting states do not recognise either same-sex marriages or registered partnerships, this may be the only option open for same-sex couples and is therefore important. In EU law, co-habitees are not directly included as family members under the Citizenship Directive. They have to prove a "durable relationship duly attested".[134] Commentators argue that this "excludes an increasing number of individuals... from the ambit of EU social protection"[135] and that it represents a "failure for the notion of free movement".[136] Dimitri Kochenov refers to a "social hierarchy...putting a heterosexual married couple at the top of the pyramid".[137] Given the strict adherence of EU law to subsidiarity in the context of same-sex registered partners, it is likely that this would also apply in the context of same-sex co-habitees, thereby further limiting such partners' rights to move with their families. In practice, as more states in Europe recognise civil partnerships or same-sex marriage, this will be less of a problem in the future.[138] The EU concept of citizenship offers stronger practical and symbolic arguments for those who favour same-sex marriage. This is because of the constitutional nature of citizenship,[139] the close connections between citizenship and marriage[140] and between citizenship and equality.[141]

It is clear that both systems have struggled with reference to how to treat same-sex couples. The ECtHR after much deliberation has recognised same-sex couples as having a "family life".[142] The right to same-sex marriage has not been recognised because of the margin of appreciation[143] and the continued emphasis upon privacy.[144] These problems may be overcome as consensus across Europe moves to favour same-sex marriage. In the EU system, there is progress, with the recognition of registered partners under the Citizenship Directive[145] but this is

134 Citizenship Directive 2004/38, art.3(2).

135 Stalford , "Concepts of Family under EU Law — Lessons from the ECHR" (n.63) 411.

136 *Ibid.*, p.419 referring to Karl Lundstrom, "Family Life and the Freedom of Workers in the European Union" (1996) 10 International Journal of Law Policy and the Family 250, 271.

137 Kochenov, "On Options of Citizens and Moral Choices of States" (n.69) 201 referring to Daniel Borillo, "Pluralisme Conjugal ou Hierachie des Sexualites: La Reconnaissance Juridique des Couples Homosexualles dans l'Union Europenne" (2001) 46 McGill Law Journal 875, 910.

138 See (n.17).

139 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Weeks, "The Sexual Citizen" (n.15) and Bradley, "Comparative Law, Family Law and Common Law" (n.15).

140 *See*, eg, Harris, "Loving before and after the Law" (n.12) 2821–2822. Angela Harris argues that "[t]he right to marry … is a right central to citizenship; or, more precisely, legal exclusion from the right to marry the partner(s) of one's choice is understood both by those excluded and the excluders as a denial of full citizenship".

141 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (n.13) and O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13).

142 *Schalk v Kopf and Austria* (n.9), [94].

143 *Ibid.*, [105].

144 *See* (nn.31 and 32).

145 Citizenship Directive 2004/38, art.3(2).

subject to subsidiarity.[146] The final section of this article examines a final contrasting theme for the EU as opposed to ECHR treatment of same-sex couples. The EU places emphasis on public citizenship. This contrasts with the emphasis on a right to private life before the ECtHR which becomes a limiting factor when it comes to the issue of recognising same-sex marriage. The next section investigates the potential for development by the deployment of these two concepts.

IV. Public Citizenship versus Private Life

Another difference in approach between the two institutions in relation to their treatment of gays and same-sex couples is that of public citizenship versus private life. The EU has developed from a free movement-based treaty into one of ever-increasing public citizenship rights,[147] and it is therefore into this model that arguments for same-sex couples in relation to free movement must be placed. Citizenship leads to a much more extensive array of rights than that justified by privacy. Privacy has traditionally had a focus on being "let alone". It is described by Mill as "a circle around every individual human being which no government … ought to be permitted to overstep".[148] In contrast, public citizenship involves rights to participate in society.

The concept of EU citizenship is now contained in art.20 of TFEU.[149] This provision has moved away from the original treaties which concentrated upon the economic status of individuals as workers, as defined in *Lawrie Blum v Land Baden-Wurttemberg*.[150] Citizens are entitled to "move and reside freely within the territory of the Member States"[151] and a further series of rights were included under the Citizenship Directive 2004/38.[152] The importance of citizenship to gays and same-sex couples arises from the extensive rights which stem from citizenship. The additional rights include a right of residence[153] recourse to a member state's social assistance scheme,[154] ensuring "equal treatment with host-country nationals",[155]

146 *See* (n.125).

147 Article 20 of TFEU (replacing its forerunner art.17 EC Treaty) provides that "(1)Citizenship of the Union is hereby established. Every person holding the nationality of a member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".

148 John Stuart Mill, *Principles of Political Economy* (Longmans Green and Co, 1936) 943.

149 Note that art.20(2) of TFEU provides that "[c]itizens of the Union shall enjoy the rights and be subject to the duties provides for in the Treaties. They shall have, inter alia (a) the right to move and reside freely within the territory of the Member States".

150 *Lawrie Blum v Land Baden-Wurttemberg* (n.63) [14] provides that "[o]bjectively defined, a 'worker' is a person who is obliged to provide services for another in return for monetary reward and is subject to the direction and control of the other person as regards the way in which the work is to be done".

151 TFEU, art.20(2).

152 Citizenship Directive 2004/38.

153 *Ibid.*, art.14(1).

154 *Ibid.*, art.14(3).

155 *Ibid.*, art.24.

allowing family members to take up employment or self employment[156] and a right of continuous legal residence after five years.[157] Family members of EU citizens also benefit from equal treatment with host country nationals[158] and extensive schooling protection for children.[159] Citizens are protected from discrimination under art.18 of TFEU which has led to far-reaching results for non-economically active citizens, as in *Grzelczyk v Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve*.[160] The economic nexus does remain important with non-economically active citizens being entitled to stay for a maximum of three months only[161] in their new host country unless they could prove they were genuinely seeking work.[162] What is also apparent is that citizenship has created a host of rights to both the EU citizens concerned and their family members.

The EU has always had a specific focus on equal pay between workers.[163] This has been further strengthened by the development of the citizenship concept, as there have always been connections between citizenship and equality arguments. Andrea Erikkson comments that "[b]ecause every kind of discrimination is antithetical to the European integration process, the principle of non-discrimination is deeply embedded in European Union law", with laws relating to equality and non-discrimination being found in distinct fields of "internal market, citizenship, immigration and labo[u]r law".[164] The EU now has far-reaching protections from discrimination on the basis of sexual orientation. Article 19 of TFEU is the legal basis for the adoption of measures to "combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[165] The EU also adopted the provisions of the Charter of Fundamental Rights which includes "same-sex orientation" as a ground for discrimination.[166] These provisions continue

156 *Ibid.*, art.23.

157 *Ibid.*, art.16.

158 *Ibid.* art.24(1).

159 Fairhurst, *Law of the European Union* (n.130) 405 comments on the extensive protection in relation to the EU worker's children's rights to be admitted to "primary and secondary schooling system, as well as to vocational courses in further and higher education, pursuant to art 12, Regulation 1612/68" referring to *Casagrande v Landeshauptstadt München* (Case C-9/74) and *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99).

160 Article 18 of TFEU; *see*, eg, *Grzelczyk v Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve* (n.77) entitled the applicant French student to obtain access to minimum subsistence allowance (known as "minimex") in Belgium.

161 *See* Citizenship Directive 2004/38, arts.6 and 7.

162 *R v Immigration Appeal Tribunal, ex p Antonissen* (n.63).

163 For example, *see* art.157 of TFEU (formerly arts.141 TEU and 119 EEC) provides that "[e]ach Member Sate shall ensure that the principle of equal pay for male and female workers for equal work of equal value is applied".

164 Eriksson, "European Justice" (n.79) 731.

165 TFEU, art.19.

166 The Charter of Fundamental Rights of the European Union 2000/C 364/01 art.21(1) provides that "[a]ny discrimination based on any ground such as sex, race, colour, ethic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

to be subject to the principle of subsidiarity and cannot exceed the competencies already granted to the EU.[167] In practice as more states in Europe reform their laws, this will be less of a problem in the future.

A. ECtHR's traditional reliance on the use of "Private Life"

The ECtHR has historically relied upon the use of "private life" to justify the expansion of gay rights.[168] Recent cases have seen the ECtHR referring to equality arguments,[169] but the "private life" argument remains the dominant force by which the ECtHR has expanded protection for gays.[170] If the free-standing equality protections under art.12 were to be ratified this would greatly improve the position of the ECtHR. At present, however, only 18 out of 47 contracting states have ratified this additional protocol.[171] The difficulty is that the ECHR privacy argument has limitations when it comes to asserting the right to same-sex marriage which is a concept very much on the public stage. In this context, the EU system offers an opportunity to develop protection for gays and their families including same-sex couples to move across Europe as citizens.[172] Subsidiarity continues to play an important role.[173]

Citizenship is becoming one of the key concepts which the EU uses to justify the ever-increasing rights of non-economically active citizens and their family members to move across the EU. Helen Stalford notes that "the emergence and formalisation of 'citizenship of the Union' in order to engage everyday individuals with the EU in a more meaningful and direct way".[174] When drawing a comparison with the ECHR system, the protection afforded to gays has traditionally been by means the right to a private life under art.8. Dr Susana Caballero notes that "the protection it affords to homosexuals is limited to the protections that attach to the private life of people".[175] There has been a recent change in this regard, with the inclusion of same-sex couples in the definition of family life before the ECtHR.[176] In addition, recent cases have started to refer to equality arguments.[177] It remains

---

167 For example, art.20 of TFEU provides that the citizenship rights granted "shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder".

168 *See*, eg, *Dudgeon v UK* (n.11); *Modinos v Cyprus* (n.11); *Norris v Ireland* (n.11); *Sutherland v UK* (n.11); *Smith and Grady v UK* (n.11) and *Lustig-Prean and Beckett v UK* (n.11).

169 For example in *Karner v Austria* (n.19); *EB v France* (n.19); *Schalk v Kopf and Austria* (n.9) and *X v Austria* (n.19).

170 This can be seen by the fact that when equality arguments were raised in *Schalk and Kopf v Austria* (n.9), they were defeated by continued reliance on the margin of appreciation [105].

171 Currently 18 out of 47 contracting states have ratified Protocol 12 of ECHR, *see* (n.20).

172 Note that art.20(2) of TFEU provides that "[c]itizens of the Union shall enjoy the rights and be subject to the duties provides for in the Treaties. They shall have, inter alia (a) the right to move and reside freely within the territory of the Member States".

173 *See* (n.125).

174 Stalford, "Concepts of Family under EU Law — Lessons from the ECHR" (n.63) 413.

175 Susana S Caballero, "Unmarried Cohabiting Couples before the European Court of Human Rights: Parity with Marriage?" (2004–2005) 11 Columbia Journal of European Law 151, 166.

176 *Schalk v Kopf and Austria* (n.9), [94].

177 *See*, eg, *Karner v Austria* (n.19); *EB v France* (n.19); *Schalk v Kopf and Austria* (n.9) and *X v Austria* (n.19).

the case however that the right to a private life remains the strongest argument for gays before the ECtHR. Where equality arguments in relation to family life have been made more convincingly, for example in *Schalk and Kopf v Austria*, there are limitations on the success of these arguments with the ECtHR continuing to rely upon margin of appreciation.[178] This may be less of a problem going forward if more countries move to recognise same-sex marriage across Europe.[179]

All citizenship rights are enacted upon the public stage. This is in stark relief to the ECHR system by which the traditional method of protection for gays was by way of their right to "private life". This means, as Carmelo Danisis argues, "the interpretation of sexual orientation given by the court has reinforced the idea that homosexuality is accepted within one's sphere while refusing to grant it public recognition of the full range of rights under the Convention".[180] The emphasis on "private life" can be seen from the initial cases concerning gays before the ECtHR, which include *Dudgeon v UK*.[181] The judgment in this case strongly condoned the criminalisation of sodomy. As such it is a progressive case in the protection of gays and the development of their rights. The judgment was reached on the basis of art.8 (right to private life). No reference was made to art.14 equality provisions.[182] In the course of their judgment, the ECtHR also appeared to condone state control over gays on the basis of what the ECtHR regarded as "the legitimate necessity in a democratic society for some degree of control over homosexual conduct".[183] In relying so heavily upon the privacy argument in the first cases concerning gays before the ECtHR, the ECHR appears to have created a limiting factor on the development of protections for same-sex couples.[184] An argument for same-sex marriage can never be won by an emphasis on privacy as marriage is a public status. In order to be successful in advancing an argument for same-sex marriage, the ECtHR needs to engage in equality arguments. This can be demonstrated by the success of international courts in utilising these points.[185]

A further example of the continued emphasis on privacy by the ECtHR can be seen in *ADT v UK* where the court emphasised the fact that the "activities … were genuinely private".[186] David Bradley also notes the emphasis on homosexuality in the private sphere in a domestic context.[187] This can be seen from the Wolfenden's Committee report into the legalisation of homosexual sexual activity where a

178 *Schalk v Kopf and Austria* (n.9), [105].
179 *See* (n.17).
180 Danisi, "How Far Can the European Court of Human Rights Go in the Fight against Discrimination?" (n.89) 803.
181 *Dudgeon v UK* (n.11).
182 Gigolo, "Sexualities and the ECHR" (n.96) 1030.
183 *Dudgeon v UK* (n.11), [49].
184 Paul Johnson, "'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights" (2010) 10(1) Human Rights Law Review 67.
185 *See* (n.14).
186 Application No 35765/97 (Judgment of 31 July 2000) [37].
187 Bradley, "Comparative Law, Family Law and Common Law" (n.15).

"realm of private morality and immorality was recommended [which] was adopted in the Sexual Offences Act 1967".[188] Such a strong emphasis on privacy at the start of the case law on gay rights leads to difficulties when it comes to expansion of consideration of public recognition of same-sex couples by means of marriage. This can be seen from more recent case law. *Schalk and Kopf v Austria* was progressive in recognising the "family life" of gays[189] but an argument as to a breach of art.14 (equality) was circumscribed on the basis of margin of appreciation.[190]

The strongest arguments for those in favour of further protection for gays and same-sex couples before the ECtHR therefore, still stem from the "private life" argument. Privacy is clearly a strong argument when it comes to the removal of criminal sanctions and the prevention of discrimination. Privacy is also a less-intrusive argument to use against those who are not supporters of gay rights. Privacy in Michele Grigolo's analysis means a "space ideally free from state intervention, where an individual organises his/her private life and eventually his/her family life in an autonomous way".[191] Being asked to be "let alone" in their own sphere of life does not cause as much interference with others than to demand equal treatment. As it is less intrusive as an argument, it is therefore more likely to be effective. Although the privacy argument was useful at the time when considering the beginning of gay rights, the ECtHR in adopting this approach seems to have created a difficulty in the development of protections for same-sex couples. Such a strong emphasis on privacy is not at all helpful, however, when it comes to marriage which is a concept very much on the public stage.

B. What is meant by citizenship?

An understanding of this concept demonstrates the potentially far-reaching consequences of the EU's embrace of citizenship through the Citizenship Directive 2004/38. A number of authors emphasise the connection between citizenship and equality. Nicholas Bamforth endorses Thomas Marshall's classic definition where he states that "all who possess the status are equal with respect to the rights and duties with which the status is endowed".[192] Michael Rosenfeld refers to citizenship as acquiring "its distinct modern meaning as equal citizenship at the time of the French Revolution",[193] and Conor O'Mahoney refers to the Irish constitution which states that[194] "[a]ll citizens shall, as human persons be held equal before the law".[195]

188 *Ibid.*, p.142.
189 *Schalk and Kopf v Austria* (n.9), [94].
190 *Ibid.*, [105].
191 Grigolo, "Sexualities and the ECHR" (n.96) 1035.
192 Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12) 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.
193 Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (n.13) 340.
194 O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13) 554–555.
195 Constitution of Ireland, art.40(1).

He also refers to *Ghaidan v Godin-Mendoza* where Baroness Hale of Richmond states that "[d]emocracy is founded on the principle that each individual has equal value".[196] The strong connection between citizenship and equality enacted on a public stage leads to strong symbolical and practical arguments for gays wishing to advance the cause of same-sex marriage.

The first point to make is to stress the constitutional importance of marriage. There are a number of authors who comment on the notions of "sexual citizenship" and the legal rights of same-sex couples to enter marriage forming a "constitutional character in many jurisdictions".[197] The right to marriage is given protection by international conventions[198] and leading cases.[199] Courts worldwide have acknowledged the important connection between citizenship and marriage. Marshall CJ in *Goodridge v Department of Public Health* stated that the right to marry was "more properly, the right to choose to marry" and further commented that "civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition".[200] The importance construed to marriage is exemplified by the level of debate and attention which is focused upon the topic of same-sex marriage. The constitutional nature of the treatment of same-sex couples can be seen from David Bradley's work where he noted the "constitutionalism" of American family law, where "attention is now focused on state constitutions and same-sex marriage".[201] In recent years, many countries and US states have legislated in favour of same-sex marriage.[202] There have also been many failed attempts to introduce same-sex marriage.

The constitutional nature of marriage is important because of the number of rights this bequeaths and the "participation in the public order" this involves.[203]

---

196 O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13) 555, referring to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [132] (Baroness Hale of Richmond).

197 Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12) 477. See also *ibid*., p.478 referring to Cossman, *Sexual Citizens* (n.12) 27.

198 *See*, eg, art.12 of the European Convention on Human Rights states that "[m]en 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".

199 *See*, eg, *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003), *Loving v Virginia*, 388 US 1 (1967).

200 *Goodridge* (n.200) 955 and 957 (Marshall CJ).

201 Bradley, "Comparative Law, Family Law and Common Law" (n.15) 129.

202 The following list shows countries which recognise same-sex marriage: Netherlands (2001), Belgium (2003), Spain (2004), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Mexico (2010), New York (2011), Denmark (2011), Brazil (2013), France (2013), California (2013), Uruguay (2013), New Zealand (2013), New Jersey (2013), England and Wales (2014), Scotland (2014).Luxembourg (2015) and Finland (from 2017). In the US, same-sex marriage is recognised by 36 states and the District of Columbia. Some states in Mexico also recognise same-sex marriage.

203 Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12) 477, 481 referring to Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2002) 1.

Brenda Cossman also characterises citizenship as being "about the process of becoming recognised subjects, about the practices of inclusion and membership, both social and legal".[204] In summary, the concept of citizenship has, according to theorists, a public role and is widely connected with individuals asserting their role on the public stage. This is especially important with reference to marriage and the public status this involves. If same-sex couples can access the status of marriage, they will have the support of all of the constitutional protections offered. This is a much more public and far-reaching protection than any privacy right or right to be let alone could ever afford.

The constitutional status of marriage is also strongly tied to equality. Several authors accept that citizenship is about "enfranchisement, about inclusion, about belonging, about equity and justice, about rights balanced by new responsibilities".[205] It is useful to engage in equality arguments not only because of the close connections between equality, citizenship and marriage but also the success of international courts in relying upon equality arguments to recognise same-sex marriage.[206] The privacy argument is not going to be sufficient in this regard. The equality argument is most strongly represented by the concept of equal citizenship status. In contrast, where same-sex couples are excluded from marriage they are being denied "full citizenship"[207] and can only be seen as "partial citizens, in so far as they are excluded from certain of these rights".[208] Dimitri Kochenov similarly states that "[m]oreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one's choice can also be viewed as a 'cultural message that certain groups are not suited for full citizenship'".[209] In the EU context, there is potential for the concept of citizenship tied in with EU free movement provisions to give extensive protections for same-sex couples to move around Europe. Taken to its logical conclusion, freedom of movement encompasses the right to move with one's family. Alison O'Neill argues that the EU should protect the right of same-sex couples to move from one state to another, arguing that this is a necessary step in the application of the treaty's free movement provisions.[210] Although in practice, the EU has emphasised subsidiarity in this context,[211] the concept of EU citizenship certainly offers opportunities for development in the protection of gays and same-sex couples. Subsidiarity will also be less of a problem in the future as more states within the EU move to recognise same-sex marriage.

---

204 *Ibid.*, referring to Cossman, *Sexual Citizens* (n.12) 27–32.

205 *Ibid.*, p.477 referring to Weeks, "The Sexual Citizen" (n.15) 39.

206 *See* (n.14).

207 Harris, "Loving before and after the Law" (n.12) 2821–2822.

208 Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument"(n.12) 477, 483 referring to Diane Richardson, "Sexuality and Citizenship" (1998) 32 Sexuality 83, 88.

209 Kochenov, "On Options of Citizens and Moral Choices of States" (n.69) 163, referring to Harris, "Loving before and after the Law" (n.12) 2821.

210 O'Neill, "Recognition of Same-Sex Marriage in the European Community, the European Court of Justice's Ability to Dictate Social Policy" (n.123) 201.

211 *See* (n.125).

The EU concept of citizenship offers more potential for future development. In the future, the position of the ECHR may change as more countries recognise same-sex marriage.[212] Currently, the ECHR remains tied to privacy arguments and is limited by the margin of appreciation. In *Schalk and Kopf v Austria*, although an argument was made under art.14 (equality), the ECtHR did not recognise the validity of this argument, instead relying upon margin of appreciation.[213] The arguments made in relation to "privacy" remain the dominant force in ECtHR reasoning, leading to limiting factors. In this context, the EU concept of citizenship offers a currently unfulfilled opportunity in expanding protection for same-sex couples.

V. Conclusion

The ECJ and the ECtHR have taken differing approaches towards their treatment of same-sex couples. Three themes have been explored which demonstrate the differences in, first, varying objects and purposes, second, contrasting definitions of family life and, third, opposing emphasis on citizenship as opposed to privacy. The ECtHR has taken the lead in driving dynamic methods of interpretation developing human rights protection for gays and same-sex couples and expanding the definition of family life. This is limited by the concept of margin of appreciation[214] and the continued emphasis on privacy.[215] Over time as more countries move to recognise same-sex marriage, and ratify the free-standing equality of Protocol 12 ECHR, these difficulties may be less important. At present, the EU concept of citizenship offers the greatest potential development for those gays and same-sex couples who favour same-sex marriage. This is because of the constitutional nature of citizenship,[216] the close connections between citizenship and marriage[217] and between citizenship and equality. [218] These connections lead to much stronger practical and symbolic arguments in favour of marriage. The increasing interplay between the EU and the ECHR is essential here in order to best move forward with the recognition of rights of gays and same-sex couples.

---

212 *See* (n.17).

213 *Schalk and Kopf v Austria* (n.9), [105].

214 *Ibid.*

215 *See* (nn.31 and 32).

216 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12) 477; Weeks, "The Sexual Citizen" (n.15) and Bradley, "Comparative Law, Family Law and Common Law Bühnen" (n.15).

217 *See Tadao Maruko v Versorgungsanstalt der Deutschen Bühnen* (n.79), eg, Harris, "Loving before and after the Law" (n.12) 2821–2822. Angela Harris argues that "[t]he right to marry … is a right central to citizenship; or, more precisely, legal exclusion from the right to marry the partner(s) of one's choice is understood both by those excluded and the excluders as a denial of full citizenship".

218 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (n.13) and O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13).

When considering the differing purposes and interpretative methods utilised, the ECtHR has developed dynamic methods of interpretation, using techniques such as "living instrument", "practical and effective rights" and "autonomous concepts". The EU instead has taken a legislative-based approach in connection with strictly assigned competencies,[219] but the margin of appreciation has stalled the ability of the ECtHR to act. This is exemplified in *Schalk and Kopf v Austria* where the ECtHR refused to recognise same-sex marriage and continued to rely upon the doctrine of margin of appreciation.[220] This may change as consensus moves in favour same-sex couples. The EU is able to enact clear legislation in this regard. With the enactment of the Citizenship Directive 2004/38 and the Charter of Fundamental Rights, the EU has engaged and expanded the protections offered by the EU to same-sex couples.[221]

Traditionally, the ECtHR did not recognise same-sex couples as having a "family life".[222] Legal protection was offered to gays by the ECtHR under the concept of private life.[223] More recently, the ECtHR has reversed this policy and now same-sex couples are recognised as coming within this definition.[224] Deficiencies remain within the approach taken by the ECtHR. Recent cases do show the ECtHR engaging with art.14 (equality arguments).[225] Despite this, reliance on the concept of "private life" continues to be a constraint on the development of ECHtR protection for same-sex couples.[226] If Protocol 12 were to be ratified, there would then be a free-standing equality provision, which would greatly improve the position of the ECHR. Currently, this is only ratified by 18 out of 47 ECHR contracting states.[227] The EU system does not have the same constraints of textual interpretation as the ECHR. The EU has engaged with the concept of citizenship, which offers greater potential for proponents of same-sex marriage. A criticism of the EU system is that it continues to operate using a hierarchy of protected statuses. Heterosexual marriage is most clearly recognised.[228] Registered partnerships are protected, but this is strictly subject to subsidiarity. [229] Co-habitees have least protection[230] and protections for same-sex co-habitees are likely to be subject to subsidiarity as well. While different categories of protection remain, this will lead to difficulties for same-sex couples seeking to take advantage of EU law in exercising their right of free movement. As more states within Europe move to recognise same-sex

219 *See*, eg, the Commentary on art.9 of the Charter of Fundamental Rights of the European Union and art.2(2) of Directive 2004/38.
220 *Schalk and Kopf v Austria* (n.9).
221 Citizenship Directive 2004/38 and Charter of Fundamental Rights of the European Union 2000/C 364/01.
222 *See* (n.100).
223 *See* (nn.31 and 32).
224 *Schalk and Kopf v Austria* (n.9) [94].
225 *See* (n.32).
226 *See* (nn.31 and 32).
227 *See* (n.20).
228 *See* Directive 2004/38, art.2(2)(a).
229 Directive 2004/38, art.2(2)(b).
230 *Ibid.*, art.3(2).

marriage, these problems will lessen over time.[231] The EU concept of citizenship is considered to offer the greatest potential for those who favour same-sex marriage. Again this will work best in practice by increased interplay with the ECHR.

This concept of citizenship operates on the public stage and there are clear connections between marriage and citizenship[232] and the constitutional status this gives to marriage.[233] If same-sex couples can access the status of marriage they will have the support of all of the constitutional protections offered. In turn, there are links between citizenship and equality.[234] Equality arguments have been successful before international courts when considering the case for same-sex marriage.[235] All of these points in combination lead to useful arguments in favour of same-sex marriage. Citizens are given extensive rights under EU law.[236] There is much potential for future development of the EU concept of citizenship for those who favour same-sex marriage. The ECHR system in order to recognise same-sex marriage has to surmount the twin obstacles of its historical affiliation with privacy arguments[237] and the limitations of the doctrine of margin of appreciation.[238] The difficulty is that the ECHR privacy argument has a lack of evolutionary capacity when it comes to asserting the right to same-sex marriage which is a concept very much on the public stage. The ECHR may well surmount these hurdles. As more states move to recognise same-sex marriage, consensus will start to favour this. In addition, ECtHR case law may continue to favour equality arguments and more ECHR contracting states may ratify the free-standing equality provisions of Protocol 12. In this context, the EU concept of citizenship offers an opportunity for those gays and same-sex couples who favour same-sex marriage. EU engagement in this area is best done in combination with positive developments before the ECHR as is shown by the growing interplay and interdependence between the organisations.

231 *See* (n.17).

232 *See*, eg, Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Cossman, *Sexual Citizens* (n.12) 27 and Diane Richardson "Sexuality and Citizenship" (n.208).

233 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Weeks, "The Sexual Citizen" (n.15) and Bradley, "Comparative Law, Family Law and Common Law" (n.15).

234 *See* Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.12); Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (n.13) and O'Mahoney, "There Is No Such Thing As a Right to Dignity" (n.13).

235 *See* (n.14).

236 Citizenship Directive 2004/38.

237 *See* (nn.31 and 32).

238 *Schalk and Kopf v Austria* (n.9), [105].

Publication Five: Hamilton, F., and Clayton-Helm, L., 'Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory' 3(1) (2016) Journal of International and Comparative Law 1 -31.

SAME-SEX RELATIONSHIPS, CHOICE OF LAW AND THE CONTINUED RECOGNISED RELATIONSHIP THEORY

Frances Hamilton and Lauren Clayton-Helm*

Abstract: A clear choice of law rule should be applied to all same-sex relationships in terms of essential validity. Interest analysis allows us to look at the public policy reasons behind why a choice of law rule may be appropriate or inapposite. This technique can lead to unpredictable results. When coupled with depecage, a delineated splitting of competing policy inculcations, this allows for a more certain rules-based system. Each incapacity to marry should have its own appropriate choice of law rule. This article argues that additional public policy reasons apply to the choice of law appropriate to same-sex relationships. These include citizenship, equality and symbolism, and together require a more extended choice of law rule. It is recommended that a new theory, the continued recognised relationship theory, is suitable for same-sex relationships. This choice of law rule would apply the law where the couple is intending to live, or the law of the country where they have lived, if their relationship has been subsisting for a reasonable period of time. This article advocates that action at the European Union level will lead to more consistent results in this sphere.

Keywords: *same-sex relationships; choice of law; interest analysis; depecage; European Union*

I. Introduction

International marriages, comprising a marriage between individuals of different nationalities, are a large proportion of the nuptials which take place in the European Union (EU) every year. Of the annual 2.2 million EU marriages, 350,000 involve an international couple.[1] "[R]elational mobility"[2] results in a greater variety of family types. There is a still greater variety of family types given the advent of same-sex

* Frances Hamilton is a Senior Lecturer in Law. Lauren Clayton-Helm is a graduate tutor and PhD candidate. Both are based at Northumbria University Law School, UK.

1 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (2009) 5, available at http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJEuropeanFamilyLaw.pdf (visited 27 May 2016).

2 Michele Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (2003) 14(5) European Journal of International Law 1023, 1026 referring to Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford, California: Stanford University Press, 1992).

marriage and civil partnership. Different states across Europe have had a diversity of legal responses across Europe to these new statuses.[3] This article responds to this relatively new type of relationship and suggests how it should be treated by private international law. It is essential for a couple to know whether they are legally married.[4] The need to settle this question is underlined by the "unparalleled importance of marriage".[5] Many international cases stress this factorisation.[6] In the 2015 US Supreme Court judgment of *Obergefell v Hodges*,[7] which licensed same-sex marriage across all states of the US, the majority opinion stressed that the right to marry was "fundamental".[8] The reasons why marriage was given this status included an emphasis upon "individual autonomy",[9] the unique support which marriage gives to a two-person union,[10] the safeguarding which marriage gives to children[11] and the fact that marriage is regarded as a "keystone of …social order".[12]

Marriage is often connected to citizenship[13] and is necessary for "full membership of society".[14] Some authors stress the public nature of marriage.[15] As well as being considered a fundamental right[16] marriage also has strong symbolical importance. For many in the Western world it is seen as the "gold standard"[17] or having a privileged status.[18] Gay rights groups were initially reluctant to embrace marriage as a goal.[19] However, after fully understanding the rights associated with

3 Within Europe, the following states recognise same-sex marriage: Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, England and Wales, Scotland and Finland (effective from 2017). Following *Oliari* all other contracting states to the European Convention on Human Rights (ECHR) will have to recognise some form of civil partnership.

4 In *Estin v Estin* 334 US 541, 553 (1948) Robert Jackson J commented that "one thing that people are entitled to know from the law is whether they are formally married". See also Barbara Stark, "When Globalization Hits Home: International Family Law Comes of Age" (2006) 36 Vanderbilt Journal of Transnational Law 1551.

5 P St J Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (1985) 14 Anglo-American Law Review 225, 225.

6 See eg *Goodridge v Department of Public Health* 798 NE 2d 941 (Mass 2003); *Loving v Virginia* 388 US 1 (1967) and *Obergefell v Hodges* 576 US __, 135 S Ct 2584 (2015).

7 See *Obergefell v Hodges* (n.6).

8 *Ibid.*, 11.

9 *Ibid.*, 12.

10 *Ibid.*, 13.

11 *Ibid.*, 14.

12 *Ibid.*, 16.

13 A full discussion as to what is meant by the concept of citizenship in this context is included in Section IV(A) of this article.

14 Richard Frimston, "Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law" (2006) 6 Private Client Business 352.

15 See Erez Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (2010–2011) 18 Duke Journal of Gender Law and Policy 105.

16 See *Obergefell v Hodges* (n.6); Elizabeth Scott, "A World Without Marriage" (2007–2008) 41 Family Law Quarterly 537, 541.

17 *Wilkinson v Kitzinger* [2007] 1 FLR 295, [6].

18 See Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.110.

19 See Yvonne Zylan, *States of Passion: Law, Identity and Social Construction of Desire* (Oxford: Oxford University Press, 2011) which comments on the changing positions of Stonewall in the UK and Lambda Legal in the US to favour same-sex marriage as a goal.

marriage and its symbolical status, these groups have engaged with marriage as a desirable status to be achieved. Marriage does undoubtedly provide the most expansive and generous recognition of rights.[20] Under EU free movement law, it is essential to fall within the definition of "family member" in order to access EU benefits and move across the EU as citizens. There is a need for clear rules in this area. Despite this, the law currently stresses subsidiarity and allows individual countries in the EU to determine whether or not to recognise same-sex marriage.[21] Following the recent European Court of Human Rights (ECtHR) decision of *Oliari v Italy* all contracting states will need to introduce some form of protection for same-sex couples to enter into a registered partnership or civil union.[22] There continues to be no right to same-sex marriage. This will affect all members of the EU who are also all contracting members to the European Convention on Human Rights (ECHR). Yet there is no requirement as to what type of status need be enacted, leading to a wide variation in the rights granted to same-sex partners. This restrictive approach may mean that a non-EU same-sex spouse or registered partner cannot relocate to the new EU state, or will not have access to all the rights granted in their state of origin. It also represents a failure of the application of the freedom of movement.[23] Non-recognition of a foreign marriage means that the right to same-sex marriage is a "meagre right indeed".[24]

Where several different jurisdictions are involved in a case it is necessary to determine which country's law applies. The laws of several different countries may be relevant where the case involves a couple of different nationalities or where the couple relocates. The choice of law rule is the mechanism which selects the appropriate law to be applied. In domestic law, there is disagreement about which choice of law rule should be employed in relation to the validity of a marriage (both heterosexual and same-sex). Recognition of a foreign marriage is broken down into two elements: formal validity and essential validity. Formal validity on the one hand looks at the rules and requirements surrounding the actual ceremony, such as the requirement of witnesses and the vows that must be undertaken. This is usually uncontroversial and depends upon the *lex loci celebratioinis*.[25] Essential validity on the other hand covers all aspects of a marriage which are not associated with formalities, the primary example being the capacity to marry. Here, there is much controversy and different theories compete for attention. These are examined in

20 See Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.110 referring to Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago, Illinois: University of Chicago Press, 2002) pp.55–56.

21 See Directive 2004/38 art.2(2).

22 (Application Nos 18766/11 and 36030/11, 21 July 2015).

23 Helen Stalford, "Regulating Family Life in Post-Amsterdam Europe" (2003) 28 European Law Review 39.

24 Barbara Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (1994) Wisconsin Law Review 1033, 1040.

25 Place of celebration.

the next section. Most commentators agree that the current law is "baffling"[26] and in need of "reformulat[ion] …"[27] Perhaps the necessity of dealing with same-sex relationships[28] can be the "new momentum required to re-examine the subject …".[29]

This article considers different choice of law rules and recommends that none of the commonly suggested choice of law rules can be applied universally. The focus of this article is to determine which choice of law rule is appropriate to same-sex relationships. Interest analysis[30] coupled with a system of rules-based depecage[31] allows us to give each incapacity to marry an appropriate choice of law rule.[32] It is necessary to consider further public policy arguments in relation to same-sex relationships. We consider arguments based on citizenship, equality and symbolism which call for a more extended choice of law rule for same-sex relationships. We recommend a novel choice of law for same-sex relationships, the continued recognised relationships theory, which is then explained. The applicable choice of law rule should be that of the country where the couple intends to reside, or if their marriage has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived. Consideration is also given as to why it is necessary to engage with this issue at an EU level before finally examining some anticipated objections of our recommendations.

II. Choice of Law Rules

Examination of the most commonly used choice of law rules allows us to consider which is appropriate to apply to same-sex relationships. Whilst the Civil Partnership Act 2004 (CPA) sets out that essential validity is to be determined in accordance

26 Friedrich Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984) 32 American Journal of Comparative Law 1, 1 referring to Cardozo, *The Paradoxes of Legal Science* (New York: Columbia University Press, 1928) 67.

27 Alan Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (2000) 20 New York Law School Journal of International and Comparative Law 387, 450. See also Michael Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (1994) 23 Anglo-American Law Review 32.

28 We use this term to refer to both same-sex marriages and all types of civil partnerships and registered unions.

29 See Reed "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.450.

30 Interest analysis is the idea that the most applicable law is the one that has the most interest in being applied after consideration of public policy reasons and was originally founded in the US and applied on a case-by-case basis. Interest analysis was founded by Brainerd Currie. See Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) 62 Michigan Law Review.

31 Depecage moves away from having a completely ad hoc-based approach. Here, rules-based depecage is used to determine that each incapacity to marry can be governed by its own choice of law rule.

32 Interest analysis on a depecage basis is something that has been explored and promoted for other incapacities within marriage validity by Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

with the *lex loci registrationis*,[33] the Marriage (Same-Sex Couples) Act 2013 (M(SSC)A) provides no such rules. The position is left open for debate, leaving couples uncertain as to which of the choice of law rules will prevail. In this article, we recommend, for the sake of consistency, that the same choice of law theory is needed for all types of same-sex relationships.

A. *Dual domicile theory and the intended matrimonial home theory*

The two primary contending theories within essential validity of heterosexual marriage are the dual domicile theory and the intended matrimonial home theory.[34] The dual domicile theory[35] is backward looking; if either of the parties' pre-nuptial domiciles would invalidate the marriage, then the consequential impact is abjuration of recognition. Essentially, the rule is based on treating each party's domiciliary law with equal respect and recognition, but, the intended matrimonial home theory[36] turns to the law of the husband's domicile unless, the couple intend to set up a matrimonial home in another country. Where this intention is satisfied within a reasonable time, that law will prevail. The dual domicile theory seeks to protect the individual. The intended matrimonial home theory seeks to protect the society of the country where the couple intend to live.

Despite these opposing aims, it is evident that both theories receive common law[37] and academic[38] support. The dual domicile theory is propounded by the Law Commission as the most appropriate policy construct.[39] The advantages include: the potential to fulfil party expectations; allowing each party's country to be considered in terms of validity and that it is relatively easy to apply prospectively.[40] Conversely, the intended matrimonial home theory considers the society that the marriage will impact upon and may also uphold party expectations.[41] In addition, as

33 Similar to the *lex loci celebrationis* for hetereosexual marriage, s.215(1) of the CPA sets out that formal validity and essential validity must still be satisfied in accordance with the relevant law which, is defined in s.212(2) as the place where the relationship is registered including its rules of private international law.

34 Geoffrey Cheshire, Peter North and James Fawcett, *Private International Law* (14th ed., by James Fawcett and Janeen M Carruthers, 2008) p.895.

35 Albert Venn Dicey, *Dicey and Morris on the Conflict of Laws* (8th ed., by JHC Morris and Others, 1967) r.31, pp.254–255.

36 Geoffrey Cheshire, *Private International Law* (Oxford: Oxford University Press, 7th ed., 1965) pp.227–228.

37 Cases such as *Re Paine* [1940] Ch 46 and *Szechter v Szechter* [1971] P 286 show support for the dual domicile theory, whilst support for the intended matrimonial home theory can be seen, albeit obiter in *Kenwood v Kenwood* [1951] P 124 and *Radwan v Radwan (No 2)* [1973] Fam 35.

38 Alan Reed recognises the advantages of both the dual domicile theory and the intended matrimonial home theory whilst setting out that neither works as a universal test in Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

39 Law Commission Report, *Private International Law Choice of Law Rules* (Law Com No 89, 1985) para 3.36.

40 *Ibid.*, p.93.

