

**A CRITICAL EVALUATION OF THE  
LAW ON SAME-SEX MARRIAGE.**

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# **A CRITICAL EVALUATION OF THE LAW ON SAME-SEX MARRIAGE.**

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## **ABSTRACT**

The aim of this research is to identify why LGBTQ people are prohibited from the institution of Marriage and to critically plot the development of same-sex marriage and legally recognised same-sex partnerships within England and Wales. An examination of why LGBTQ people are statute barred from the established act of Marriage but have only been able to enter into a formal legal partnership (CPA 2004) inferred as second-class in comparison to the status of Marriage will be explored at length.

Equality is a central theme throughout, but specifically I discuss the effect of same-sex partnership legislation along with an examination of the development of a system to recognise actual same-sex marriage. The institution of Marriage, the Civil Partnership Act 2004 and the Marriage (Same-Sex Couples) Act 2013 are all separate institutions, and I will discuss their relationship to each other, along with a comparison of other jurisdictions with same-sex provisions currently in operation.

The complexities in the conflict of rights between religion and sexuality are explained as a recurring theme in same-sex recognised partnerships. An overview of both the positives and inadequacies of same-sex marriage legislation is presented and an explanation what just what it is intended to provide, evaluating whether this mirrors existing opposite-sex marriage legislation.

To conclude, I draw on the discussion of 'equal' but 'different' marriage for LGBTQ people and suggest an alternative form of universal equality based marriage for everyone. Finally discussing the introduction and commencement of the MSSCA 2013.

The research was conducted between 2012 to the start of 2014 and is based upon primary and secondary sources obtained from academic books, legal journals, databases and UK Government authorities. Supplemental information from non-governmental organisations and other media resources are included to illustrate issues or events where appropriate.

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## Chapter 1.

### **Introduction and LGBTQ Reform.**

#### **Introduction.**

The past decade has seen a rapid acceleration in the development of same-sex partnership legislation along with a more liberal willingness to accept different relationships that have previously been outside of normative values. Some years ago, whilst conducting research into the Civil Partnership Act 2004, examining whether the CPA 2004 was merely second-class marriage with unequal rights and regulation, it became apparent that this particular research was not able to fully identify the deeper and underlying issue of why LGBTQ<sup>1</sup> people were statute barred from the established act of Marriage. This research firstly seeks to identify why LGBTQ people are prohibited from the institution of Marriage and secondly to plot the development of legally recognised same-sex partnerships within the UK. The equality agenda has included marriage as a goal for many LGBTQ people, but has hindrance by the relationship between the Church and the State, and also by historical, social and legal influences impacted upon advancement? The intention here is to contribute to existing knowledge in this subject and where possible give a deeper insight into the development and effect of same-sex partnership and marriage legislation, than that which is currently available.

The current position in the UK is that only opposite-sex partners can enter into a valid legal marriage<sup>2</sup> although this is set to change in 2104.<sup>3</sup> The CPA 2004 is the present mechanism for

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<sup>1</sup> LGBTQ: Lesbian, Gay, Bisexual, Transgender, Queer.

<sup>2</sup> Matrimonial Causes Act 1973, s11(c).

<sup>3</sup> Upon the introduction of the Marriage (Same-Sex) Couples Act 2013 coming into force in March 2014.

same-sex partners to enter into a partnership which the UK Government have hailed the civil as successful in putting both same-sex and opposite-sex partners on an equal footing. However, many LGBTQ activists and individuals view this as an unequal addition to a hierarchical list of relationships, suggesting the civil partnership as merely a registration system that attracted a second-class status akin to sexual apartheid.<sup>4</sup> The CPA 2004 was a progressive move forward and perhaps hailed as a stepping-stone, with the intention of providing equality and mirroring civil marriage,<sup>5</sup> yet this was not actual same-sex marriage, but instead a separate entity occupying a distinct identity of its own.<sup>6</sup>

Many LGBTQ people wanted 'equal marriage' but legislative prohibition has prevented them from entering into the institution of marriage. However, to grasp what actual marriage is, it is important to appreciate the deep-rooted social and moral aspects of marriage and the historical influence of the Church and the State. Looking back at the history of marriage and its legislation provides an indication of how both religion and patriarchy are engrained into very heart of the institution of marriage and how the act of marriage itself is exclusive to two gender specific partners.