41 For instance, in *Radwan v Radwan (No 2)* (n.37) where the couple had been living together as man and wife for nearly 20 years and the application of the intended matrimonial home theory upheld their expectations.

only one law need be applied, more marriages are likely to be held valid. Therefore, this satisfies the policy aim attached to upholding the validity of marriage.[42]

Regardless of the aforementioned positives, neither theory can be applied universally. The dual domicile theory leads to more marriages being found invalid, which is caused by potentially having to satisfy the law of two countries.[43] Another demerit is that the theory fails to consider the law of the country to which the marriage will belong.[44] Finally, a major criticism is the foundation of the theory on the concept of domicile, which has many of its own challenges.[45] Domicile may not always reflect the country to which the parties belong,[46] as a result of the difficulties in obtaining a domicile of choice. Such criticisms go to the very root of the theory as it is clear that domicile itself is in need of reform and has been for some time.[47]

There are also many criticisms of the intended matrimonial home theory. Unless alternative intentions can be proven, it is the law of the husband's domicile that applies. In the modern day this is recognised as sexist and "totally out of touch with modern etymologies of gender equality".[48] It fails to reflect developments within the law, such as the abolition of the married women's domicile of dependency rule.[49] This rule meant that prior to its abolition, upon marriage a woman was stripped of her personal domicile and was instead deemed to take that of her husband. This would only change in accordance with his domicile much like the domicile of a minor. As the theory is founded on the parties' particular intentions at the time of marriage this can also be problematic,[50] application in the prospective may be difficult particularly if intentions are unclear, and it is uncertain what would happen if the couple move. It can also be argued that on occasion it is the parties' domiciliary law that has the most interest in being applied,[51] which may stem from an interest to protect the particular party involved from factors such as duress, undue influence

42 See Law Commission Report, *Private International Law Choice of Law Rules* (n.39), pp.88–89.

43 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

44 Charles Taintor, "Marriage in the Conflict of Laws" (1955–1956) 9 Vanderbilt Law Review 607, 611–612.

45 The law surrounding domicile itself is recognised as problematic by academicians; PB Carter, "Domicil: The Case for Radical Reform in the United Kingdom" (1987) 36 International and Comparative Law Quarterly 713; Richard Fentiman, "Domicile Revisited" (1991) 50(3) Cambridge Law Journal 445 and indeed by the Law Commission; Law Commission Report, *Private International Law: The Law of Domicile* (Law Com No 88, 1985).

46 Trevor C Hartley, "The Policy Basis of the English Conflict of Laws of Marriage" (1972) 53 Modern Law Review 571, 576.

47 See for instance, suggestions for reform dating back to 1954 and 1985; Private International Law Committee, *First Report of the Private International Law Committee* (Cmnd No 9068, 1954) and Law Commission Report, *Private International Law: The Law of Domicile* (n.45).

48 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.397.

49 It was abolished by s.1(1) of the Domicile and Matrimonial Proceedings Act 1973.

50 *Radwan v Radwan (No 2)* (n.37).

51 For example the domiciliary law may be trying to protect one of the parties, for instance, as a result of their age.

or exploitation. The exploration of these two theories shows that neither should constitute a universal theory. Further alternatives are now considered.

B. Competing choice of law theories

Another option is the most real and substantial connection test. In a similar vein to the intended matrimonial home theory it focuses on the country which will be most affected by the marriage as opposed to the people.[52] The primary distinction between the two theories is the way in which this country is selected. There is no longer a sole focus on the intended matrimonial home. Instead, this test draws on this categorisation along with other factors including domicile and nationality. Whilst this may create a well-rounded determination of what law should apply and attract support for the theory,[53] it lacks certainty and predictability, and can thus be criticised.[54] Criticism comes as a result of the lack of definition and clarity of the term "most real and substantial connection". Its application would inevitably lead to the courtroom for matters to be assessed on a case-by-case basis.[55] Consequently, this theory is not the most practical of options.

The alternative reference test is another option. The test is based on applying either the dual domicile rule or the intended matrimonial home theory depending on which one would recognise the marriage. It allows the courts to select the rule that will result in the marriage being recognised as valid and therefore upholds the policy of the validity of marriage. However, difficulties remain. The test is based on the court's ability to cherry pick in order to get the desired result and is for that reason difficult to promote. In essence, it endorses both the dual domicile theory and the intended matrimonial home theory, but is then able to cast aside either theory if it would result in the invalidity of marriage, which appears contrary to principle.[56] It is also a time-consuming method. It may require the courts to consider up to three different laws before selecting the appropriate route.

The elective dual domicile test would apply the domiciliary law of either party.[57] If either party's domiciliary law holds the marriage valid, the law relating to the other party becomes irrelevant and the marriage is upheld. Aside from validating

52 Chris MV Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford: Oxford University Press, 4th ed., 2011) p.359.

53 It can be seen in cases such as *Vervaeke v Smith* [1983] 1 AC 145; *Lawrence v Lawrence* [1985] Fam 106 (at first instance) and *Westminster City Council v C* [2009] Fam 11. Academic support can also be seen in Richard Fentiman, "Activity in the Law of Status: Domicile, Marriage and the Law Commission" (1986) 6(3) Oxford Journal of Legal Studies 353 and Richard Fentiman, "The Validity of Marriage and the Proper Law" (1985) 44(2) Cambridge Law Journal 256.

54 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and the Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.2.

55 *Ibid.*

56 *Ibid.*, Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.37.

57 Cheshire, North and Fawcett, *Private International Law* (n.34), p.913.

marriages, there is little else to be commended.[58] It is a controversial option, as it recognises the importance that domiciliary law plays in marriage validity, but rejects the law that may cause a problem, regardless of the motive behind the law. Not only does this appear to fly in the face of applying the law of the domicile, but it could also lead to limping marriages[59] and the ability to evade domiciliary laws. It is understandable that this theory has been subject to criticism.[60]

Finally, it is also important to consider the precedent already set within same-sex relationships. The CPA dictates that the *lex loci celebrationis*[61] is the applicable law for essential validity, making it a viable option for same-sex marriage. Its application may bring certainty and continuity of the law for the interested parties,[62] but it may also encourage forum shopping. If all that is required for same-sex couples to marry is to travel across the border, it may lead to an increased enforcement of public policy rules by the countries in which the parties are domiciled and resident, on the basis that attempts are being made to evade their laws. This could in turn produce more limping marriages.[63] Greater application of public policy exceptions would counteract any potential certainty and continuity such a rule could offer.

The law in this area is uncertain. While it is apparent that the dual domicile theory and the intended matrimonial home theory are the two main contenders, any one of the aforementioned theories could be applied by the courts to same-sex relationships. No one rule is sufficiently sophisticated enough to apply universally.[64] Exceptions also exist, allowing the courts in certain circumstances to deviate from these rules in order to produce the desired result.[65] It is, therefore, important to consider the ideas of interest analysis[66] and depecage[67] which we consider in the next section.

Interestingly, amidst all of the ambiguity of the applicable choice of law rule, it has been suggested by Stuart Davis that the absence of any direction in the M(SSC)A is a nod in favour of the dual domicile theory.[68] Davis' justification for this suggestion is that it will ensure that same-sex marriages are dealt with in the same

58 See Clarkson and Hill, *The Conflict of Laws* (n.52), p.360.

59 For example, where a marriage is recognised in one country but not another, which, in the case of the elective dual domicile test could easily occur in relation to the parties and the country in which they are domiciled.

60 See Law Commission Report, *Private International Law Choice of Law Rules* (n.39), para 3.38.

61 See works referred to in note 25.

62 Martina Melcher "(Mutual) Recognition of Registered Relationships via EU Private International Law" (2013) 9(1) Journal of Private International Law 149, 161–162.

63 A potential problem that was also recognised by Martina Melcher.

64 See eg Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.231 in which he discusses that the failings of the theories stem from trying to apply them universally, when instead it is a degree of flexibility that is required.

65 These exceptions are the rule in *Sottomayor v De Barros* (1879) 5 PD 94, the rule where England is the *lex loci* and public policy grounds.

66 See works referred to in note 30.

67 See works referred to in note 31.

68 Stuart Davis, Marriage (Same-Sex Couples) Bill Memorandum (2013) 2, para 3.3.

vein as heterosexual marriages.[69] This justification is tentative, given it has been recognised by judges for decades that the dual domicile theory is not always the most appropriate choice of law rule.[70] This dissent from the dual domicile theory continued even after the Law Commission confirmed it as their preferred template.[71] It, therefore, appears rudimentary to declare its application as a mere continuation of the norm.[72] In fact, despite the Law Commission report, it is possible that any of the theories previously outlined may be adopted by the courts. In view of their application in other marriage validity cases, it is not difficult to comprehend any of the theories being applied by the judiciary. Indeed, theories surrounding interest analysis and depecage also show how developments, since the Law Commission Report, may replace a universal choice of law rule.[73]

C. *Choice of law rules considered in EU law*

The concept of "automatic recognition" is considered by the European Commission[74] in their assessment of how free movement rights could be improved through the recognition of civil status records. The Commission observe that the failure to recognise such records raises the alarming "question of quite a different magnitude concerning not the actual documents themselves, but their effects".[75] In an attempt to find a pathway through the problem, they consider whether automatic recognition of civil status situations established in other member states could be an appropriate solution. Applying this rule to same-sex relationships would put mutual trust between Member States at the heart of the solution and would provide much needed certainty. It would reassure same-sex couples that crossing state borders would not be a cause for concern in respect of recognition of their relationship; nor would it require the other Member State "to change its substantive law or modify its legal system".[76] A problem arises in that it may, like the application of the *lex loci*, also bring with it risks of forum shopping and increased enforcement of public

69 *Ibid.*

70 For instance, *Kenwood v Kenwood* (n.37) and *Radwan v Radwan (No 2)* (n.37) provide support for the intended matrimonial home theory and *Vervaeke v Smith* (n.53) provides support for the most real and substantial connection test.

71 Examples include *Westminster City Council v C* (n.53) and *Minister of Employment and Immigration v Narwal* [1990] 2 FC 385.

72 This is further supported by the fact that many academics are now looking at the idea of depecage and a move away from a one rule fits all approach; see for instance, Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27) and Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5).

73 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and Reed, Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

74 COM(2010) 747, "Less Bureaucracy for Citizens Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records" 14 December 2010.

75 *Ibid.*, para.1.

76 *Ibid.*, para.4.3.

policy exceptions, which, prevent the other member states having to recognise the relationship. The European Commission recognise, when considering automatic recognition more generally, that compensatory measures to prevent abuse of public order rules may be necessary, and more importantly state that "[t]his might prove to be more complicated in other civil status situations such as a marriage".[77]

Alternate options also emerge in EU law. In the area of enforcement of matrimonial judgments, Rome III[78] was proposed to bring in choice of law rules. The earlier convention (Brussels II bis)[79] only provided rules on jurisdiction. Rome III was not agreed by all Member States. It was rejected by many, including the United Kingdom (UK), and was for that reason unsuccessful. Instead some Member States proceeded to establish enhanced cooperation between contracting parties only. This was introduced by Council Regulation EU No 1259/2010.[80] The regulation provided that the parties could choose the applicable law on divorce,[81] or failing that, set down a checklist of choice of law rules, which determines the most appropriate law when following the order in which they are set out in the checklist.[82] Chapter 2, art.8, provides that the first choice would be where the parties have their common habitual residence, thus making habitual residence the primary default choice of law rule in the absence of a mutual agreement by the parties.

When considering the appropriateness of habitual residence as the applicable law, it is important to note its autonomous nature.[83] It is an amorphous notion and therefore does not provide the unity required in a set choice of law rule.[84] Habitual residence requires concurrence of physical residence and a mental status of having a settled purpose of remaining.[85] The length of residence required to satisfy physical presence is difficult to determine.[86] It is based on the facts of the individual case and, therefore, "the subjective element tends to lead to unpredictability".[87] The intention

77 *Ibid.*

78 COM(2006) 399, "Proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters" 17 July 2006.

79 Council Regulation (EC) No 2201/2003.

80 The countries involved with the enhanced cooperation are: Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal.

81 Chapter 2, art.5.

82 Chapter 2, art.8.

83 As per Baroness Hale of Richmond, "habitual residence may have a different meaning in different statutes according to their context and purpose". (*Mark v Mark* [2006] 1 AC 98, 105 [15]).

84 Aude Fiorini, "Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?" (2008) 22(2) International Journal of Law, Policy and the Family 178.

85 *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309, 344.

86 For instance, in *Re J (Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578 it was stated that it would not be achieved in a day "but an appreciable period of time". In *Re F (Minor) (Child Abduction)* [1992] 1 FLR 548 it was suggested that a month could be an appreciable period of time, and in *Marinos v Marinos* [2007] 2 FLR 1018 it was said that it could be measured in weeks not months, and in appropriate cases, days. However, in *A v A (Child Abduction) (Habitual Residence)* [1993] 2 FLR 225 eight months was considered insufficient.

87 Pippa Rogerson, "Habitual Residence: The New Domicile" (2000) 49 International and Comparative Law Quarterly 86, 90.

element on the other hand, may appear easier to satisfy, as it need only be for a fixed period of time, as opposed to indefinitely.[88] This in itself is problematic as it does not take into account the connection a person may or may not have with the country. A person resident for work purposes could still be deemed habitually resident there, which would in turn make that countries' law applicable. The concept is, therefore, "unsuitable for general choice of law purposes as it generates a link with a country that may be tenuous".[89]

Similarly, habitual residence is also used in regulation (EU) No 650/2012 on dealing with succession and should be explored further as it also provides an exception to this rule, where there is a country to which the accused was manifestly more closely connected at the time of death.[90] This provides no further certainty. What would be considered a manifestly close connection? Like the most real and substantial connection test, it is likely to be assessed on a case-by-case basis and would lack certainty and predictability. On the assessment of the laws created above, it would seem that EU law brings no greater choice of law rules into the mix, as they too have problems surrounding certainty and predictability. The problem of determining the most appropriate choice of law rule remains.

D. Loophole created by the M(SSC)A

Another issue with the M(SSC)A is the loophole that has been created in the recognition of foreign same-sex marriages. Prior to the M(SSC)A, the CPA recognised foreign same-sex marriages as civil partnerships.[91] This recognition was achieved by specifying foreign same-sex marriage as a form of "overseas relationships".[92] Whilst foreign same-sex marriages were downgraded to civil partnerships, they were recognised as long as the *lex loci* had been satisfied. This has been amended by the M(SSC)A.[93] Foreign same-sex marriages can no longer be recognised as civil partnerships under the CPA. Instead they would need to be recognised as a marriage in accordance with the M(SSC)A. One positive aspect is that foreign marriages are no longer downgraded to civil partnerships[94]

88 For instance, see *Re R (Abduction: Habitual Residence)* [2004] 1 FLR 216 and *Kapur v Kapur* [1984] FLR 920.

89 See Clarkson and Hill, *The Conflict of Laws* (n.52), p.341.This problem was also recognised by the Law Commission, along with the fact that it is under developed (Law Commission Report, *Private International Law: The Law of Domicile* (n.45) para 2.4).

90 Chapter III, art.21.

91 See *Wilkinson v Kitzinger* (n.17).

92 See ss.212(1)(a), 213 and Sch.20 M(SSC)A.

93 Schedule 2 Pt.3 s.5(2) of M(SSC)A inserts s.213(1A) into the CPA which states: "But, for the purposes of the application of this Act to England and Wales, marriage is not an overseas relationship".

94 Such a change in Status from same-sex marriage to civil partnership was often considered as a downgrade in *Wilkinson v Kitzinger* (n.17) where the couple argued, albeit unsuccessfully, that it was a violation of their rights not to have their relationship recognised in the capacity of marriage into which they had entered.

which were perceived by many as a lesser status.[95] The CPA and M(SSC)A apply different choice of law rules, creating a gap in the law that engulf some marriages. This loophole within the law means that a foreign same-sex marriage may not be recognised. Under the CPA, a foreign same-sex marriage would have been recognised as a civil partnership, if it satisfied the *lex loci*. Now the foreign same-sex marriage would need to be recognised as a marriage under the M(SSC)A. It is the subject of debate as to which choice of law theory would apply. If it is the dual domicile theory as Davis asserts, the domiciliary laws of both parties would need to be satisfied, otherwise the marriage would not be recognised.[96] Although s.10(1)(b) of M(SSC)A allows a discretion for the courts to recognise a marriage, Davis argues that they may not go so far.[97] This could mean that the foreign same-sex marriage is not recognised. Amidst the emotional stress and anguish such a scenario would impact upon some couples,[98] significant legal implications may also follow. Such implications may arise from couples not fully understanding their legal position until a matter arises and it has become too late, for instance, upon the death of one of the parties when matters of inheritance and intestacy arise. This is another example of why clarity is needed. The same choice of law should be applied to all types of same-sex relationships in order to avoid such problems. The difficulty to be faced is that of selecting the appropriate choice of law rule.

III. Interest Analysis, Depecage and Public Policy Factors

Theorists, such as Michael Davie, suggest that the very fact that none of the choice of law theories have assumed dominance of essential validity of marriage, suggests that there are flaws with each of the competing theories.[99] Using any of them as a universal choice of law rule is inappropriate.[100] Having one inflexible choice of law rule would mean that rules are selected "without regard to the underlying specific

95 This concept of it being considered as a lesser status, a form of second-class citizenship is an area that many academics have considered, see for instance, Kerry Abrams, "Citizen Spouse" (2013) 101(2) California Law Review, 407; Michael Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (2011) 97 Virginia Law Review 1267 and Angela Harris, "Loving Before and After the Law" (2007–2008) 76 Fordham International Law Review 2821.

96 A problem that was also considered by Stuart Davis in his memorandum, which he explored through setting out a scenario which could potentially unfold; see Davis, Marriage (Same-Sex Couples) Bill Memorandum (n.68), pp.3-4.

97 *Ibid.*, p.4.

98 See *Wilkinson v Kitzinger* (n.17).

99 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.32.

100 See Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.231.

issue at hand".[101] In other words, one inflexible choice of law rule means that the rule is applied without looking at the public policy interests behind the rule, which may of course be crucial to the outcome of the case itself. Interest analysis seeks to remedy this by enabling us to look at the "purposes for which the law was created".[102] It is the idea that the most applicable law is the one that has the most interest in being applied, based upon public policy considerations. Interest analysis was originally founded in the US for tort law selectivity and applied on a case-by-case basis.[103]

Interest analysis is seen as beneficial as it analyses the public policy reasons behind the choice of law rule, allowing courts to select the rule that results in the fairest overall result to the case. Friedrich Juenger explains that, in choosing the applicable law, the court is "determining a controversy", and needs to understand how the choice made will reflect the overall outcome of the case.[104] In the US interest analysis has been used in the fields of contract and tort. However, it is has not been commonly applied to family law.[105] It has been suggested that it is appropriate to apply this to the incapacities of marriage.[106] Supporters of interest analysis argue that it produces fair solutions in each of the different cases it is used in because of its flexibility.[107] Richard Fentiman outlines the importance of having a test which can respond to the needs of particular cases.[108] This is demonstrated by a case where the commonly used choice of law rules provide no consistently accepted answers. An example is a couple who have separate domiciles and no intended matrimonial home,[109] or a couple who move around Europe for work reasons. The fact that courts have not been able to respond to these problems in a uniform fashion[110] demonstrates the need for flexibility in a test. Interest analysis, in contrast to endorsing just one choice of law rule which may be unsuitable to certain cases, has sufficient flexibility as the public policy reasons behind each choice of law rule can be examined.

---

101 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390. See also Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26).

102 See Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24), p.1090 referring to Gregory Smith, "Choice of Law in the United States" (1987) 38 Hastings Law Journal 1041, 1047. See also Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5).

103 See Currie, *Selected Essays on the Conflict of Laws* (n.30).

104 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.4.

105 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

106 See *Radwan v Radwan (No 2)* (n.37), Cummings-Bruce J 51.

107 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.48 states that this is what supporters of interest analysis claim, although he strongly disagrees with interest analysis arguing that: "[t]hus Currie's methodology supplies a subterfuge to promote the very result-orientation that he deplored" (p.49).

108 See Fentiman, "Activity in the Law of Status: Domicile, Marriage and the Law Commission" (n.53).

109 *Ibid.*

110 *Ibid.*

Criticisms of interest analysis remain. Critics argue that if applied alone it could lead to confusion, lack of consistency and limited predictability.[111] The US experience of interest analysis in the field of contract and tort is illustrative, as a separate analysis was potentially required for each given set of facts. It has therefore been criticised as resulting in an "ad hoc case-by-case approach".[112] Interest analysis can therefore lead to confusion.[113] US judges acknowledge the lack of consistency.[114] Other writers have also commented upon difficulties with certainty and being unable to predict the conclusion of a case, where each case is essentially determined by its particular factual circumstances.[115] Critics of the US experience therefore conclude that other jurisdictions should not follow the same approach, especially in the field of marriage where it is so necessary to know how each case will be treated.[116] A further criticism of interest analysis is that it can result in a balance towards the forum determining the case.[117] These criticisms show that interest analysis alone cannot be a solution. Instead a system of rules-based depecage[118] balances the competing interests of flexibility and certainty.[119]

A. Rules-based depecage

Depecage applies interest analysis not on a case-by-case basis, but on an issue-by-issue basis. When applied to the incapacities to marry, each of the incapacities to marry would be governed by its own choice of law rule. The advantages of interest analysis are therefore maintained as the public policy reasons remain crucial to the choice of law rule. At the same time there is certainty as to the result to be achieved as each incapacity to marry has its own firm choice of law rule. Critics argue that this further complicates an already "complex methodology" by further "issue splitting",[120] but we argue that this approach offers the right

111 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.27 refers to comments from Chief Judge Fuld in *Neumeier v Kuehner* 31 NY 2d 121, 127 (1972) who explains that in a US context "our decisions … it must be acknowledged, lacked consistency". See also Lea Brilmayer, "Interest Analysis and the Myth of Legislative Intent" (1980) 78 Michigan Law Review 392 and J Skelly Wright, "The Federal Courts and Nature and Quality of State Law" (1967) 13 Wayne Law Review 317, 334.

112 *Tooker v Lopez* 24 NY 2d 569, 584 (1969).

113 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26).

114 See works referred to in note 111; see also *Tooker v Lopez* (n.112).

115 See Brilmayer, Interest Analysis and the Myth of Legislative Intent" (n.111); see also Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

116 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.43. See also Scott Fruehwald, "Choice of Law and Same-Sex Marriage" (1999) 51 Florida Law Review 799.

117 Courtland Peterson, "Proposals of Marriage between Jurisdiction and Choice of Law" (1980–1981) 14 UC Davis Law Review 869, 871. See also Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.29.

118 See works referred to in note 31.

119 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27) and Fruehwald, "Choice of Law and Same-Sex Marriage" (n.116).

120 See Juenger, "Conflict of Laws: A Critique of Interest Analysis" (n.26), p.41.

balance between the competing concerns. Reed suggests that a rules-based theory should avoid "excessive judicial particularistic intuitionism".[121] Theorists have suggested looking at each incapacity to marry in turn.[122] Age, consanguinity and affinity, polygamy, consent and marriage after divorce are each examined. An appropriate choice of law is assigned by determining what the law in each of these areas is designed for in terms of apposite utilisation. We consider here which choice of law rule should be applied to same-sex relationships. It is useful first to look at existing precedents as to which public policy factors have been deemed important.

B. Public policy factors

When considering which public policy factors would be relevant to apply to the choice of law for same-sex relationships, it should first of all be pointed out that some types of public policy factors apply in relation to all the incapacities to marry. The parties to a marriage have a legitimate expectation that they have entered into a valid marriage. For this reason, several authors comment on the importance of validating a marriage.[123] A marriage should therefore not be easily invalidated. Simplicity is also essential as non-lawyers, such as marriage registrars, immigration officers and social security staff are involved with important tasks concerning the validity of a marriage.[124] Another important issue, which is of particular relevance to the EU is to have uniformity internationally as to the validity of a marriage.[125] The parties to the marriage should also be protected. This can be shown from the purpose of a minimum age restriction or where there are concerns about a lack of consent as a result of some fraud, duress or mistake.[126] Objections to different types of marriage based on "sociological, religious and moral grounds" can also be relevant.[127] These can be seen from the rules prohibiting consanguinity[128] and

121 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.390.

122 See *Ibid.*, and Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27).

123 See *Ibid.* and Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24).

124 See Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.47.

125 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.391. See also Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24) and Robert Leflar, "Choice Influencing Considerations in Conflicts Law" (1966) 41 New York University Law Review 267.

126 Eg Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27), p.54 stated that in relation to lack of consent that the "purpose behind the law will generally be to protect the person form the consequences of their misapprehension or weakness".

127 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.430.

128 Where there is a blood relationship between the parties, for example uncle and niece.

affinity.[129] In relation to consanguinity there is another relevant concern about preventing marriage between those who are too closely related, in order to prevent the increased risk of the birth of disabled children.

C. *Polygamous marriages*

When selecting a choice of law rule for same-sex relationships, a review of how polygamous marriages have been treated by the courts is particularly interesting. This is because the justifications for prohibiting such unions are often similar to reasons given by courts and governments who prohibit same-sex relationships. The prohibition on polygamous marriage, it is argued, is supported by religion and society as a whole.[130] Despite this line of argument, these have not been the determining factors as to how polygamous marriages are treated by English courts. Simon J in *Cheni v Cheni* explained that "common sense" and a "reasonable tolerance"[131] were also relevant. The prohibition on a polygamous marriage under English law remains in place. However, the law has now developed to recognise a polygamous marriage conducted in a foreign jurisdiction unless there are strong reasons against doing so.[132] Arguably this can be justified on the basis that while the object of English law is to protect monogamous marriage it does not mean that there is any "justification for invalidating a polygamous marriage".[133] In taking a tolerant approach that English courts respect the traditions of other countries rather than imposing their own view as to what constitutes a valid marriage. This can be demonstrated from the polygamous marriage which was under consideration in *Hussain v Hussain*.[134] The husband was a domiciled Englishman and the wife was domiciled in Pakistan. Ormrod LJ recognised the validity of the marriage. The reasons for his decision included concerns about "repercussions on the Muslim community" and the fact that we are now "an increasingly pluralistic society".[135]

Several authorities state that the choice of law theory in relation to polygamous marriages is that of the intended matrimonial home of the couple.[136] In practice, case law[137] has extended the choice of law beyond that of the intended matrimonial

129 Where the parties to the marriage are already related through marriage, for example step-mother and step-son.

130 See eg in *Hyde v Hyde* (1865–1869) LR 1 P & D 130, Lord Penzance described "[m]arriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others".

131 *Cheni v Cheni* [1965] P 85, 99 (Simon J).

132 *Alhaji Mohamed v Knott* [1969] 1 QB 1.

133 See Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.234.

134 *Hussain v Hussain* [1983] Fam 26.

135 *Ibid.*, 32 (Ormrod LJ).

136 See *Radwan v Radwan (No 2)* (n.37). This is supported by Davie, "The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws" (n.27) and Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27).

137 See *Hussain v Hussain* (n.134).

home. This means that a polygamous marriage conducted abroad is recognised in England even though the couple now reside here. Smart explains that whilst the intended domicile as "a connecting factor serves its purpose well, … in exceptional cases it may have to yield to other circumstances".[138] English courts therefore do not apply a simple intended matrimonial home test to polygamous marriages. Instead they also consider other factors as well and apply a tolerant approach to how polygamous marriages are treated. This leads to the validation of polygamous marriages conducted abroad, even where the couple are residing in this jurisdiction. The English courts are applying in practice an extended intended matrimonial home test. This makes an interesting precedent of a country recognising a form of marriage which cannot be conducted in their own jurisdiction. In this article we make the case for an extended choice of law in relation to same-sex relationships.

IV. Choice of Law in Relation to Same-Sex Relationships

The main focus of this article is to determine which choice of law provision should be applied in relation to same-sex relationships. Any law preventing same-sex relationships is usually justified on the grounds of protection of society,[139] religion[140] and public morality. In determining the choice of law to be applied to same-sex relationships, we suggest a novel and more extensive suggested choice of law rule which we term the continued recognised relationship theory. The applicable rule to be applied would be the law where the couple are intending to live, or the law of the country where they have lived, if their relationship has been subsisting for a reasonable period of time. This goes beyond the intended matrimonial home test as the intended place of domicile is not the only relevant factor; instead consideration is also given to where the couple have already resided. Equally, the dual domicile theory is not being utilised as we consider that past factors are not the only relevant ones; the couples' future intentions also being equally valid. There is nothing in this rule which requires individual countries to allow same-sex marriage to take place within their own jurisdiction. This more extensive choice of law rule can be justified because of concerns surrounding upholding marriage validity, consideration of the view of the parties to the marriage and the example of how polygamous marriages have been treated. We also argue that additional public policy issues apply when

138 Smart, "Interest Analysis, False Conflicts, and the Essential Validity of Marriage" (n.5), p.237 referring to *Ibid.* (Ormrod LJ).

139 See eg Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24) and Brian Bix, "Choice of Law and Marriage: A Proposal" (2002–2003) 36 Family Law Quarterly 255.

140 Eg Kathryn Marshall "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (2010) 2 William and Mary Policy Review 194, 225 argues that "[r]eligiosity is also an 'exceptionally strong determinant' of opposition to gay marriage". In *Bellinger v Bellinger* [2003] 2 AC 467 Lord Nicholls described "[m]arriage … as an institution, or a relationship deeply embedded in the religious and social culture of this country".

considering same-sex relationships, which all argue in favour of a more extended choice of law rule. In turn, we will discuss each of the public policy concerns of citizenship, symbolism and equality. Although these arguments are often most appropriate to recognition of same-sex marriage, for the sake of consistency we argue that the same choice of law should be applied to all same-sex relationships, including civil partnerships.

A. Citizenship

Citizenship is one of the public policy concerns which argue strongly in favour of a more extensive choice of law rule in relation to same-sex couples. It is important to understand what is meant by citizenship in this context. There are clear connections between citizenship and equality. All citizens who have the status are regarded as equals.[141] Equal citizenship involves inclusion, enfranchisement and equity and justice.[142] "Sexual citizenship" has been recognised by a number of authors, who see the right to enter into marriage for same-sex couples as having a "constitutional character".[143] Marriage involves not only the personal relationship between the two individuals involved but also puts the relationship on a public footing. This is because of the number of public rights it involves and it "participates in the public order" concerned.[144] In turn because of the public nature of marriage this has constitutional importance. The right to marriage is given protection by international conventions[145] and leading cases,[146] and many countries have legalised same-sex marriage.[147] Same-sex couples who cannot access the status of marriage will not

141 Nicholas Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (2012) 10(2) Int'l J Const L 477, 478 referring to Thomas H Marshall, "Citizenship and Social Class" in Thomas H Marshall and Tom Bottomore (eds), *Citizenship and Social Class* (London: Pluto Press, 1992) p.18. See also Michael Rosenfeld, "Introduction: Gender, Sexual Orientation and Equal Citizenship" (2012) 10(2) IJCL 340; Conor O'Mahoney, "There Is No Such Thing as a Right to Dignity" (2012) 10(2) IJCL 551, 555 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [132] (Baroness Hale of Richmond).

142 See Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.141), p.483 referring to Jeffrey Weeks, "The Sexual Citizen" (1998) 15 Theory, Culture and Society 38, 39.

143 *Ibid*., p.478 referring to Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford: Stanford University Press, 2007) p.27.

144 *Ibid*., p.481 referring to Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Massachusetts: Harvard University Press, 2000) pp.2, 1.

145 See eg 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".

146 See eg *Goodridge v Department of Public Health* (n.6) and *Loving v Virginia* (n.6).

147 The following list shows which countries and US states currently recognise same-sex marriage. Netherlands (2001), Belgium (2003), Massachusetts (2003), Spain (2004), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Mexico (2010), Denmark (2011), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), England and Wales (2013), Scotland (2014), Luxembourg (2015), US nationwide (2015) and Finland (effective from 2017).

have the full level of constitutional protections and can therefore be regarded as partial citizens only.[148]

This article argues for a solution with regards to having a uniform choice of law for same-sex relationships at an EU level. The EU has embraced the concept of citizenship. This can be seen from the extensive rights granted to citizens under the Citizenship Directive 2004/38. For example, citizens and family members of citizens are given extensive rights of residence,[149] access to Member State's social assistance scheme[150] and equality in relation to employment[151] and self-employment.[152] Alison O'Neil argues that the EU's free movement provisions entail the right of same-sex couples to move around Europe.[153] If an EU citizens' family cannot move along with the EU citizen, it is going to deter and may prevent an EU citizen moving entirely. Citizenship is therefore a strong public policy factor in favour of having a more extensive choice of law rule.

B. Symbolic status of marriage

Marriage also has a symbolic status. Zvi Triger argues that marriage has been used as a weapon against gays.[154] Marriage is viewed by many as the preferred status which gives many legal privileges in countries across Europe as well as the United States.[155] To be denied recognition of this status is to be demoted to a second-class status. Michael Dorf discusses the "symbolic impact" that results.[156] The strength of the symbolism argument can also be seen in same-sex couples continuing to fight for same-sex marriage, even after being given many of the legal rights of civil partnership. France, England and Wales and Denmark are all examples of jurisdictions that went on to introduce same-sex marriage legislation even after the prior introduction of civil partnership. This was despite the fact that in England civil partnerships were given almost equivalent legal protections to that of married

148 See Bamforth, "Sexuality and Citizenship in Contemporary Constitutional Argument" (n.141), p.483 referring to Diane Richardson, "Sexuality and Citizenship" (1998) 32 Sociology 83, 88.

149 Citizenship Directive 2004/38 art.14(1).

150 *Ibid.*, art.14(3).

151 *Ibid.*, art.24.

152 *Ibid.*, art.23.

153 Alisson O'Neill, "Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy" (2004) 37 Cornell Int'l L J 199, 201.

154 Zvi Triger, "Fear of the Wandering Gay: Some Reflections on Citizenship, Nationalism and Recognition in Same-Sex Relationships" (2012) 8(2) International Journal of Law in Context 268.

155 See Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.110. See also the Equality Network, "Equal Marriage: Report of the Equality Network Survey of LGBT People's Views on Marriage Equality" (2011), available at http://www.equality-network.org/wp-content/uploads/2013/08/Equal-Marriage-Report-26.1.11.pdf (visited 27 May 2016).

156 See Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (n.95), p.1275. See also Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15), p.150 and Misha Isaak, "What's in a Name? Civil Unions and the Constitutional Significance of Marriage" (2008) 10 University of Pennsylvania Journal of Constitutional Law 607.

couples. Symbolism is therefore another strong public policy argument which favours a more extensive choice of law rule.

C. *Equality arguments*

Equality arguments are vital in relation to success of the recognition of same-sex marriage.[157] In many international cases where arguments in relation to same-sex marriage have been made successfully, equality has often been the deciding argument.[158] This can be seen from the latest cases in the US Supreme Court[159] as well as leading decisions from Canada[160] and South Africa.[161] Recognition of same-sex marriage is seen by many as the latest in the chapter of historical debates regarding marriage laws, following the abolition of miscegenation and Nazi anti-Jewish legislation.[162] Other marriage reforms which demonstrate the changing nature of marriage[163] concern the reversal of laws which did not allow women to own property during marriage and recognition of transsexuals in their new sex.[164] Some authors argue that public policy factors should be weighed, and that some factors such as equality concerns should be given greater weight on the scales.[165] Barbara

157 See eg Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140) and 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.

158 See eg *Goodridge v Department of Public Health* (n.6) as discussed by Jonah Crane, "Legislative and Constitutional Responses to *Goodridge v Department of Public Health*" (2003–2004) 7 New York University Journal of Legislation and Public Policy 465. See also *Obergefell v Hodges* (n.6).

159 *United States v Windsor* 570 US ___, 133 S Ct 786 (2013) and the US Supreme Court decision of 6 October 2014 denying certiorari in appeals from five states. The cases were *Bogan v Baskin* (Indiana) No 14-277 (7th Cir); *Walker v Wolf* (Wisconsin) No 14-178 (7th Cir); *Herbert v Kitchen* (Utah) No 14-124 (10th Cir); *McQuigg v Bostic* (Virginia) No 14-251 (4th Cir); *Rainey v Bostic* (Virginia) No 14-153 (4th Cir); *Schaefer v Bostic* (Virginia) No 14-225 (4th Cir) and *Smith v Bishop* (Oklahoma) No 14-136 (10th Cir).

160 *Halpern v Toronto* 65 OR (3d) 161 (CA) (2003). For discussion, see Claire L'Heureux-Dube, "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective" (2003) 1(1) International Journal of Constitutional Law 35.

161 *Minister of Home Affairs v Fourie* [2006] (1) SA 524 (CC).

162 See eg David Richards, "Carl F Stychin Book Review: Governing Sexuality: The Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon" (2004) 2(3) International Journal of Constitutional Law 727; Dorf, "Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings" (n.95); Scott, "A World Without Marriage" (n.16); Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140) and Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24).

163 See eg Cindy Tobisman, "Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families" (1997) 12 Berkeley Women's Law Journal 112 on the changing nature of marriage.

164 See eg, *Goodwin v United Kingdom* (2002) 35 EHRR 18.

165 See eg Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24) referring to Arthur von Mehren and Donald Trautman, *The Law of Multistate Problems: Cases and Materials on Conflicts of Laws* (Boston, Massachusetts: Little, Brown and Co, 1965) pp.342–375 and Arthur von Mehren, "Recent Trends in Choice-of Methodology" (1975) 60 Cornell Law Review 927.

Cox is one such author. She considers that equality should be given greater weight on the scale and that there should be recognition of same-sex marriage because this would end "age-old discrimination and prejudice and misunderstanding".[166] It also demonstrates the importance of equality as a public policy factor tending towards a more extensive choice of law rule. This argument has received much criticism with Scott Fruehwald arguing that there are no "substantively neutral" or "objective criteria" to weigh the competing public policy concerns.[167] As this article is proposing that the choice of law should be determined at an EU level, there is an interesting point to make about how these public policy issues may be weighted. The EU is committed to join the ECHR.[168] The ECtHR has long had a policy of weighing competing arguments.[169] Human rights arguments are given greater weight than those of commercial interests, for example.[170] An argument could therefore be made that equality-based human rights concerns should be given greater weight than other competing public policy arguments. This argument has been given a considerable boost by the July 2015 decision of the ECtHR in *Oliari v Italy*.[171] All ECtHR contracting states have to introduce either civil partnership/ registered partnership although it remains open to their discretion as to the exact form this will take. There is no requirement to introduce same-sex marriage where the ECtHR continues to be bound by the margin of appreciation[172] (as will be explored further in the next section), currently allowing Member States discretion on this policy. The important public policy concerns of citizenship, symbolism and equality do have to be born in mind when determining which choice of law should be applied to same-sex relationships. We argue that the more extensive continued recognised relationship theory is appropriate. The next section looks further at why it is necessary to tackle this matter at an EU level.

166 See Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (n.24), p.1033.

167 See Fruehwald, "Choice of Law and Same-Sex Marriage" (n.116), p.838. He also refers to Douglas Laycock, "Equal Citizens of Equal and Territorial States; The Constitutional Foundations of Choice of Law" (1992) 92 Columbia Law Review 249.

168 EU states make up 28 of the Council of Europe's 47 member states. Following the Lisbon Treaty the EU has also agreed to accede to the ECtHR. Treaty on European Union (TEU) art.6(2) provides that "The Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

169 This is known as the doctrine of proportionality. See Steve Foster, *Human Rights and Civil Liberties* (Cambridge: Pearson, 3rd ed., 2011) 65 who explains that "Restrictions should be strictly proportionate to the legitimate aim being pursued and the authorities must show that the restriction in question does not go beyond what is strictly required to achieve that purpose."

170 For example, in the area of freedom of expression, the ECtHR has given less protection to commercial free speech. *Eg* in *Hachette Filipacchi Associates v France* (2009) 49 EHRR 23 there was no violation of art.10 when the applicant companies were prosecuted for advertising cigarettes contrary to French law. In contrast, press free speech is given much greater protection as being essential to democracy. See *Sunday Times v United Kingdom* (1979–80) 2 EHRR 245.

171 See *Oliari v Italy* (n.22).

172 *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

V. European Union

The right to free movement across the EU, and the need to avoid limping marriages,[173] advocates in favour of EU involvement. Problems are caused by "divergences between Member States",[174] and this is particularly acute in the area of same-sex relationships. Many Member States now have some legal form of same-sex relationship, but there is wide diversity on how this has been introduced.[175] Even following *Oliari v Italy*[176] this will not change as Member States will be able to determine what form of same-sex relationship they introduce.

It remains controversial as to whether the EU should be involved. Some authors stress what can be learnt from other regimes,[177] but others argue that international comparisons are not appropriate in family law.[178] This is because of the heavy influence which religious and other racial and political considerations have had on the shaping of family law.[179] There are legitimate concerns that a single European approach would result in unnecessary homogeneity.[180] Political reality also has to be faced. It remains controversial as to whether Member States will support further expansion of free movement laws.[181]

---

173 See works referred to in note 59.

174 Gordon Moir and Paul Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (1995) 20(3) European Law Review 268, 269.

175 See works referred to in note 3. For discussion, see also Kate Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (2010) 6(1) Cambridge Student Law Review 155.

176 See *Oliari v Italy* (n.22).

177 See eg Richards, "Carl F Stychin Book Review: Governing Sexuality: The Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon" (n.162) and William Eskridge Jr, *Equality Practices, Civil Unions and the Future of Gay Rights* (Oxon: Routledge, 2002).

178 See eg Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (New York: Clarendon Press, 1998) and David Bradley, "Comparative Law, Family Law and Common Law" (2003) 33(1) Oxford Journal of Legal Studies 127.

179 See Bradley, "Comparative Law, Family Law and Common Law" (n.178) referring to HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1946) pp.31–32. See also the Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1); Niamh Nic Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (2009) 34(2) European Law Review 230 and Aloni, "Incrementalism, Civil Unions and the Possibility of Predicting Same-Sex Marriage" (n.15).

180 See Moir and Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (n.174), p.280. Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.238 states that "constitutional differences remind us that they 'are often that part of social identity about which people care a great deal …" referring to Joseph Weiler, "Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space" in his *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999).

181 See for discussion, Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (n.175). This problem is particularly controversial following the re-election of the Conservative government in 2015.

A. *EU emphasis on subsidiarity*

The EU recognises the strength of these arguments and continues to emphasise subsidiarity.[182] The EU has to act within and cannot exceed the bounds of its competency.[183] Both the EU and the ECtHR have followed a policy of subsidiarity or margin of appreciation in this area. Although the ECtHR has now recognised the right of same-sex couples to some form of civil partnership, or registered partnership,[184] these policies allow a "degree of discretion" afforded to Member States[185] who can continue to determine the extent of rights given to same-sex couples. There is no requirement to enact same-sex marriage. This was refused in *Schalk and Kopf v Austria* where the right to same-sex marriage was denied due to a lack of consensus between contracting states.[186] The EU's traditional position which determined that gender discrimination did not cover sexual orientation[187] has been reformed, but the EU Citizenship Directive[188] continues to have a narrow interpretation of family members.[189] Spouses are included within the category of family members,[190] but this does not include same-sex spouse. The term is gender-neutral and some argue that it should include same-sex partners,[191] yet it remains

182 The Commentary on art.9 of the Charter of Fundamental Rights of the European Union provides that "There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples." Also art.2(2) of Directive 2004/38 provides that "family member means (a) spouse, (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State".

183 Article 5(2) of the Treaty on European Union provides that the Union shall act "only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein". For discussion, see Stalford, "Regulating Family Life in Post-Amsterdam Europe" (n.23).

184 See *Oliari v Italy* (n.22).

185 For discussion, see Emily Wada, "A Pretty Picture. The Margin of Appreciation and the Right to Assisted Suicide" (2005) 27 Loyola Los Angeles International and Comparative Law Review 275 and Petra Butler, "Margin of Appreciation: A Note towards a Solution for the Pacific" (2008–2009) Victoria University Wellington Law Review 687.

186 *Schalk and Kopf v Austria* (n.172), [105].

187 *Grant v South-West Trains Ltd* [1998] 1 CMLR 993. See also the domestic decision of *R v Ministry of Defence, ex p Smith* [1996] QB 517 which applied the same interpretation of the EU directive. See also *Advocate-General v MacDonald* 2003 SC (HL) 35; *Pearce v Governing Body of Mayfield Secondary School* [2000] ICR 920 decided under the then existing Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment.

188 Directive 2004/38.

189 For discussion, see Stalford, "Regulating Family Life in Post-Amsterdam Europe" (n.23) and Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (n.175).

190 See Directive 2004/38 art.2(2)(a). Determined by *Netherlands v Reed* [1987] 2 CMLR 448 to be genuine marital relationships only.

191 Dimitry Kochenov, "On Options of Citizens and Moral Choices of States: Gays and European Federalism" (2009) 33(1) Fordham International Law Review 156, 190 referring to Mark Bell, "EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process", 2005 *ILGA Europe*, available at www.ilga-europe.org/sites/default/files/Attachments/eu_directive_free_movement_guidelines_2005.pdf (visited 27 May 2016).

clear that the EU system of subsidiarity does not require member states to recognise same-sex marriages conducted in other states.[192] The principle of subsidiarity is made explicit in relation to registered partnership where Citizenship Directive 2004/38 expressly includes registered partners as family members under art.2(2), but this is only "if the legislation of the host Member State treats registered partnerships as equivalent to marriage".[193] As all EU Member States are also contracting members of the ECHR they will be bound by the ruling of *Oliari v Italy* and will need to introduce some form of same-sex relationship, although they have discretion as to what form this takes.[194] The likelihood of marked differences between the varying statuses granted to same-sex partners is a clear restriction on the ability of a non EU same-sex spouse or partner to relocate to another EU country.[195]

Many authors believe that the margin of appreciation is necessary in international law.[196] A negative result of this approach is that the matter is left to the individual states' discretion. Critics have argued that this may not adequately safeguard the position of minority groups in society.[197] Action at an EU level may improve this position. It is argued here that the EU is the appropriate forum within which to bring forward the proposed choice of law rule. This is because of the already existing and growing area of European family law. The EU, as compared to other sources of European family law, allows for greater co-ordinated action. There is also a necessity of the EU to act according to the imperative of its free movement provisions. In the past the EU and the ECtHR have taken differing approaches to their treatment of same-sex couples but over time the two organisations are growing closer. Each of these points is dealt with in turn.

B. European family law

Peter McEleavy reports on the "rapidly emerg[ing]" area of EU family law.[198] The area where the EU has been most active in terms of family law includes that of enforcement of matrimonial judgments on divorce between different EU

192 See works referred to in note 182.
193 Directive 2004/38 art.2(2)(b).
194 See *Oliari v Italy* (n.22).
195 For discussion, see Grigolo, "Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject" (n.2).
196 See eg Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?"(2005) 16(5) European Journal of International Law 907 and Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" (1998–1999) 31 New York University Journal of International Law and Policy 843.
197 See Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" (n.196), pp.920–921.
198 Peter McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) 53(3) International and Comparative Law Quarterly 605. See also Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (n.175).

countries.[199] The Brussels II legislation has been referred to as a "watershed in the evolution of EU law".[200] Other developments include those concerning succession laws.[201] The Commission on European Family Law was also established in 2001, with funding in part from the EU to consider laws on the basis of voluntary harmonisation. There have also been proposals for Regulations concerning the property consequences for unmarried couples, and registered partnerships, but these have not been introduced.[202] Further proposals concerning recognition of public documents,[203] and on the free movement of citizens,[204] have not progressed. Any further EU conventions will need to be carefully negotiated. This is because of the current political climate and criticisms about the way Brussels II and successors were negotiated.[205] There are clear precedents for EU involvement in family law.

C. EU allows for greatest coordinated action

It is also argued that the EU as compared to other sources of European family law allows for greatest co-ordinated action. Other bodies such as the Council of Europe, Hague Conference and the United Nations have all done important work, but the EU system offers the easiest approach to bringing forward legislation in this area. This is because of the closer level of involvement between Member States meaning that the EU can "secure a deeper form of agreement, relatively unscarred by compromise".[206] This advantage is less since the growth in size of the EU, other bodies often struggle to secure agreement to conventions. This can

199 See eg Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, 26 September 1968; Council Regulation (EC) No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses of 29 May 2000 (known as Brussels II); Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (known as Brussels II bis).

200 Maire Ni Shuilleabhain, "Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective" (2010) 59(4) International and Comparative Law Quarterly 1021, 1022.

201 Regulation (EU) No 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession will apply from 17 August 2015, to the succession of persons who die on or after that date. Denmark, Ireland and the United Kingdom did not take part in the adoption of the instrument.

202 The European Commission proposed in COM(2011) 127,"Bringing Legal Clarity to Property Rights for International Couples", 16 March 2011 and two further regulations; COM(2011) 125, a Council Regulation on Jurisdiction, Applicable Law and Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, 16 March 2011 and COM(2011) 126, a Council Regulation on Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, 16 March 2011.

203 COM(2010) 747, "Less Bureaucracy for Citizens Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records" (n.74).

204 COM(2013) 228, "Proposal for a Regulation on Promoting the Free Movement of Citizens", 24 April 2013.

205 For discussion, see McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (n.198).

206 See Moir and Beaumont, "Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community" (n.174), p.288.

be demonstrated by the lack of progress of the International Commission on Civil Status' Convention on the Recognition of Registered Partnerships. Despite being opened for signature in 2007 this has only attracted two signatories, resulting in a limited level of success.[207]

D. EU free movement imperative

EU free movement provisions are also another reason for the EU to act in this area.[208] The reality is that many European citizens will exercise their right of free movement to take up work in other countries, or marry nationals from other countries.[209] European integration is, therefore, "no longer purely economic".[210] Some commentators view harmonisation of private international laws as essential in order to guarantee free movement.[211] This is because an EU citizen is unlikely to move country to take up work elsewhere in Europe if their family members cannot move with them. As the rules of private international law determine (amongst other important roles) if a marriage is valid, these are a key ingredient to ensure free movement of persons. The Centre for Social Justice also argues that there is a need for international involvement as individual states are not capable of dealing with increased mobility of persons between states by themselves.[212] Allowing each individual country in Europe to determine their own choice of law rules only adds to complexities for couples who may move several times across different European borders. There is a key role for the EU to play in this area.

E. Growing closeness between EU and ECtHR

A further important argument surrounding EU involvement is despite past divergences, there is a growing closeness between the EU and the ECtHR. The EU is now concerned with the "protection of fundamental rights" within the European legal order.[213] Some writers argue that the EU is engaging in a "rights revolution"[214]

---

207 Portugal in 2008 and Spain in 2009.

208 For discussion, see Stalford, "Regulating Family Life in Post-Amsterdam Europe" (n.23).

209 See *Ibid.*, and also Spencer, "Same-Sex Couples and the Right to Marry: European Perspectives" (n.175).

210 Alegria Borras, "Explanatory Report on the Brussels II Convention … on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters" (16 July 1998) Official Journal C 221 para.1.

211 See McEleavy, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (n.198).

212 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1).

213 See Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.230.

214 Mark Dawson, Elise Muir and Monica Claes, "Enforcing the EU's Rights Revolution: The Case of Equality" (2012) 3 European Human Rights Law Review 276. See also Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.233 referring to S Douglas-Scott, *Constitutional Law of the European Union* (Essex: Longman, 2002) p.431.

but it remains important to avoid over generalisations[215] as the EU is continuing to carry out and develop key economic functions. The growing closeness between the ECtHR and the EU is demonstrated by the enactment of the EU Charter on human rights, the fact that all EU states are also members of the ECHR and that under the Lisbon Treaty the EU has agreed to accede to the ECHR.[216] The EU and the ECtHR also work together[217] and cross-refer to each other's judgments.[218] These points draw us to conclude that the EU is the appropriate institution to bring forward a new choice of law mechanism in relation to recognition of same-sex relationships. The continued recognised relationship theory would mean that a same-sex relationship would be valid where this is recognised in the new state where the couple intend to reside, or where the relationship has been subsisting for a reasonable period of time. There is no requirement for individual countries to allow same-sex relationships to be enacted within their own jurisdiction. The final section deals with some anticipated criticisms of this proposed choice of law.

VI. Anticipated Criticisms of the Continued Recognised Relationship Theory

Firstly, an anticipated criticism of the continued recognised relationship theory is that it is going too far too fast. Secondly, is that it would be difficult to operate in practice due to difficulties in defining what is meant by the relationship having been subsisting for a reasonable period of time. Thirdly, is its application to the varying types of civil partnerships across the EU and finally is the recognition of a relationship that a member state would not allow its own domicilaries or nationals to enter into. Turning to the first point, there is a concern that recognising a same-sex relationship in a country which does not allow domestic same-sex couples to marry could lead to a backlash in public opinion. It was suggested that this was a matter that should be handled with thoughtful consideration and that there should be "patience in reform".[219] There are examples of backlash occurring within the recognition of same-sex marriages. In the US although the first states began

215 See Shuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (n.179), p.236 referring to Oliver and Roth, "The Internal Market and the Four Freedoms" (2004) 41 Common Market Law Review 407, 408.

216 TEU art. 6(2) provides that "The Union shall access to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

217 See eg CM(2007)74, "Memorandum of Understanding between the Council of Europe and the European Union" prepared at the 117th Session of the Committee of Ministers (Strasbourg, 10–11 May 2007), available at https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)74&Language=lanEnglish (visited 27 May 2016).

218 See eg *Stauder v City of Ulm* [1969] ECR 419, *Selma Kadiman v Freistaat Bayern* [1997] ECR I-2133 and *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] 3 CMLR 1049.

219 Dale Carpenter, "A Traditionalist Case for Gay Marriage" (2008–2009) 50 South Texas Law Review 93 referring to Edmund Burke, *Reflections on the Revolution in France* (London: James Dodsley, 1790).

recognising same-sex marriage in 2003,[220] this led to a backlash and within six months, eleven states amended their constitutions to prohibit same-sex marriage.[221] It was not until 2014 that public opinion in the US could be seen to have developed sufficiently, to declare in *United States v Windsor*[222] that s.3 of the Defence of Marriage Act 1996 was unconstitutional in its restriction of the terms "marriage" and "spouse" to heterosexual couples, and recognition of same-sex marriages had extended to 36 states. These developments were further added to when, in 2015, it was held by the US Supreme Court in *Obergefell v Hodges*,[223] that the fundamental right to marry is also guaranteed to same-sex couples and thus required all states to issue marriage licenses to same-sex couples and to recognise those marriages validly entered into in other states. It is, therefore, argued that enacting legislation too far in advance of public opinion delayed action in favour of same-sex marriage.

Fears of a backlash would, however, be minimalised as progress would be made on an incremental basis. This involves making change on a step-by-step approach[224] in order to secure "real and sustainable equality".[225] Incremental steps promote public opinion to change and become desensitised.[226] Civil partnerships encouraged public opinion to adjust, before moving on to strive for same-sex marriage. Experience demonstrates that countries that first recognised civil partnership, before introducing same-sex marriage managed to reach sustainable solutions, without experiencing any backlash.[227] Equally the suggested choice of law rule would be another incremental step, allowing public opinion to become desensitised. Nothing in our theory requires EU states to introduce domestic legislation to conduct same-sex relationships.

Turning to the second issue, the continued recognised relationship theory requires a new Member State to recognise the relationship when it has been subsisting for a reasonable period of time. Without a definition of "reasonable period of time" the theory is open to criticism. However, this is something that

220 See *Goodridge v Department of Public Health* (n.6).

221 For further discussion see Robert Verchick, "Same-Sex and the City" (2005) 37 Urban Law 191.

222 See *United States v Windsor* (n.159).

223 See *Obergefell v Hodges* (n.6).

224 This follows the theory of small change. This was first advanced by Kees Waaldijk, "Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands" in Robert Wintemute and Mads Andenaes (eds), *Legal Recognition of Same-Sex Partnerships: A study of National, European and International Law* (North America, US: Hart Publishing, 2001) pp.437–464 and later advanced by Eskridge, *Equality Practices, Civil Unions and the Future of Gay Rights* (n.177) and Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (n.20) who advocated recognition of same-sex marriage on a step-by-step approach.

225 See Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140), p.199.

226 See Eskridge, *Equality Practices, Civil Unions and the Future of Gay Rights* (n.177), p.119. See also Marshall, "Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and the Civil Rights Movements Juxtaposed" (n.140), pp.199–200 who explains that such slow change, although frustrating at the time, allows "public opinion to adjust gradually to the changes sought by social movement".

227 England and Wales, France and Denmark are examples of this experience.

would be negotiated between EU Member States. We do not advocate setting a particular time scale, such as a fixed number of years, as there is no way of making such a determination. A fixed period of time would also fail to recognise the individuality in relationships, or provide the necessary flexibility to take into account the many differing familial arrangements. Instead, we would recommend that reasonable time be based upon a series of factors including; duration of civil status, duration of relationship prior to obtaining the status in question, whether there are children involved, and type of property and joint commitments entered into. This test should not prove difficult, as in many of the straightforward instances it will be obvious to the Member States involved that the relationship is one of a solid and durable nature due to some of the above-mentioned factors. In respect of the more challenging cases, it should be remembered that the EU already uses the durable relationship test for heterosexual co-habitees.[228] Similarly, this criticism could be applied to many of the other choice of law rules. For instance, the intended matrimonial home requires that the couple move to the intended matrimonial home within a reasonable time, without defining reasonable time. Likewise the most real and substantial connection test does not define how the most real and substantial connection is determined. The list of factors would at least provide clarity in many of the straightforward cases.

Thirdly, criticism could be directed at the theory when considering its application to civil partnership type relationships as opposed to same-sex marriages. A marriage is a universally recognised status and, thus would not produce difficulties when expecting a fellow Member State to recognise it: "[T]he major international difference between marriage and civil partnerships is the territorial limitations of the latter".[229] Civil unions come in many different forms around the EU, and there must be some consideration of whether the new Member State would be required to recognise the version attached to the couple from their previous Member State or their own version. This is important as it could lead to an upgrade or downgrade in the relationship status and the legal consequences that come with it.[230] It is our suggestion that the general rule should be to apply the status which is most similar to that which the couple are in.[231] Alternatively, if that is not possible, the relationship should be upgraded. Even though this could mean couples are left with greater obligations than they had intended,[232] it would

228 In EU law, co-habitees are not directly included as family members under Citizenship Directive 2004/38 art.3(2). They have to prove a "durable relationship duly attested".

229 Kenneth Mck Norrie, "Recognition of Foreign Relationships Under the Civil Partnership Act 2004" (2006) 2(1) Journal of Private International Law 137, 166.

230 For instance, if a couple from France with a French *Pacte Civil De Solidarite* were to move to England and have their relationship recognised as an English civil partnership their status and legal obligations would be upgraded.

231 This idea of equivalence was explored by Hillel Y Levin, "Resolving Interstate Conflicts Over Same-Sex Non-Marriage" (2011) 63 Florida Law Review 47 in respect of same-sex relationships.

232 This point was considered by M Harper and K Landells, "The Civil Partnership Act 2004 in Force" [2005] Family Law 963.

at least provide them with the same, if not better minimum levels of protection and recognition. Downgrading a couple's status may lead to problems surrounding second-class citizenship if couples feel they are being stripped of their elected relationship status.[233]

Finally, the choice of law rule could be criticised as it would require Member States to recognise existing same-sex relationships if a couple move there, that they would not permit their own dommicilaries or nationals to enter into. It may be argued that it is creating one rule for one but not for another. This criticism could be levelled at other incapacities. When considering age in England, in accordance with s.2 of the Marriage Act 1949 the parties must be at least 16, and any marriage involving a party below that age is void. Regardless of this, as it is the dual domicile rule that often applies to the incapacity, marriages between parties not domiciled in England are still held valid in England, despite English domicilaries being prevented from entering such marriages.[234] Likewise, as previously mentioned within the article, similar respect is shown to foreign polygamous marriages even upon moving to England.[235] It is, therefore, argued that this is something the courts are already accustomed to, and could require similar application and tolerance demonstrated within other incapacities.

VII. Conclusion

The law surrounding same-sex relationships, and the appropriate choice of law rule, is evidently unclear. Despite the need for clear choice of law rules, as a result of subsidiarity, countries in the EU are able to determine to what extent to recognise same-sex relationships. The examination of the choice of law rules within marriage validity highlighted the competition amidst the theories. It is apparent that no one theory is appropriate for universal application. Instead, it is our suggestion that a rules-based approach to interest analysis would provide a more appropriate option. By applying depecage, a rule could be chosen to apply to all same-sex relationships. Our recommendation is that this rule should be the continued recognised relationship theory, which provides that the applicable law is that of the country where the couple intend to reside, or if their relationship has been subsisting for a reasonable period of time, it should be the law of the country where they previously lived.

For the purposes of free movement and the prevention of limping marriages[236] it is essential that this matter is dealt with at an EU level. With the high volume

233 See for instance *Wilkinson v Kitzinger* (n.17) where the couple felt that being demoted to the status of civil partners was like being offered a "consolation prize".

234 *Alhaji Mohamed v Knott* (n.132).

235 *Radwan v Radwan (No 2)* (n.37).

236 See works referred to in note 59.

of migration and marriages involving international couples,[237] it is not difficult to see the benefits that would be gained from the harmonisation of this matter.[238] It is argued here that the EU is the appropriate place within which to bring forward the proposed choice of law rule. This is because of the already existing and growing area of European family law. The EU as compared to other sources of European family law allows for greater co-ordinated action. There is also a necessity of the EU to act due to the imperative of its free movement provisions. Irrespective of the fact that the EU and the ECtHR have taken divergent approaches in this area, over time the two organisations converge.

The continued recognised relationship is a choice of law rule which could lead to a more extensive protection of same-sex relationships. This more extensive choice of law rule can be justified because of concerns surrounding upholding marriage validity, consideration of the view of the parties to the marriage and the example of how polygamous marriages have been treated in England and Wales. We also argue that additional public policy concerns of citizenship, symbolism and equality apply. All of these are compelling arguments in favour of a more extensive choice of law rule. While these arguments are often most appropriate to recognition of same-sex marriage, for the sake of consistency we argue that the same choice of law should be applied to all same-sex relationships, including civil partnerships.

We have also dealt with anticipated criticisms of the continued recognised relationship theory. Firstly, these include objections that this theory is receiving accelerated promotion. Secondly, is that it would be difficult to operate in practice due to difficulties in defining what is meant by the relationship having been subsisting for a reasonable period of time. Thirdly, is its application to the varying types of civil partnerships across the EU, and finally that Member States would be required to recognise a relationship that it would not permit its own domicilaries to enter into. We have suggested how these criticisms can be best dealt with. There is no requirement for Member States to legalise same-sex marriage in their own jurisdiction. A marriage subsisting for a reasonable period of time can be defined by looking at all factors, not just the length of marriage. The relationship to be recognised is that which is most similar to the one where the parties originated. If that is not possible the relationship should be upgraded. This tolerance and acceptance of existing relationships already occurs within other incapacities.

237 The Centre for Social Justice, "European Family Law: Faster Divorce and Foreign Law" (n.1).

238 For instance, certainty and predictability can be achieved through community action, as was identified in relation to divorce by Fiorini, "Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going too Far?"(n.84), p.185 in stating: "It is clear that, of the four objectives identified by the Commission (increasing legal certainty and predictability, preventing 'rush to court', increasing flexibility and ensuring access to court) the first two can only be achieved by community action, no Member States acting alone being able to solves problems that the lack of uniform rules in Europe give rise to."

There is no perfect solution. The aim is not to achieve the unachievable, but to identify and advance the best possible answer. This needs to be subject to further debate amongst EU nations. This article also develops an area of law that has been neglected. Marriage validity and the choice of law rules therein is an area of law in need of attention.[239] There is only space to tackle same-sex relationships within this work, but, this could be the starting point for a consideration of the choice of law rules applicable to other incapacities to marriage.

239 See Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules" (n.27), p.450.

Publication Six: Hamilton, F., The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders (2018) *Family Law* 693 - 696

EU Citizenship free movement rights and same-sex couples

Frances Hamilton, *Senior Lecturer in Law, Northumbria University*

Frances' research interests involve the difficulties facing individual countries and international courts in recognising same-sex relationships. She takes a comparative law approach as well as looking at human rights law and an EU free movement perspective. She is also interested in the necessary interaction between legal and social change in this area. She has worked as Senior Lecturer in Law at Northumbria University since 2009 and prior to this worked as a solicitor in London.

On 11 January 2018, Advocate General Melchior Wathelet stated in his Advocate General's Opinion in the case of *Relu Adrian Coman and Others v Inspectoratul General pentru Imigra˘ri and Others* (Case C-673/16) ('*Coman*') that non-EU citizen same-sex spouses should be granted the right of permanent residence if their EU citizen same-sex spouse relocated to a different state in the EU. This would be the case even if the couple relocated to a jurisdiction, which does not allow their own citizens to enter into same-sex marriages, or registered partnerships.

The case concerned Mr Coman, a Romanian national, who married his US partner Mr Hamilton in Brussels in 2010. In 2012 they decided to move to Mr Coman's home state of Romania. However, the plan was thwarted. Romania does not allow same-sex marriage on a domestic basis and therefore also refused to recognise a foreign same-sex marriage. Mr Hamilton, not being an EU national himself, was consequently refused a right of permanent residence in Romania. Advocate General Melchior Wathelet ruled against the Romanian authorities and stated that, as a matter of EU law, whilst EU Member States can determine whether to introduce same-sex marriage/ civil partnership on a domestic level they must recognise the free movement of EU citizens and their families and therefore grant permanent residence rights to non-EU spouses of same-sex marriages conducted abroad. If the Advocate General's Opinion is agreed by the European Court of Justice (ECJ) this would greatly enhance rights for non-EU citizenship spouses. As such, this is another example of expanding citizenship rights granted to family members of EU citizens. After Brexit, UK citizens would not be able to benefit from EU free movement rights, amongst the ever expanding number of rights granted to EU citizens and their family members.

Concept of EU citizenship

The concept of European citizenship has led to greatly enhanced rights across Europe for EU citizens and their family members. As part of the expanding concept of citizenship, the EU has increased the level of its human rights protections. These include the right to access human rights protections under Art 7 of the EU Charter of Fundamental Rights, which includes a right to private and family life broadly defined. This provision broadly echoes the protections guaranteed by Art 8 of the European Convention on Human Rights (European Convention). The EU now has far-reaching protections from discrimination on the basis of sexual orientation. Article 19 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis for the adoption of measures to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The EU also adopted Art 21 of the Charter of Fundamental Rights which includes 'sexual orientation' as a ground for discrimination. This further expands the grounds for discrimination from those stated in Art 14 of the European Convention. As the European Convention text was drafted in the 1950s, it noticeably does not include sexual orientation as a ground for discrimination in its stated text. Instead the European Court of Human Rights (ECtHR) has been required to use its dynamic interpretative techniques to expand protections for LGBTQ individuals.

Further EU citizenship rights are given to individuals who fall under the definition of family as defined by EU law. Once included within this definition, EU citizens' family members (even if not EU citizens themselves) can access a 'plethora of benefits.' (see Helen Stalford, 'Concepts of Family Under EU Law – Lessons from the ECHR' 16(3) *International Journal of Law, Policy and the Family* at p 427 for further comment). As well as protections based on human rights, EU citizens and their family members are entitled to a whole host of benefits. These include free movement rights between Member States (TFEU, Art 20(2)), additional rights of residence (TFEU, Art 14(1)), extensive non-discrimination provisions (TFEU, Arts 18 and 24 and case law such as

Grzelczyk v Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve (Case C-184–99) which greatly extended citizenship non-discrimination rights for non-economically active citizens), rights to take up employment or self-employment (TFEU, Art 23), access to the member state's social assistance scheme (TFEU, Art 14(3)) and rights of access to education for children (Art 12, Regulation 1612/68 as interpreted by case law further extending educational rights for example *Casagrande v Landeshauptstadt München* (Case C-9/74) and *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99)).

EU law definition of family member

It therefore becomes essential to understand which individuals are included within the definition of family member by EU law. This matter is particularly pertinent for same-sex couples where many countries have introduced varying forms of same-sex marriage, civil partnership and registered unions, with varying degrees of rights granted. Whilst 15 European nations have recognised same-sex marriage (as of March 2018 this includes Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the UK (excluding Northern Ireland) with Austria to introduce same-sex marriage from 1 January 2019) and many more recognise civil partnership (Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Slovenia and Switzerland) the position is far from clearly decided across Europe. Within the UK, Northern Ireland has not introduced same-sex marriage. They have civil partnership only. Other European states have introduced no form of legal status for same-sex partners and continue to reserve marriage for opposite sex couples. The *Coman* case concerned Romania. Although in recent years Romania has made great strides in recognising LGBTQ rights including decriminalising homosexuality, introducing anti-discrimination laws and equalising the age of consent for instance, it still provides no legal status for same-sex partners. Romania's Civil Code determines that marriage must be between persons of the opposite sex (Art 259 of Romanian Civil Code).

Up until the Advocate General Melchior Wathelet's Opinion, the EU had always determined that subsidiarity should take precedence and allowed individual EU states to determine whether or not to recognise same-sex marriage or other forms of civil partnership. In EU law there remains a hierarchy or recognised statuses. Spouses are most clearly protected and fall clearly within the definition of family member (Citizenship Directive 2004/38 Art 2(2)(a)). Although it could be argued that the word 'spouse' is gender-neutral and so should include same-sex partners (see Dimitri Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' 33(1) *Fordham International Law Review* 156 at 190) EU law has until Advocate General Melchior's recent Advocate General's Opinion not recognised that approach. The commentary on Art 9 of the Charter of Fundamental Rights of the EU provides that '[t]here is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples'. Advocate General Melchior Wathelet's Opinion would therefore reverse years of the subsidiarity approach and represent a further expansion of EU citizenship and the ever-expanding notion of who is a family member and therefore entitled to further EU citizenship rights such as permanent residency.

The traditional EU concept of spouse did therefore not include same-sex couples. Whilst EU law does include registered partnerships under the definition of family member, whether they would be given any EU citizenship rights depended upon whether the EU receiving state would recognise such relationships (Directive 2004/38 Art 2(2)). This again strengthens the concept of subsidiarity. This would also be likely to change, should Advocate General Melchior Wathelet's Opinion be recognised by the ECJ. Further down the list of protected statuses are cohabitees. This is an important category to consider for same-sex couples living in states which do not allow same-sex marriage or civil partnership, as there could be no opportunity to enter into a more regulated relationship. Within EU law, cohabitees are only included within the definition of family member if they have a relationship 'duly attested' (Citizenship Directive 2004/38 Art 3(2)). No firm guidance is given as to what is meant by a relationship duly attested, but it is likely to mean a relationship of several years duration. It should be pointed out that in relation to same-sex cohabitees, it is unlikely that further citizenship rights would be granted following Advocate General Melchior Wathelet's Opinion, even if enforced by the ECJ. Advocate General Melchior Wathelet does not recommend that any EU country should be forced to introduce same-sex marriage or registered partnership protections. Instead he recommends that all EU countries should be made to grant EU citizenship rights, such as permanent residency to non-EU national spouses of EU citizens who married abroad. Cohabitees who do not fall within any legally protected categories, would not have any firm rights upon which to rely to enforce their union.

Impact of Advocate General Melchior Wathelet's Opinion

The traditional position in EU law, which emphasised subsidiarity concerns above all else, clearly made it harder for same-sex families to relocate across Europe and has been described as a 'failure for the notion of free movement' (see Stalford's article above at p 419). It can also be seen as a system which favours heterosexuals due to subsidiarity concerns. Dimitri Kochenov refers to heterosexual's rights as being 'at the top of the pyramid' (see Kochenov's article above at p 201). This position would be greatly improved if Advocate General Melchior Wathelet's Opinion is agreed by the ECJ. Advocate General Melchior Wathelet supports a gender neutral interpretation of the word spouse and describes that word as being 'neutral as to the sex of the persons concerned and indifferent as the place where the marriage was contracted'. He further backs up his arguments by reference to the 'general evolution' of Member States of the EU in their treatment of same-sex couples.

He goes on to refer to human rights arguments whereby same-sex couples now fall within the definition of family life (see *Schalk and Kopf v Austria (Application No30141/04*) [2010] ECHR 1996). In *Schalk* the ECtHR finally recognised that a 'cohabiting same-sex couple living in a stable partnership, fell within the notion of 'family life', just as the relationship of different-sex couple in the same situation would' (*Schalk*, para 94). This statement has been described as a 'landmark' in the evolution of ECtHR case law concerning the LGBTQ community (See Conor O'Mahoney, 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families' (2012) 26 (1) International Journal of Law Policy and the Family 31 at page 38).

Ultimately however the ECtHR has stopped short of recognising same-sex marriage due to concerns about the 'deep rooted social and cultural connotations' (*Schalk*, para 62). This in turn leads to a wider margin of appreciation, otherwise known as area of discretion, being granted to EU Member States (*Schalk*, para 105). To this date the ECtHR system does not recognise same-sex marriage. Advocate General Wathelet also draws upon further ECtHR case law which he states has 'provided that there should be a right to some level of legal protection for same-sex couples'who should be provided with some form of civil partnership / registered partnership (see *Coman* referring *to Oliari and Others v Italy (Application Nos 18766/11 and 36030/11*) [2015] ECHR 716 (ECtHR, 31 July 2015). He further relies upon case law from the ECtHR which has extensively interpreted the European Convention to prevent discrimination against LGBTQ individuals (see *Coman* referring to decisions of the ECtHR such as *Karner v Austria (Application No 40016/98)* [2003] 2 FLR 623 (ECtHR 24 July 2003)). Whilst this progressive approach by Advocate General Melchior Wathelet is to be welcomed by pro LGBTQ activists, this would actually go further that what is currently provided by the ECtHR.

In the *Oliari* case, the ECtHR sought to confine the decision to require Member States to provide some level of civil partnership to countries, such as Italy (which the case concerned) who are socially accepting of same-sex couples. (For comment see Helen Fenwick and Andy Hayward, 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' 2017 (6) European Human Rights Law Review 545). A new claim is now being brought by a Russian couple, to test whether the ECtHR decision in *Oliari*, which required Italy to introduce a civil partnership law, would be extended to a country such as Russia, which is far less socially accepting to the GLBT community (see *Irina Borisovna Fedotova and Irina Vladimironova Shipitko v Russia (Application No 40792/10)* communicated to the ECtHR on 2 May 2016). In any event Advocate General Melchior Wathelet's opinion, even if agreed by the ECJ would not oblige EU Member States to introduce any level of civil partnership/ same-sex marriage. Instead, they would only be obliged to recognise same-sex marriages (and likely civil partnerships) conducted abroad and provide the non-EU national same-sex spouse with citizenship rights such as that of permanent residency.

Conclusion

It should be noted that the Advocate General Melchior Wathelet's Opinion is not binding on the ECJ. However, such opinions are highly influential and a Cambridge Law Research paper reported statistics that the 'received wisdom is that the Court follows the Advocate General in about 70 per cent of cases' (Carlos Arrebola and Ana Julia Mauricio, Cambridge Journal of Comparative and International Law, Vol. 5(1), University of Cambridge Faculty of Law Research Paper No. 3/2016). The judges are now in the middle of their deliberations and will give their judgments at later date, which is expected to be this summer. If the ECJ follows the Advocate General's opinion this will form part of the general overall approach of the EU which has developed from an international economic agreement guaranteeing the right to freedom of movement of goods, services, persons and capital, to one of ever-increasing public citizenship rights. EU citizenship leads to a much more extensive array of rights than those justified by economic concerns alone and is one of the driving forces behind the expanding definition of family member as interpreted by the ECJ. Brexit means however that the UK citizens will not be able to benefit from any expanding free movement provisions to include non-EU national same-sex spouses within the definition of family member. Without the benefit of the protections of EU law, UK citizens in same-sex relationships will have to continue to rely on whatever rights their country of destination sees fit to grant them.

Commentary on cited Published Work contained in PART THREE 'INTERNATIONAL IMPACT'

(7) Hamilton, F., 'The Symbolic Status of Same-Sex Marriage.' (2017) 47 *Family Law* 851

(8) Hamilton, F., 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 *Journal of Transnational Law and Policy* 121-153

The final two pieces comprising the third part of this PhD utilise comparative methodology.[225] They analyse and draw upon the work set out in parts one and two and chart the wider international implications regarding appropriate strategies for success for proponents of same-sex marriage. Publication 7 stresses the symbolic status of same-sex marriage, and it is therefore placed first in part 3 as publication 8 considers the

[225]Comparative legal methodology is the act of comparing the law of one country to that of another. This involves frequently comparing one law against another, but can be broader than that to encompass also cultural comparisons. For discussion see *Eberle* (n62).

international impact of this point**.** Publication 7 considers why same-sex marriage remained an important issue even after the enactment of civil partnership in the UK in 2004. In contrast to other jurisdictions such as France which gave limited rights after enacting civil partnership,[226] the UK opted to give very similar rights on civil partnership to same-sex couples as to those given to married heterosexual couples.[227] However, very quickly civil partnership began to be criticised as a 'second-class status'[228] compared in the US to the treatment of blacks in the Jim Crow South[229] and derided as a 'weapon' being utilized against the LGBTQ+ community to prevent them accessing same-sex marriage.[230] In addition, practical differences remain between civil partnership and same-sex marriage.[231] Parts one and two

[226] The French civil partnership legislation, the 'pacte civil de solidarite' (the PACS) which although providing a large range of rights nearly equivalent to marriage, did not include citizenship.

[227] Civil partners were given very similar legal rights to married heterosexual couple 'with the exception of the form of ceremony and the actual name and status of marriage' as discussed in *Wilkinson v Kritzinger* (n57) at paragraph 49.

[228] See Crane (n214) at 471 and *Dorf* (n215).

[229] *Marshall, K*. (n213).

[230] See *Triger* (n215).

[231] Practical differences between same-sex marriage and civil partnership include (1) the quadruple lock for religious organisations, (2) the fact that there is no requirement to consummate a civil partnership and (3) that adultery is not a ground for dissolution of a civil partnership, whereas it is a ground for divorce of a marriage. Should a couple wish to relocate jurisdiction for instance, civil partnerships receive less protection from private international law and EU law than heterosexual marriage.

also illustrate a difference in treatment by the ECtHR and the CJEU.

Ultimately, Publication 7 argues that even following the enactment of near equal civil partnership in the UK, it is the symbolism of marriage which meant that campaigners continued to bring forward their arguments in favour of same-sex marriage.[232] Publication 7 considers that marriage is the key social institution celebrated and recognised around the world and references authors who state that 'assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy'.[233] Leading judgments have also referred to marriage as 'fundamental.'[234] Publication 7 elaborates on themes developed in part 2 by re-instating the close connections between symbolism of marriage and citizenship. Publication 7 explains that the 'ability to form a marriage has great relevance to an individuals' status as an equal citizen.'[235] Publication 7 concludes that marriage has a

---

[232] *Grigolo* (n135) at 1041 explains that 'only marriage [not civil partnership] can guarantee the symbolic benefits of full equality.'

[233] See *Aloni* (n55) at 141 referring to *Cott* (n137) at 1.

[234] See the Supreme Court of the USA in *Obergefell et al v Hodges* (n6) at 11.