The control of the Church and the intrusiveness of Canon law have been instrumental in the regulation and control of marriage and in keeping the status quo. Historically, the very notion of same-sex partnerships has been outlawed with the prospect of same-sex marriage being almost abhorrent to the very core of fundamental religious belief. Although in the 21st century,

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<sup>4</sup> Peter Tatchell, 'Civil Partnerships are Divorced from Reality: Today's Rich Variety of Relationships and Lifestyles is not Reflected by this New One-Size-Fits-All Legislation' *The Guardian* (London, 19 December 2005) 24.

<sup>5</sup> Department of Trade and Industry, *Explanatory Notes to the Civil Partnership Act 2004* <[http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen\\_20040033\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen_20040033_en.pdf)> accessed 11 August 2013.

<sup>6</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 77.

the introduction of marriage for LGBTQ people that is based upon the same equal terms as their heterosexual counterparts is considered long overdue by many academics, libertarians and equal rights campaigners.<sup>7</sup> The differing religious denominations have been vociferous on the issue of marriage and marital status, expressing both oppressive and negative opinion. However, it is not only those that are embroiled in religious fundamentalism who have opposed same-sex marriage and any redefinition of marriage, but also the far right and those with a strong belief in conservative values,<sup>8</sup> although conservatism will be a catalyst in bringing a same-sex couples Bill into Parliament.

Marriage for all has become a contentious campaigning issue with LGBTQ activists and all those in support of 'gay marriage' who have vigorously lobbied and campaigned for the introduction of same-sex marriage. However, there still exists the issue of the introduction of a universal equality based marriage, that would accommodate those in 'different relationships' although this too has deep opposition from traditionalists and those that wish to preserve marriage as an exclusive institution reserved for heterosexual couples only. The experiences of transgender (trans) people within formalised partnerships and marriages has shown that the law has not actually been accommodating for those that identify as trans or intersex. The restrictive complications caused by the Matrimonial Causes Act 1973 (MCA) where the parties to a marriage must be respectively male and female,<sup>9</sup> has imposed a legislative ban on both same-sex partners and also those that identify as trans.

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<sup>7</sup> 'Equal Love Homepage' (*Equal Love* 14 December 2012) <[www.equallove.org.uk](http://www.equallove.org.uk)> accessed 14 December 2012.

<sup>8</sup> HC Deb 5 February 2013, vol 558, col 198.

<sup>9</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 61.

Chapter one, will plot LGBTQ reform and the positive gains made within a relatively short period of time. The influence of the ECHR and Human Rights law will be outlined and lead to reviews of ECHR cases brought under Article 8, the ‘right to respect for private and family life’ and Article 14, the ‘prohibition of discrimination’. The effect of opposite-sex cohabitation was instrumental in steering the Government towards the consideration and introduction of same-sex partnership legislation and this will conclude the chapter on reform. Since this research is concerned with same-sex ‘marriage’ that LGBTQ people would like to enter into, the second chapter introduces traditional heterosexual marriage to attempt to define the institution of marriage and modern marriage. Chapter three examines the development of the first same-sex legislation in the form of the CPA 2004, that is not the same-sex marriage that was yearned for, but instead a registration system that would alienate and prevent some LGBTQ people from entering into it. Discrimination and religious belief opposition would arise during the operation of the CPA 2004 and these challenges in both the domestic courts and the ECtHR are illustrated. The fourth chapter, discusses issues the discrimination and outlawing of opposite-sex couples that the CPA 2004 imposes. Continuing, a comparison of the inherent differences between civil partnerships and marriage will indicate the erosion of the judgement in *Hyde*<sup>10</sup>. The treatment that is afforded to the relationships of trans people is examined, reviewing the positive intentions of the GRA 2004, but also the impact of restrictive freedoms and religious conscientious objection upon the issue of disclosure in relation to acquired gender. Chapter five will plot the recent development of same-sex marriage, firstly looking at relationships falling within the ECtHR definition of ‘family life’ and the significance of *Schalk and Kopf*<sup>11</sup>, then moving on to a review recognition in other countries. An explanation of political influence and the move towards consultation and introduction of a

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<sup>10</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>11</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

same-sex marriage Bill will be illustrated with extracts from Hansard to indicate heated Parliamentary debate surrounding the Bill. The striking a balance in the conflict of rights between sexuality and religion has led to the introduction of a ‘quadruple lock’ system to accommodate the Church and State, the effect of how this has impacted on same-sex marriage will be discussed. Finally, the introduction of the MSSCA 2013 will be considered towards the end of the chapter, along with future plans concerning Scotland and NI. A final conclusion in chapter 6 will consider the sphere of marriage in conjunction with LGBTQ reform and the future operation of the MSSCA 2013.