[235] See for example *Bamforth* (n58) at 478. See also *Dorf* (n215) and Cossman, B., *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (n137) at 32 which characterises citizenship as being 'about the

symbolic weight that 'cannot be explained simply by the many benefits understood to be guaranteed through it.'[236] Publication 7 considered that for proponents of same-sex marriage, civil partnership, even if viewed as unequal, can have a worth of its own as a 'building-block on the road to recognition of same-sex marriage.'[237] This conclusion should now be updated following reflection on the recent Supreme Court *Steinfeld* judgment.[238] This case resulted in the Supreme Court, declaring the Civil Partnership Act 2004's bar on entry for heterosexual couples to be incompatible with Articles 8 and 14 ECHR.[239] Law reform has now swiftly taken place. The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 received royal assent on 26th March 2019 and came into force on 26th May 2019. In an era when same-sex marriage is available, civil partnership has taken on an intrinsic value of its own, for those couples, such as in *Steinfeld* who view marriage as associated with patriarchal

process of becoming recognised subjects, about the practices of inclusion and membership, both social and legal.'

[236] Publication 7.

[237] See publications 7 and 8.

[238] *Steinfeld v Secretary of State for International Development* [2018] UKSC 32 .

[239] *Ibid.*

baggage.[240] The value attached to statuses such as marriage needs continuing scrutiny as a status following other new developments such as potential changes to divorce law to remove the fault-based grounds.

Publication 8 utilises the work in parts 1 and 2 as a springboard towards further development of appropriate strategies for success for proponents of same-sex marriage worldwide. Publication 8 endorses the incrementalist or step-by-step approach. This theory, also known as the theory of 'small change' was first advanced by Waaldijjk,[241] and subsequently developed by Eskridge[242]and Merin.[243] These theorists suggest that each country will go through a similar series of stages in their path towards legalisation of same-sex marriage.[244] Merin, refers to a 'standard sequence' of events including the first stage of 'repeal of sodomy laws, before moving on to prohibiting discrimination against LGBTQ+ persons and the final stage of

---

[240] See *Ibid*. and also the ECtHR in *Oliari v Italy* (n9) which discussed the intrinsic value of marriage. See also Hayward, A, 'Relationships with Status: Civil Partnership in an Era of Same-Sex Marriage' in forthcoming edited collection, Hamilton, F. and Noto La Diega, G., (Eds.) under the working title *'Same-Sex Relationships, Law and Society'* (Routledge, 2020).

[241] *Waaldijk* (n61) at 437.

[242] *Eskridge* (n61).

[243] *Merin* (n61).

[244] *Aloni* (n55).

legal recognition of same-sex relationships.'[245] Publication 8 applies a comparative law analysis to the practical application of this theory. Publication 8 argues that incrementalism has been followed in practice by many countries including England and Wales, Scotland, Denmark, France and Nordic countries. Reflecting on the work in part 1, publication 8 also comments that in practice ECtHR case law has also developed in an incrementalist fashion,[246] stopping short of the recognition of same-sex marriage due to concerns about a lack of consensus.[247]

Unlike other theorists who use incrementalism to predict when change will next occur, publication 8 uses incrementalism in connection with a comparative law methodology to establish a strategy for success for those who favour same-sex marriage. One of the major criticisms of incrementalism is that it proceeds too slowly. This can be seen from the fact that worldwide, the great majority of countries do not give any 'formal recognition to

[245] *Merin* (n61) at 326.

[246] In practice the ECtHR has also adopted a gradually increasing level of protection for gays and same-sex couples. See n131.

[247] *Schalk and Kopf v Austria* (n8).

same-sex couples...'[248] However slow change can be seen as advantageous as it is more likely to lead to lasting, substantively effective and enduring change. Waaldijk argues that incrementalism is useful in allowing change over time.[249] This is because it 'permit[s] gradual adjustment of antigay mind-sets, slowly empowers... gay right advocates and ...discredit antigay arguments.'[250] It is in this context that publication 8 reiterates the point made in publication 7 that smaller change such as anti-discrimination laws and civil partnership, in due course, could be effective as 'building blocks' on the road to recognition of same-sex marriage. Publication 8 looks at the fact that public opinion and the enforcement of laws are closely ' interwoven… because the law has little meaning if it is not enforced'.[251] There is a correlation between favourable public opinion and legal change

[248] Saez, M., 'General Report 'Same Sex Marriage, Same-Sex Cohabitation, And Same-Sex Families around the World; Why 'Same' is so Different' (2001) 19 *Am. U. J. Gender Soc. Pol'y and L.* 1-56 at 31.

[249] See *Waaldijk* (n61) at 437.

[250] *Eskridge* (n61) at 119. See *also Marshall, K* (n213) at 199-200 who explains that such slow change although frustrating at the time allows 'public opinion to adjust gradually to the changes sought by social movement.' See also Gallagher, M., 'Why Accommodate? Reflections on the Gay Marriage Culture Wars' (2010) 5 *Northwestern J. of L. & Social Pol'y* 260-273 at 260 and Polikoff, N. D., 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage will not Dismantle the Legal Structure of Gender in Every Marriage (1993) 79 *Va. L. Rev.* 1535-1550.

[251] *Gonzalez* (n99) at 285.

in order to achieve success in the long term.[252] A change in the law alone will not result in public acceptance of same-sex couples and publication 8 gives South Africa as an example in this context.[253] Ultimately, some countries need longer to adjust, and change may not come to 'some jurisdictions for a long time, and maybe not ever.'[254] Publication 8 in setting forward a strategic approach also recommends the use of the legislative rather than judicial approach. Incrementalists favour the legislative approach as it allows engagement with democratically

[252] For example, prior to the enactment of same-sex marriage in England and Wales, 53% of those consulted supported same-sex marriage. See 'Equal Marriage: 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 Public opinion polls in France and Denmark also show a consistent support for same-sex marriage prior to legislation. For example see in relation to France Ifop poll (June 2008) s62%, BVA poll (November 2009) 64%, Credoc poll (July 2010) 61%, TNS-Sofres poll (Jan 2011) 58%, Ifop poll (June 2011) 63%, BVA poll (December 2011) 63%, Ifop poll (October 2012) 61%, BVA poll (October 2012) 58%, CSA poll (December 2012) 54%, Ifop poll (December 2012) 60% and prior to legislation in Denmark public opinion polls from A YouGov Poll (Dec 2012) found that 79% of Danes were in favour of same-sex marriage. See also annual public opinion pools from the Pew Research Centre, May 2019, A Global Snapshot of Same-Sex Marriage available at https://www.pewresearch.org/fact-tank/2019/05/17/global-snapshot-sex-marriage/

[253] See Publication 8. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at https://www.pewresearch.org/fact-tank/2019/05/17/global-snapshot-sex-marriage/ notes that ''In 2013, we surveyed 11 of the 28 nations that now have legalized same-sex marriage in all or part of their territory. In all but one of them (South Africa), a majority of people said homosexuality should be accepted. And while only 32% of South Africans said homosexuality should be accepted, that was by far the highest acceptance level of the eight African countries surveyed.'

[254] *Eskridge* (n61) at 119.

elected representatives.[255] Stychin argues if the judiciary are too active in this context it could lead to public opinion being polarised.[256] Publication 8 goes on to give a detailed analysis of the *Obergefell v Hodges* case before the Supreme Court in the US.[257] Although this legalised same-sex marriage across the US, with the leader of the majority judges referring to rights to liberty and equality enshrined in the US constitution,[258] this was vehemently criticised by the dissenting judges as usurping democratic rights.[259]

[255] See *Richards* (n110) at 733 who referring to the critique of *Stychin* (n110) argues that 'recognition should happen democratically rather than judicially and argues for a democracy in which gays are mobilised as full citizens, demanding their rights...'

[256] *Id.* See also Dent G. W. Jr., 'The Defense of the Traditional Marriage' (1999) 15 *J. of L. & Politics* 581-644 at 622.

[257] *Obergefell v Hodges* (n6).

[258] *Id* per Justice Kennedy at 19 (delivering a majority judgment of 5 out of 9 judges of the US Supreme Court) which determined that the denial of a right to marry violated the '[r]ights implicit in liberty and rights secured by equal protection' guaranteed by the Fourteenth amendment.

[259] See *Obergefell v Hodges* (n6) dissenting judgments from Justice Roberts and Scalia

Published Work contained in Part THREE:

'INTERNATIONAL IMPACT'

(7) Hamilton, F., 'The Symbolic Status of Same-Sex Marriage.' (2017) 47 *Family Law* 851 .

(8) Hamilton, F., 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 *Journal of Transnational Law and Policy* 121-153

Publication Seven: Hamilton, F., 'The Symbolic Status of Same-Sex Marriage.' (2017) 47 Family Law 851.

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 considers that marriage 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 marriage[2] 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

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 solidarte ('PACS') which although providing a large range of rights nearly equivalent to marriage[11] 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 standard[18] 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 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 conventions[27] 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 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'[32]. The *Wilkinson v Kritizinger* 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 perception of lasting commitment among lesbians'[36]. 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'.[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 French[40] 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 citizenship[43] 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 pas 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'.

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 Titial 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].
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 Kritzinger* (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 Kritzinger* (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_.pdf22. *Aloni* (No 10) at 105.
22 Frances Hamilton, 'Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 *Florida Journal or Transnational Law and Policy* 121 at 138 24 *Ibid* at 138
23 . *Oliari and Others v Italy*, App Nos. 18766/11 and 36030/11, 21 July 2015 at para 81.
24 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.
25 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'
26 See Crane (n18) at 469 referring to *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003) at para 948.
27 Yvonne Zylan, *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.
28 See *Obergefell et al v Hodges, Director, Ohio Department of Health* (2015) US 57.
29 *Ibid.* at 11
30 Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) *European Journal of International Law* 1023 at 1041.
31 See *Wilkinson v Kritzinger* (No 8).
32 *Wilkinson v Kritzinger* (No 8) para [18].
33 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
34 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.
35 *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
36 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).
37 *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.
38 See for discussion Michael Rosenfeld, 'Introduction: Gender, Sexual Orientation and Equal Citizenship' (2012) 10(2) *International Journal of Constitutional Law* 340.
39 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.
40 *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557[132] (Baroness Hale of Richmond).
41 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.
42 Richard Frimston, 'Marriage and Non-Marital Registered Partnerships: Gold, Silver and Bronze in Private International Law' (2006) *Private Client Business* 352.
43 See *Aloni* (No 10).
44 *Bamforth* (No 39).481 referring to *Cott* (No 27) 1.
45 Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007) 27–32.
46 *Grigolo* (No 33) 1041.
47 See *Hamilton* (No 24) 138.
48 See *Hamilton* (No 24) 138.

Publication Eight: Hamilton, F., 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 *Journal of Transnational Law and Policy* 121-153

STRATEGIES TO ACHIEVE SAME-SEX MARRIAGE AND THE METHOD OF INCREMENTALIST CHANGE

FRANCES HAMILTON*

ABSTRACT

Following the decision of the Supreme Court in *Obergefell v. Hodges*,[1] all U.S. states are required to license marriages between same-sex couples. This decision, although having the effect of immediately introducing same-sex marriage across the U.S., was taken by an unelected court and in the absence of a democratic mandate. Many other countries worldwide have yet to enact same-sex marriage. This piece considers an appropriate strategy for enacting lasting change for those in favour of same-sex marriage. Comparative constitutionalism is used in order to learn from the experience of other nations in tackling similar social and legal issues. After an analysis of recent international examples this article recommends the use of slow incremental change. This is often characterised by an intermediate stage of civil partnership legislation and by use of the legislative rather than court-based approach. This method allows influence upon and engagement with public opinion, which is useful to ensure successful change. This article demonstrates by way of case studies that countries which do not follow this method are more likely to see a backlash in public opinion and a subsequent legislative reversal of a court judgement. Alternatively, lack of public support could lead to less than substantive equality for same-sex couples.

I. INTRODUCTION

In recent years there has been an increase in the number of countries which recognise same-sex marriage.[2] Change has been

* Frances Hamilton is a Senior Lecturer at Northumbria University.

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. The following list shows the states that currently recognise same-sex marriage: Netherlands (2001), Belgium (2003), Spain (2004), Canada (2005), South Africa (2006),

particularly rapid in the U.S. The *Obergefell* case marks the current highpoint in recognition of same-sex marriage.[3] Following the decision of the Supreme Court on June 26, 2015, it was determined that all U.S. states are required to license marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.[4] Justice Kennedy, in delivering the opinion of the majority of five out of nine judges, determined that denial of the right to marriage to same-sex couples violated "[r]ights implicit in liberty and rights secured by equal protection" guaranteed by the Fourteenth Amendment.[5] *Obergefell* does follow a line of cases which have increased recognition of the rights of same-sex couples to wed, but represents a marked increase in the Supreme Court's willingness to intervene in this matter.

In 2013, the Supreme Court in *U.S. v. Windsor*[6] declared section 3 of Defence of Marriage Act (DOMA) of 1996[7] unconstitutional for violating equal protection principles. After that case, the federal government had to recognise same-sex marriages conducted in different U.S. states. However, at that time no requirement was made for U.S. states to recognise same-sex marriages conducted in other U.S. states or foreign jurisdictions. Until the *Obergefell* case, the Supreme Court had a record of denying standing in same-sex marriage cases. This was highlighted by the Supreme Court case of October 6, 2014, where certiorari was denied in five appeals in relation to same-sex marriage.[8] In so doing, the Supreme Court allowed individual states to determine whether or not to legalise

---

Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Mexico (2010), Denmark (2011), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), England and Wales (2014), Scotland (2014), Luxembourg (2015), Republic of Ireland (2015), USA nationwide (2015) and Finland (2017). In addition, many states in Mexico recognise same-sex marriage.

3. *See generally Obergefell*, 135 S. Ct. 2584.

4. *Id.*

5. *Id.* at 2603-05.

6. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

7. Section 3 of DOMA provided that: "In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

8. The US Supreme Court denial of certiorari on October 6, 2014, immediately affected the five states concerned in the appeal (Virginia, Indiana, Wisconsin, Oklahoma and Utah) where state courts had previously struck down same-sex marriage bans. The cases were: Bogan v. Baskin, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); Wolf v. Walker, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *cert. denied*, 135 S. Ct. 316 (2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); McQuigg v. Bostic (Virginia) 14-251, 4th Cir., *certiorari denied* October 6, 2014; Rainey v. Bostic (Virginia) 14-153, 4th Cir., *cert. denied*; Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 314 (2014); and Bishop v. Smith, 760 F.3d 1070 (10th Cit. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

same-sex marriage and many did so.[9] The Supreme Court appeared reluctant to intervene at the federal level and left this decision to individual states. Kathy Graham explains that "[t]raditionally, in the United States the regulation of marriage and family is a matter that has been left to the states . . . ."[10] The majority opinion in *Obergefell*, as penned by Justice Kennedy, dismissed concerns about "insufficient democratic discourse" on the basis that there had been "far more deliberation than this argument acknowledges."[11] He went on to refer to referenda, legislative debates and scholarly writings, amongst other sources.[12] Yet at the time when *Obergefell* was decided the U.S. was divided on this issue, as same-sex marriage remained prohibited in twelve states.[13]

The four dissenting judges in *Obergefell* were scathing of the democratic power which the Supreme Court had usurped. Chief Justice Roberts stated that "[f]or those who believe in a government of laws, not of men, the majority's approach is disheartening."[14] Justice Scalia in his dissent also commented upon the " . . . naked judicial claim to legislative – indeed super-legislative-power; a claim fundamentally at odds with our system of government."[15] This use of power by the Supreme Court is especially marked in Justice Scalia's view because the "[f]ederal judiciary is hardly a cross-section of America."[16] He went on to comment upon the homogenous background of the nine judges, with only one representative from the mid-states, and no representatives from the southwest states or evangelical Christians.[17] Justice Scalia concluded that the decision of the majority violated the principle of "no social transformation without representation."[18] The speed of the decision by the Supreme

---

9. Prior to *Obergefell*, 38 states in the US had legalised same-sex marriage to some degree.

10. Kathy T. Graham, *Same-Sex Unions and Conflicts of Law: When 'I Do' May be Interpreted as 'No, You Didn't'*, 3 WHITTIER J. CHILD & FAM. ADVOC. 231, 237 (2004). *See also* Erez Aloni, *Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 141 (2010); Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognise Them*, UTAH L. REV. 393 (2012); Steven K. Specht, *The Continuing Relevance of the Full Faith and Credit Clause: The Life of the Same-Sex Marriage After Windsor and Beshear*, 2 INDON. J. OF INT'L & COMP. L. 423, 435 (2015) ("[h]istorically, defining marriage has been left to the states and federal law has given these definitions a presumption of validity").

11. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

12. *Id.*

13. Prior to *Obergefell*, the following states still banned same-sex marriage: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.

14. *See Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

15. *Id.* at 2629 (Scalia, J., dissenting).

16. *Id.*

17. *Id.*

18. *Id.*

Court in the U.S. is also at odds with the position in Europe. Although many European states have been legislating individually in favour of same-sex marriage,[19] at a European level the leading European courts have been greatly concerned about developing a consensus on the issue before acting.[20] On July 21, 2015, the European Court of Human Rights ("ECtHR") determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership, not same-sex marriage.[21]

One point on which there is international agreement is in relation to the constitutional importance of marriage. Nancy Cott states that "from the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy."[22] This is reflected by the protection of marriage in international conventions[23] and the importance construed upon marriage in influential judgments.[24] In leading cases such as *Goodridge*[25] and *Loving*, marriage has been referred to as a "vital social institution"[26] and "one of the 'basic civil rights of man' fundamental to our very existence and survival."[27] Similarly, in *Obergefell* the majority judgment referred to the "transcendent importance of marriage."[28] Exclusion or not from marriage for same-sex couples is therefore of constitutional importance[29] as the ability to participate in a legally recognised marriage has implications for an individual's

---

19. 11 states in Europe have now legalised same-sex marriage and 24 have some form of civil partnership or registered union.

20. *See, e.g.*, Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409, 436.

21. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.

22. Aloni, *supra* note 10, at 141 (citing NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 1 (2000)).

23. See for example Article 12 of the European Convention on Human Rights which states that "[m]en 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 Article 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."

24. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Loving v. Virginia, 388 U.S. 1 (1967).

25. *Goodridge*, 798 N.E.2d. at 941.

26. Jonah M.A. Crane, *Legislative and Constitutional Responses to Goodridge v. Department of Public Health*, 7 N.Y.U. J LEGIS. & PUB. POL'Y 465, 469 (2003-2004) (referring to *Goodridge*,798 N.E.2d at 948).

27. Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). *See also* YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE 224 (2011) (referring to *Loving*, 388 U.S. at 12).

28. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

29. Other writers who discuss the constitutional importance of marriage include Nicholas Bamforth, *Sexuality and Citizenship in Contemporary Constitutional Argument* 10(2) INT'L. J. CONST. L. 477-492, 477 (2012); BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND AND CULTURAL REGULATION OF SEX AND BELONGING 27 (2007); Jeffrey Weeks, *The Sexual Citizen*, 15 THEORY, CULTURE AND & SOCIETY 35-52, 39 (1998); and David Bradley, *Comparative Law, Family Law and Common Law*, 23(1) OXFORD J. LEGAL STUD. 127-146, 129 (2003).

constitutionally protected status as an equal citizen.[30] Same-sex couples who are excluded from marriage are not truly equal. This has led authors to conclude that excluding gays from marriage is denying them the full status of citizenship.[31] Michael Dorf goes so far as to say that "withholding the word marriage impermissibly connotes a kind of second-class citizenship that is inconsistent with the government's basic obligation of equal protection."[32] Excluding same-sex couples from marriage also denies them the full legal incidents of marriage, including rights of inheritance, maintenance and any tax concessions that may be available to married couples.[33]

It is unsurprising that in relation to discussions of gay rights, marriage continues to be a hot topic. William Araiza refers to the "continued centrality of marriage to discussions of gay rights mak[ing] the recent writing on the topic all the more important."[34] For many the fight for same-sex marriage is seen as part of a continuing struggle for equality. The battle for legal rights by the gay community has been described as, the "most recent and gripping

30. *See, e.g.*, Bamforth, *supra* note 29, at 478 (referring to THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 18 (Thomas H. Marshall and T. Bottomore eds., 1992), where he states in discussing citizenship that "all who possess the status are equal with respect to the rights and duties with which the status is endowed."); Conor O'Mahoney, *There is No Such Thing as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 555 (2012), which also discusses the Irish Constitution and the emphasis laid upon equality in that document which states that "[a]ll citizens shall, as human persons be equal before the law."; Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267 (2011).

31. *See, e.g.*, Bamforth, *supra* note 29, at 484 (referring to Diane Richardson, *Sexuality and Citizenship*, 31 SOCIOLOGY 83, 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*, Dimitri Kochenov, *On Options of Citizens and Moral choices of States: Gays and European Federalism*, 33 FORDHAM INT'L L. REV. 156, 163 (2009) (referring to Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM INT'L L. REV. 2821, 2823 (2008), who states that "[m]oreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one's choice can also be viewed as a 'cultural message that certain groups are not suited for full citizenship.'").

32. Dorf, *supra* note 30, at 1269.

33. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (concerning the survivor of a same-sex couple who was forced to pay inheritance tax as her Canadian same-sex marriage had not been recognised. Federal law would otherwise have exempted a surviving spouse from paying such tax.) For further discussion on the incidents of marriage *see also*, Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage*, 10 INT'L J. L. CONTEXT 5 (2014).

34. William D. Araiza, Book Review, 19 J. HIST. SEXUALITY 371, 371 (2010) (reviewing WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE; FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE (2006); MARK D. JORDAN, AUTHORIZING MARRIAGE: CANON, TRADITION IN THE BLESSING OF SAME-SEX UNIONS (2006); MARK D. JORDAN, BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE (2006); RICHARD D. MOHR, THE LONG ARC OF JUSTICE: LESBIAN AND GAY MARRIAGE, EQUALITY AND RIGHTS (2005)).

of the great historical struggles for such rights, including those of religious and ethnic minorities and women,"[35] and often involves intense political debate.[36]

However, not everyone sees marriage as a goal. Yvonne Zylan writes that "[feminist] . . . critics found much to dislike in marriage."[37] Marriage was understood as "at best problematic for, and at worst deeply oppressive to, women as a class."[38] It was seen as unattractive for gays to seek to join such a traditional institution. This attitude has largely changed in the face of "bracing realism"[39] and an acknowledgement of the "unique . . . constitutive power"[40] of marriage and the associated rights this entails. Gay rights movements worldwide have adopted a more positive view towards marriage.[41] This move accords with the changing nature of marriage itself. Marriage is not a "fixed and immutable institution"[42] and recent years have seen many changes in the nature of marriage itself.[43] This article is written from the perspective of a same-sex marriage supporter. The purpose of the piece is to develop strategies for success for those who favour same-sex marriage equality, or at the very least progress towards achievement of that goal. Success is measured by means of a long-term substantive equality for same-sex couples and the achievement of same-sex marriage without any backlash in public opinion.

This article advocates the use of comparative constitutionalism. This is of particular interest to those countries which are

---

35. David A. J. Richards, Book Review, 2 INT'L J. CONST. L. 727, 727 (2004) (reviewing CARL F. STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM (2003)).

36. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 112 (2002).

37. ZYLAN, *supra* note 27, at 204.

38. *Id.*

39. *Id.* at 205 (referring to MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999)).

40. *Id.* at 275.

41. *Id.* at 205 (referring to Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. OF L. & SOC. CHANGE 567, 611 (1994)). *See also*, Aloni, *supra* note 10, at 156 (referring to Beccy Shipman & Carol Smart, *'It's Made a Huge Difference': Recognition, Rights and the Personal Significance of Civil Partnerships*, 12 SOC. RES. ONLINE, ¶ 2.5 (2007), http://www.socresonline.org.uk/12/1/contents.html).

42. Gretchen Van Ness, *The Inevitability of Gay Marriage*, 38 NEW ENG. L. REV. 563, 564 (2004) (commenting on the arguments made by other unreferenced authors). *See also*, Cindy Tobisman, *Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families?*, 12 BERKELEY WOMEN'S L. J. 112, 112 (1997) (explaining that the "institution of marriage is not monolithic and unchanging.").

43. For example, changes allowing inter-racial couples to marry and allowing married women an independent legal status. For discussion *see* Tobisman, *supra* note 42, at 112. *See also* Ian Loveland, *A Right to Engage in Same-Sex Marriage in the United States*, 1 EUR. HUM. RTS. L. REV., 10 (2014); Leckey, *supra* note 33, at 11.

"demographically and culturally similar."[44] Not every commentator sees the usefulness of such comparisons in family law. David Bradley argues that such comparisons are "particularly problematic,"[45] as "the European experience is inherently different from that of the United States."[46] Differences have to be acknowledged, but comparisons enable a choice of strategies to be developed. A review of how other well developed nations have grappled with similar social claims concerning discrimination and equal protection before the law[47] enables an evaluation of the methods and concepts used to date.[48] Brenda Cossman also favours comparative constitutionalism. She writes that "[t]he migration of same-sex marriages and its cultural representations are changing the cultural landscape within which constitutional challenges will occur and constitutional doctrine will develop."[49] Comparisons are perhaps of particular interest in the U.S. Traditionally, the U.S. has "lagged significantly behind those of other jurisdictions . . . ."[50] Although this position has been reversed by the *Obergefell* decision in favour of same-sex marriage across the U.S.,[51] questions remain as to whether a Supreme Court judgment was the appropriate way of achieving this goal. For those jurisdictions which have yet to achieve same-sex marriage, evaluating the experience from other countries allows proponents of same-sex marriage to plan appropriate strategies.

Case law also demonstrates the rising influence of comparative constitutionalism. Despite criticism that the U.S. fails to look with regularity outside its own borders,[52] leading cases see the U.S. Supreme Court referring to judgments from the European Court of Human Rights.[53]

---

44. ESKRIDGE, supra note 36, at 83.

45. Bradley, *supra* note 29, at 127. Other writers also comment on the difficulties of international comparisons as regards family law. *See, e.g.*, KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 59-61 (1998); Alision Diduck & Frances Raday, *Introduction: Family – An International Affair*, 8 INT'L J. L. CONTEXT 187 (2012).

46. Aloni, *supra* note 10, at 117.

47. Claire L'Heureux-Dube, *Realising Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective*, 1 INT'L J. CONST. L. 35, 36 (2002).

48. ESKRIDGE, supra note 36, at 112.

49. Amanda Alquist, *The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach*, 30 U. LA VERNE L. REV. 200, 208 (2008) (referring to BRENDA COSSMAN, *Migrating Marriages and Comparative Constitutionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006)).

50. *See* Richards, *supra* note 35, at 727. *See also* Araiza, *supra* note 34, at 371.

51. *See generally*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

52. L'Heureux-Dube, *supra* note 47, at 36.

53. William N. Eskridge Jr., *Development – United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT. J. CONST. L. 555, 555 (2004) (explaining that "Justice Anthony Kennedy's opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights." (referring to Lawrence v. Texas, 539 U.S. 558 (2003))).

Chief Justice William Rehnquist advised that U.S. courts should "begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[54] Yet this dicta was far from uncontroversial with Justice Scalia dissenting on the basis that constitutional entitlements do not "spring into existence . . . because foreign nations decriminalize conduct."[55] He considered discussion of foreign views to be "dangerous."[56] Despite these differing views, there is no way of avoiding this issue as globalisation means that with same-sex couples relocating internationally, courts in different countries and U.S. states will be forced to consider the legality of same-sex marriages conducted in other jurisdictions. The influence of comparative constitutionalism can also be seen from the greater speed of recognition of same-sex marriage in Europe and the U.S. since 2010.[57] This demonstrates the impact that a change in one jurisdiction in recognising same-sex marriage has on another jurisdiction. International comparisons are not only useful, but necessary as they reflect what is already happening.

The theory of incremental development towards same-sex marriage is also supported. Incrementalism, also known as the theory of 'small change' was first advanced by Kees Waaldijjk,[58] and subsequently developed by William N. Eskridge[59] and Yuval Merin.[60] Erez Aloni explains that, "these scholars suggest that every country or state will, on its path to the legalization of same-sex marriage, follow the same three-stage process."[61] Yuval Merin refers in his book to what he terms the "standard pattern or process, or 'standard sequence' each stage being a prerequisite for the next one."[62] The model of small change begins with the "repeal of sodomy laws." He then explains that the next step is to "prohibit discrimination against gay men and lesbians on the basis of sexual orientation" before the third level of "recognition of same-sex

54. Eskridge, *supra* note 53, at 555 (referring to William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kornmers eds.,1993)).

55. *Lawrence*, 539 U.S. at 598.

56. *Id.* (referring to Foster v. Florida, 537 U.S. 470, 470 (2002) (Thomas J., concurring in denial of *cert.*). Alquist, *supra* note 49, at 209 (referring to this as an example of "a resistance to allowing international case law and social trends to influence this country's court decision.").

57. *See supra* note 2.

58. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenaes eds., 2001).

59. ESKRIDGE, supra note 36.

60. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

61. Aloni, *supra* note 10, at 107.

62. MERIN, supra note 60, at 326.

partnerships as equal to opposite-sex unions."[63] There are also several other authors which review, discuss and support the incrementalist approach.[64] The incrementalist method has also been followed in practice by many countries, including England and Wales, Scotland, Denmark, France and Nordic countries. In practice the ECtHR has also adopted a gradually increasing level of protection for gays and same-sex couples. This began with the decriminalisation of sodomy laws,[65] before moving on to equality in employment[66] and tenancy conditions for gays,[67] with more recent cases emphasising the need for equality in adoption[68] and civil partnership rights where these had already been introduced for heterosexuals.[69] The latest ECtHR case determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership.[70] Yet same-sex marriage has not been introduced so far due to concerns by the ECtHR over lack of consensus.[71] This piece analyses the importance of the incrementalist theory in light of recent developments especially the decisions of the U.S. Supreme Court in *Windsor v. U.S.* and *Obergefell*.[72] Unlike other theorists who use incrementalism to predict when change would next occur, this piece uses incrementalism in connection with comparative constitutionalism to establish a strategy for success for those who favour same-sex marriage. In the next section the incremental approach is considered in further depth, before going on to consider the concept of civil partnership and the advantages of taking a legislative rather than court-based approach. Examples from different jurisdictions are used to demonstrate that slow incremental change is to be welcomed. This allows public opinion to have influence. It also avoids a backlash in public opinion and ensures the substantive reality of equality protections.

---

63. *Id.*

64. Hillel Y. Levin, *Conflicts and the Shifting Landscape around Same-Sex Relationships*, 41 CAL. WESTERN INT'L L. J. 93 (2010); Graham, *supra* note 10; Rains, *supra* note 10; Aloni, *supra* note 10, at 107; Kathryn L. Marshall, *Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed*, 2 WM. & MARY POL'Y REV. 194, 194 (2010); Nanci Schanerman, *Comity: Another Nail in the Coffin of Institutional Homophobia*, 42 U. MIAMI INTER-AM. L. REV. 145 (2010); Alquist, *supra* note 49.

65. Dudgeon v United Kingdom, 45 Eur. Ct. H.R. (1981).

66. Smith v. United Kingdom, 1999-IV Eur. Ct. H.R. 45; Lustig-Prean v. United Kingdom, Eur. Ct. H.R., App. Nos. 31417/96 & 32377/96 (1999).

67. Karner v. Austria, 2003-IX Eur. Ct. H.R. 199.

68. EB. v. France, App. No. 43546/02, (2008).

69. Vallianatos v. Greece, 2013-VI Eur. Ct. H.R. 125.

70. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.

71. *Id.*

72. United States v. Windsor, 133 S. Ct. 2675 (2013); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

II. THE INCREMENTAL APPROACH

Marriage is not a "fixed and immutable institution."[73] It is pertinent to make the point that the institution of marriage has "a history of continuous evolution."[74] The extent of the change already achieved can be seen from examples in the U.S. where "as recently as 1967, state governments denied inter-racial couples to marry."[75] Similarly, over a lengthy period there has been radical change to those marriage laws that denied married women an independent legal status.[76] The ECtHR has also recognised the right of transsexuals to marry in their new sex.[77] As the institution of marriage changes, so the attraction of this institution increases for same-sex couples. Indeed, same-sex couples can be seen as one of the drivers of change. These legal changes accord with the reality as to what constitutes a modern day family. Dale Carpenter states that gay families are "not . . . top-down creations of government bureaucrats or radical visionaries. They are bottom-up facts of life."[78] Michele Grigolo also identifies the "diversification of the ways people establish relationships and families . . . ."[79] It is correct that "progress in promoting tolerance towards homosexuality has not been linear . . . ,"[80] but change has already been happening for some time. The debate should instead consider the speed of change. The pace of slow incremental change should be welcomed where this accords with change in public opinion.

Kathryn Marshall sets out the debate about speed of change when she argues that there "remains a significant divide between those who argue in favour of pushing for immediate and full equality and those who favour a more incremental approach."[81] Proponents

---

73. Van Ness, *supra* note 42, at 564 (commenting on the arguments made by other unreferenced authors). *See also* Tobisman, *supra* note 42, at 112 (explaining that the "institution of marriage is not monolithic and unchanging.").

74. Rt. Hon. Maria Miller MP, Minister for Women and Equalities, *Ministerial Forward*, EQUAL MARRIAGE: THE GOVERNMENT'S RESPONSE 4 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

75. Tobisman, *supra* note 42, at 112. *See also* Loveland, *supra* note 43; Leckey, *supra* note 33, at 11.

76. Tobisman, *supra* note 42, at 112.

77. *See* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 4 (stating that "The Court had found . . . that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender" of a post-operative transsexual).

78. Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 SOUTH TEX. L. REV. 93, 102 (2008).

79. Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. INT'L L. 1023,1026 (2003).

80. Aloni, *supra* note 10, at 136 (referring to M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE L.J. & FEMINISM 71, 75 (2005)).

81. Marshall, *supra* note 64, at 194.

of immediate action argue that "proceeding too slowly or conceding too much will cause the movement to become stagnant or toothless."[82] Hand-in-hand with this approach is a concern about the lack of equity for those affected,[83] and that the "need for governmental incrementalism" is an inappropriate reason for delay.[84] Moving too quickly in the absence of support from public opinion could result in a backlash of public opinion or less than substantive equality. Hillel Levin, writing before the recent *Obergefell* judgment also advised that "nationwide recognition of same-sex marriage will, should and can only be achieved through public persuasion."[85] In introducing same-sex marriage nationwide without a full democratic mandate, the Supreme Court in *Obergefell*[86] runs the risk that there will be a lack of substantive support nationwide. It is hoped that public approval across all states will be successfully achieved, but this may take time.

An alternative approach to immediate action is that of incrementalism.[87] As explained in the introduction this involves a series of small changes on the path towards legalisation of same-sex marriage. After the decriminalisation of sodomy, the next step is the achievement of equality on the basis of sexuality before moving on to equalisation of same-sex unions. There are many examples of countries that followed the rules of small change. These include the Nordic countries of Norway, Sweden and Iceland.[88] Spain is also given as an example of success for incrementalism in Southern Europe.[89] In the U.S., Vermont is cited as an example of a state which has taken the slow incremental approach. Following a

82. *Id.* at 196-97.

83. *Id.* at 198 (referring to arguments which include "the principled belief that it is unjust to delay struggles for equality while waiting for 'the right moment.") Another interesting example can be seen from the civil rights movement where Dr. Martin Luther King, Jr., wrote that "This 'Wait' has almost always meant 'Never'. It has been a tranquilizing thalidomide, relieving the emotional stress . . . ." MARTIN LUTHER KING, JR., *Letter from a Birmingham City Jail, in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, Jr. 289, 292 (James M. Washington ed., 1986).

84. Kathryn Chapman, (Case Comment) Halpern v. Canada (Att'y Gen.) (2002), 215 D.L.R. 4th 223 (Can. Ont. Div. Ct.), 19 CANADIAN J. FAM. L., 423, 426 (2002) (referring to Justice LaForme in *Vriend v. Alberta* [1998] 1 S.C.R. 493, 559-60 (Can.) (cited in *Halpern* at ¶ 306)).

85. Levin, *supra* note 64, at 103.

86. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

87. *See* Waaldijk, *supra* note 58, at 437; ESKRIDGE, *supra* note 36; MERIN, *supra* note 60.

88. For further explanation *see* Aloni, *supra* note 10, at 118; Macarena Saez, *Same Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World; Why 'Same' is So Different*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1, 9 (2011).

89. For further explanation *see* Aloni, *supra* note 10, at 123; Saez, *supra* note 88, at 5 (referring to Carlos Martinez de Aguirre Aldaz & Pedro de Pablo Contreras, *National Report: Spain*, 19 AM. U. J. GENDER SOC. POL'Y & L., 289 (2012)).

judgement from the Vermont Supreme Court in 1999,[90] same-sex civil unions were legalised the following year.[91] Subsequently, a same-sex marriage law was enacted in 2009.[92]

Many criticisms of the incrementalist strategy remain. These centre around the fact that this strategy is drawn from Nordic experience which may not be appropriate to the U.S. because of "important cultural or social differences."[93] The U.S. is seen as different because of "its greater heterogeneity and its strain of religious fundamentalism . . . "[94] in contrast to the "small ethnically homogeneous populations" and separation of "religion and politics . . . "[95] common in Nordic countries. As the incrementalist strategy aims to predict future change in same-sex marriage, Professor Badgett recommends that other factors are also important including, "rates of heterosexual cohabitation, levels of religiosity and tolerance toward homosexuality."[96] All of these factors are appropriate issues to consider in predicting change. What is of most relevance is not predicting change but instead what can be learnt from countries which have followed the steps of the incremental change process. All of the Nordic countries cited have followed this process and have managed to introduce same-sex marriage resulting in a substantive and lasting change and avoiding a backlash in public opinion. David Richards also gives Vermont as an example of a state where civil partnership (and now subsequently same-sex marriage) has been introduced, "without a reactionary constitutional amendment."[97] With the increase in the number of countries passing same-sex marriage legislation in recent years, England and Wales, France, and Denmark, for example, join the number of countries to have followed the incrementalist strategy. The concerns about drawing comparisons from small countries with homogenous populations, although still relevant, are now less accurate.

One of the major criticisms of the incrementalist strategy is that it proceeds too slowly. Worldwide, the great majority of countries do not give any "formal recognition to same-sex couples . . . ,"[98] as "[l]esbian and gay relationships are not currently relevant to the

90. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

91. VT. STAT. ANN. tit. 15, §§ 1201–07 (2002); An Act Relating to Civil Unions, § 42, 2000 Vt. Acts & Resolves 72, 87–88.

92. Marriage Equality Act 2009 Vt. Acts & Resolves 1-11.

93. Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

94. Araiza, *supra* note 34, at 375.

95. ESKRIDGE, *supra* note 36, at 97.

96. Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

97. Richards, *supra* note 35, at 727.

98. Saez, *supra* note 88, at 31.

public law agenda of most developing countries . . . ."[99] Before the recent decision of the ECtHR in *Oliari and Others v. Italy*[100] many countries within Europe had no protections for same-sex couples. Italy, Greece and Cyprus showed slow progress and were the "least developed with regards to same-sex marriage."[101] None of these countries offered any legal protection for same-sex couples. Indeed, the Italian Constitution referred to the "right of the family as a natural society based on marriage."[102] There were several failed attempts to introduce registered partnerships in Italy.[103] Similarly, in Greece there was no protection for same-sex couples. In 2008, Greece enacted a 'Free Unions Pact' that only applied to heterosexual partners and the ECtHR subsequently found this to violate Article 14 (equality) in conjunction with Article 8 (the right to private life) of the European Convention on Human Rights.[104] Greece had to amend its law to have equality for same-sex couples in respect of access to civil partnership.[105] Following the decision of *Oliari and Others v. Italy* on July 21, 2015,[106] all contracting states to the European Convention on Human Rights will have to introduce a form of civil union or registered partnership.[107] There is still no requirement to introduce same-sex marriage due to concerns about a lack of consensus on this issue between European nations.[108]

Some countries need longer to adjust, and change may not come to "some jurisdictions for a long time, and maybe not ever."[109] In many ways it is better to wait for the appropriate conditions for change. Change that outstrips public opinion could lead to a backlash in public opinion,[110] or a lack of substantive equality.[111] This does not mean that there should be no change. Smaller changes such as anti-discrimination laws and civil partnership, in due course, could be effective in providing necessary legal protections. Change can be effected at the appropriate slower pace. The influence of comparative constitutionalism means that even if a country does not give same-sex couples legal protection, the

99. ESKRIDGE, *supra* note 36, at 97.
100. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.
101. Aloni, *supra* note 10, at 124.
102. Art. 29 Costituzione [Cost.] (It.).
103. For further discussion *see* Saez, *supra* note 88, at 32.
104. Vallianatos v. Greece, 2013-VI Eur. Ct. H.R. 125.
105. Schalk v. Austria, 2010-IV Eur. Ct. H.R. 409.
106. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.
107. *Id.*
108. *Id.*
109. ESKRIDGE, *supra* note 36, at 119.
110. Such as examples seen from certain U.S. states, which is explored in the final section of this piece.
111. Such as the example seen from South Africa, which is explored in the penultimate section of this piece.

enactment of same-sex marriage laws in other countries has had an influence on the public consciousness of that jurisdiction. In addition, international bodies such as the European Union ("EU") and the Council of Europe (the governing body behind the European Convention on Human Rights) continue to exert an influence in discussing these topics when legal challenges are brought. Finally, with the influence of globalisation, there are going to be increasing instances of same-sex married couples asking for legal recognition of their same-sex marriage legitimately conducted in another jurisdiction.

Slow change can also be seen as advantageous. Slower change is more likely to lead to lasting, substantively effective and enduring change[112] as it allows time to "permit . . . gradual adjustment of antigay mind-sets, slowly empower . . . gay right advocates and . . . discredit antigay arguments."[113] It is necessary to allow for a change in public opinion as in reality the law cannot change unless public opinion also changes. Public opinion and enforcement of laws are "interwoven . . . because the law has little meaning if it is not enforced."[114] This corresponds with the theory that to conduct legislative change, "the inclination of the majority of the people . . . are in favour of a change."[115] The effect is circular as "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law."[116]

In an interesting and useful comparison Kathryn Marshall discusses how civil rights lawyers and activists adopted a pragmatic strategy with "victories . . . often frustratingly incomplete, but the principles they established were the ones that translated most

---

112. MERIN, supra note 60, at 308.

113. ESKRIDGE, *supra* note 36, at 119. *See also* Marshall, *supra* note 64, at 199-200 (explaining that such slow change although frustrating at the time allows "public opinion to adjust gradually to the changes sought by social movement."); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260, 260 (2010); Nancy D Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

114. Kimberly Gonzalez, *Gay Marriage and Gay Union Law in the Americas*, 16 L. & BUS. REV. AM. 285, 285 (2010).

115. Amy L. Wax, *The Conservative's Dilemma: Social Change, Traditional Institutions and Same-Sex Marriage*, 42 SAN DIEGO L. REV., 1059, 1100 (2005) (referring to MICHAEL FREEDMAN, EDMUND BURKE AND THE CRITIQUE OF POLITICAL RADICALISM 160 (1980) (quoting Edmund Burke, *Speech on the Acts of Uniformity* (February 6, 1772), *in* 7 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE (2005))). *See also* Maimon Schwarzschild, *Marriage, Pluralism and Change: A Response to Professor Wax*, 42 SAN DIEGO L. REV. 1115, 1116 (2005) (stating that "[i]n other words, as a politician, you should 'acquiesce in change only if both the public and [you] concur that some modification is necessary.'").

116. ESKRIDGE, *supra* note 36, at 97.

effectively into lasting and tangible social progress."[117] In contrast, pushing too hard could result in a harmful backlash, disrupting dialogue on the issue, and causing "unnecessary polarization"[118] as seen in certain U.S. states.[119] After *Windsor*,[120] commentators argued that the Supreme Court was taking a cautious approach.[121] In that case, whilst the Supreme Court decision meant that the federal government had to recognise same-sex marriages, the Supreme Court did not find any requirement for states to recognise same-sex marriage conducted in other jurisdictions.[122] Michael Klarman argues that the "*Windsor* majority were not yet prepared to impose gay marriage on the states."[123] The *Windsor* majority were concerned that too broad a ruling would result in a backlash[124] and Justice Ginsburg is known to consider that "the Court erred in *Roe v. Wade* by intervening too quickly and too aggressively on abortion issues."[125] Similarly in the decision of October 6, 2014, the U.S. Supreme Court, by denying certiorari in relation to same-sex marriage appeals, allowed the five states in question to take their own decisions in relation to this matter.[126] There were concerns that if the Supreme Court got too far ahead on this issue that this could backfire.[127] This caution has now been thrown to the wind. Following the decision in *Obergefell*, the Supreme Court by a majority of five to four determined that same-sex marriage be legalised nationwide.[128] This may raise concerns about the possibility of a backlash in public opinion or a lack of substantive support in some of the U.S. states. In his dissenting judgment Chief Justice Roberts

---

117. Marshall, *supra* note 64, at 199-200 (referring to Judge Stephen Reinhardt, *Legal and Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11, 12 (2005).

118. *Id.* at 199-200.

119. See section 5 of this piece on backlash.

120. United States v. Windsor, 133 S. Ct. 2675 (2013).

121. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127, 146 (2014).

122. *Windsor*, 133 S. Ct. at 2675. For further discussion *see* Klarman, *supra* note 121, at 146.

123. Klarman, *supra* note 121, at 146-47.

124. *Id.* at 148.

125. *Id.* at 146-47 (referring to Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 376, 379-82, 385-86 (1985); Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV.1185, 1198-200, 1205-08 (1992); Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 15-16 (2013); Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit).

126. *See supra* note 8.

127. Richard Wolf, *First Take: Justices Decide Gay Marriage by Not Deciding*, USA TODAY (October 6, 2014), http://www.usatoday.com/story/news/politics/2014/10/06/supreme-court-gay-lesbian-marriage-analysis/16803357/.

128. *See generally*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

discussed the "consequences to shutting down the political process."[129] In his view, "[p]eople denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide."[130] He goes on to refer to refer to Justice Ginsburg who in reflecting on the decision of the Supreme Court in *Roe v. Wade* in the context of the abortion debate commented that "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[131] It is hoped that over time public support in favour of same-sex marriage in every state across the U.S. may be achieved. Nonetheless, it remains a missed opportunity that the U.S. has lost the chance to have a full democratic debate on this issue.[132]

Statistics demonstrate that favourable public opinion is essential in ensuring effective and long-lasting change for proponents of same-sex marriage. For example, prior to the enactment of same-sex marriage in England and Wales, 53% of those consulted supported same-sex marriage.[133] Similar statistics emerge for France and Denmark. They enacted same-sex marriage in 2013 and 2012 respectively.[134] Pew Research Centre conducts surveys annually in 17 nations on this subject, refer to the correlation between public support for and legal recognition of same-sex marriage.[135] It is not surprising that there is most likely to be a backlash in public opinion, where court judgments strongly contravene public opinion.[136] Countries that have legalised same-sex marriage, but are struggling to ensure substantive change, show a

---

129. *Id.* at 2625 (Roberts C.J., dissenting).

130. *Id.*

131. *Id.* (referring to Ginsburg, *supra* note 125, at 385-86).

132. *Id.*

133. EQUAL MARRIAGE: THE GOVERNMENT'S RESPONSE 11 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

134. Public opinion polls in France show a consistent support for same-sex marriage from 2008 onwards prior to the French same-sex marriage legislation in 2013. The following examples show the figures in support of same-sex marriage: Ifop poll (June 2008) 62%, BVA poll (November 2009) 64%, Credoc poll (July 2010) 61%, TNS-Sofres poll (January 2011) 58%, Ifop poll (June 2011) 63%, BVA poll (December 2011) 63%, Ifop poll (October 2012) 61%, BVA poll (October 2012) 58%, CSA poll (December 2012) 54%, Ifop poll (December 2012) 60%. Public opinion polls in Denmark also show a consistent support for same-sex marriage prior to the Danish same-sex marriage legislation in 2012. A YouGov Poll (Dec 2012) found that 79% of Danes were in favour of same-sex marriage.

135. *A Global Snapshot of Same-Sex Marriage*, PEW RESEARCH CENTRE (June 4, 2013), http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/.

136. See Klarman, *supra* note 121, at 148-149 (referring to Baehr v. Lewin, 852 P.2d 44, 67-68 (Haw. 1993) (a judgment of the Hawaiian Supreme Court which introduced "gay marriage when Americans imposed that reform by a margin of at least three to one.")).

lack of public support for the institution.[137] The next section looks at one of the biggest criticisms of the incrementalist strategy, being that it often involves an intermediate stage of civil partnership.

III. THE IMPACT OF CIVIL PARTNERSHIP

One of the central planks of the incrementalist strategy is the introduction of intermediate stage legal protections where discrimination against gays is prohibited on the basis of sexual orientation.[138] In many instances this takes the form of civil partnerships. It should be noted that "registered partnership take different forms in different countries"[139] ranging from near equality in the United Kingdom[140] to less than equal protection in other states. The French pacte civil de solidarite ("PACS") is an example of the latter category as, although it "provides rights and obligations similar but not equal to marriage . . . ,"[141] notably citizenship is not included.[142]

Even if the legal protections are similar, for many, civil partnership is not considered as a desirable status. Interestingly, in this context, the ECtHR has noted the "intrinsic value" of civil partnerships, "irrespective of the legal effects, however narrow or extensive."[143] Despite this endorsement by the leading human rights court in Europe, civil partnerships are often seen as being "separate but equal," and consigning same-sex couples to "second-class status."[144] In this way, civil partnerships have been compared to segregated schools and public services in the 'Jim Crow South.'[145] This contrasts to marriage which is seen as the gold standard.[146] On a practical note, if a same-sex couple wish to relocate

---

137. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135 (noting South Africa as an instance of this where only "32% say it should be accepted versus 61% saying it should not be.").

138. MERIN, supra note 60, at 326.

139. Aloni, *supra* note 10, at 111.

140. Civil Partnership Act 2004. Aloni, *supra* note 10, at 122 described this as the "comprehensive model for registered partnerships."

141. For further explanation *see* Saez, *supra* note 88, at 25 (referring to Hughes Fulchiron, *National Report: France*, 19 AM. U. J. GENDER SOC. POL'Y & L. 123 (2011)).

142. Eric Fassin, *Same-Sex, Different Politics: 'Gay Marriage' Debates in France and the United Sates*, 13 PUB. CULTURE 215, 217 (2001). *See also* Saez, *supra* note 88, at 26; Leckey, *supra* note 33, at 11 (describing it as a "lighter form of union for both third parties and the partners.").

143. Oliari v. Italy, Eur. Ct. H.R. ¶ 81 (2015), http://hudoc.echr.coe.int/eng?i=001-156265.

144. Crane, *supra* note 26, at 471. *See also* Dorf, *supra* note 30.

145. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 543 (2007). *See also* Richard M. Lombino II, *Gay Marriage: Equality Matters*, 14 S. CAL. REV. L. & WOMEN'S STUD. 3, 17 (2004).

146. Wilkinson v. Kitzinger [2006] EWHC (Fam) 2022, [5] (Eng.); *See also* Aloni, *supra* note 10, at 110 (referring to MERIN, supra note 60, at 55-56 (describing marriage as the

internationally, civil partnerships may also be "unequal in the literal sense, as they may not prove as 'portable' as same-sex marriage."[147]

Aside from these criticisms of civil partnership as a status in itself, others criticise the "incrementalist paradigm . . . [and the fact that] civil unions are viewed as a necessary step prior to the complete legalization of same-sex marriage."[148] Erez Aloni considers that civil partnerships may stall progress,[149] and are seen as a "stumbling block that can significantly delay acceptance of same-sex marriages."[150] In contrast, it is argued that civil partnerships are a useful building block on the road to the recognition of same-sex marriage. Intermediate stage legislation allows public opinion to adjust and develop. The ECtHR in *Oliari and Others v. Italy* appears to have taken the same view.[151] Although the ECtHR in that decision determined only that same-sex couples should have the option of entering into a form of civil union or registered partnership,[152] the ECtHR did note the "continuing international movement towards legal recognition"[153] which suggests that the ECtHR will at some point legalise same-sex marriage, when sufficient consensus is reached. It is useful at this stage to look at some case examples of countries which have enacted civil partnership regimes in order to see how this affected their progress towards recognition of same-sex marriage.

When the UK government enacted the Civil Partnership Act 2004 it created a regime which gave distinct but equivalent protection to marriage for same-sex couples.[154] This Act was, "shaped by consultation with the stakeholders and public at large" who were not prepared for same-sex marriage at that date.[155] Stonewall (one of the leading gay rights organisations in the UK) considered civil partnership to be "preferable to marriage."[156] It is perhaps unsurprising that when Erez Aloni was writing in 2010 he

---

"privileged and preferred legal status in Europe and the United States."); George W. Dent Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 617 (1999) (referring to marriage as bringing many "intangible benefits" including "honour, respect [and] the social stamp of approval.").

147. Marshall, *supra* note 64, at 199-200.

148. Aloni, *supra* note 10, at 105.

149. *Id.* at 116 (referring to *Developments in the Law – II Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003)).

150. Aloni, *supra* note 10, at 109.

151. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.

152. *Id* at ¶ 174.

153. *Id* at ¶ 178.

154. For further discussion *see* Saez, *supra* note 88, at 15 (referring to Kenneth Norrie, *National Report: United Kingdom*, 19 AM. U. J. GENDER SOC. POL'Y & L. 329 (2011)).

155. Wilkinson v. Kitzinger [2006] EWHC (Fam) 2022, [51] (Eng.).

156. Aloni, *supra* note 10, at 156 (referring to Shipman, *supra* note 41, at ¶ 2.5).

did not consider that the UK would "allow same-sex marriage in the near future . . . ."[157] In his opinion the civil partnership legislation meant that, "[c]ourts and legislatures have less of an impetus to push for same-sex marriage as there is less of an identifiable harm or damage . . . ."[158] A few years later, both England and Wales and Scotland introduced same-sex marriage legislation.[159] Civil partnership did not deter those who wanted to pursue same-sex marriage.[160] Instead, civil partnership in fact offered a useful staging post, allowing for the development of public opinion. Before the 2013 Act was enacted, the UK government commissioned another public consultation. This demonstrated that 53% of those surveyed in England and Wales supported same-sex marriage.[161] This slow incremental change, allowing for adjustment in public opinion, means that a backlash in public opinion has been avoided.

Other countries also demonstrate the usefulness of civil partnership as a staging post thereby allowing for a change in public opinion. When Erez Aloni was writing in 2010 both France and Denmark were given as examples of countries which were content with civil partnership.[162] He stated that "LGB individuals feel less discriminated against and have less motivation to fight for same-sex marriage . . . ."[163] For some years this statement appeared to be correct. With respect to France other writers also commented that the PACS legislation had reduced pressure on the government.[164] Similarly, in Denmark, same-sex marriage was not considered an important topic,[165] with "GLBT resistance to marriage as a patriarchal institution . . . ."[166] In 2012, Denmark passed same-sex marriage legislation and France followed suit the following year. A

157. Aloni, *supra* note 10, at 126.

158. *Id.* at 151.

159. Marriage (Same Sex) Couples Act 2013 c. 30 (Eng.); Marriage and Civil Partnership (Scotland) Act 2014 (ASP 5).

160. Wilkinson v. Kitzinger [2006] EWHC (Fam) 2022, [5] (Eng.) (demonstrating the dissatisfaction with civil partnership as a status for those who favoured same-sex marriage).

161. EQUAL MARRIAGE: THE GOVERNMENT'S RESPONSE 11 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

162. Aloni, *supra* note 10, at 152 (referring to Edward Cody, *Straight Couples in France are Choosing Civil Unions Meant for Gays*, WASH. POST (Feb. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303365.html). *See also* Aloni, *supra* note 10, at 118 (referring to Denmark as giving "striking proof of the problems associated with registered partnerships – change is slow.").

163. *Id.* at 152.

164. *See* Daniel Borillo & Eric Fassin, *The PACS, Four Years Later: A Beginning or an End?*, *in* SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS NATIONAL DIFFERENTIALS 19-26 (Marie Digoix & Patrick Festy eds., 2004), https://www.ined.fr/fichier/s_rubrique/19410/124.fr.pdf.

165. Aloni, *supra* note 10, at 118.

166. Araiza, *supra* note 34, at 373.

number of different opinion polls showed that both the French[167] and Danish public supported same-sex marriage.[168] Comparative constitutionalism played a part given the rapid increase in the number of European countries and U.S. states which enacted same-sex marriage legislation since 2010.[169] Ultimately, although change in both countries was slow in this regard it did eventually over a period of time lead to the desired goal, with no incidence of backlash in public opinion. In determining a strategy to proceed proponents in favour of same-sex marriage need to select either the legislative or the court based approach.

IV. METHOD OF PROCEEDING – COURT OR LEGISLATION

A powerful influence on which path is chosen depends on the constitutional setting of each country. Countries with constitutional courts and far reaching Bills of Rights are far more likely to see court action used to bring about change.[170] This can be demonstrated by the U.S. The majority in *Obergefell* justified action by the Supreme Court on the basis that "[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right."[171] This decision followed a line of court cases in the U.S. looking at the right of same-sex couples to wed.[172] The court-based approach is not without difficulties. The decision of the Supreme Court, meant that the Obama administration avoided having to legislate in favour of same-sex marriage. President Obama has publicly stated his support for same-sex marriage.[173] Commentators (who in this context were discussing the earlier *Windsor* case of 2013) doubted whether legislative action would have been successful as it "would certainly have failed in [Congress] and might well have failed in the Senate."[174] Commentators on these judgements criticised the "naked

167. *See A Global Snapshot of Same-Sex Marriage*, *supra* note 135.

168. *Id.*

169. *See supra* note 2.

170. *See* Normann Witzleb, *Marriage as the 'Last Frontier?' Same-Sex Relationship Recognition in Australia*, 25 INT'L J. L. POL'Y & FAM. 135, 154 (2011), who considers this issue from an Australian point of view and states that the absence of a Bill of rights in Australia "means that there is no prospect of achieving marriage equality through a judicial challenge of the discriminatory status quo . . . ").

171. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

172. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013).

173. President Barack Obama stated at his inaugural address that, "Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well." Barack Obama, U.S. President, Inaugural Address, 2013 DAILY COMP. PRES. DOC. 32 (Jan. 21, 2013).

174. Loveland, *supra* note 43, at 17.

usurpation of the legislative function."[175] The four dissenting judges in *Obergefell* have also made similar criticisms of the majority decision in that case.[176] Following the court-based approach, the federal government had to recognise same-sex marriage without any direct input from the democratic process. Public opinion in the U.S. now overall broadly favours same-sex marriage, but this masks great differences in attitude between U.S. states.[177] Case studies demonstrate that where courts attempt to move ahead of public opinion this may lead to a backlash in public opinion or a lack of substantive equality.[178]

Those who favour the incremental approach also favour legislative action. The legislative approach allows countries to enact changes in favour of same-sex marriage as a result of action from their democratically elected representatives. David Richards, referring to the critique of Carl Stychin, argues that "recognition should happen democratically rather than judicially and argues for a democracy in which gays are mobilised as full citizens, demanding their rights . . . ."[179] He goes on to argue that if the judiciary do too much of the work in recognising the rights of gays this could mean that democracy is marginalised and public opinion polarised.[180] Incrementalists favour the legislative-based approach as this allows for public opinion to adapt and change.

Other states have attempted to use the court-based approach. Court action can draw helpful attention to the issue of same-sex marriage, which can "become part of the national debate . . . ."[181] Another perceived advantage of proceeding by court litigation is that constitutional courts can move ahead of public opinion.[182] Yvonne Zylan notes that lawyers, in determining their strategy are guided by "purposive instrumentalism."[183] In many cases the reason why lawyers select the immediate court-based approach is because this is seen as the quickest way to attract the package of rights associated with married couples.[184] Court-based attempts to

---

175. *Id.* at 18-19 (comparing this to Lord Simonds in *Magor and St Mellons RDC v. Newport Corp.* [1952] A.C. 189 at 191).

176. *Obergefell*, 135 S. Ct. at 2611-12.

177. Klarman, *supra* note 121, at 150-151 (noting that "states in the Deep South, especially Mississippi remain strong in their anti same-sex marriage stance.").

178. See section 5 of this piece on Backlash.

179. Richards, *supra* note 35, at 733.

180. *Id. See also* Dent, *supra* note 146, at 622.

181. Bruce M. Wilson, *Claiming Individual Rights through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT'L J. CONST. L. 242, 252 (2007).

182. *Id.*

183. ZYLAN, *supra* note 27, at 215.

184. *Id.* at 209 (referring to George Chauncey, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY (2004) (quoting Mary Bonauto, one of the lead attorneys in Baker v. Vermont, 744 A.2d 864 (Vt. 1999))).

introduce same-sex marriage legislation could result in a confused outcome and lack of successful resolution to a dispute. The U.S. situation is particularly complex. Before the recent decision in *Obergefell*[185] there were challenges to same-sex marriage bans arising in every state where these were in force. Where the court-based introduction of same-sex marriage is successful in introducing changes to the law, attempts to proceed public opinion may not result in lasting or substantive change. One possible method of court action leading to a successful introduction of same-sex marriage is for courts to adopt a compromise approach by suspending their judgment to give the legislature time to canvas public opinion on the topic and amend legislation.[186]

It is useful to consider several leading examples where court judgments have attempted to jump ahead of public opinion. In a case from the civil rights battle, the U.S. Supreme Court in *Brown v. Board of Education*, declared segregated schooling illegal.[187] Commentators agree that, in practice, this decision was "almost completely ignored for over a decade by eleven states" with laws continuing to require segregated schooling.[188] Bruce Wilson points this out as an example where "a Supreme Court ruling does not guarantee enforcement or respect by lower courts or government agencies."[189] Another well-known example is from the abortion debate. Michael Klarman comments that, "[m]any scholars and judges believe that the Court in *Roe v. Wade* fomented such a backlash by intervening so aggressively on the abortion issue in 1973."[190] In the context of same-sex marriage it is useful to consider case examples from two contrasting countries; South Africa and Canada. Both countries introduced change by means of Constitutional Court decisions, but the effectiveness of these decisions is linked largely to the state of public opinion.

The end of apartheid in South Africa was marked by a radical new constitution being introduced in 1996.[191] This contained a "famous anti-discrimination clause that explicitly forbids discrimination because of sexual orientation."[192] Nicola

185. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

186. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (where the court suspended its decision for a period of 180 days to allow the legislature to take action if this was seen as appropriate).

187. Brown v. Bd. of Educ., 347 U.S.483, 495 (1954).

188. Wilson, *supra* note 181, at 247 (referring to *Brown*, 347 U.S. at 483).

189. *Id.* (quoting ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS 465 (Clinton Rossiter ed., 1961) (noting that the judiciary has "no influence over either the sword or the purse.")).

190. Klarman, *supra* note 121, at 148.

191. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

192. Patrick Awondo et al., *Homophobic Africa? Toward a More Nuanced View*, 55 AFRICAN STUDIES REV. 145, 147 (2012).

Barker notes that South Africa was the "first country in the world to explicitly include legal protections for lesbians and gay men in its Constitution . . . ."[193] Subsequently, the South African Constitutional Court ruled in favour of same-sex marriage[194] and the Constitutional Court "gave the legislature a year to amend the Marriage Act to include same-sex marriage."[195] Despite this much vaunted decision[196] it is debatable as to what real progress has been made both legally and substantively. Firstly, the legal changes made in South Africa have not resulted in legal equality for same-sex couples. Instead of amending the existing Marriage Act, four new statutes were passed in South Africa.[197] Marriage under the Marriage Act remained open only to heterosexual couples, but the new statutes covered both same and opposite-sex couples. A divide between the legal protection available to heterosexual and same-sex couples, therefore, remains and has been criticised as "simultaneously reinforc[ing] the primacy of heterosexual civil marriage . . . ."[198] South Africa demonstrates that a court judgment will not "automatically result" in a legislative change which gives "gold standard" recognition of same-sex couples marital status. [199]

It is also doubtful whether same-sex couples in South Africa have achieved substantive equality. Writers argue that "[i]n South Africa, countervailing tendencies remain very strong and vocal . . . ."[200] Patrick Awondo, Peter Geschiere and Graeme Reid argue that "despite ground-breaking success in terms of law and policy . . . the South African experience also speaks as to the limits of the law. The Constitution remains an ideal, sometimes at far remove from lived reality . . . ."[201] There is continued violence towards gays including, the "targeting rape of lesbians [which] is an extreme symptom of a gap between the ideals of the Constitution and everyday life . . ."

---

193. Nicola Barker, *Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa*, 7 INT'L J. L CONTEXT 447, 448 (2011).

194. In the famous case of *Minister of Home Affairs v. Fourie* 2005 (3) BCLR 355 (CC), the South African Constitutional Court found that the marriage laws then in existence (which defined marriage as between a man and a woman only) violated section 9 Equality, section 10 Dignity and section 14 Right to Privacy, of the Bill of Rights.

195. For further explanation *see* Saez, *supra* note 88, at 7.

196. For further explanation *see* Barker, *supra* note 193, at 448 (describing South Africa as a "world leader in equality" and the "first nation in the global south and one of the first in the world legally to recognise same-sex marriage . . . .").

197. Instead of amending the Marriage Act the legislature introduced four new statutes that regulate unions. These include the Marriage Act, the Customary Marriages Act, the Civil Union Act, and the Recognition of Customary Marriage Act.

198. Barker, *supra* note 193, at 465. *See also* Pierre De Vos, *The Inevitability of Same-Sex Marriage in South Africa's Post Apartheid State*, 23 S. AFRICAN J. ON HUM. RTS. 432 (2007); Elsje Bonthuys, *Race and Gender in the Civil Union Act*, 23 S. AFRICAN J. ON HUM. RTS. 526, 533 (2007).

199. Barker, *supra* note 193, at 465.

200. Awondo, *supra* note 192, at 157.

201. *Id.*

and that the "existence of high-profile attacks place the aspirations of the constitution in stark relief . . . ."[202] It should be stated that this opinion is not universal. Other authors refer to gays and lesbians finding a way of "living a creative, productive and satisfying life," and that the "image of the lesbian as a rape victim is limiting and inaccurate."[203] Despite these different viewpoints, the lack of egality through legal protections, and the reporting of violent attacks against gays, demonstrates that a high profile Constitutional Court decision does not automatically lead to substantive change. It is suggested that the difficulty in South Africa is that the majority of the public do not support same-sex marriage.[204] Slower incremental change in accordance with public opinion is more likely to lead to substantive protection for gays.

Canada is another interesting country to look at in terms of judicial activism. The Canadian courts used the extensive equality provisions in the Canadian Constitution[205] to introduce same-sex marriage.[206] The Ontario Divisional Court initially found a violation of the equality provisions in the Canadian Charter, but suspended a remedy for twenty-four months to allow for debate. [207] When the case reached the Ontario Court of Appeal they introduced same-sex marriage without waiting for legislative approval.[208] Wade Wright notes that this case was the "first to reformulate the opposite-sex definition, and to order that same-sex couples be permitted to marry with immediate effect . . . ."[209] The federal government responded quickly stating they agreed with the changes[210] and this resulted in the Civil Marriage Act 2005 which gave marriage rights to same-sex couples.[211] Canada now has achieved almost "complete equality between same-sex and opposite-sex marriages . . ." [212] including the same-sex adoption rights.

Canada is unusual in having a court-based introduction of same-sex marriage which introduced substantive change. The immediate

---

202. *Id.* at 159.

203. *Id.* (referring to Z. Matebeni, Exploring Black Lesbian Sexualities and Identities in Johannesburg (2011) (unpublished Ph.D. dissertation, University of the Witatersrand)).

204. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135 (stating that "in 2014 only 32% considered that homosexuality should be accepted, whereas 61% said it should not be.").

205. L'Heureux-Dube, *supra* note 47, at 36 (referring to the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11 (U.K.)).

206. Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT'L J. L. POL. & FAM. 249, 250 (2006).

207. Chapman, *supra* note 84, at 424 (referring to Halpern v. Canada (Att'y Gen.) (2002), 215 D.L.R. 4th 223 (Can. Ont. Div. Ct.)).

208. Halpern v. Canada (Att'y Gen.) (2003) 65 O.R. 3d 161 (Can. Ont. C.A.).

209. For further explanation *see* Wright, *supra* note 206, at 253.

210. *Id.* at 256.

211. For further explanation *see* Gonzalez, *supra* note 114, at 300.

212. Saez, *supra* note 88, at 7.

introduction of change is "questionable"[213] as there was no pause to engage with the legislature and public opinion.[214] Ultimately, whilst this approach was risky it did not lead to a backlash in public opinion, due to the high level of public support and earlier state level recognition of same-sex marriage for same-sex marriage in Canada. Kathryn Chapman notes that although the same-sex marriage debate in Canada had been "contentious both within the gay, lesbian, bisexual and transgendered (glbt) communities . . . approximately two-thirds of Canadians support the right of same-sex couples to marry . . . ."[215] Arguably one of the reasons why there was such a level of public support for judicial action in Canada stems from the fact that several authors argue that Canada is an example in itself of a country which followed the method of incrementalist change.[216] Nanci Schanerman lists the earlier changes which had been made prior to the introduction of same-sex marriage. "Those changes include spousal support, guardianship, adoption, pension entitlement and medical decision-making."[217] By the time the Federal Marriage Act was enacted, same-sex marriage was legal in the majority territories and provinces.[218] This approach was successful in Canada, due to the support of public opinion, but the reality for many countries is that same-sex marriage "has been achieved by a legislative, rather than a judicial strategy . . . ."[219] William Eskridge adds that although "judges can jump-start [the] politics of recognition . . . such politics will have limited effect unless or until the Parliament gives the judicial decision teeth . . . ."[220] Case studies demonstrate that, where courts attempt to move ahead of public opinion this may lead to a backlash in public opinion, or a lack of substantive equality and ultimately a delay in legal protection for same-sex couples.

V. THE PROBLEM OF BACKLASH

Writers and judges argue that acting in advance of public opinion can "mobilize opponents, undercut moderates and retard

213. Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality and its Limits (1985-2005)*, 49 MCGILL L. J. 1143, 1165 (2004).

214. Wright, *supra* note 206, at 253.

215. *See* Chapman, *supra* note 84, at 424 (referring to Canadian National Legal Poll (June 22, 2001)). *See also* Donald G. Casswell, *Moving Toward Same-Sex Marriage*, 80 CAN. BAR REV. 810 (2001).

216. Schanerman, *supra* note 64; Alquist, *supra* note 49.

217. Schanerman, *supra* note 64, at 158.

218. Gonzalez, *supra* note 114, at 300.

219. Wilson, *supra* note 181, at 253.

220. ESKRIDGE, *supra* note 36, at 104.

the cause they purport to advance."[221] In one judge's opinion "doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."[222] Past experience from the U.S. is also a prime example of the backlash in public opinion which can be experienced if change is introduced too swiftly in the area of same-sex marriage.[223] Seeking to outpace public opinion by means of a court-based judgment can, in effect, mean that achievement of same-sex marriage can take longer to achieve than if the incremental approach had been followed in the first place. Several U.S. state examples will be studied to demonstrate this perspective. Conclusions will be drawn as to what lessons can be learnt from this experience. This is particularly necessary in relation to the recent decision of the U.S. Supreme Court in *Obergefell*[224] in bringing forward same-sex marriage nationwide across the U.S.

The Massachusetts Supreme Court became the first state to recognise same-sex marriage.[225] Vermont had earlier recognised same-sex civil union,[226] but the Massachusetts Supreme court was "ground-breaking"[227] in holding a statute unconstitutional that denied "same-sex couples the opportunity to obtain a marriage license."[228] The Massachusetts Supreme Court deliberately favoured same-sex marriage as civil unions were seen as "continu[ing] to relegate same-sex couples to a different status . . . ."[229] In making this decision the Massachusetts Supreme Court were not deterred, despite the lack of a "broad social consensus" supporting the

221. Marshall, *supra* note 64, at 199 (referring to Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005).

222. *Id.* (referring to *Speaking In a Judicial Voice*, *supra* note 125, at 1198).

223. See section 5 of this piece on Backlash.

224. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

225. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

226. Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

227. Crane, *supra* note 26, at 465 (referring to Press Release, Lambda Legal Defense and Education Fund, Praising Massachusetts Court Ruling Allowing Same-Sex Couples to Marry, Lambda Legal Vows to Push Forward (Nov. 18, 2003) (on file with the New York University Journal of Legislation and Public Policy)). *See also* Press Release, National Gay and Lesbian Task Force, Massachusetts High Court Same-Sex Marriage Decision is an Exhilarating Victory in the Struggle for Equal Rights (Nov. 18, 2003) (on file with the New York University Journal of Legislation and Public Policy) (describing this as "a critical step in the right direction.").

228. Crane, *supra* note 26, at 465 (referring to Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

229. Aloni, *supra* note 10, at 129 (referring to Ops. of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004)).

introduction of same-sex marriage.[230] Iowa is another state that introduced same-sex marriage by means of court action despite a lack of public support for same-sex marriage.[231]

Erez Aloni argues that Massachusetts and Iowa discredit the incrementalist theory as they both introduced same-sex marriage by state Supreme Court action, without any preparatory steps such as civil partnership.[232] In practice, although Iowa never had civil partnership, there had been other legislative amendments in favour of gays prior to the legalisation of same-sex marriage.[233] It is also debatable as to whether these changes can be considered successful, as although same-sex marriage was achieved immediately in the states in question this led to a backlash across other US states.[234] Within six months of the enactment of same-sex marriage in Massachusetts, "voters responded with a crushing blow, approving, in eleven states, constitutional amendments outlawing same-sex marriage."[235] Michael Klarman argues that this backlash was unsurprising as, "when the Massachusetts Supreme Court ruled squarely in favour of gay marriage in 2003, the country was opposed by roughly two to one."[236] Subsequently, federal legislation was enacted in the shape of DOMA,[237] allowing states the right to "deny recognition to same-sex marriages should they be allowed in other states."[238] Richard M. Lombino II believed DOMA is an example of backlash in itself.[239]

Examples from other U.S. states also demonstrate a backlash in public opinion in the particular state which enacted the same-sex marriage legislation. In these examples reforms have typically been introduced by the state Supreme Courts, but have then been

---

230. *See* Amelia A. Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2194 (2005) (referring to *Goodridge*, 798 N.E.2d at 958).

231. See Aloni, *supra* note 10, at 130 (referring to Varnum v. Brien, 653 N.W.2d 862, 906 (Iowa 2009)). *See also* ZYLAN, *supra* note 27, at chapter 6.

232. Aloni, *supra* note 10, at 129.

233. The Iowa Anti-Discrimination Act 2007 prohibited discrimination on the ground of sexual orientation.

234. For discussion *see* Crane, *supra* note 26, at 465 and ZYLAN, *supra* note 27, at 214.

235. For discussion *see* Robert R. M. Verchick, *Same-Sex and the City*, 37 URB. LAW. 191, 191 (2005). *See also* ZYLAN, *supra* note 27, at 214 (stating that the "Massachusetts case plainly accelerated the process" of backlash and further opining that several states "affirmed their same-sex marriage bans in the immediate wake of Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (including Arizona, New York and Washington) . . . .").

236. Klarman, *supra* note 121, at 148-49 (referring to MICHAEL J. KLARMAN, MAKING SENSE OF THE MARRIAGE DEBATE FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 45 (2012) (noting opinion polls conducted around 1990 showing support for gay marriage between 11% and 23%.)).

237. The Defense of Marriage Act ('DOMA') 1996.

238. For further explanation *see* Lombino, *supra* note 145, at 4.

239. *Id.* (referring to Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993)).

"overruled by state constitutional amendment."[240] One state example which can be used in this context is that of Hawaii. In the leading 1993 case of *Beahr v. Lewin*,[241] Erez Aloni reports that the Hawaii Supreme Court "recognized that the exclusion of same-sex marriage amounts to discrimination on the basis of sex . . . ."[242] Shortly afterwards in a state referendum by a majority of 69%, Hawaiian voters asked the legislature "to amend the marriage law to apply only to opposite-sex couples."[243] Erez Aloni cites Hawaii as an example of the "problems associated with the theory of small change and the incremental approach . . . ."[244] He later states that in Hawaii's case "[i]ncrementalism . . . has been too slow and too gradual."[245] The Hawaiian experience can instead be used to demonstrate the difficulties connected with courts too far outpacing public opinion. The Hawaiian Supreme Court decision[246] from 1993 delayed the legal protection of same-sex couples for many years. It was only when the slow incremental approach was adopted that same-sex couples achieved legal protection in Hawaii. Hawaii legalised civil unions in 2011,[247] and same-sex marriage legislation was enacted in November 2013.[248]

California is another example of public opinion backlash. After a series of initiatives in which at "least one bill extending greater rights to same-sex couples pass[ed] every year,"[249] California briefly authorized same-sex marriages briefly in 2008 by means of a Supreme Court Judgment.[250] This made California the second state after Massachusetts to recognise same-sex marriage. In a move seen as "surprising" by some commentators given the widely held view of California voters as 'liberal',[251] the California Constitution was amended to declare that "only marriage between a man and a woman is valid or recognised in California."[252] It was many years later and after much litigation that same-sex marriage became legal

240. Richards, *supra* note 35, at 727 (giving Hawaii and Alaska as examples of this trend).

241. *Baehr*, 852 P.2d at 74.

242. Aloni, *supra* note 10, at 128 (referring to *Baehr*, 852 P.2d at 74).

243. *Id.* (referring to MERIN, supra note 60, at 221-22).

244. *Id.*

245. *Id.* at 129.

246. *Baehr*, 852 P.2d at 74.

247. Hawaii Civil Unions Act, HAW REV. STAT. § 572-B2 (2011).

248. Hawaii Marriage Equality Act, HAW REV. STAT. § 572-1 (2013).

249. For further explanation *see* Gonzalez, *supra* note 114, at 300 (referring to the County of San Francisco Equal Benefits Ordinance 1997, Berkeley and Los Angeles Equal Benefits Ordinances 1999, Californian Domestic Partnership Registry 1999, expansion of the rights of same-sex couples under domestic partnership law 2001 and further extension of rights under domestic partnership law in 2003).

250. In re Marriage Cases, 43 Cal.4th 757 (Cal. 2008).

251. For discussion *see* Gonzalez, *supra* note 114, at 285.

252. CAL. CONST. art. 1 § 7.5 (held to be unconstitutional by Perry v. Schwarzenegger, 702 F. Supp. 2d 921 (N.D. Cal. 2010)).

again in California on June 28, 2013.[253] This demonstrates that a state Supreme Court decision taken in advance of a development of public opinion can lead to a backlash of public opinion or a lack of substantive equality. A backlash of public opinion ultimately leads to delay in legal protection for same-sex couples. Instead, if the slow incremental approach had been taken, positive change in favour of protection of same-sex couples could be achieved with none of the time and expense involved in the multiple litigation attempts made necessary in California by the overly optimistic decision of the Californian Supreme Court from 2008.[254] The examples from Hawaii and California were typical of many U.S. states and a wide number of states passed constitutional amendments outlawing same-sex marriage.[255] Many states subsequently challenged these constitutional amendments and went on to legalise same-sex marriage individually.