This research is largely book based, utilising primary and secondary sources obtained from cases, legislation and UK Hansard where applicable. Books and academic works, legal journals and databases have been particularly useful in providing a deeper understanding of the issues surrounding the discussion and introduction of same-sex marriage. Government papers, including consultation documents and surveys, along with independent statistics and those supplied by the *ONS* are included to support research arguments and findings. Information from non-governmental organisations and other media resources (magazines, newspapers, webpages) are used in the research to illustrate issues or events where a more topical approach is needed to illustrate the social effect of legislation and legal decisions. Since most of this subject area is relatively modern there is not a large amount of case law available, except in the case of established marriage. But all sources have been evaluated to provide a richer and more rounded view of the topic of same-sex marriage and partnerships.

### **Reform; from outsiders to acceptance.**

The existence of high-technology communications and access to the world-wide web makes it more accessible than ever for LGBTQ people to meet others to form friendships, relationships

and perhaps find casual sex too. We have what has been aptly termed ‘love in cyberspace’ with LGBTQ virtual dating, chat rooms and social media, all providing services such as Gaydar, Gaydargirls, BiCupid, Transpassions and the all-male Grindr.<sup>12</sup> Technology is utilised to provide both public and private virtual spaces for LGBTQ people, thus making the opportunity of finding like-minded people, casual sex, friends or partners more accessible than ever before. A plethora of support organisations, professional services, nightclubs, bars, cafes, sports and health clubs, magazines and newspapers – in fact all manner of services, places and locations exist for LGBTQ people to meet each other and enjoy their modern sexually liberated freedoms together. Same-sex relationships within the UK are no longer considered taboo as they were over half a century ago, in fact they are relatively commonplace and partners are able to participate in the hierarchical ladder of relationships by affirming their union and receiving State sanction in the form of the civil partnership should they so wish. Although for many years the more pragmatic of LGBTQ people have taken to being married outside of the United Kingdom, in the knowledge that they hold a ‘real marriage’ to bind their relationship together (albeit that is currently reclassified and recognised as a civil partnership in the UK).<sup>13</sup>

Historically, same-sex partnerships and relationships for people with same-sex attractions have been intrinsically marginalised<sup>14</sup> and it must be remembered that life for those who identify as LGBTQ has not been so easy over recent decades. In March 1954, the unjust *Montagu Case* dominated the news<sup>15</sup> where five men were charged with homosexual acts, including Lord Montagu of Beaulieu and the journalist Peter Wildeblood who had fallen in love with an RAF

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<sup>12</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 179

<sup>13</sup> Relocating in Denmark, Belgium or the Netherlands for example.

<sup>14</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 173.

<sup>15</sup> Peter Wildeblood, *Against the Law* (Weidenfeld and Nicolson 1955) 63.

corporal. Wildeblood's private life was exposed and his personal letters read out aloud in court during the show trial where he was found guilty of 'conspiring to incite acts of gross indecency' and handed a sentence of 18 months imprisonment.<sup>16</sup> In the same year, the 'Wolfenden Committee'<sup>17</sup> was appointed by the government to consider and report its findings on 'Homosexual Offences and Prostitution' although this would not be published until some three years later.