In 2010, Kathryn Marshall stated that although there had been some striking changes in public opinion in the U.S., there are "a clear majority of Americans today who oppose same-sex marriage."[256] U.S. public opinion in favour of same-sex marriage has gathered strength. Statistics from Pew Research noted that whilst in 2001, Americans opposed same-sex marriage by a 57% to 35% margin, "since then support for same-sex marriage has steadily grown." Today a majority of Americans (54%) support same-sex marriage, compared with 39% who oppose it,[257] with studies from statisticians continuing to show fast growing support for same-sex marriage in the U.S.[258] This does however mask disparities between U.S. states, where in some cases opposition to same-sex marriage remains strong.[259] This was still the case when *Obergefell* was decided.[260] At that time, 12 U.S. states still prohibited same-sex marriage.[261] In deciding to legalise same-sex marriage across the

253. Hollingsworth v. Perry, 570 U.S. 133 S. Ct. 2652 (2013) (case was dismissed on standing grounds, meaning that same-sex marriage became legal in California again).

254. In re Marriage Cases, 43 Cal. 4th 757 (2008).

255. When writing in 2010, Kathryn L. Marshall discussed the then 29 US states who had constitutional amendments outlawing same-sex marriage. Marshall, *supra* note 64, at 200.

256. *Id.* at 205.

257. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135. *See also* Klarman, *supra* note 121, at 148-49 (referring to Nate Silver, *How Opinions on Same-Sex Marriage is Changing and What it Means*, N.Y. TIMES (Mar. 26, 2013), http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/).

258. Klarman, *supra* note 121, at 156-157 (referring to Nate Silver, How Opinions on Same-Sex Marriage is Changing and What it Means, N.Y. TIMES (Mar. 26, 2013).

259. Klarman, *supra* note 121, at 150-51 (noting that "states in the Deep South, especially Mississippi, remain strong in their anti same-sex marriage stance."). *See also* ZYLAN, *supra* note 27, at at 214; Marshall, *supra* note 64, at 205.

260. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

261. *See supra* note 13.

U.S., the Supreme Court abandoned its earlier approach of showing caution and deference to individual states in this matter. The earlier cautious approach was exemplified by *Windsor v. United States*[262] where the majority of the Supreme Court had valid concerns about a backlash in public opinion.[263] Some commentators supported the step-by-step approach arguing that there was much to question in the "strategic wisdom of pushing forward an issue" which still draws strong opposition.[264] Michael Klarman when writing in the Harvard Law Review in 2014 commented that the Supreme Court would act when "public opinion shifts overwhelmingly in its favour." He argued that people would find a way to support same-sex marriage "or else their views will come to appear bigoted."[265] In making a decision in favour of same-sex marriage nationwide across the U.S. in 2015 in *Obergefell*,[266] the question remains as to whether the Supreme Court have waited sufficiently for the shift in public opinion. The agreement of all U.S. states was far from certain and there was doubt whether the matter would have passed through Congress. Adopting a legislative approach, even if this had taken longer, would have offered a clearer solution, allowing democracy to have its impact on such crucial measures. By not taking an incremental approach the Supreme Court runs the risk that there may be a lack of substantive support in every U.S. state. Public approval across all states may take time to achieve. In any event, the U.S. did not see a full democratic debate on this issue.

VI. CONCLUSION

International conventions[267] and leading case law[268] demonstrate that marriage is of fundamental constitutional importance. Exclusion of same-sex couples from marriage therefore has implications upon an individual's constitutionally protected status as an equal citizen.[269] This has led authors to conclude that

262. United States v. Windsor, 133 S. Ct. 2675 (2013).

263. Klarman, *supra* note 121, at146-47 (referring to Ginsburg, *supra* note 125, at 376, 379-82, 385-86; *Speaking in a Judicial Voice*, *supra* note 125, at 1198-200, 1205-08; Ruth Bader Ginsburg, Gillian Metzger and Abbe Gluck, *supra* note 125, at 15-16).

264. Marshall, *supra* note 64, at 203 (referring to Klarman, *supra* note 221, at 472).

265. Klarman, *supra* note 121, at 160.

266. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

267. *See, e.g.*, European Convention on Human Rights art. 12 ("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.") *See also* United Nations Covenant on Civil and Political Rights art. 23(2) ("[T]he right of men and women of marriageable age to marry and to found a family shall be recognized.").

268. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Loving v. Virginia, 388 U.S. 1 (1967).

269. *See, e.g.*, Bamforth, *supra* note 29, at 478 referring to MARSHALL, *supra* note 30, at 18 (stating, in discussing citizenship, that "all who possess the status are equal with respect

excluding gays from marriage is denying them the full status of citizenship.[270] Different jurisdictions are all dealing with the same social phenomenon caused by same-sex marriage. Comparative constitutionalism is advantageous in evaluating the experience of other nations in tackling the same problem and planning a strategy to achieve same-sex marriage. Although not without dissenting voices,[271] comparative constitutionalism has been recommended by senior members of the judiciary[272] and in practice is happening anyway with senior courts referring to each others' judgements worldwide.[273] The speed of the recognition of same-sex marriage worldwide from 2010 also shows that comparative constitutionalism is happening in practice. [274]

Marriage is not a fixed and immutable institution and has in fact been changing over the years as can be seen when considering the changing nature of women's legal position in marriage,[275] the repeal of laws which prohibited inter-racial marriage,[276] and the recognition of transsexuals' rights with regard to marriage by the ECtHR.[277] The debate concerns not whether change should occur, but instead the speed of change. Incremental change in accordance with public opinion is to be recommended. There are many criticisms about the incremental strategy. Some of these stem from the fact that the incremental theory was largely drawn from Nordic countries that are too far removed from the actualities of other states to make any comparison meaningless.[278] Since an increasing number of other states have recognised same-sex marriage by

---

to the rights and duties with which the status is endowed."); O'Mahoney, *supra* note 30, at 555 (also discussing the Irish Constitution and the emphasis laid upon equality in that document which states that "[a]ll citizens shall, as human persons be equal before the law.").

270. *See, e.g.*, Bamforth, *supra* note 29, at 484 (referring to Richardson, *supra* note 31, at 88 (stating 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* Kochenov, *supra* note 31, at 163 (referring to Harris, *supra* note 31, at 2823 (stating that "[m]oreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one's choice can also be viewed as a 'cultural message that certain groups are not suited for full citizenship.'")).

271. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2488 (2003) (Scalia, J., dissenting).

272. Eskridge, *supra* note 53, at 555 (referring to Rehnquist, *supra* note 54).

273. For example Eskridge, *supra* note 53, at 555 (referring to *Lawrence*,123 S. Ct. at 2472, and explaining that "Justice Anthony Kennedy's opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights.").

274. *See supra* note 2.

275. Tobisman, *supra* note 42, at 112.

276. *Id. See also* Loveland, *supra* note 43; Leckey, *supra* note 33, at 11.

277. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 4 ("The Court had found . . . that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender" of a post-operative transsexual).

278. See for example Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

means of the incrementalist progress[279] these concerns, although relevant, become less accurate. The criticism that incrementalism proceeds too slowly[280] could also be seen as an advantage. Slow change allows for public opinion to change and develop.[281] Moving too quickly in the absence of support from public opinion could result in a backlash of public opinion[282] or less than substantive equality.[283] The countries which have followed the incremental approach do not show any incidence of a backlash in public opinion or lack substantive change.

The incrementalist approach often includes the staging post of civil partnership. This is an intermediate stage which prevents discrimination against same-sex partners whilst not according them full equality. Although the ECtHR recognises the intrinsic value of civil partnerships,[284] this has been criticised as reducing same-sex couples to a second class status,[285] whilst allowing only heterosexuals to access the gold standard[286] of marriage. Another criticism involves the fact that civil partnership can stall or even prevent the achievement of same-sex marriage and full equality for same-sex couples as they will no longer have the impetus of campaigning for legal equality.[287] This article advocates the usefulness of civil partnership. This intermediate stage allows for public opinion to adjust towards a more favourable attitude towards same-sex marriage. Erez Aloni when writing in 2010, gave England

279. States which have used the incremental approach in recent years include for example England and Wales, Scotland, France, and Denmark.

280. Marshall, *supra* note 64, at 198 (referring to arguments which include "the principled belief that it is unjust to delay struggles for equality while waiting for 'the right moment.'") Another interesting example can be seen from the civil rights movement, where Dr. Martin Luther King, Jr., wrote that "This 'Wait' has almost always meant 'Never'. It has been a tranquilizing thalidomide, relieving the emotional stress . . . ." KING, *supra* note 83, at 292.

281. ESKRIDGE, *supra* note 36, at 119. *See also* Marshall, *supra* note 64, at 199-200 (explaining that such slow change although frustrating at the time allows "public opinion to adjust gradually to the changes sought by social movement."); Gallagher, *supra* note 113, at 260; Polikoff, *supra* note 113.

282. See section 5 of this piece on Backlash.

283. See section 4 of this piece comparing the legislative and court-based approaches where South Africa is discussed.

284. Oliari v. Italy, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-156265.

285. *See, e.g.*, Crane, *supra* note 26, at 471; Dorf, *supra* note 30.

286. Wilkinson v. Kitzinger [2006] EWHC (Fam) 2022, [18] (Eng.). *See also* Aloni, *supra* note 10, at 110 (referring to MERIN, *supra* note 60, at 55-56 (describing marriage as the "privileged and preferred legal status in Europe and the United States.")); Dent, *supra* note 146, at 617 (referring to marriage as bringing many "intangible benefits" including "honour, respect [and] the social stamp of approval.").

287. Aloni, *supra* note 10, at 116 (referring to *Developments in the Law – II Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, *supra* note 149).

and Wales, France and Denmark as examples of the obstructionist nature of civil partnership.[288] In recent years, all these states have enacted same-sex marriage, once public opinion had time to adjust.

This paper also recommends the use of the legislative rather than court-based approach. The legislative approach allows for an engagement with the democratic process.[289] The court-based approach can often lead to confusion and delay whilst multiple appeals are pursued. The South African case study also demonstrated that change introduced by Constitutional Court may result in a legal court victory but it does not necessarily introduce substantive change if this too far outpaces public opinion.[290] Whilst the Canadian Constitutional Court action was successful in introducing lasting change, this article would argue that this was due to earlier incremental increases in the rights of gays and the wide spread public support for same-sex marriage in Canada.[291] Statistics demonstrate that favourable public opinion is essential in ensuring effective and long-lasting change for proponents of same-sex marriage. There is a correlation between public support for and legal recognition of same-sex marriage.[292] Slow incremental change characterised by civil partnership, legislative action and an adjustment of public opinion is the preferred method for introducing same-sex marriage. By not taking an incremental approach in the *Obergefell* case,[293] the U.S. Supreme Court runs the risk that there may be a lack of substantive support in every U.S. state. It is hoped that public approval is achieved but experience will teach how long this takes to arrive.

---

288. Aloni, *supra* note 10, at 126 and 152.

289. For discussion see Richards, *supra* note 35, at 733. *See also* Dent, *supra* note 146, at 622; Loveland, *supra* note 43, at 18-19 (comparing this to Lord Simonds in *Magor and St Mellons RDC v. Newport Corp.* [1952] A.C. 189 at 191).

290. For discussion *see* Barker, *supra* note 193, at 448.

291. *See* Chapman, *supra* note 84, at 424.

292. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135.

293. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Commentary Conclusions

This work illustrates that against the background of globalisation and increasing numbers of international families, a new, more holistic approach towards recognition of same-sex couples' rights should be taken. In consideration of focal research question one 'What role can the ECtHR and the EU play in claims for the recognition of same-sex marriage?', this work demonstrates that the ECtHR and the EU have an important role to play in claims for recognition of same-sex marriage. The work in part one critiques the use of the MoA doctrine by the ECtHR[260] and sets out a strategy for future development for proponents of same-sex marriage before the ECtHR.[261] This needs to include detailed consideration of how the consensus standard can be quantified and measured.[262] The work in part 2, which foreshadowed recent CJEU case law developments,[263] concluded that the EU offers the most potential for proponents

[260] Publication one argues that use of the MoA means that contracting states remain free to determine whether or not to sanction same-sex marriage, meaning that erroneous or discriminatory reasons could continue to maintain influence.

[261] Publication two argues that more concentration on equality arguments under Article 14 is needed, in combination with a revitalised by use of the family aspect of Article 8 and a new dynamic interpretation of Article 12 (right to marry). Publication 3 also recommends that a free standing equality clause in the shape of Protocol 12, should be ratified by the contracting states to the ECHR.

[262] See publication 3.

[263] As discussed in Publication 6 this includes the *Coman* (n11) and *MB* (n11) (as discussed in additional publication 2 included in Appendix 4).

of same-sex marriage due to the EU concept of citizenship which entails extensive free movement rights for EU citizens and family members.[264] The EU also provides the best opportunity for a unified choice of law provision for same-sex relationships relocating across international borders.[265]

In consideration of focal research question 2 'What further impact do pan-European courts' approaches to same-sex marriage cases have internationally?', work in part 3 demonstrates the potential for and developing international impact of pan-European courts' approaches to same-sex marriage. Publication 7 stresses the symbolic value of same-sex marriage,[266] and then publication 8 considers the international impact of this point**.** Considering strategies for success for proponents of same-sex marriage is further developed in publication 8. Comparative law methodology is utilised which endorses incrementalism[267] or a step-by-step approach.[268] The same methodology also leads to conclusions that the legislative (as opposed to judicial) approach is considered to be preferable as it allow countries to enact

[264] See n172.

[265] Thereby avoiding limping marriages, For example where a marriage is recognised in one country but not another and 'divergences between Member States.' See *Moir and Beaumont* (n74) at 269.

[266] *Grigolo* (n135) explains that 'only marriage [not civil partnership] can guarantee the symbolic benefits of full equality.'

[267] *Waaldijk* (n61).

[268] Although criticisms of the incrementalist approach need to be remembered.

change in favour of same-sex marriage as a result of action from their democratically elected representatives.[269]

On reflection, starting from a position of being a solicitor and recent LLM graduate,[270] this project has challenged me to write in a comparative and international style across a series of legal academic disciplines including EU law, ECtHR law and private international law. Key points in development include advancing from recognising problems and taking a case based analysis[271] to suggesting solutions and taking broader thematic approaches.[272] Important conferences include Trento, Italy in 2014,[273] co-organisation of the Northumbria / Sunderland conference in 2014[274] and the international level conference held at Northumbria in 2018.[275] The six-year period of publication has seen immense change[276] but many challenges for proponents of

[269] *Richards* (n110) referring to *Stychin* (n110).

[270] I completed my LLM at Trinity College Dublin in 2009, where I was much influenced by the International Family Law course.

[271] Publication 1.

[272] Publications 2, 3, 4, 5 and 8.

[273] The Rights on the Move Rainbow families in Europe Conference' Trento 16-17 October 2014 following which I published the additional supporting publication 1 set out in Appendix 4.

[274] This 2014 conference co-organised with Sunderland University entitled 'Social and Legal Implications of Same-sex Marriage in North East' resulted in fifty local activists being invited.

[275] The second SLS funded conference entitled 'Same-Sex Relationships, A New Revolutionary Era and the Influence of Legal and Social Change' took place on 10th September 2018. This attracted international presentations from academics, lawyers and sociologists based in the UK, Ireland, Italy and the Netherlands.

[276] Whilst in 2013 only six states in Europe recognised same-sex marriage, by 2019 this has increased to sixteen states. See n2 for detail.

same-sex marriage remain. [277] Even following *Coman*, some countries in Europe continue to refuse to recognise foreign same-sex marriage.[278] This is despite leading international organisations worldwide highlighting the importance of equality concerns.[279] As discussed throughout, Article 14 European Convention contains a non-discrimination provision as do manifold provisions of EU law[280] and the ICPR.[281] All of this

---

[277] Worldwide over 70 countries continue to criminalise sexual relationships between same-sex couples.

[278] Noto La Diega, G., in chapter 'The European approach to recognising, downgrading, and erasing same-sex marriages celebrated abroad' in forthcoming edited collection, Hamilton, F. and Noto La Diega, G., (Eds.) under the working title *'Same-Sex Relationships, Law and Society'* (Routledge, 2020) explains that '.. a minority of countries (such as Hungary and Czech Republic) adopt the erasure model, whereby perfectly valid same-sex marriages celebrated abroad do not produce any effects despite the virtual availability of civil unions to nationals.' This is in direct breach of both EU Law and European human rights law as enshrined in *Coman* (n11) and *Orlandi*. (n131).

[279] Goal 10 of the UN Sustainable Development Goal is to 'reduce inequality within and among countries.' The text is available at https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-10-reduced-inequalities.html includes targets of by 2030 to 'empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.'

[280] For example Article 21 of the EU Charter of Fundamental Rights provides for non-discrimination 'based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation..' Other key pieces of EU legislation include the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation which prohibits discrimination in the area of employment on the basis of sexual orientation, religious belief, age and disability and the 2009 Lisbon Treaty which introduced a horizontal clause with a view to integrating the fight against discrimination into all EU policies and actions (Article 10 TFEU).

[281] The International Covenant on Civil and Political Rights provides at Article 26 that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

points to much continuing work for proponents of same-sex marriage.

I continue to be inspired by international comparison[282] and comparative methodology will be a focal tool in my research going forwards. My chapter in the upcoming edited collection for Routledge[283] will contain an updated comparison between the EU and ECtHR approaches considering the potential impact of Brexit. In future work, when selecting other jurisdictions pertinent for comparison, I intend to look at the USA, the Republic of Ireland and Italy. A comparison between the USA and the ECtHR provides the focus for a publication currently in draft.[284] The Republic of Ireland is the subject of two chapters in the Routledge book.[285] As part of my role as visiting Professor at the University of Pisa in Italy in March 2020 I intend to write a joint article with Professor Angioletta Sperti comparing the routes taken in England and Wales and Italy towards same-sex marriage.

---

[282] This was first inspired by attending the major EU funded international conference held at the University of Trento in 2014 entitled 'The Rights on the Move Rainbow families in Europe Conference,' my presentation at which formed publication 1 of the additional supporting publications in Appendix 4. This can be seen as a formative version of Publication 2 which is published in one of the leading international academic journals in the area.

[283] My chapter is entitled: 'The Potential of European Union Law to Further Advance LGBTQ+ Persons and Same-Sex Couples' Rights.'

[284] Current draft article entitled:' A Re-Evaluation of the Method of Incrementalist Change to Achieve Same-Sex Marriage - A Comparative Study between the United States and Europe.'

[285] Contributing authors are: Dr Fergus Ryan, Associate Professor, NUI Maynooth and Dr Brian Tobin, Lecturer, NUI Galway, Republic of Ireland.

In my future research I am interested in utilising the socio-legal doctrinal and comparative approaches employed in this PhD by publication to make further comparisons between the developing treatment of LGBTQ+ persons and other areas which are also concerns when considering equal citizenship. In this respect I have work under review concerning Northern Ireland treatment of LGBTQ+ persons and women's access to abortion rights. Following a presentation at the EPATH conference in April 2019,[286] the US Journal of Sociology Study[287] requested publication of a further article which will consider the use of consensus by ECtHR in relation to a comparison between LGBTQ+ persons and same-sex marriage cases and developing case law concerning transpersons. Following request by the International Labor Rights Case Law Journal[288] I have written a case note on CJEU advancement of transpersons' rights on the basis of non-discrimination concerning access to UK state pension.[289]

---

[286] The 3rd European Professional Association for Trans Gender Health was held in Rome in April 2019.

[287] The Journal of Sociology Study's website is available at http://www.davidpublisher.org/Home/Journal/SS

[288]The International Labor Rights Case Law Journal website is available at https://brill.com/view/journals/ilrc/ilrc-overview.xml. Please note this journal uses Americans spellings.

[289] In the case of *MB* (n11) the CJEU determined that the requirement of the Gender Recognition Act 2004, which required trans persons to annul their marriage before they would be granted a full Gender Recognition Certificate in their new sex (prior to same-sex marriage being legalised in 2013), which was also necessary to claim state pension benefits for women from the age of 60, contravened Article 4 Council Directive 79//7/EEC non-discrimination provisions.

I also plan to further develop the impact of my work. Working with multi-university partners,[290] we are investigating obtaining funding in order to create a worldwide hub of LGBTQ+ legal rights to be specifically targeted at the STEM sector.[291] The next stage is to confirm intermediate level funding in order to engage with focus groups of the intended end users. This will determine what information would be most beneficial.[292] Although at a developmental stage, the potential significance of this work lies in assisting LGBTQ+ STEM workers to access legal information about foreign law. This may ultimately not only change the behavior of individuals but also company human resources policies concerning advice to LGBTQ+ STEM workers travelling abroad.[293]

I have also designed and successfully piloted to the Women in Leadership Programme a course on the Gender Pay Gap and Company Response, which I am now investigating into turning into a stand-alone CPD course. This is also the subject of a potential separate impact case study in developmental stage. I have recently been appointed Equality Lead including

[290] See n24.

[291] It is anticipated that this would be hosted on the charity, Pride in STEM's webpage.

[292] Pride in STEM have provisionally agreed to put the focus groups together.

[293] It is anticipated that this will develop into an impact case study, with associated future bids and suggested dissemination events at relevant scientific bodies.

responsibility for a team application for Northumbria University Faculty of Business and Law's application for the Athena Swan Bronze Award. This has inspired further potential work including the proposal of a Feminist Job Application project, considering how University promotion opportunities work in practice, which may involve rewriting job applications in a feminist voice. I have also been successful in achieving funding from the VC's Equality and Diversity Programme to update Northumbria University's in-house policies concerning travel guidance resource for LGBTQ+ staff members. I am excited about the future multiple possibilities and consider that work in this area is essential. The development of LGBTQ+ rights for proponents of same-sex marriage illustrates that change is possible, but that many issues remain to be considered.

Appendix 1

Citations

Citations from Google Scholar (September 2019)

Why the margin of appreciation is not the answer to the gay marriage debate

Authors

Frances Hamilton

Publication date

2013

Journal

European Human Rights Law Review

Volume

2013

Issue

1

Pages

47-55

Publisher

Sweet & Maxwell

Cited by 5

2014201520162017

Scholar articles

Why the margin of appreciation is not the answer to the gay marriage debate
F Hamilton - European Human Rights Law Review, 2013
Cited by 5 Related articles All 2 versions

Why the margin of appreciation is not the answer to the gay marriage debate

Search within citing articles

[PDF] cambridge.orgFull View
A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee
D McGoldrick - International & Comparative Law Quarterly, 2016 - cambridge.org
The margin of appreciation (MoA) has become the central conceptual doctrine in the
institutional and jurisprudential architecture of the European Convention on Human Rights
(ECHR). This article critiques the existence and operation of the MoA within the ECHR …
Cited by 21Related articlesAll 4 versionsWeb of Science: 10

[PDF] heinonline.org

[PDF] Same-sex marriage: Building an argument before the European Court of Human Rights in light of the US experience

E Bribosia, I Rorive, L Van den Eynde - Berkeley J. Int'l L., 2014 - HeinOnline

In 2013 the question of whether same-sex couples should be able to enter into a legal
marriage was still a much-disputed societal issue at the forefront of legal discourse in many
democratic countries belonging to the Council of Europe, as well as in numerous states in …

Cited by 12Related articlesAll 8 versions

[PDF] eur.nl

The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage …

M Shahid - 2017 - papers.ssrn.com

This contribution assesses the consensus-based analysis and reasoning of the European
Court of Human Rights in recent judgments concerning equal marriage rights and compares
it to the Court's past jurisprudence on European consensus and the margin of appreciation …

Related articlesAll 6 versions

[HTML] tandfonline.com

The case for same-sex marriage before the European Court of Human Rights

F Hamilton - Journal of homosexuality, 2017 - Taylor & Francis

For proponents of same-sex marriage, this essay sets forward a critical analysis of relevant
arguments before the European Court of Human Rights. The privacy aspect of Article 8
European Convention of Human Rights will never be a successful argument with reference …

Cited by 1Related articlesAll 5 versions

[PDF] nchu.edu.tw

[PDF] A Study on Same-Sex Relationships: A Socio-legal Perspective

趙書含 - 2015 - ir.lib.nchu.edu.tw

The issue of same-sex relationships has been an important topic of debate under
international and national law. By taking a socio-legal perspective, this thesis investigates
the historical background and the evolution of law regarding same-sex relationships. After …

Related articles

Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change

Authors

Frances Hamilton

Publication date

2015

Journal

J. Transnat'l L. & Pol'y

Volume

25

Pages

121

Description

The case for same-sex marriage before the European Court of Human Rights

Authors

Frances Hamilton

Publication date

2017/10/29

Journal

Journal of homosexuality

Pages

1-25

Publisher

Routledge

Same-sex marriage, consensus, certainty and the European court of human rights

Frances Hamilton

Publication date

2018

Journal

European Human Rights Law Review

Volume

2018

Issue

1

Pages

33 - 45

Publisher

Sweet & Maxwell

Downloads

My published piece 'The Case for Same-Sex Marriage Before the European Court of Human Rights has been downloaded from the Journal of Homosexuality, Taylor and Francis Website available at

https://www.tandfonline.com/doi/abs/10.1080/00918369.2017.1380991

887 times as at September 2019.

Northumbria Research Link shows downloads from the Northumbria University Library website for my profile

Activity Overview

2,251 Hits

Most downloaded items

1.	**Why the margin of appreciation is not the answer to the gay marriage debate**	372
2.	**Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change**	89
3.	**The case for same-sex marriage before the European Court of Human Rights**	86
4.	**The Symbolic Status of Same Sex Marriage**	47
5.	**Same-sex relationships, choice of law and the continued recognised relationship theory**	14
6.	**Same-sex marriage, consensus, certainty and the European court of human rights**	13
7.	**The differing treatment of same sex couples by European Union law and the European convention on human rights: the European Union concept of citizenship**	6
8.	**The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders**	2
9.	**Rights for LGBTQ persons: MB v Secretary of State for Work and Pensions**	0

102550all

International requests through Northumbria University Library

The following information demonstrates a selection of requests, received through Northumbria University library from Spain, South Africa, Germany, Belgium, Poland, Ireland and Australia.

From: Northumbria Research Link <as.researchlink@northumbria.ac.uk>
Sent: 10 March 2019 21:43
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders "

This item has been requested from Northumbria Research Link by arivvan@upo.es . Please can you respond.

Hamilton, Frances (2018) *The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders.* Family Law. ISSN 0014-7281
Family Law Journal Article 2018.pdf

The following reason was given:

I am writing, as part time professor at the University Pablo de Olavide (Sevilla, Spain), a paper about the Coman case.

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

Accept the request

Reject the request

From: Northumbria Research Link <as.researchlink@northumbria.ac.uk>
Sent: 22 November 2018 13:18
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " The Expanding Concept of EU Citizenship Free

Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders "

This item has been requested from Northumbria Research Link by aleksandrs.fillers@uantwerpen.be . Please can you respond.

Hamilton, Frances (2018) *The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders.* Family Law. ISSN 0014-7281
Family Law Journal Article 2018.pdf

The following reason was given:

Dear Sir/Madam, I am a private international law researcher at the University of Antwerp (Belgium) writing my PhD on EU private international law. I was interested to read the contribution by F. Hamilton on Expanding of EU citizenship rights to free movement as it deals with an issue that is relevant for my research: substitution of traditional private international law by EU primary law (in this case free movement). Kind regards, Aleksandrs Fillers

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

Accept the request

Reject the request

From: Northumbria Research Link <as.researchlink@northumbria.ac.uk>
Sent: 14 November 2018 20:52
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders "

This item has been requested from Northumbria Research Link by bryonymoore345@outlook.com<mailto:bryonymoore345@outlook.com> . Please can you respond.
Hamilton, Frances (2018) The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders. <http://nrl.northumbria.ac.uk/cgi/users/home?screen=EPrint::View&eprintid=33865> Family Law. ISSN 0014-7281 Family Law Journal Article 2018.pdf
The following reason was given:
To Whom it may concern, I am a recent graduate interested in family law and protection for minorities, and I am very interested in the area of law, and I would be reading the paper purely out of interest in the subject

matter! Thank you very much :) Kind regards, Bryony Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.
Accept the request<http://nrl.northumbria.ac.uk/cgi/users/home?screen=Request%3A%3ARespond&requestid=2690&action=accept>
Reject the request<http://nrl.northumbria.ac.uk/cgi/users/home?screen=Request%3A%3ARespond&requestid=2690&action=reject>

From: Northumbria Research Link <as.researchlink@northumbria.ac.uk>
Sent: 04 September 2018 21:28
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders "

This item has been requested from Northumbria Research Link by m.m.adam.czwarno@gmail.com . Please can you respond.

Hamilton, Frances (2018) *The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders.* Family Law. ISSN 0014-7281
Family Law Journal Article 2018.pdf

The following reason was given:

I'm a student of law and history at the College of Inter-Area Individual Studies In the Humanities and Social Sciences at the University of Warsaw. Currently collecting academic material to write a legal opinion on the ECJ ruling in Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări (Case C-673/16).

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

Accept the request

Reject the request

From: Northumbria Research Link [mailto:as.researchlink@northumbria.ac.uk]
Sent: 27 April 2017 14:12

To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " Why the margin of appreciation is not the answer to the gay marriage debate "

This item has been requested from Northumbria Research Link by sandra.lukosek@yahoo.de . Please can you respond.

Hamilton, Frances (2013) *Why the margin of appreciation is not the answer to the gay marriage debate.* European Human Rights Law Review, 2013 (1). pp. 47-55. ISSN 1361-1526

The following reason was given:

Dear Sir or Madam, I am working on behalf of an exchange programme from Humboldt University, Berlin/ Germany. I am preparing for an exchange seminar with German and Armenian students about the ECHR. One of the topics will be: Implications of the margin of appreciation and the principle of subsidiarity in the context of Art. 8 and 12 - Same sex marriage regulations in the domestic legislation of Armenia and Germany. I think it would be very helpful to take this Article into consideration and I woul be very gratful, if you could send it to me. Thank you and kind regards Sandra

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

From: Northumbria Research Link [mailto:as.researchlink@northumbria.ac.uk]
Sent: 13 March 2017 14:21
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " Why the margin of appreciation is not the answer to the gay marriage debate "

This item has been requested from Northumbria Research Link by mcknight-c5@email.ulster.ac.uk . Please can you respond.

Hamilton, Frances (2013) *Why the margin of appreciation is not the answer to the gay marriage debate.* European Human Rights Law Review, 2013 (1). pp. 47-55. ISSN 1361-1526

The following reason was given:

To Whom it Concerns, I am a final year Law student at Ulster University and I am doing a dissertation regarding same-sex marriage in Northern Ireland and the role of the devolved government in protecting human rights.

Obviously as part of this the margin of appreciation needs to be discussed and I believe this article would be of help. If this article is used it will obviously be fully referenced and acknowledged within the work in accordance with OSCOLA referencing. Thank you in advance Caoimhe McKnight

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

From: Northumbria Research Link [mailto:as.researchlink@northumbria.ac.uk]
Sent: 10 February 2017 01:43
To: AS researchlink <as.researchlink@northumbria.ac.uk>
Subject: Request for " Why the margin of appreciation is not the answer to the gay marriage debate "

This item has been requested from Northumbria Research Link by claerwen.ohara@gmail.com . Please can you respond.

Hamilton, Frances (2013) *Why the margin of appreciation is not the answer to the gay marriage debate.* European Human Rights Law Review, 2013 (1). pp. 47-55. ISSN 1361-1526

The following reason was given:

Hello, I would like to request a copy of this article as part of some research that I am conducting in order to put together a phd proposal. I cannot access this article through the Monash University database. Thank you

Please consider removing restrictions or uploading the full text to the archive so that it will be available immediately to future searchers.

From: Mills, L [lmills@sun.ac.za] <lmills@sun.ac.za>
Sent: 20 November 2018 09:59
To: Frances Hamilton <frances.hamilton@northumbria.ac.uk>
Subject: [SPAM] MB v Secretary of State for Work and Pensions

Dear Frances,

My name is Lize and I am a law lecturer at Stellenbosch University in South Africa. I am currently trying to write an article comparing

the decision of *MB v Secretary of State for Work and Pensions* to that of a South African decision, namely *KOS v Minister of Home Affairs* - the similarity being that in both instances the State required persons who have had their natal sex changed, to first terminate their marriage before their sex change would be recognised, despite clear enabling legislation to the contrary.

While doing my research, I came across a reference to your article:

Hamilton, Frances (2018) *MB v Secretary of State for Work and Pensions: Further Development from the European Court of Justice for LGTBQ Persons.* Family Law. ISSN 0014-7281

Our librarian has tried his best to find a copy of the article but there is an embargo placed on this until 2020? Is this correct? Do you perhaps have information as to how and when I will be able to acquire a copy?

Kind regards,

Lize

Dr L Mills

Senior Lecturer | Department of Private Law

Faculty of Law

e: lmills@sun.ac.za | **t:** +27 21 808 3179/84

a: Old Main Building | Room 1009

Cnr of Ryneveld and Victoria Streets

Stellenbosch

Appendix 2

Guest Seminars and Conferences I have organised in my role as Co-Convenor for the Northumbria University Gender Sexuality and the Law Research Interest Group

Talks which I have organised as Gender Sexuality and the Law Research Interest Group Co-Convenor include;

7 May 2019, Two Speakers on the Recognition of Foreign Same-Sex Marriage,' Tomás Dombos, Hatter Society, Hungary and Dr Guido Noto La Diega, Northumbria University.

7 February 2019, Dr Andy Hayward, Durham University, 'Relationship with Status – The Emerging Institution of Civil Partnership in England and Wales.

10th September 2018, The second SLS funded conference entitled 'Same-Sex Relationships, A New Revolutionary Era and the Influence of Legal and Social Change' took place on 10th September 2018. This attracted international presentations from academics, lawyers and sociologists based in the UK, Ireland, Italy, the Netherlands and Cyprus.

3 May 2018, Dr Sarah Lamble, Birkbeck University on the subject

of ‘Queer Approaches to Transformative Justice.

24th April 2018, Dr Chris Dietz, Leeds University on the subject of the ‘Self Declaration Model of Gender in Denmark.3

December 2017, Dr Raven Bowen, York University on ‘Understanding Duality – Examining Engagement in Sex Work Alongside Square Jobs.,’

March 2015, Prof Rosemary Auchmuty, Reading University on Civil Partnership Dissolution.

October 2014, Dr Nikki Godden-Rausal Newcastle University on Revenge Porn

June 2014. Co-organised with Sunderland University entitled ‘Social and Legal Implications of Same-sex Marriage in North East’ resulted in fifty local activists being invited.

October 2013, Professor Rosemary Hunter, Kent University on the Feminist Judgments Project.

Appendix 3

Ethical Approval Confirmation

Primae Face Case

Co-authorship Agreement Documentation

Ethical Approval Confirmation

From: EthicsOnline@Northumbria <EthicsOnline@Northumbria>
Sent: 01 November 2018 09:10
To: Frances Hamilton <frances.hamilton@northumbria.ac.uk>
Subject: Research Ethics: Your submission has been approved

Dear Frances Hamilton,

Submission Ref: 12110

Following independent peer review of the above proposal*, I am pleased to inform you that **APPROVAL** has been granted on the basis of this proposal and subject to continued compliance with the University policies on ethics, informed consent, and any other policies applicable to your individual research. You should also have current Disclosure & Barring Service (DBS) clearance if your research involves working with children and/or vulnerable adults.

* note: Staff Low Risk applications are auto-approved without independent peer review.

The University's Policies and Procedures are here

All researchers must also notify this office of the following:

- Any significant changes to the study design, by submitting an 'Ethics Amendment Form'
- Any incidents which have an adverse effect on participants, researchers or study outcomes, by submitting an 'Ethical incident Form'
- Any suspension or abandonment of the study.

Please check your approved proposal for any Approval Conditions upon which approval has been made.

Use this link to view the submission: View Submission

Research Ethics Home: Research Ethics Home

Please do not reply to this email. This is an unmonitored mailbox. If you are a student, queries should be discussed with your Module Tutor/Supervisor. If you are a member of staff please consult your Department Ethics Lead.

Primae Facie Case

(a) Working Title: 'What Role Can the European Court of Human Rights ('ECtHR') and the European Union ('EU') Play in Relation to Same-Sex Marriage Claims and What Further Impact Does This Have Internationally?

(b) Summary (300 words maximum). This work has been published at a time of rapid social and legal change worldwide concerning the recognition of same-sex relationships. When this work was begun in 2012 only six countries in Europe had same-sex marriage and today that number is up to 15. Unlike many prominent works on this matter which are highly influenced by feminist / queer theoretical approaches, the research methodology utilised is largely doctrinal, socio-legal and comparative in nature. These works make a novel and significant contribution to the prior knowledge base in a number of ways. (1) They provide a benchmark in relation to ECtHR case law concerning same-sex marriage. A novel critique of same-sex marriage claims based on the European Convention is set forward together with a novel critique of the consensus doctrine and a suggested original approach of how the ECtHR can address this. (2) Further articles demonstrate originality by predicting the importance of EU recognition of same-sex relationships where free movement of EU citizens and their non-EU national same-sex spouses are concerned and by recommending a novel conflicts of law theory. In addition further original work is demonstrated by discussing the impact of Brexit in relation to free movement rights of same-sex

couples. (3) When considering international repercussions a novel approach is suggested by stating that incrementalism can be used in a strategic manner. These works have been impactful in relation to informing teaching, being utilised in international conferences and supporting present and anticipated future funding applications. Many have been assessed as internationally excellent following peer review in preparation for Northumbria University's Research Excellence Framework (REF 2021) selection and have been cited in international academic literature.

(c) List of published work on which the application is based:

(1) Frances Hamilton, 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate' (2013) 1 *European Human Rights Law Review* 47 -55.

(2) Frances Hamilton, 'Gays and the European Court of Human Rights: the Equality Argument 'pp75-80 in ebook C Casonato and A Schuster (eds) 'Rights on the Move – Rainbow Family in Europe: Proceedings of the Conference Trento 16-17 October 2014 (Universita degli studi di Trento 2014) available online at http://eprints.biblio.unitn.it/4448

(3) Frances Hamilton, 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2017) *Journal of Homosexuality* 1-25.

(4) Frances Hamilton, 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) 1 *European Human Rights Law R*eview 33 – 45.

(5) 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(1) *Journal of International and Comparative Law* 87-113.

(6) 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 -31. (Contribution as Joint Author).

(7) Frances Hamilton, 'The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders' (2018) *Fam Law* 693 – 696.

(8) Frances Hamilton, 'The Symbolic Status of Same-Sex Marriage' (2017) 47 *Fam Law* 851-854.

(9) Frances Hamilton, 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist (2016) 25 *Journal of Transnational Law and Policy* 121-153

Co-authorship Agreement Documentation

DECLARATION OF CO-AUTHORSHIP OF PUBLISHED WORK

(Please use one form per co-author per publication)

Section A
Name of candidate: Frances Hamilton

Name of co-author: Lauren Clayton-Helm

Full bibliographical details of the publication (*including authors*)**:**

Hamilton, F., and Clayton-Helm, L., Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory' 3(1) (2016) *Journal of Internaitonal and Comparative Law 1-31*

Section B
DECLARATION BY CANDIDATE (*delete as appropriate*)

I declare that my contribution to the above publication was as:

(i) principal author

(ii) joint author

(iii) minor contributing author

My specific contribution to the publication was (*maximum 50 words*):

Identifying public policy concerns, which are specifically relevant to same-sex relationships and considering that these call for a more extended choice of law. Jointly developing the 'continued recognised relationship theory' and advocating involvement at an EU level. Putting together the structure. Both authors contributed throughout to the final resulting output.

Signed: F. Hamilton (candidate) **10th January 2019** (date)

Section C
STATEMENT BY CO-AUTHOR (*delete as appropriate*)

Either **(i) I agree with the above declaration by the candidate**

Signed: L. Clayton-Helm co-author) **4/2/19** (date)

Appendix 4

Further supporting publications

(1) Hamilton, F., 'Gays and the European Court of Human Rights: the Equality Argument 'pp75-80 in ebook Casonato, C. and Schuster, A. (eds) 'Rights on the Move – Rainbow Family in Europe: Proceedings of the Conference Trento 16-17 October 2014 (Universita degli studi di Trento 2014) available online at http://eprints.biblio.unitn.it/4448

(2) Hamilton, F., 'Rights For LGBTQ Persons: MB v Secretary of State for Work and Pensions (2019) *Family Law* (1) 54 – 57.

Additional Supporting Publication One: Hamilton, F., 'Gays and the European Court of Human Rights: the Equality Argument 'pp75-80 in ebook Casonato, C. and Schuster, A. (eds) 'Rights on the Move – Rainbow Family in Europe: Proceedings of the Conference Trento 16-17 October 2014 (Universita degli studi di Trento 2014) available online at http://eprints.biblio.unitn.it/4448)

RIGHTS *ON THE MOVE*

Rainbow families in Europe

Conference proceedings

Trento, 16-17 October 2014

Carlo Casonato and
Alexander Schuster (eds.)

Rights On The Move – Rainbow Families in Europe

Proceedings of the Conference, Trento, 16-17 October 2014

Edited by

Carlo Casonato and
Alexander Schuster

UNIVERSITY OF TRENTO

2014

E-published in Italy by

Università degli Studi di Trento, Facoltà di
Giurisprudenza via Calepina, 14
I-38122 Trento
http://web.unitn.it/giurisprudenza

First edition published in 2014

Rights on the move : rainbow families in Europe : proceedings of the conference : Trento, 16-17 October 2014 / edited by Carlo Casonato and Alexander Schuster. – Trento : Università degli Studi di Trento. Facoltà di
Giurisprudenza, 2014. – 1 testo elettronico (PDF) (xvi, 407 p.). - ISBN: 978-88-8443-591-0

ISBN: 978-88-8443-591-0

This publication has been produced with the financial assistance of the European Union, DG Justice, Fundamental Rights and Citizenship Programme, Grant agreement JUST/2012/FRAC/AG/2805. The views expressed are those of the authors. The report does not reflect the views of the European Commission, nor does the European Commission accept responsibility for the accuracy of the information contained herein.

More on the *Rights on the move – Rainbow families in Europe* project at

http://www.rightsonthemove.eu

Project partners

Gays and the European Court of Human Rights: the Equality Argument

Frances Hamilton[1]

Abstract

This piece articulates specific difficulties for the European Court of Human Rights ('ECtHR') in engaging with equality arguments in relation to same-sex marriage. It is argued that it is a necessity to engage with equality arguments due to the close connections between equality, citizenship and marriage. The text of the European Convention of Human Rights ('ECHR') does not assist as Article 14 (equality) is a conditional right only. Whilst earlier cases concerning gay rights were secured by a right to privacy (Article 8) with a narrow margin of appreciation which reflected a universally understood concept, in relation to equality arguments there is greater relativist scope leading to a wider margin of appreciation. Lastly, in seeking to engage in equality arguments comparisons between different groups categorised by sexual orientation are required, thereby further emphasising the concept of the dominant heterosexual norm.

Keywords

Same-Sex Marriage, Equality, Citizenship, Margin of Appreciation

* * * * *

Introduction

Traditionally, privacy arguments have been the most successful in the advancement of gay rights before the ECtHR. This point has been asserted by other authors[2] and is also

[1] Frances Hamilton is a Senior Lecturer in Law at Northumbria University.

[2] Other authors who also argue this point include Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67; Barbara Stark, 'When Globalization Hits Home: International Family Law Comes of Age', (2006) 36 *Vanderbilt Journal of Transnational Law* 1551 and Carmelo Danisi, (2011) 'How far can the European Court of Human Rights go in the Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' 9(4) *International Journal of Constitutional Law* 793.

reflected in the case law of the ECtHR.[3] It is argued that locating the protection of gay rights specifically within the protection of privacy has limited the scope for the evolution of gay rights.[45] In contrast until recently there have been far fewer arguments made under Article 14, which is the non-discrimination clause in the ECHR. Article 14 (equality) is a conditional right which can only be asserted where another alleged violation of the ECHR is made simultaneously.[6] Throughout its earlier judgments in the area of gay rights the ECtHR did not find it necessary to consider the arguments brought forward on the basis of Article 14. In *Dudgeon v UK,* the ECtHR found that 'there is no call to rule on the merits' of Article 14 as the same complaint had already been examined under Article 8'[7] and this set a trend for further cases following the same approach.[8] Whilst more recent cases have given credence to arguments of equality,[9] these continue to have to be made in connection with Article 8. The success of equality arguments has also been limited.[10] In relation to same-sex marriage, a wide margin of appreciation was afforded to contracting states to determine their own policies, due to a lack of consensus.[11]

---

[3] Cases include for example *Dudgeon v UK,* Application No 7525/76, Judgment of 22 October 1981; *Sutherland v UK,* Application No 25186/94, Judgment of 21 May 1996; *Smith and Grady v UK*, Application Nos 33985/96 and

[4] /96, Judgment of 27 September 1999 and *Lustig-Prean and Beckett v UK*, Application Nos 31417/96 and 32377/96, Judgment of 27 September 1999.

[5] Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67.

[6] See for further explanation George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705 at 708.

[7] *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 69. Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 reports at 1030 that in this case the '[c]ourt did not find it necessary to examine the case under Article 14.'

[8] See for example *ADT v UK* (2001) 31 E.H.R.R. 33 at paragraph 40, *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R .548 at paragraphs 107-109 and *Smith and Grady v UK* (2000) 29 E.H.R.R. 493 at paragraphs 114 – 116.

[9] Cases where the ECtHR has given more emphasis to equality arguments include for example *Karner v Austria*, Application No 40016/98, Judgment of 24 July 2003,*Salgueiro da Silva Mouta v Portugal,* Application No 33290/96, *Lardner v Austria*, Application No 18297/03, Judgment of 3 February, *EB v France*, X and Others v Austria, Application No 19010/07, Judgment of 19 February 2013.

[10] For example *Schalk and Kopf v Austria* 53 E.H.R.R. 20.

[11] *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20 at paragraph 105.

Concentration upon the protection of privacy, means that the ECtHR has not evaluated and developed equality arguments under Article 14. It is necessary to engage in equality arguments in relation to the case for same-sex marriage, which is a concept very much on the public stage. Equality arguments make a strong case for same-sex marriage because of the close connections between equality, citizenship and marriage. This piece considers specific difficulties for the ECtHR in utilizing the equality argument.

The Limitations of the Privacy Argument in Relation to Same-Sex Marriage

Arguments based on privacy[12] result in basic protections for gays, and would not be successful in relation to same-sex marriage. The stress on privacy before the ECtHR has resulted in what Johnson describes as a 'significant limitation… in respect of the 'evolution' of lesbian and gay human rights across Europe.'[13] Marriage is a concept very much on the public stage and cannot be protected by a right to be 'let alone.' Whilst privacy was a valuable argument when considering the early gay rights cases such as the decriminalisation of sodomy, this argument is no longer so effective when gays want to obtain public rights such as same-sex marriage.

The difference between being protected under privacy as opposed to equality has a huge impact upon the extent of the rights protected. Bamforth argues that this debate is important on a constitutional level.[14] Whilst privacy is a right to be 'let alone,' in contrast equality is associated with citizenship and its public status.[15] An important part of citizenship

---

[12] The right to privacy has traditionally been defined as containing a focus on a right to be 'let alone.' It is described by Mill as 'a circle around every individual human being which no government … ought to be permitted to overstep.' John Stuart Mill, *Principles of Political Economy* (London, New York and Toronto: Longmans Green and Co, 1936) at 943.

[13] Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67 at 76. For further criticism see also Eve Sedgewick, *Epistemology of the Closet* (Harmondsworth: Penguin, 1990) at 71 and Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1040.

[14] Nicholas Bamforth, 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477.

[15] Nicholas Bamforth, (2012) 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477-492 at 478 referring to Marshall, 'Citizenship and Social Class', in Marshall and Bottomore (eds), (1992) *Citizenship and Social Class* 18.

in this context concerns its connections with marriage.[16] Thus, depending on whether the ECtHR relies upon privacy or equality determines whether it will be possible to recognise same-sex marriage. In a traditional reliance upon privacy arguments, the ECtHR has limited its remit for development. This is in contrast to other jurisdictions that have relied successfully upon the equality argument in relation to same-sex marriage.[17] It is argued that it is necessary for the ECtHR to engage with this argument in order to recognise same-sex marriage. Obstacles remain for the ECtHR in using the equality argument. Firstly, the equality argument has a wider margin of appreciation than that of privacy. Secondly, the equality argument requires categorisation of different groups of sexual orientation therefore reinforcing the idea of the heteronormative standard.

Equality has a Wider Margin of Appreciation than Privacy

In this section a specific disadvantage for the ECtHR in seeking to utilize the equality argument before the ECtHR is identified. The doctrine of margin of appreciation[18] has come under criticism for many reasons, including vagueness, lack of transparency[19] and the fact that it

[16] See for further discussion Angela Harris, 'Loving Before and After the Law' (2007-2008) 76 *Fordham International Law Review* 2821 at 2822, Nicholas Bamforth, (2012) 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477, Nancy Cott, *Public Vows: A History of Marriage and the Nation 2* (2000) at 1, Brenda Cossman, (2007*) Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging 27,* Dimitri Kochenov (2009) 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' 33(1) *Fordham International Law Review* 156 at 163.

[17] See for example *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40)[2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), 1 December 2005 and and *United States v. Windsor*, 570 U.S. (2013) (Docket No. 12-307).

[18] The margin of appreciation has been described as 'amount of discretion...in fulfilling their obligations under the ECtHR' Petra Butler, 'Margin of Appreciation - A Note towards a solution for the Pacific' (2008-2009) 39 *Victoria University Wellington Law Rev*iew 687 at 695 referring to Howard Charles Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Netherlands: Brill, 1996) at 13 who describes the margin of appreciation as '[t]he latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies.'

[19] See Emily Wada, 'A Pretty Picture The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 275 at 280; Petra Butler, 'Margin of Appreciation - A Note towards a solution for the Pacific' (2008-2009) 39 *Victoria University Wellington Law Rev*iew 687 at 702; Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638 at 641 and Jeffrey Brauch, 'The Margin of

leaves the door open for potential discrimination against minorities.[20] The criticism of the margin of appreciation here relates to the varying widths given to the margin of appreciation in respect of specific rights. In relation to privacy cases the ECtHR has confirmed that there is a narrow margin of appreciation,[21] leading to a strong protection of privacy interests. This was justified in respect of privacy arguments because of the harm which the restriction of private sexual lives could do to individuals and also the consensus among contracting states that there is no need to criminalise such activities. Such arguments do not apply to same-sex marriage. Same-sex marriage cannot be brought forward on the basis of a privacy argument as it is a concept on the public stage. Instead an equality argument has to be used. In areas of little international consensus the ECtHR applies a wide margin of appreciation.[22] It is therefore no

---

Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 113 at 121.

[20] See Loveday Hudson, 'A Marriage by any other name? Shalk and Kopf v Austria' 11(1) *Human Rights Law Review* 170. See also Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *New York University Journal of International Law and Politics* 843 and George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' *European Journal of International Law* 509, Sweeney, 'Margin of Appreciation: Cultural relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *International and Comparative Law Quarterly* 459 at 462 quoting Lester, 'Universality versus Subsidiarity: a Reply' (1998) 1 *European Human Rights Law Review* 73 at 76 and Frances Hamilton, 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate'2013(1) *European Human Rights Law Review* 47.

[21] See *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 52, *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R. 548 at paragraph 82 and in *Smith and Grady* (2000) 29 E.H.R.R. 493 at paragraph 89 the ECtHR discussed the fact that since these cases concerned 'a most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 paragraph 2 of the Convention.' See also *ADT v UK* (2001) 31 E.H.R.R. 33 at paragraph 38.

[22] Tom Lewis, 'What not to wear: Religious rights, the European Court and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395 at 397; Rafaella Nigro, 'The Margin of Appreciation Doctrine and the Case Law of the European Court of Human Rights on the Islamic Veil' (2010) 11 *Human Rights Law Review* 531; Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638 and Emily Wada, 'A Pretty Picture The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loyola of Los Angeles International & Comparative Law Review* at 279 who comments that while the 'presence of a consensus does not of itself mean that there is a [narrow] margin of appreciation… the absence of a consensus is probably a decisive factor in finding that there is a [wide] margin of appreciation.' See also Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 *Columbia Journal of European Law* 113 at 128.

surprise that when it came to same-sex marriage a wide margin of appreciation was found. In *Schalk and Kopf v Austria*, the ECtHR stated that '[t]he issue of same-sex marriage concerned a sensitive area of social, political and religious controversy. In the absence of consensus, the State enjoyed a particularly wide margin of appreciation.'[23] In moving from privacy as the main focus of gay rights to an equality argument, the ECtHR has potentially weakened protection for gays by moving from the universally understood right of privacy to the more amorphous right of equality.[24] The next section considers a further difficulty with the use of the equality argument by the ECtHR.

The Equality Argument Requires Categorisation of Individuals into Classes of Sexual Orientation

Throughout its case law the ECtHR refers to gays as 'homosexuals', creating a clear categorisation of sexual interests.[25] This was the common practice of the ECtHR, but in using a privacy argument there was scope for moving away from this practice should it become to be seen as unfavourable. Categorisation of individuals into different groups dependent upon sexual orientation means that the idea of the heteronormative stereotype is reinforced.[26] When the equality argument is deployed it becomes a requirement to categorise individuals into classes of sexual orientation, as equality necessitates comparisons to be made between different groups. The categorisation of individuals is harmful as it means that minority groups are asserting their 'other'ness against the 'heteronormal' group, and further it creates an identitarian crisis as individuals have to fit themselves within specific boxes which may be inappropriate. The deployment of the equality argument exacerbates these critiques.

Queer theorists challenge the categorisation of relationships into homosexual and heterosexual and argue that categories should not be seen 'fixed and given.'[27] This could lead

[23] *Schalk and Kopf v Austria* 53 EHRR 20 at paragraph 45.

[24] See also Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001) 15 *Emory International Law Review* 391 at 416-417.

[25] See for example *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 32; *Sutherland v UK,* Admissability, Application Number 25186/94, 21 May 1996 at paragraph 2; *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R. 548 at paragraph 67; *Smith and Grady* (2000) 29 E.H.R.R. 493 at paragraph 74 and *Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 at paragraph 30.

[26] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 on this practice.

[27] See Ibid. and Felicia Kornbluh, 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) Law and Social Inquiry 537.

to an identitarian crisis for those individuals who are forced to identify with a certain group, thereby eroding the true variety of identities to which individuals may ascribe.[28] By ascribing labels to certain categories such as the use of homosexual, this is turn forcing individuals to join a particular group in order to bring legal challenges. It also confirms the dominance of the heteronormative norm. Grigolo explains that categorisation into different sexual groups is disadvantageous because it 'reinforces the dichotomy within which the 'other' ...is defined' meaning that the 'position for the dominant (the heterosexual man) is confirmed and stabilised.'[29] It is argued that the use of equality argument has exacerbated the need to categorise individuals into groups of sexual interests, as equality necessitates a comparison to be made.[30]

Conclusion

This piece sets out some of the specific difficulties facing the ECtHR in seeking to engage in the equality argument as opposed to privacy. It is necessary to deploy the use of the equality argument because of the close connections between the interlocking concepts of marriage, equality and citizenship. International examples from South Africa and the US have also demonstrated the importance of the equality argument on the international stage.[31] As Polikoff, a queer theorist, states 'when the claim for same-sex marriage is based on equality

---

[28] See Ibid. See also Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1027-1028; and Felicia Kornbluh, 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) *Law and Social Inquiry* 537 at 539.

[29] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1025.

[30] See Marta Cartabia, 'The European Court of Human Rights: Judging non-discrimination' (2011) 9(4) *International Journal of Constitutional Law* 808-814 at 812 Cartabia notes that 'the very structure of the discrimination test as such is responsible for the unpredictable outcomes of the controversies' because '… [as] a matter of fact, judging non-discrimination implies drawing a comparison between different persons and situations.'

[31] See for example *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40)[2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) and *United States v. Windsor*, 570 U.S. (2013) (Docket No. 12-307).

it can still be problematic.'[32] It has been demonstrated that the ECtHR traditionally focused on privacy as a justification, meaning that equality has not been the main focus for the ECtHR. The text of the ECHR itself does not aid the ECtHR as article 14 is a conditional right. The free standing right to equality under Protocol 12 has not been ratified by the UK. Also in deploying the equality argument the ECtHR is moving from the privacy concept which has a narrow margin of appreciation, to a much wider margin of appreciation under an equality doctrine around which there is a variable standard and therefore less guaranteed protection for gays and same-sex couples. Finally, the equality argument presupposes categorisation of individuals into certain specific boxes of sexual interest. This may not be desirable either because of the strengthening of the heteronormative approach of the ECtHR or because of the difficulties of individuals in identifying with certain set categories. It has become necessary for the ECtHR to deploy arguments based on equality when cases are brought concerning same-sex marriage, but the author has here articulated some of the specific difficulties for the ECtHR in this regard. The way forward based on equality is not easy, and it is arguably for that reason that the ECtHR in *Schalk and Kopf v Austria* settled for a lack of consensus argument.[33]

[32] Nancy Polikoff, 'Equality and Justice for Lesbian and Gay Families and Relationships' (2008-2009) 61 *Rutgers Law Review* 529 at 547.

[33] *Schalk and Kopf v Austria* 53 EHRR 20 at paragraph 45.

Additional Supporting Publication Two: Hamilton, F., 'Rights For LGBTQ Persons: MB v Secretary of State for Work and Pensions (2019) Family Law (1) 54 – 57.

Rights for LGBTQ persons: MB v Secretary of State for Work and Pensions

Frances Hamilton

Case Comment

Family Law

Fam. Law 2019, 49(Jan), 54-56

Subject
Social security

Other related subjects
European Union; Family law; Human **rights**

Keywords
Annulment; Direct discrimination; EU law; Gender recognition certificates; Marriage; Sex discrimination; State retirement pension; Transsexuals

Abstract

Discusses MB v Secretary of State for Work and Pensions (C-451/16) (ECJ) on whether the denial of a state pension to a transgender person living as a woman when she reached the age of 60 in 2008, on the ground that she had not obtained a gender recognition certificate due to her wish not to annul her marriage, a condition at the time, had infringed the non-discrimination provisions of Directive 79/7 art.4.

Cases cited

MB v Secretary of State for Work and Pensions (C-451/16) EU:C:2018:492; [2019] 1 C.M.L.R. 4; [2018] 6 WLUK 500 (ECJ (Grand Chamber))

Coman v Inspectoratul General pentru Imigrari (C-673/16) EU:C:2018:385; [2019] 1 W.L.R. 425; [2018] 6 WLUK 15 (ECJ (Grand Chamber))

Legislation cited

Directive 79/7 on equal treatment for men and women in matters of social security art.4

Gender Recognition Act 2004 (c.7)s.4

European Court of Justice of rights for LGBTQ persons.

In the case of MB v Secretary of State for Work and Pensions[Case C-451/16] [2018] Pens. L.R. 17, the European Court of Justice ('CJEU') determined that the requirement of the Gender Recognition Act 2004 ('GRA 2004'), which required trans persons to annul their marriage before they would be granted a full Gender Recognition Certificate in their new sex (prior to same-sex marriage being legalised in 2013), which was also necessary to claim state pension benefits for women from the age of 60, contravened Article 4 Council Directive 79//7/EEC non-discrimination provisions. The consequence of the GRA 2004 provisions meant that many individuals never obtained gender recognition certificates as they did not want to annul their marriages. This subsequently meant that they could not exercise the right to claim the state pension at the lower age of 60 previously given to women (where men had to wait until 65). The far reaching judgment from the CJEU demonstrates again that the expanding nature of EU family law. The concept of EU citizenship is leading to an ever greater array of rights being given to EU citizens. Following Brexit UK citizens will no longer be able to benefit from such interventions from the CJEU.

Introduction

The case of *MB v Secretary of State for Work and Pensions [Case C-451/16] [2018] Pens. L.R. 17* ('the MB case') concerned a trans person who was born a male in 1948 and married in 1974. She subsequently underwent gender reassignment surgery in 1995. When she sought to claim her state pension at the age of 60 in 2008 she was rejected. At the time (prior to state pension reform) whilst women were entitled to access their pensions from the age of 60, men had to wait until 65 (s44 Social Security Contributions Act 1992 read in conjunction with s122 of that Act and with Schedule 4 paragraph1 of the Pensions Act 1995). MB was rejected on the basis that the UK state still officially classified her as a male. This was because MB had never obtained a full Gender Recognition Certificate. MB had not completed this legal process because the Gender Recognition Act ('GRA 2004') in force at the time, prior to the legalisation of same-sex marriage in 2013, required a married applicant to annul their marriage. MB did not wish to annul her marriage.

At the time the GRA was enacted in 2004 the UK had only legalised civil partnership, by way of the Civil Partnership Act 2004, and not same-sex marriage. In 2004 it was considered by some that although civil partnerships had given nearly the same legal rights to same-sex couples, that UK society was not ready for same-sex marriage. Jacqui Smith (then Deputy Minister for Women and Equality) stated in the House of Commons that 'I recognise that Hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage' (See Hansard, HC, 12 October 2004, Col 177). The GRA 2004 therefore provided that in order to obtain a full gender recognition certificate not only did strict medical conditions have to be met but that also that a married applicant had to have their marriage annulled by the court (section 4(3) and section 5 GRA 2004). This provision was only reformed following the Marriage (Same Sex Couples) Act 2013, Schedule 5 of which amended s4 GRA 2004 to provide that a full gender recognition certificate could be issued to a married applicant if their spouse consents.

The original requirements of the GRA 2004 requiring a marriage to be annulled before a full gender recognition certificate could be issued required a very 'painful and sensitive decision' for many trans persons in stable marriages who had no desire to divorce (see for comment http://www.journalonline.co.uk/Magazine/54-

10/1007115.aspx). Whilst a consequence of the Same Sex Marriage 2013 provisions is that 'trans persons are no longer forced to choose between the legal recognition of their relationship or of their gender identity' (See Charlotte Bendall, 'Publication Review. From Civil Partnership to Same Sex Marriage: Interdisciplinary Reflections' Eds, by Nicola Barker and Daniel Monk , Int. J.L.C. 2017, 13(3), 429-432 at page 430) the *MB* case demonstrates the continued impact of the previous legislation. MB's case will be one of many where trans persons continue to be affected. Further in Northern Ireland whilst civil partnership legislation has been in force since 2004, there continues to be no recognition of same-sex marriage.

Role of the European Court of Justice ('CJEU')

In the *MB* case before the CJEU the question raised was whether the UK legislation was discriminatory on the grounds of sex, contrary to Article 4 of Council Directive 79/7/EEC. This directive provides that there should be a principle of equal treatment and 'no discrimination whatsoever on ground of sex either directly or indirectly…' On behalf of the UK Secretary of State for Work and Pensions the argument was made that it should be for Member States 'to determine the conditions under which a person's change of gender may be legally recognised' (paragraph 23 *MB* judgment). It was argued that this should not only relate to physical and psychological criteria, but also criteria relating to marital status (paragraph 23 *MB* judgment). The UK government relied upon previous case law from the CJEU which the UK government argued had accorded an area of discretion to Member State's in this area (Judgement 7 January 2004, *KB v NHS Pensions Agency (C-117-01) EU: C: 2004: 7 [2004] 1 CMLR 28* at paragraph 35 and of 27 April 2006, *Richards v Secretary of State of Work and Pensions (C243-04) EU:C; 2006: 256 [2006] 2 CMLR 49* at paragraph 21).

According an area of discretion to Member States in sensitive areas of family law also reflects the position of the European Court of Human Rights ('ECtHR'). Although the ECtHR has made important judgements in favour of recognising trans persons rights (for example see *Christine Goodwin v UK Application 28957/95, Judgment of 11th July 2002*) the ECtHR continues to allows Member States to make recognition of a change of gender conditional on annulment of that person's marriage (16 July 2014, *Hamalainen v Finland (37359/09) [2015] 1 FCR 379 / 37 BHRC 55*). In the related area of same-sex marriage, ultimately the ECtHR has left this to the discretion of the Member State (*Schalk and Kopf v Austria* (App. No. 30141/04)). Although the ECtHR has recognised that a 'co-habiting same-sex couple living in a stable relationship' fall under the notion of 'family life' (*Schalk and Kopf v Austria* at paragraph 94), and the ECtHR has accorded same-sex couples some right of legal protection, dependent upon the factual circumstances existing upon the ground of that member state (*Oliari v Italy* App Nos 18766/11 and 36030/11 (ECtHR, 31 July 2015), ultimately the ECtHR has stopped short of recognising same-sex marriage due to concerns about imposing upon Member States' 'deep rooted social and cultural' concerns (*Schalk and Kopf v Austria* para 62). This in turn leads to a wide margin of appreciation, or area of discretion being granted to Member States (see Schalk and Kopf v Austria para 105) when it comes to recognising same-sex marriage.

However, although traditionally the EU has similarly always determined that subsidiarity should take precedence (see for instance commentary on art 9 of the Charter of Fundamental Rights of the European Union which states that Member States do not have an 'explicit requirement to facilitate [same-sex] marriages') a recent case has demonstrated that the CJEU is prepared to make far reaching judgments in this area. In the case of C-673/16 *Relu*

Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others ('*Coman*') the CJEU determined that a non-EU citizen same-sex spouse should be granted the right of permanent residence when their EU citizen same-sex spouse relocated to a different state in the EU. This is the case even where the couple relocate to another jurisdiction (in the *Coman* case Romania) which does not allow any recognition of same-sex partnerships. Although the CJEU judgement in no way required EU states to recognise same-sex marriage, it has greatly enhanced EU free movement rights for same sex couples. It has also set a precedent for the CJEU in extending rights for same-sex couples and GLBTQ individuals more broadly.

In *MB* the CJEU ultimately determined that although Member States continue to have authority and competence when determining matters of civil status and legal recognition of gender, Member States must exercise this authority in such a way to comply with provisions relating to the principle of non-discrimination. In *MB* close examination was made by the CJEU of Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of sex as regards social security. Ultimately the GRA section 4 conditions which required an annulment of marriage as a condition to access a state pension for persons who had changed sex, was considered to be direct discrimination on the grounds of sex (see *MB* paragraph 29).

Conclusion

The *MB* case is noteworthy on a number of different levels. The judgment itself extends the rights of trans persons who under the GRA 2004 were required to annul their marriages in order to access state retirement benefits from the age of 60 for women. As many trans persons, including the applicant in the *MB* case, did not wish to annul their marriages they were not able to obtain a Gender Recognition certificate or subsequently the state pension entitlements which all other women could access. This has been found by the CJEU to be direct discrimination contrary to Article 4 of Directive 79/7 which prohibits all forms of discrimination on grounds of sex as regards social security (see *MB* paragraph 29). On another level the *MB* case alongside the recent *Coman* judgment represents a further intervention by the CJEU in the development of rights for LGBTQ individuals. This again demonstrates the ever expanding nature of EU family law. The concept of EU citizenship is leading to an ever greater array of rights being given to EU citizens. Following Brexit UK citizens will no longer be able to benefit from such interventions from the CJEU.

Bibliography

Table of Cases

England and Wales case law

A v A (Child Abduction) [1993] 2 FLR 225.

Advocate-General for Scotland v MacDonald [2004] 1 All ER 339.

Alhaji Mohamed v Knott [1969] 1 QB 1.

Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467.

Cheni v Cheni [1965] P 85.

Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 All E.R. 411; [2004] 3 W.L.R. 113.

Hussain v Hussain [1983] Fam 26.

Hyde v Hyde [1865–1869] LR 1 P & D 130.

Kapur v Kapur [1984] FLR 920.

KB v NHS Pensions Agency and another [2004] OPLR 145.

Kenwood v Kenwood [1951] P 124.

Lawrence v Lawrence [1985] Fam 106.

Magor and St Mellons RDC v Newport Corpn [1952] A.C. 189.

Marinos v Marinos [2007] 2 FLR 1018

Mark v Mark [2006] 1 AC 98.

Minister of Employment and Immigration v Norwall [1990] 26 RFL (3d) 95.

Pearce v Governing Body of Mayfield School [2000] ICR 920.

*R. v Brown [*1994] 1 A.C. 212.

R v Ministry of Defence, ex parte Smith [1996] 1 All ER 257.

Radwan v Radwan (No 2) [1973] Fam 35.

Re C (Abduction: Habitual Residence) [2004] 1 FLR 216.

Re F (Child Abduction) [1992] 1 FLR 548.

Re J (Abduction: Custody Rights) [1990] 2 AC 562.

Re Paine [1940] Ch 46.

Richards v Secretary of State of Work and Pensions [2006] 2 FLR 487.

Shah v Barnet London Borough Council [1983] 2 AC 309.

Sottomayor v De Barros (No 2) [1879] 5 PD 94.

Steinfeld v. Secretary of State for Education [2017] EWCA Civ 81.

Steinfeld v Secretary of State for International Development [2018] UKSC 32 .

Szechter v Szechter [1971] P 286.

Vervaeke v Smith [1983] 1 AC 145.

Westminster City Council v C [2009] Fam 11.

Wilkinson v Kritzinger [2006] EWHC 835; [2006] 2 FCR 537.

Court of Justice of the European Union cases.

Baumbast and R v Secretary of State for the Home Department (Case C-413/99).

Casagrande v Landeshauptstadt Munchen (Case C-9/74).

Coleman v Attridge Law and Steve Law (Case C-303/06).

Grant v South West Trains (Case C-249/96).

Grzelczyk Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve (Case C-184-99).

Jurgen Romer v Freie und Hansestadt Hamburg (Case C-147/08.

Lawrie-Blum v Land Baden Wurttemberg (Case C-66/85).

MB v Secretary of State for Work and Pensions (Case C-451/16).

Metock v Minister for Justice, Equality and Law Reform (C-127/08).

R v Immigration Appeal Tribunal, ex p Antonissen (Case C-292/89).

R v Ministry of Defence, ex p Smith (Case C-249/96).

Reed v Netherlands (Case C-59/85)

Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others (Case C-673/16) Advocate General Opinion Melchior Wathelet, 11 Janaury 2018.

Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others (Case C-673/16).

Safet Eyüp v Landesgeschäflsstelle des Arbeitsmarktservice Vorarlberg (Case C-65/98).

Selma Kadiman v Freistaat Bayern (Case C-351/95).

Stauder v Ulm (Case C-29/69).

Tadao Maruko v Versorgungsanstalt der deutschen Buhmen (Case C-267/06).

European Court of Human Rights cases

A, B, C v Ireland, App. No. 30141/04 (14 December 2010).

ADT v United Kingdom, App. No. 35765/97 (4 August 2000).

Berrehab and Koster v. The Netherlands, App. No. 10730/83 (June 21 1998).

Bosphorus Hava Yollari Turizm v TicaretAnonim Sirketi v Ireland, App. No. 45036/98 (30 June 2005).

Boughanemi v. France, App. No. 22070/93 (24 April 1996).

Chapin and Charpentier v. France, App. No. 40183/07 (9 June 2016).

Christine Goodwin v United Kingdom , App. No. 28957/95), 11 July 2002.

Cossey v United Kingdom (1991) App. No. 10843/84 (27 *September 1990).*

Dudgeon v United Kingdom App. No. 7525/76 (22 October 1981).

EB v France, App. No. 43546/02 (22 January 2008).

Engel v Netherlands App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (8

June 1976).

Fedetova and Shipitko v Russia, App. No. 40792/10 (Communicated on 2 May 2016).

Ferguson, Stretzel, French, Green, Hull, Watters, Maloney, Toresen, Doyle, Freeman, Garrett, Hilken, Goggin, Skarsholt, Munro, O'Neill and Ferguson v United Kingdom, App. No.8254/11 (Communicated on 2 February 2011).

Frette v France, App. No. 36515/97 (26 February 2002).

Hachette Filipacchi Presse Automobile v France, App. No. 40454/07 (10 November 2015).

Hämäläinen v. Finland, App. No. 37359/09 (16 July 2017).

Hirst v United Kingdom (No.2), App. No. 64025/01 (6 October 2005).

I v. United Kingdom, App. No. 25680/94 (11 July 2002).

JRM v. The Netherlands, App. No. 16944/90 (8 February 2003).

Karner v Austria, App. No. 40016/98 (24 July 2003).

Kerkhoven and Hinke v. Netherlands, App. No. 15666/89 (19 May 1992).

Kozak v. Poland, App. No. 13102/02 (2 March 2010).

Kroon v. Netherlands, App. No. 18535/91, 27 October 1994.

L and V v. Austria, (2003, January 9). App. Nos. 39392/98 and 39829/98 (9 January 2003).

Lardner v Austria, App. No. 18297/03 (3 February 2005).

Laskey v United Kingdom, App. Nos. 21627/93, 21628/93, 21974/93 (19 February 1997).

Leander v Sweden (1987), App. No. 9248/81) (26 March 1987).

Lustig-Prean and Beckett v United Kingdom, App. Nos. 31417/96 and 32377/96 (27 September 1999).

Lautsi v Italy, App. No. 30814/06 (18 March 2011).

Marckx v. Belgium, App. No. 6833/74 (13 June 1979).

Mata Estevez v Spain, App. No. 56501/00 (10 May 2001).

Mikulic v. Croatia, App. No. 53176/99 (7 February 2002).

Modinos v Cyprus, App. No. 15070/89 (22 April 1993).

Norris v Ireland, App. No 10581/83 (26 October 1983).

Oliari v. Italy, App. Nos. 18766/11 and 36030/11 (31 July 2015).

Ratzenbock v Austria, App. No.28475/12 (26 October 2017).

Rees v. UK., App. No. 9532/81 (17 October 1986).

Salgueiro da Silva Mouta v Portugal, App. No. 33290/96 (21 December 1999).

Schalk and Kopf v Austria, App. No. 30141/04 (24 June 2010).

Sheffield and Horsham v UK, App. No. 13816/1018 (30 July 1998).

Simpson v United Kingdom, App. No.11716/85 (14 May 1986).

SL v Austria, App. No. 45330/99 (9 January 2003).

Smith and Grady v United Kingdom, App. Nos. 33985/96 and 33986/96 (27 September 1999).

Sunday Times v United Kingdom, App. No. 6538/74 (26 April 1979).

Sutherland v. UK, App. No. 25186/94 (1 July 1997).

Vallianatos v. Greece, App. Nos. 29381/09 and 32684/09 (7 November 2013).

X and Others v. Austria, 19 February 2013.

X and Y v. UK, App. No. 21830/93 (22 April 1997).

Z v Finland, App. No. 2209/93 (25 February 1997).

US Cases

Baehr v. Lewin [1993] (Hawaii) 852 P.2d 44.

Bipartisan Legal Advisory Group of the US House of Representatives v Gill linked

with *Department of Health and Human Services v Massachusetts* and *Office of Personnel Management v Golinski* [U.S. Supreme Court] (2013) 12-13 US 201.

Bogan v Baskin [2014] (Indiana) No 14-277 (7th Cir).

Brown v Board of Education [1954] (US Supreme Court) 347 U.S.483.

Estin v Estin [1948] (US Supreme Court) 334 U.S. 541.

Foster v Florida [2002] (US Supreme Court) 537 U.S. 990.

Goodridge v Department of Public Health [2003] (Mass.) 798 N.E.2d 94.

Herbert v Kitchen [2014] (Utah) No 14-124 (10th Cir).

Hollingsworth v Perry [2013] (US Supreme Court) 570 US 133.

Lawrence v Texas [2003] (US Supreme Court) 539 U.S. 558.

Lewis v. Harris [2006] (N.J.) 908 A.2d 196, 224.

Loving v Virginia [1967] (US Supreme Court) *388 US 1.*

McQuigg v Bostic [2014] (Virginia) No 14-251 (4th Cir).

Neumeier v Kuehner [1972] (N.Y.) 31 NY2d 569.

Obergefell et al. v. Hodges, Director, Ohio Department of Health [2015] (US Supreme Court) 135 US 2584.

Rainey v Bostic [2014](Virginia) No 14-153 (4th Cir).

Re Marriage Cases [2008] (Cal.) 43 Cal. 4th 757 .

Roe v Wade [1973] (US Supreme Court) 410 US 113.

Schaefer v Bostic [2014] (Virginia) No 14-225 (4th Cir).

Smith v Bishop [2014] (Oklahoma) No 14-136 (10th Cir).

Tooker v Lopez [1969] (N.Y.) 24 NY2d 569.

United States v. Windsor [2013] (US Supreme Court) 570 US 307).

Varnum v Brien [2009] (Iowa) 653 N.W.2d 862.

Walker v Wolf [2014] (Wisconsin) No 14-178 (7th Cir).

Republic of Ireland Case Law

Zappone and Gilligan v Revenue Commissioners [2008] *2 I.R. 417*.

South African Case Law

Minister of Home Affairs v Fourie CCT 60/40 [2005] ZACC 19; [2006] (3) B.C.L.R. 355 (CC); [2006] (1) SA 524 (CC).

Canadian Case Law

Baker v Vermont [1999] (Vermont) 744 A.2d 864.

Halpern v Canada (Attorney General) [2003] (Ontario) 65 OR (3d) 161 (CA).

M v H [1999] (Supreme Court of Canada) 2 S.C.R. 3.

Vriend v Alberta [1998] (Supreme Court of Canada) 1 SCR 493 550-560.

UN Human Rights Committee Case Law

Juliet Joslin et al. v. New Zealand [2002] Communication No. 902/1999, U.N. Doc. A/57/40.

Inter-American Court Case Law

Obligaciones Estatales en Relacion Con El Cambio De Nombre, La Identidad de Genero, Y Los Derechos Derivados De Un Vinculo Entre Parejas Del Mismo Sexo 9 January 2018

Table of Legislation

England and Wales

Domicile and Matrimonial Proceedings Act 1973.

Civil Partnership Act 2004.

Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 received royal assent on 26th March 2019.

Gender Recognition Act 2004.

Marriage (Same-Sex Couples) Act 2013.

Matrimonial Causes Act 1973.

Social Security Contributions Act 1992.

International Treaties

Brighton Declaration, 'High Level Conference on the Future of the European Court of Human Rights' 9 December 2012.

Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters, 26 September 1968.

European Convention on Human Rights 1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

The International Covenant on Civil and Political Rights as adopted by the United Nations in 1966.

Vienna Convention on the Law of Treaties 1969.

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity 2006.

European Union Treaties

Charter of Fundamental Rights of the European Union 2000/C 364/01 (2000).

Treaty on European Union (Consolidated Version) C 325/5 (2002).

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306 (2007).

Treaty on the Functioning of the European Union, OJ C 202 (2016).

EU Regulations, Directives and Opinions

Regulation (EEC) No 1612/68 on Freedom of Movement for Workers within the Community of 15 October 1968.

Directive No (EEC) 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment of 9 February 1976.

Directive No 2000/78/EC on Equal Treatment in Employment and Occupation of 27 November 2000.

Council Regulation (EC) No 1347/2000 on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both Spouses of 29 May 2000 (known as Brussels II).

Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility of 1 March 2001 (known as Brussels II bis).

EU Directive 2004/38 on the Rights of Citizens of the Union and their Family Members to Move and Reside Freely Within the territory of the Member States of 29 April 2004 (known as the Citizenship Rights' Directive).

Regulation (EU) No 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession of 4 July 2012.

Art 4 Council Directive 79//7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security of 19 December 1978.

European Union Documents

COM(2006) 399, 'Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters' 17 July 2006.

COM (2007) 74 'Memorandum of Understanding between the Council of Europe and the European Union' prepared at the 117th Session of the Committee of Ministers, 10 May 2007.

COM(2010) 747, 'Less Bureaucracy for Citizens Promoting Free Movement of Public Documents and Recognition of the Effect of Civil Status Records' 14 December 2010.

COM(2011) 127, 'Bringing Legal Clarity to Property Rights for International Couples' 16 March 2011.