The landmark publication of the highly persuasive *Wolfenden Report*<sup>18</sup> of 1957 was mainly intended to research the position of prostitution and homosexual men, although there was little reference made to lesbians in the report, continuing to leave them absent 'because physical relationships between women were not widely understood at the time'.<sup>19</sup> The report revealed the predicament of women prostitutes and homosexual men specifically, but commissioned in the 1950s at a time when life was very different for lesbians and gay men, bearing in mind that this was only a decade after the end of the Second World War.<sup>20</sup> Although in fact there was no actual penalty for lesbianism, the Law was hazardous for gay men who could find themselves imprisoned for criminal offences that were deemed by the courts as grossly indecent<sup>21</sup> or against public or private morality. Psychiatric treatment was given (to men) whilst in prison, in the hope of curing the offenders from their homosexuality and putting them back on the right track to heterosexuality.<sup>22</sup> Offences such as homosexuality, sodomy and bestiality ('unnatural offences') were the subject of a 1954 Home Office Report to the Cabinet

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<sup>16</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006) 1

<sup>17</sup> The 1954 Government appointed Sir John Wolfenden to lead the enquiry

<sup>18</sup> Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) - named after Sir John Wolfenden who led the enquiry on behalf of the Government in 1954.

<sup>19</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006) 3

<sup>20</sup> The Second World War ended in 1945 and the Wolfenden enquiry began in 1954.

<sup>21</sup> Criminal Law Amendment Act 1885, s 11 and contrary to the Sexual Offences Act 1956, s 13.

<sup>22</sup> Brian Wheeler, 'When Gays Were "Cured"' (*BBC News Magazine*, 11 November 2003)

< <http://news.bbc.co.uk/1/hi/magazine/3258041.stm> > accessed 11 December 2013.



on the issue of sexual offences and the following paragraph sums up the climate and the feeling of the UK Government at that time:

*Homosexual Offences* 10. There is a considerable body of opinion which regards the existing law as antiquated and out of harmony with modern knowledge and ideas, and, in particular, represents that unnatural relations between consenting adults, which are, not criminal except in Great Britain and the United States, should no longer be criminal in this country, and that the criminal law, in dealing with unnatural, and with normal, sexual relations, should confine itself to the protection of the young; and the preservation of public order and decency.<sup>23</sup>

This statement illustrates the State differentiation between ‘unnatural relations’ and ‘unnatural (and) normal sexual relations’ descriptive terms that were prevalent in the vocabulary of the courts of the 1950s, but additionally the ‘preservation of public order and decency’ highlights the obsession and definition with what was considered to be decent and what was not? Obviously, a relationship with a person of the same-sex was deemed as ‘unnatural’ and certainly not considered to be decent at all, but we can see an admission that the law in relation to sexuality was antiquated and the report on sexual offences expressed a recommendation for change.

This period was a dark time of blackmail, danger and intrigue, best depicted by the 1961 film ‘*Victim*’ that portrayed the lives of blackmailers and their victims, the film featured a homosexual barrister and a ring of other male acquaintances who were regularly blackmailed.<sup>24</sup> Of course, all of this was at a time when technology was not advanced, with the only way to make friends was to go to meeting places that were often behind locked closed doors or hidden away amongst shabby backstreets and the less palatable areas of our towns and cities. These

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<sup>23</sup> Home Office, *Sexual Offences. Memorandum by the Secretary of State for the Home Department and Minister for Welsh Affairs* Cabinet (54) 60, 17 February 1954  
<<http://filestore.nationalarchives.gov.uk/pdfs/small/cab-129-66-c-54-60-10.pdf>> accessed 24 December 2013.

<sup>24</sup> *Victim*, Basil Dearden, Allied Film Makers [1961]

meeting places were relatively safe places of refuge where ‘homosexuals’ of the 1950s and 1960s spent their leisure time and socialising with each other. The upper classes had the somewhat easier experience of gentlemen’s clubs, theatre dining, sporting clubs and other ‘respectful’ types of meeting places, but this section of society were more inclined to travel, therefore having exposure to a broader section of homosexual men or women. In 1967, some ten years after the *Wolfenden Report* the law against male homosexuality was reformed and the decriminalisation (in England and Wales) of sex between two males<sup>25</sup> became a catalyst in establishing a turning point in the liberation of gay men,<sup>26</sup> but it would be a further 37 years after decriminalisation that the law would recognise same-sex partnerships.<sup>27</sup> The 1967 reform in the law allowed only for ‘consenting adults (males over 21) in private’<sup>28</sup> although this did not prevent people outside of these legal limitations from having loving or sexual relationships together. This change in the law did not extend to Scotland, Northern Ireland, Isle of Man or the Channel Islands, where homosexuality continued to be illegal.<sup>29</sup> However, in spite of legislative change, this does not immediately change attitudes and as late as 1990 the well-known and respected, if not controversial, Lord Denning announced that; ‘homosexuals should not be judges because they would be more open to blackmail’.<sup>30</sup>

### **The influence of Human Rights Law.**

In the context of this research into the background of marriage and the advance towards same-sex marriage, it is pertinent to consider how a governmental change of attitude occurred towards

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<sup>25</sup> Sexual Offences Act 1967, s 1(1) – provided for the decriminalising of homosexual acts in private between consenting adults over the age of 21.