COM(2011) 125, 'A Council Regulation on Jurisdiction, Applicable Law and Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes' 16 March 2011.

COM(2011) 126, 'A Council Regulation on Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships' 16 March 2011.

COM(2013) 228, 'Proposal for a Regulation on Promoting the Free Movement of Citizens' 24 April 2013.

International Legislation

US Legislation

US Constitution
United States Defense of Marriage Act 1996 known as DOMA.
Iowa Anti-Discrimination Act 2007.
California Marriage Protection Act 2008 (known as Proposition 8).
Hawaii Civil Unions Act 2011.
Hawaii Marriage Equality Act 2013.

Canadian Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982 enacted as Schedule B to the Canada Act 1982 (UK).
Marriage Equality Act (Vermont) 2009.

South African Legislation

Constitution of the Republic of South Africa 1996.
The Marriage Act 1961.
The Civil Union Act 2006.

Other National Legislation

Constitution of Ireland.
Italian Constitution.
Romanian Civil Code.

Secondary Sources

Abrams, K., 'Citizen Spouse' (2013) 101(2) California Law Review 407.

Akandji-Kombe, J. F., 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the ECHR. Human Rights Handbook No.7' (2007) available at http://www.echr.coe.int/LibraryDocs/dg2/hrhand/dg2-en-hrhand-07 (2007).pdf

Aloni, E., 'Incrementalism, Civil Unions, and the Possibility of Predicting Same-Sex Marriage (2010- 2011) 18 Duke Journal of Gender Law and Policy 105.

Alquist, A., 'The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach' (2008) 30 University La Verne Law Review 200.

Ammaturo, F., 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe (2014) 23 Social and Legal Studies 175.

Amnesty International database at www.amnesty.org.

Araiza, W. D., 'Book Review, Project Muse: 'The Long Arc of Justice: Lesbian and Gay Marriage, Equality and Rights', and 'Gay Marriage; for Better or for Worse? What We've Learned from the Evidence' and 'Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage' and 'Authorizing Marriage: Canon, Tradition in the Blessing of Same-Sex Unions' (2010)19(2) Journal of the History of Sexuality 371.

Arrebola, C. and Mauricio, A. J., 'University of Cambridge Faculty of Law Research Paper No. 3/2016' (2016) 5(1) Cambridge Journal of Comparative and International Law.

Auchmuty, R., 'SameSex marriage Revived; Feminist Critique and Legal Strategy' (2004)14(1) Feminist and Psychology 101.

Awondo, P., Geschiere, P. and Reid, G., 'Homophobic Africa? Toward a More Nuanced View' (2012) 55 African Studies 145.

Badgett, M. V. L., 'Predicting Partnership Rights: Applying the European Experience in the United States' (2005) 17 Yale Law Journal and Feminism 71.

Bailey, M., 'Same Sex Relationships Across Borders' (2004) 49 McGill Law Journal100.

Bala, N., 'Context and Inclusivity in Canada's Evolving Definition of Family' (2002) 16(2) International Journal of Law, Policy and the Family 145.

Bamforth, N., 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10 International Journal of Constitutional Law 477.

Barker, N., 'Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa' (2011) 7(4) International Journal of Law in 447.

Barker, N., 'Civil Partnership: An Alternative to Marriage? Ferguson and Others v. UK (2012) 42 Family Law 548.

Barker, N., 'Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage' (Basingstoke, UK: Palgrave Macmillan, 2012),

Barrett, S. J., 'For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights' (2006-2008) 73 Brooklyn Law Review 695.

Bell, M., 'EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process' (2005 ILGA Europe, The European Region of the International Lesbian and Gay Association).

Bendall. C., 'From Civil Partnership to Same Sex Marriage: Interdisciplinary Reflections' in Barker, N. and Monk, D., Eds. (2017) 13(3) International Journal of Law in Context 429.

Benvenisti, E., 'Margin of Appreciation, Consensus and Universal Standards' (1998–99) 31 New York University Journal of International Law and Policy 843.

Bergsten, H.,'The Proliferation of Same-Sex Marriage Legislation Among the Member States in the European Union' (2018 Halmstad University) available at diva-portal.org.

Bix, B., 'Choice of Law and Marriage: A Proposal' (2002–2003) 36 Family Law Quarterly 255.

Bonthuys, E., 'Race and Gender in the Civil Union Act' (2007) 23 South African Journal of Human Rights 526.

Borillo, D., 'Pluralisme Conjugal ou Hierachie des Sexualites: La Reconnaissance Juridique des Couples Homosexualles dans l'Union Europenne' (2001) 46 McGill Law Journal 875.

Borillo, D. and Fassin, E., 'The PACS, Four Years Later: A Beginning or an End? (2003) Cross National Deferentials 19.

Borras, A., 'Explanatory Report on the Brussels II Convention … on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters' (1998) Official Journal C 221 para.1.

Bradley, D., 'Comparative Law, Family Law and Common Law' (2003) 33(1) Oxford Journal of Legal Studies 127.

Bratza, N., Evidence to UK Joint Committee on Human Rights, 13 March 2012, HC 873-iii Q140.

Brauch, J., 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004–05) 11 Columbia Journal of European Law 113.

Bribosia, E., Rorive, I. and Van den Eynde, L., 'Same-sex Marriage: Building an Argument before the European Court of Human Rights in Light of the U.S. Experience. (2014) 32 Berkeley Journal of International Law 1.

Brilmayer, L., 'Interest Analysis and the Myth of Legislative Intent' (1980) 78 Michigan Law Review 392.

Burke, E., 'Reflections on the Revolution in France' (1790) (SMK Books 2012).

Burke, E., 'Speech on the Acts of Uniformity February 6, 1772' in 7 'The Works of The Rights Honorable Edmund Burke' (Project Gutenberg, 2014).

Butler, P., 'Margin of Appreciation—A Note Towards a Solution for the Pacific' (2008–09) 39 Victoria University of Wellington Law Review 687

Cabellero, S. S., 'Unmarried Cohabiting Couples Before the European Court of Human Rights: Parity with marriage?' (2004 -2005) 11 Columbia Journal of European Law 151.

Čar, A., 'EU Law Bibliography' (2017) Croatian Yearbook of European Law and Policy.

Cardozo, B. N., 'The Paradoxes of Legal Science' (Columbia University Press, New York City, US, 1928).

Carpenter, D., 'Bad Arguments Against Gay Marriage' (2005–06) 7 Florida Coastal Law Review 181.

Carpenter, D., 'A Traditionalist Case for Gay Marriage' (2008–2009) 50 South Texas Law Review 93.

Cartabia, M., 'The European Court of Human Rights: Judging Non-Discrimination. (2011) 9 International Journal of Constitutional Law 808.

Carter, P B., 'Domicil: The Case for Radical Reform in the United Kingdom" (1987) 36 International and Comparative Law Quarterly 713.

Casswell, D G., 'Moving Toward Same-Sex Marriage' (2001) 80 Canadian Bar Review.

Centre for Social Justice, 'European Family Law: Faster Divorce and Foreign Law' (Centre For Social Jutice, 2009).

Chapman, K., 'Case Comment, Halpern v Canada (AG) [2002] O.J. 2714 (Ont. Div. Ct.)' (2002) 19 Canadian Journal of Family Law 423.

Chauncey, G., 'Why Marriage?:The History Shaping Today's Debate Over Gay Equality' (Basic Books, US, 2004).

Cheshire, G., North, P. and Fawcett, J., 'Cheshire, North and Fawcett Private International Law' (14th Ed., Oxford University Press, Oxford, 2008).

Clarkson C. M. V. and Hill, J., 'The Conflict of Laws' (4th Ed., Oxford University Press, Oxford, 2011).

Cody, E., 'Straight Couples in France are Choosing Civil Unions Meant for Gays' Washington Post, 14th February 2009.

Cooper, S. L., 'Marriage, Family, Discrimination, and Contradiction: An Evaluation of the Legacy and the Future of the European Court of Human Rights Jurisprudence on LGBT Rights (2011) 12 German Law Journal 1746.

Cornides, J., 'Three Case Studies on 'Anti-Discrimination' (2012) 23 European Journal of International Law 517.

Cossman, B., 'Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (Stanford University Press, Palo Alto, California, 2007).

Cossman, B., 'Migrating Marriages and Comparative Constitutionalism' in Choudry, S., Ed., 'The Migration of Constitutional Ideas' (Reissue Edition, Cambridge University Press, Cambridge, 2011).

Cott, N., Public Vows: A History of Marriage and the Nation (Harvard University Press, Cambridge, Massachusetts, 2000).

Council of Europe database available at https://hudoc.echr.coe.int/eng

Council of Europe, website at http://www.coe.int/en/web/conventions/ search-on-treaties/-/conventions/treaty/177/signatures?p_auth=0Kq9rtcm.

Cox, B., 'Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?' (1994) Wisconsin Law Review 1033.

Crane, J., 'Legislative and Constitutional Responses to Goodridge v. Department of Public Health' (2003 – 2004) 7 New York University Journal of Legislation and Public Policy 465.

Currie, B., 'Selected Essays on the Conflict of Laws '(1963) 62 Michigan Law Review.

Curry-Sumner, I., 'EB v France: A Missed Opportunity' (2009) 21(3) Child and Family Law Quarterly 356.

Danisi, C., 'How Far can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New standards in its Non-Discrimination Jurisprudence' (2011) 9 International Journal of Constitutional Law 793.

Davie, M., 'The Breaking-Up of Essential Validity of Marriage Choice of Law Rules in English Conflict of Laws' (1994) 23 Anglo-American Law Review 32.

Davis, S, 'Marriage (Same-Sex Couples) Bill Memorandum' (MB11) (2013) available at https://publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m11.ht

Dawson, M., Muir, E. and Claes, M., 'Enforcing the EU's Rights Revolution; the Case of Equality' (2012) 3 European Human Rights Law Review 276.

De Aguirre Aldaz, C. M. and De Pablo Contreras, P., 'National Report: Spain' (2011) American University Journal Gender Social Policy and Law 289.

Dent, G., 'The Defense of Traditional Marriage' (1999) 15 Journal of Law and Politics 581.

De Vos, P., 'The Inevitability' of Same-Sex Marriage in South Africa's Post Apartheid State' (2007) 23 South African Journal on Human Rights 432.

Dicey, A. V., 'Dicey Morris and Collins on the Conflict of Laws' in Collins and Harris, J., (15th Ed., Sweet and Maxwell, London, 2018).

Diduck, A. and Raday F., 'Editorial: 'Introduction: Family—An International Affair'' (2012) 8(2) International Journal of Law in Context 187.

Donoho, D. L., 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2011) 15 Emory International Law Review,391.

Donald, A. and Leach, P., 'Parliaments and the European Court of Human Rights' (Oxford University Press, Oxford, 2016).

Dorf, M., 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97 Virginia Law Review 1267.

Douglas-Scott, S., 'Constitutional Law of the European Union' (Longman, 2002).

Duggan, L., 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Nelson D. and Castronovo R. (Eds.) 'Materializing Democracy: Toward a Revitalized Cultural Politics' (Duke University Press, 2002) 175.

Duggan, L., 'Beyond Same-Sex Marriage' (2008) 9(2) Studies in Gender and Sexuality 155.

Dunlap, M., '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.

Dzehtsiarou, K., 'Does Consensus Matter? The Legitimacy of European Consensus in the Case law of the European Court of Human Rights' (2011) 3 Public Law 534.

Dzehtsiarou, K., 'Interview with Judge of the ECTHR Cornelius Birsan' (European Court of Human Rights, Strasbourg, 2010).

Dzehtsiarou, K., 'Interview with Judge of the ECtHR Renate Jaeger' (European Court of Human Rights, Strasbourg, 2010).

Eberle, E. J., ' The Method and Role of Comparative Law' (2009) 8(3) Global Studies Law Review 451.

Equality Network, "Equal Marriage: Report of the Equality Network Survey of LGBT People's Views on Marriage (Equality Network, 2011).

Eriksson, A., 'European Justice: Broadening the Scope of European Non-Discrimination Law' (2009) 7(4) International Journal of Constitutional Law 731.

Eskridge Jr, W., 'Equality Practices, Civil Unions and the Future of Gay Rights' (Routledge, 2002).

Eskridge Jr, W., 'Development—United States: Lawrence v Texas and the Imperative of Comparative Constitutionalism' (2004) 2(3) International Journal of Constitutional Law 555.

European Commission, 'European Union Accession Criteria' available at http://ec.europa.eu/enlargement/policy/conditions-membership/ index en.htm.

European Union database available at https://eur-lex.europa.eu/homepage.html;

EU Network of Independent Experts on Fundamental Rights, 'Commentary on the Charter of Fundamental Rights of the European Union' June 2006, available at

https://sites.uclouvain.be/cridho/documents/Download.Rep/NetworkCommentaryFinal.pdf

Fairhurst, J., 'Law of the European Union' (9th Ed., , Pearson Publishing, 2012).

Fassin, E., 'Same-Sex, Different Politics: 'Gay Marriage' Debates in France and the United States' (2001) 13(2) Public Culture 215.

Fentiman, R., 'The Validity of Marriage and the Proper Law' (1985) 44(2) Cambridge Law Journal 256.

Fentiman, R., 'Activity in the Law of Status: Domicile, Marriage and the Law Commission' (1986) 6(3) Oxford Journal of Legal Studies 353.

Fentiman, R., 'Domicile Revisited' (1991) 50(3) Cambridge Law Journal 445.

Fenwick, H., '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.

Fenwick, F., and Hayward, A., 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' (2017) European Human Rights Law Review 544.

Fenwick H., and Hayward, A., 'Equal Civil Partnerships: Implications of Strasbourg's Latest Ruling for Steinfeld and Keidan', UK Human Rights Blog, 21 November 2017 available at https://ukhumanrightsblog.com/2017/11/21/equal-civil-partnerships-implications-of-strasbourgs-latest-ruling-for-steinfeld-and-keidan-helen-fe.

Fiorini, A., 'Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?' (2008) 22(2) International Journal of Law, Policy and the Family 178.

Freedman, M., 'Edmund Burke and the Critique of Political Radicalism' (Blackwell, Oxford, 1980).

Fruehwald, S., 'Choice of Law and Same-Sex Marriage' (1999) 51 Florida Law Review 799.

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

Fulchiron, H., 'National Report: France' (2011) 19 American University Journal of Gender Social Policy and Law.

Gallagher, M., 'Why Accommodate? Reflections on the Gay Marriage Culture Wars' (2010) 5 Northwestern Journal of Law and Social Policy 260.

Gerards, J., 'The Prism of Fundamental Rights' (2012) 8 European Constitutional Law Review 173.

Giddens, A., 'The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies' (Stanford University Press, Stanford, California, US, 1992).

Ginsburg, R. B., 'Essay, Some Thoughts on Autonomy and Equality in Relation to *Roe v Wade'* (1985) North Carolina Law Review 63.

Ginsburg, R. B., 'Madison Lecture, Speaking in a Judicial Voice' (1992) 67 New York University Law Review 1185.

Ginsburg, R. B., Metzger, B., and Gluck, A., (2014) 25 Columbia Journal of Gender and Law 6.

Gonzalez, K., 'Gay Marriage and Gay Union Law in the Americas' (2010) 16 Law and Business Review America 285.

Grabbe, H., 'Citizens' Europe: Crowded Out by Economic Focus' (2012) 5 Intereconomics 268.

Graham, K. T., 'Same-Sex Unions and Conflicts of Law: When 'I Do' May be Interpreted as 'No, You Didn't' (2004) 3 Whittier Journal of Child and Family Advocacy 231.

Grigolo, M., 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) European Journal of International Law 1023.

Gutteridge, H. C., 'Comparative Law: An Introduction to the Comparative Method of Legal Study and Research' (Cambridge University Press, 1946) .

Hamilton, A., 'The Federalist No 78' in Rossiter, C. Ed., (Mentor, 1961).

Hamilton, F., 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate' (2013) 1 European Human Rights Law Review 47.

Hamilton, F., 'Gays and the European Court of Human Rights: the Equality Argument in ebook Casonato, C. and Schuster, A. (Eds) 'Rights on the Move – Rainbow Family in Europe: Proceedings of the Conference Trento 16-17 October 2014' (Universita degli studi di Trento 2014) available online at http://eprints.biblio.unitn.it/4448

Hamilton, F., '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(1) Journal of International and Comparative Law 87.

Hamilton, F., and Clayton-Helm, L., 'Same Sex Relationships Choice of Law and the Continued Recognised Relationship Theory' (2016) 3(1) Journal of International and Comparative Law 1.

Hamilton, F., 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 Journal of Transnational Law and Policy 121.

Hamilton, F., 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2017) Journal of Homosexuality 1.

Hamilton, F., 'The Symbolic Status of Same-Sex Marriage' (2017) 47 Family Law 851.

Hamilton, F., 'Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights' (2018) 1 European Human Rights Law Review 33.

Hamilton, F., 'The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders' (2018) Family Law 693.

Hamilton, F., 'Rights for LGBTQ Persons: MB v Secretary of State for Work and Pensions (2019) Family Law 54.

Hamilton, F., and Noto La Diega, G. Eds., 'Same-Sex Relationships, Law and Society.' (Forthcoming , Routledge, 2020).

Hamilton, F., 'The Potential of European Union Law to Further Advance LGBTQ+ Persons and Same-Sex Couples' Rights' in Hamilton, F., and Noto La Diega, G. Eds., 'Same-Sex Relationships, Law and Society.' (Forthcoming , Routledge, 2020).

Harper, M. and Landells, K., 'The Civil Partnership Act 2004 in Force' (2005) Family Family Law 963.

Harris, A., 'Loving Before and After the Law' (2007-2008) 76 Fordham International Law Review 2821.

Hartley, T. C., 'The Policy Basis of the English Conflict of Laws of Marriage" (1972) 53 Modern Law Review 571.

Harvard Law Review, 'Developments in the Law – Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe' (2003) 116 Harvard Law Review 2004.

Hay, H., 'Radically Gay, Gay Liberation in the Words of its Founder' (Beacon Press, Boston, 1996).

Hayward, N., 'Same-Sex Registered Partnerships: A Right to be Recognised?' (2016) 75 Cambridge Law Journal 27.

Heaphy, B., Smart, C. and Einarsdottir, A., 'Same Sex Marriages: New Generations, New Relationships' (Palgrave MacMillan, 2013).

Helfer, L. and Voeten, E., 'International Courts as Agents of Legal Change: Evidence From LGBT Rights in Europe' (2014) 68(1) International Organization 77.

Herring, D., 'The Public Family: Exploring Its Role in Democratic Society' (University of Pittsburgh Press, Pittsburgh, 2003).

Hicks, S. C., 'The Jurisprudence of Comparative Legal Systems' (1983) 6 Loyola of Los Angeles International and Comparative Law Review 83.

Hodson, L., 'A Marriage By Any Other Name? Schalk and Kopf v. Austria' (2011) 11 Human Rights Law Review 170.

Home Office, 'Equal Civil Marriage Consultation' (2012, now closed) available at https://www.gov.uk/government/consultations/equal-marriage-consultation

Hunt, A., 'The Theory of Critical Legal Studies' (1986) 6(1) Oxford Journal of Legal Studies 1.

Hutchinson, M., 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 International and Comparative Law Quarterly 638.

ILGA Europe Website: www.ilga-europe.org

International Labor Rights Case Law Journal website is available at https://brill.com/view/journals/ilrc/ilrc-overview.xml.

Isaak, M., 'What's in a Name? Civil Unions and the Constitutional Significance of Marriage' (2008) 10 University of Pennsylvania Journal of Constitutional Law 607.

Johnson, G., 'Vermont Civil Unions: The New Language of Marriage' (2000 – 2001) 25 Vermont Law Review 15.

Johnson, P., 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) Human Rights Law Review 67.

Johnson, P., 'The Choice of Wording Must be Regarded as Deliberate: Same-Sex Marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) European Law Review 207.

Johnson, P., 'Homosexual Propaganda in the Russian Federation: Are They in Violation of the European Convention on Human Rights?' (2015) 3(2) Russian Law Journal 37.

Johnson, P., 'Marriage, Heteronormativity and the European Court of Human Rights: A Reappraisal' (2015) 29 International Journal of Law Policy and the Family 56.

Joris, T., and Vandenberghe, J., 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?' (2008-2009) 15 Columbia Journal of European Law 1.

Josephson, J., 'Citizenship, Same-Sex Marriage and Feminist Criitques of Marriage' (2005) 3(2) Perspectives on Politics 269.

Journal of Sociology Study's website is available at http://www.davidpublisher.org/Home/Journal/SS

Juenger, F., 'Conflict of Laws: A Critique of Interest Analysis' (1984) 32 American Journal of Comparative Law 1.

Kairys, D., 'Legal Reasoning' in Kairys, D., Ed., *'The Politics of Law, The Polemics of Law, a Progressive Critique'* (Pantheon, New York, 1987).

Kairys, D., 'Law and Politics' (1984) 52 George Washington Law Review 243.

Kennedy, D., and Klare, K. E., 'A Bibliography of Critical Legal Studies' (1984) 94 Yale Law Journal 461.

King , M. L. Jr., 'Letter from a Birmingham City Jail' in Washington, J. M. Ed., ' 'Testament of Hope, the Essential Writings of Martin Luther King Jr.' (Harper and Row, 1986).

Klarman, M. J., 'Brown and Lawrence (and Goodridge)' (2005) 104 Michegan Law Review 431.

Klarman, M. J., 'From the Closet to the Altar: Courst, Backlash and the Struggle for Same-Sex Marriage' (Oxford University Press, 2012).

Klarman, M. J., 'Windsor and Brown: Marriage Equality and Racial Equality' (2014) 16 Harvard Law Review 127.

Knop, K., 'Citizenship, Public and Private' (2001) 71 Law and Contemporary Problems 312.

Kochenov, D., 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 Fordham International Law Review 156.

Kornbluh, F., 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36 Law and Social Inquiry 537.

Lambda Legal Defense and Education Fund Press Release, 'Praising Massachusetts Court Ruling Allowing Same-Sex Couples to Marry, Lambda Legal Vows to Push Forward' (2003) New York University Journal of Legislation and Public Policy.

Lavender, N., 'The Problem of the Margin of Appreciation' (1997) 4 European Human Rights Law Review 380.

Law Commission Report, *Private International Law: The Law of Domicile* (Law Com No 88, 1985).

Law Commission Report, *Private International Law Choice of Law Rules* (Law Com No 89, 1985).

Letsas, G., 'Two Concepts of the Margin of Appreciation' (2006) 26(4) 4 Oxford Journal of Legal Studies 705.

Laycock, D., 'Equal Citizens of Equal and Territorial States; The Constitutional Foundations of Choice of Law' (1992) 92 Columbia Law Review 249.

Lecky, R., 'Must Equal mean Identical? Same-Sex Couples and Marriage' (2014) 10(1) International Journal of Constitutional Law 5.

Leflar, R., 'Choice Influencing Considerations in Conflicts Law' (1966) 41 New York University Law Review 267.

Lester, P., 'The European Convention in the New Architecture of Europe' (1996) 1 Public Law 6.

Lester, P., 'Universality Versus Subsidiarity: A Reply' (1998) 1 European Human Rights Law Review 73.

Letsas, G., 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies, 705.

Letsas, G., 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509.

Levin, H. Y,. 'Resolving Interstate Conflicts Over Same-Sex Non-Marriage' (2011) 63 Florida Law Review 47.

Lewis, T., 'What Not to Wear: Religious rights, the European Court, and the Margin of Appreciation' (2007) 56 International and Comparative Law Quarterly 395.

L'Heureux-Dube, C., 'Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective' (2003) 1(1) International Journal of Constitutional Law 35.

Lombino, R. M. II, 'Gay Marriage: Equality Matters' (2003) 14 Southern California Review of Law and Women's Studies 3.

Loveland, I., 'A Right to Engage in Same- Sex Marriage in the United States' (2014) 1 European Human Rights Law Review 10.

Lundstrom, K., 'Family Life and the Freedom of Workers in the European Union' (1996) 10 International Journal of Law Policy and the Family 250.

Macdonald, R., 'The Margin of Appreciation' in Macdonald, R., Matscher, F. and Petzold H., Eds., 'The European System for the Protection of Human Rights' (Martin Nijhoff Publishers, 1993).

Mahoney, P., 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 Human Rights Law Review 57.

Marshall, K. L. , 'Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed' (2010) 2 William and Mary Policy Review 194.

Marshall, T., 'Citizenship and Social Class' in Marshall. T. and Bottomore, T. Eds., 'Citizenship and Social Class' (Pluto Press, London, UK, 1992).

Matebeni, Z., 'Exploring Black Lesbian Sexualities and Identities in Johannesburg' PhD. Diss (University of the Witwatersrand (2011).

McEleavy, P., 'The Communitarization of Divorce Rules: What Impact for English and Scottish Law?' (2004) 53(3) International and Comparative Law Quarterly 605.

McGoldrick, D., 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 International and Comparative Law Quarterly 21.

Melcher , M., '(Mutual) Recognition of Registered Relationships via EU Private International Law' (2013) 9(1) Journal of Private International Law 149.

Merin, Y., '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).

Mill, J. S., 'On Liberty in Collini, S. Ed., 'On Liberty and Other Writings' (Cambridge University Press, Cambridge, 1859).

Mill, J. S., 'Principles of Political Economy' (Longmans Green, London, UK, 1936).

Miller, A., 'Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage' (2005) 38 Loyola of Los Angeles Law Review 2185.

Miller, Rt. Hon M., MP, Minister for Women and Equalities, 'Ministerial Forward: Equal Marriage: the Government's Response' (December 2012) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf

Moir G., and Beaumont, P., 'Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community' (1995) 20(3) European Law Review 268.

Moreham, N., ‘The Right to Respect for Private and Family Life in the European Convention on Human Rights: A Re-Examination’ (2008) European Human Rights Law Review 44.

Namath, M., ‘Statement at a Press Conference Concerning the Federal Marriage Act on Capitol Hill Washington, DC (March 4, 2004).

National Gay and Lesbian Task Force, ‘Press Release Massachusetts High Court Same-Sex Marriage Decision is an Exhilarating Victory in the Struggle for Equal Rights’ 2003, New York University Journal of Legislation and Public Policy.

Nigro, R., ‘The Margin of Appreciation Doctrine and the Case Law of the European Court of Human Rights on the Islamic Veil’ (2010) 11 Human Rights Law Review 531.

Norrie, K. M., ‘Recognition of Foreign Relationships Under the Civil Partnership Act 2004’ (2006) Journal of Private International Law 166.

Norrie, K., ‘National Report: United Kingdom’ (2011) 19 American University Journal Gender Social Policy and Law 329.

Noto La Diega, G., ‘The European Approach to Recognising, Downgrading, and Erasing Same-Sex Marriages Celebrated Abroad’ in Hamilton, F. and Noto La Diega, G., Eds., ‘Same-Sex Relationships, Law and Society’ (Forthcoming, Routledge, 2020).

Obama, President, Inaugural Address 2013 Daily Comp. Pres. Doc. 32 (21 Jan 2013).

Oliver and Roth, ‘The Internal Market and the Four Freedoms’ (2004) 41 Common Market Law Review 407..

O’Mahoney, C., ‘Irreconcilable Differences? Article 8 ECHR and Irish law on Non-Traditional Families’ (2012) International Journal of Law Policy and the Family 26.

O'Neill, A., 'Recognition of Same-Sex Marriage in the European Community, the European Court of Justice's Ability to Dictate Social Policy' (2004) 37 Cornell International Law Journal 199.

McClain, L., 'Deliberative Democracy, Overlapping Consensus and Same-Sex Marriage' (1997–1998) Fordham Law Review 1241.

Permanent Bureau of the Hague Conference on Private International Law, 'Note on Developments in Internal Law and Private International Law concerning Cohabitation outside Marriage, Including Registered Partnerships' Preliminary Document No.11 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference", available at http://www.hcch.net

Peterson, C., 'Proposals of Marriage between Jurisdiction and Choice of Law' (1980–1981) 14 Unversity of California Davis Law Review 869.

Pew Research Centre, 'A Global Snapshot of Same-Sex Marriage' (May 2019) available at https://www.pewresearch.org/fact-tank/2019/05/17/global-snapshot-sex-marriage/

Pew Research Centre 'Changing Attitudes on Gay Marriage' (May 2019) at https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/

Picker, C. B., 'Comparative Law Methodology and American Legal Culture: Obstacles and Opportunities' (2011) 16 Roger Williams University Law Review 86.

Polikoff, N. D., 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage will not Dismantle the Legal Structure of Gender in Every Marriage ' (1993) Virginia Law Review 1535.

Polikoff, N., 'Equality and Justice for Lesbian and Gay Families and Relationships' (2008-2009) 61 *Rutgers Law Review* 529.

Poppelwell-Scevak, C. A. R. L., 'The European Court of Human Rights and Same-Sex Marriage: The Consensus Approach' (University of Oslo Thesis 2016)

Private International Law Committee, *First Report of the Private International Law Committee* (Cmnd No 9068, 1954).

Rains, R.E., 'A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognise Them' (2012) Utah Law Review 393.

Rauch, J., 'Red Families, Blue Families, Gay Families and the Search for a New Normal' (2010) 28 Journal of Inequality 333.

Rawls, J., 'A Theory of Justice' (Belknap Press, Cambridge, Massachusetts, 1971).

Reed, A., 'Essential Validity of Marriage: The Application of Interest Analysis and Depecage to Anglo-American Choice of Law Rules' (2000) 20 New York Law School Journal of International and Comparative Law 387.

Rehnquist, W. H., 'Constitutional Courts – Comparative Remarks' (1989) in Kirchhof P. and Kornmers, D. P., Eds., 'Germany and its Basic Law: Past, Present and Future – A German – American Symposium' (Nomos, 1993).

Reinhardt, S., 'Legal and Political Perspectives on the Battle Over Same-Sex Marriage' (2005)16 Stanley Law and Policy Review 12.

Reczek, C., Elliott, S. and Umberson, D., 'Commitment Without Marriage: Union Formation Among Long Term Same-Sex Couples' (2009) 30 . 738

Research Gate database: https:www.researchgate.net

Richards, D., 'Carl F Stychin Book Review: Governing Sexuality: The Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon' (2004) 2(3) International Journal of Constitutional Law 727.

Richardson, D, 'Sexuality and Citizenship' (1998) 32 Sociology 83.

Richardson, D., 'Desisting Sameness? The Rise of Neoliberal Politics of Normalisation' (2005) 37 Antipodes 519.

Rogerson, P., 'Habitual Residence: The New Domicile' (2000) 49 International and Comparative Law Quarterly 86.

Ronchi, P., 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy' (2011) 13(3) Ecclesiastical Law Journal 287.

Rosenfeld, M., 'Introduction: Gender, Sexual Orientation and Equal Citizenship' (2012) 197110 International Journal of Constitutional Law 340.

Saez, M., '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.

Scappucci, G., and Cabral, P., 'Is the Court of Justice Refusal to 'Think Pink' a Missed Opportunity?' (1998) 5 EU Focus 2.

Schanerman, N., 'Comity; Another Nail in the Coffin of Institutional Homophobia' (2010) 42 University of Miami Inter-American Law Review 145.

Scheppele, K. L., 'Legal Theory and Social Theory' (1994) 20 Annual Review of Sociology 383.

Schwarzschild, M., 'Marriage, Pluralism and Change: A Response to Professor Wax' (2005) 42 San Diego Law Review1115.

Scotland, Baroness, Statement in the House of Lords (Hansard, HL 22 April 2004, Col 388).

Scottish Government, 'Same Sex Marriage to be Legalised' (25 July 2012) available at http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012.

Schwobel, C., 'Whither the Private in Global Governance' (2012) 10 International Journal of Constitutional Law 1106.

Scott, E. S., 'A World Without Marriage' (2004–2008) 41 Family Law Quarterly 537.

Sedgewick, E., 'Epistemology of the Closet' (Penguin, Harmondsworth, UK, 1990).

Shahid, M., 'The Right to Same-Sex Marriage; Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage' (2017) 10(3) Erasmus Law Review 184.

Shany, Y., 'Toward a General Margin of Appreciation Doctrine in International Law' (2005) 16 European Journal of International Law 907.

Shipman, B. and Smart, C., 'Its Made a Huge Difference': Recognition, Rights and the Personal Significance of Civil Partnerships' (2007) 12 Sociological Research Online.

Shuibhe, N. N., 'Margins of Appreciation; National Values, Fundamental Rights and EC Free Movement Law' (2009) 34 European Law Review 230.

Shuilleabhain, M. N., 'Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective' (2010) 59(4) International and Comparative Law Quarterly 1021.

Shulman, J., Gotta, G. and Green, R-J., 'Will Marriage Matter? Effects of Marriage Anticipated by Same-Sex Couples?' (2012) 33(2) Journal of Family Issues 158.

.

Siegel, R. B., 'Community in Conflict: Same-Sex Marriage and Backlash' (2017) 4 University of California Law Review 1728.

Silver, N.,' How Opinions on Same-Sex Marriage are Changing and What it Means' (New York Times, March 26 2013).

Smart, P. St. J., 'Interest Analysis, False Conflicts, and the Essential Validity of Marriage' (1985) 14 Anglo-American Law Review 225.

Smith, G., 'Choice of Law in the United States' (1987) 38 Hastings Law Journal 1041, 1047.

Smith, J., (then Deputy Minister for Women and Equality) Statement in the House of Commons (See Hansard, HC, 12 October 2004, Col 177).

Specht; S. K., 'The Continuing Relevance of the Full Faith and Credit Clause; The Life of the Same-Sex Marriage After Windsor and Beshear' (2015) The Indonesian Journal of International and Comparative Law 383

Spencer, K., 'Same-Sex Couples and the Right to Marry: European Perspectives' (2010) 6(1) Cambridge Student Law Review 155.

Stalford, H., 'Concepts of Family under EU law: Lessons from the ECHR' (2012) 16 International Journal of Law, Policy, and the Family 410.

Stark, B., 'When Globalization Hits Home: International Family Law Comes of Age (2006) 46 Vanderbilt Journal of Transnational Law 1551.

Stychin, C. F., 'Governing Sexuality: The Changing Politics of Citizenship and Law Reform' (Hart, Oxford and Portland, Oregon, 2004) .

Sutherland, E., 'A Step Closer to Same-Sex Marriage Throughout Europe' (2011) 15 Edinburgh Law Review 97.

Sweeney, J. A., 'Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post–Cold War Era' (2005) 54 International and Comparative Law Quarterly 459.

Tahmindjis, P., 'Sexuality and International Human Rights Law' (2016) 48(3) Journal of Homosexuality 9.

Taintor, C., 'Marriage in the Conflict of Laws' (1955–1956) 9 Vanderbilt Law Review 607.

Tarin, A., 'Samasooliste Paaride õigus Abielule Kui Inimõigus' (University of Tartu Thesis, 2017).

Teutonico, D., 'Pajic v. Croatia' (2016-2017) 25 Tulane Journal of International and Comparative Law 461.

Tobin, B., 'Gay Marriage—A Bridge Too Far?' (2007) 15 Irish Student Law Review 175.

Tobisman, C., 'Marriage vs Domestic Partnership: Will We Ever Protect Lesbians' Families?' (1997) 12 Berkeley Women's Law Journal 112.

UK Government, 'Equal Marriage, the Government's Response' (December 2012) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf

UK Parliament database www.parliament.co.uk

UN Sustainable Development Goals available at https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-10-reduced-inequalities.html

Unger, R.M., 'The Critical Legal Studies Movement' (Harvard University Press, Cambridge, 1986).

U.S. Legal Dictionary available at https://definitions.uslegal.com/l/lex-specialis/

Van Ness, G.,' The Inevitability of Gay Marriage' (2003-2004) 38 New England Law Review 563.

Verchick, R., 'Same-Sex and the City' (2005) 37 Urban Law Review 191.

Von Mehren, A., and Trautman, D., 'The Law of Multistate Problems: Cases and Materials on Conflicts of Laws' (Little, Brown and Co, Boston, Massachusetts, US, 1965).

Von Mehren, A., 'Recent Trends in Choice-of Methodology' (1975) 60 Cornell Law Review 927.

Von Toggenburg, G., 'LGBT Go Luxembourg: On the Stance of Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice' (2008) European Law Reporter 174.

Waaldijk, K., 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Wintemute, R. and Andenaes, M., Eds., 'Legal Recognition of Same-Sex Partnerships: A study of National, European and International Law' (Hart, 2001).

Waaldijk, K., Asland, J., Et al., 'More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation, and Registered Partnership for Different-Sex and Same-Sex Partners. A Comparative Study of Nine European Countries' (Documents de travail no. 125, Paris, France: Institut National d'Études Démographiques, 2005).

Waaldijk, K., Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' in Waaldijk, K., Van Den Brink, M., Burri, S. and Goldshmidt, J., Eds., 'Equality and Human Rights: Nothing But Trouble' 38 Sim

Special (Liber Amicorum Titial Loenen, Utrecht, Netherlands, Netherlands Institute of Human Rights, 2016).

Wada, E., 'A Pretty Picture. The Margin of Appreciation and the Right to Assisted Suicide' (2004) 27 Loyola of Los Angeles International and Comparative Law Review, 275.

Walker, K., 'Moving Gaily Forward? Lesbian, Gay and Transgender Human Rights in Europe' (2001) 2 Melbourne Journal of International Law 122.

Walsh J, and Ryan, F., 'The Rights of De Facto Couples' (Irish Human Rights Commission, 2006).

Warner, M., Ed., 'Fear of a Queer Planet: Queer politics and Social Theory' (University of Minnesota Press, Minneapolis, 1993).

Warner, M., 'The Trouble with Normal: Sex, Politics and the Ethics of Queer Life' (Harvard University Press, 1999).

Wax, A. L., 'The Conservative's Dilemma: Social Change, Traditional Institutions and Same-Sex Marriage' (2005) 42 San Diego Law Review 1059.

Weeks, J., 'The Sexual Citizen' (1998) 15 Theory, Culture and Society 38.

Weeks, J., Heaphy, B. and Donovan, C., 'Same-Sex Intimacies: Families of Choice and other Life Experiments (Routledge, New York, 2001).

Weiler, J., 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in Weiler, J., The Constitution of Europe (Cambridge University Press, Cambridge, 1999).

Williams, G., 'Learning the Law' (Sweet and Maxwell, 2002).

Wilson, B. M., 'Claiming Individual Rights through a Constitutional Court. The Example of Gays in Costa Rica' (2007) 5(2) International Journal of Constitutional Law 252.

Wintemute, R., 'Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2000) and Its Limits' (2003-2004) 49 McGill Law Journal 1143.

Wintemute, R., '"Within the Ambit': How Big is the 'Gap' in Article 14 European Convention on Human Rights?: Part 1' (2004) 4 European Human Rights Law Review, 366.

Wintemute, R., 'Consensus is the Right Approach for the European Court of Human Rights' (The Guardian, 12 August 2010).

Witzleb, N., 'Marriage as the 'Last Frontier? Same-Sex Relationship Recognition in Australia' (2011) 25(2) International Journal of Policy and the Family 135.

Wolfson, E., '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.

Wright, J. S., 'The Federal Courts and Nature and Quality of State Law' (1967) 13 Wayne Law Review 317.

Wright, W. K., 'The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales' (2006) 20 International Journal of Law Policy and Family 249.

Yourow, H. C. 'Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (Brill, Netherlands, 1996).

Zago, G., 'A Victory for Italian Same-Sex Couples, a Victory for European Homosexuals? A Commentary on Oliari v. Italy' (2015), Articolo 29 Leiden University, Leiden, Netherlands.

Zweigert, K. and Kotz, H., 'An Introduction to Comparative Law' (Clarendon Press, Oxford, 1998).

Zylan, Y., 'States of Passion: Law, Identity and Social Construction of Desire' (Oxford University Press, 2011).