<sup>26</sup> ‘John Wolfenden comes 45th in a list of the top 500 lesbian and gay heroes’ *The Pink Paper* (London, 26 September 1997) 19.

<sup>27</sup> Upon the introduction of the Civil Partnership Act 2004.

<sup>28</sup> Sexual Offences Act 1967, s 1(1)

<sup>29</sup> Sexual Offences Act 1967, s 11(5)

<sup>30</sup> ‘Lord’s Century: Denning at 100’ (*BBC News*, 23 January 1999)

< <http://news.bbc.co.uk/1/hi/uk/260718.stm> > accessed 8 December 2013.

the recognition of same-sex relationships in the UK and the development of an Act specifically beneficial to same-sex partnerships.<sup>31</sup> Was it natural progression, social need, or the influence of cohabiting couples, or perhaps coercion from pressure groups that instigated debate on the subject of same-sex relationships? Certainly, developments in case law, the European Convention on Human Rights and the enactment of the Human Rights Act 1998 (HRA) had impact upon UK domestic law.<sup>32</sup> However, the issues of morality, procreation and HIV/Aids,<sup>33</sup> are also important factors related to the development of same-sex legislation.<sup>34</sup> Although not one particular event or epiphany brought about the discussion of same-sex partnerships, but instead, a correlation of events that whilst advancing lesbian and gay rights, also contributed to the affirmation of identity of LGBTQ citizens in the UK.

The European Convention on Human Rights provided a fundamental set of rights that were central to establishing lesbian and gay identity, whilst furthering and supporting the recognition of same-sex relationships. However, it was not until 1996 that the primary aim of the European Convention on Human Rights to promote uniform protection of fundamental human rights was exercised in the United Kingdom.<sup>35</sup> Enforcement of the Convention in the domestic legal system was not directly possible since the European Convention on Human Rights held the status of an International Treaty until October 2000.<sup>36</sup> Although, in advance of the enactment of the Human Rights Act 1998<sup>37</sup> significant milestones had been achieved by lesbians and gay

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<sup>31</sup> Civil Partnership Act 2004.

<sup>32</sup> *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 (HL).

<sup>33</sup> AIDS: Acquired Immune Deficiency Syndrome, a condition of the human immune system caused by the Human Immunodeficiency Virus, referred to as HIV.

<sup>34</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006) 13.

<sup>35</sup> Alex Carroll, *Constitutional and Administrative Law* (Pearson Education 2007) 387-390.

<sup>36</sup> Howard Davis, *Human Rights Law Directions* (OUP 2007) 54-55.

<sup>37</sup> Human Rights Act 1998, implemented 2 October 2000.

men petitioning mainly on the violation of the qualified right of Article 8, concerning the ‘right to respect for private and family life’.<sup>38</sup>

LGBT pressure groups have been instrumental in furthering the equality agenda as early as the 1970s, such as the Gay Liberation Front,<sup>39</sup> Campaign for Homosexual Equality, International Lesbian and Gay Association, Stonewall and Outrage!<sup>40</sup> The pressure group ‘Stonewall’ was established in London 1989 by a group of women and men who were active in the struggle against the homophobia imposed by Section 28.<sup>41</sup> Their aim was to form a professional lobbying group to oppose section 28 of the Local Government Act 1988 enacted by the Conservative Government to prevent local authorities from intentionally ‘promoting homosexuality’ and amongst other restrictions promoting LGBT relationships as ‘pretend’ family relationships. Stonewall has since campaigned on issues of inequality, discrimination and political attacks upon LGB people; age of consent for gay men;<sup>42</sup> equality for LGB people serving in the military; and furtherance of same-sex relationships.

A significant gain was made in the early 1980s with *Dudgeon v UK*<sup>43</sup> where male homosexual acts were a crime in Northern Ireland. The ECtHR ruled that laws criminalising male homosexual activity in NI were an interference with the private life of the applicant Jeff Dudgeon. The UK was unable to justify these laws under Article 8(2), therefore it was held that this was a breach of Article 8, the right to respect and family life. The effect of *Dudgeon* was to impact upon regulatory laws that restricted sexual orientation and freedom, since they

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<sup>38</sup> European Convention on Human Rights, art 8 (1).

<sup>39</sup> GLF, *Gay Liberation Front Manifesto* (Russell Press 1971)

<sup>40</sup> Ian Lucas, *Outrage! – an Oral History* (Cassell 1998)

<sup>41</sup> Local Government Act 1986, s 2a inserted by Local Government Act 1988, s 28(1)(a)(b): Section 28 is also referred to as Clause 28.

<sup>42</sup> European Commission of Human Rights in the case of *Sutherland v UK* (1996) 24 EHRR CD 22.

<sup>43</sup> *Dudgeon v UK* (1983) 5 EHRR 578.

directly affected intimate feelings and relationships, establishing that private life also includes sexual life, thus decriminalising male homosexual acts in NI.<sup>44</sup>

Two important cases concerning the age of consent highlighted the inequality between homosexual and heterosexual relationships. The age of consent was determined by the Sexual Offences Act 1967,<sup>45</sup> setting the age of consent for homosexual men at 21 years (the highest in Europe), compared to that of 16 years for heterosexuals and lesbians. Stonewall<sup>46</sup> brought its first challenge to inequality to the ECtHR in 1993 with *Wilde v UK*.<sup>47</sup> However, the Government lowered the age of consent in 1994, from 21 to 18<sup>48</sup> in advance of any ruling from the ECtHR and the application was struck out.<sup>49</sup> Not long after, in 1997 a second challenge in *Sutherland*<sup>50</sup> pressed for a reduction in the age of consent from 18 to 16 years and the ECtHR held that the unequal age of consent was a breach in accordance with Articles 8 and 14.<sup>51</sup> The judgment in *Sutherland* identified an important fact in the inadequacies of ‘the difference in treatment of homosexual and heterosexual relationships, and the difference in treatment between male homosexual and lesbian relationships’.<sup>52</sup>

### **Recognition of same-sex ‘family’ units.**

During the Blair Government,<sup>53</sup> the Ministry of Defence operated a hostile and longstanding ban on lesbians and gay men in the armed forces, where homosexuality was an automatic

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<sup>44</sup> Howard Davis, *Human Rights Law Directions* (OUP 2007) 293

<sup>45</sup> Sexual Offences Act 1967, s 1(1): the SOA 1967 formulated on the findings of the *Wolfenden Report 1957*.

<sup>46</sup> Stonewall – LGB pressure and lobbying group.

<sup>47</sup> *Wilde v UK* (1995) 19 EHRR CD86.

<sup>48</sup> Criminal Justice and Public Order Act 1994, amended Section 1 of the Sexual Offences Act 1967, implemented 3 November 1994.

<sup>49</sup> European Convention on Human Rights, art 30 (1).

<sup>50</sup> *Sutherland v UK* (1997) 24 EHRR CD 22.

<sup>51</sup> Articles 8 and 14: the right to respect and family life and the prohibition of discrimination.

<sup>52</sup> *Sutherland v UK* (1997) 24 EHRR CD 22, para 49.

<sup>53</sup> Tony Blair, Labour Prime Minister, May 1997 to June 2007.

legislative ground for discharge.<sup>54</sup> The ECtHR ended this practice with the cases of *Smith and Grady v UK*,<sup>55</sup> and *Lustig-Prean and Beckett v UK*,<sup>56</sup> where the applicants, all serving members of the armed forces were dismissed for being homosexual. The court held that although interference into their private lives was ‘in the interests of national security’ and in the ‘prevention of disorder’<sup>57</sup> it was considered to be disproportionate and a breach of Article 8.<sup>58</sup> Significantly, the rules were changed and in January 2000 the ban on lesbians and gay men was lifted,<sup>59</sup> this decision eventually affected traditional areas of service life, giving equal status, pension and compensation rights to both homosexual and heterosexual partners, but importantly, allowing same-sex couples to reside in ‘Service Family Accommodation’ that was traditionally reserved for opposite-sex partners only.<sup>60</sup>

The subject of family values ideology<sup>61</sup> and discussion of what actually constitutes a ‘family’ was advanced by *Fitzpatrick v Sterling Housing Association*.<sup>62</sup> This case concerned the succession of a rented property tenancy that was refused to Martin Fitzpatrick upon the death of his life-long partner John Thompson. The Court of Appeal held that ‘same-sex relationships be recognised as “family” relationships for Rent Act purposes’ thus allowing the right to succeed the tenancy of their home.<sup>63</sup> Contrast *Fitzpatrick* with the failed 1986 succession case; *Harrogate Borough Council v Simpson*<sup>64</sup> deciding whether a lesbian couple had lived together

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<sup>54</sup> Army Act 1955, s 11(3) and Air Force Act 1955, s 11(3) and Naval Discipline Act 1957, s 138(1).

<sup>55</sup> *Smith and Grady v UK* (2000) 29 EHRR 493.

<sup>56</sup> *Lustig-Prean and Beckett v UK* (1999) 29 EHRR 548.

<sup>57</sup> European Convention on Human Rights, art 8 (2).

<sup>58</sup> European Convention on Human Rights, art 8: Right to respect for private and family life.

<sup>59</sup> Military ban on homosexuality lifted on 12 January 2000.

<sup>60</sup> Terri Judd, ‘How the Forces Finally Learnt to Take Pride’ *The Independent* (London, 27 July 2009) 10.

<sup>61</sup> Rebecca Bailey-Harris, ‘Third Stonewall Lecture – Lesbian and Gay Family Values and the Law’ (1999) 29 Family Law 560.

<sup>62</sup> *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 (HL).

<sup>63</sup> Rent Act 1977, s 1(3).

<sup>64</sup> *Harrogate Borough Council v Simpson* [1986] 2 FLR 91 (CA).

‘as husband and wife’<sup>65</sup> to qualify for (heteronormative)<sup>66</sup> succession as a family member.<sup>67</sup> However, the successful *Fitzpatrick* and later *Ghaidan v Godin-Mendoza*<sup>68</sup> cases compounded the recognition of same-sex partners as a ‘family’ unit.<sup>69</sup> Progress in the UK had been disparate, but the enactment of the Human Rights Act 1998<sup>70</sup> promoted the view that discrimination of any kind was unacceptable; it ‘brought rights home’<sup>71</sup> now providing enforcement of the European Convention on Human Rights into the domestic courts.

The influence of HIV/Aids<sup>72</sup> must be recognised, when from the early 1980s the anti-gay Conservative Government<sup>73</sup> persistently attempted to attribute and scapegoat gay men as initial carriers of the disease, since it was claimed that this contributed to the decline in traditional family values.<sup>74</sup> But the reality of same-sex partners who contracted HIV/Aids found themselves excluded from any medical consultation, information access or visiting rights,<sup>75</sup> since they were not ‘kin’ or considered to be immediate family members either. Gay men found themselves excluded continuing to be stereotyped as promiscuous and since homosexual activity was classed as being not for procreation, it was deemed immoral.<sup>76</sup> Therefore, if the institution of a recognised partnership was provided it would be likely to generate stable and

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<sup>65</sup> In accordance with the list of eligible members in the Housing Act 1980, s 50(3).

<sup>66</sup> Heteronormative: A culture or belief system that assumes heterosexuality is the norm.

<sup>67</sup> Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 18.

<sup>68</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 FLR 600.

<sup>69</sup> ‘What is a ‘Family’?’ (1999) 29 Family Law 802.

<sup>70</sup> Human Rights Act 1998, implemented 2 October 2000.

<sup>71</sup> Stephen Cretney, *Same Sex Relationships: From ‘Odious Crime’ to ‘Gay Marriage’* (OUP 2006) 43.

<sup>72</sup> AIDS: Acquired Immune Deficiency Syndrome, a condition of the human immune system caused by the Human Immunodeficiency Virus, referred to as HIV.

<sup>73</sup> The Conservative Government in power from 1979 until 1997.

<sup>74</sup> John Shiers, ‘One Step to Heaven’ in Bob Cant and Susan Hemmings (eds), *Radical Records: Thirty years of lesbian and gay history 1957 – 1987* (Routledge 1988).

<sup>75</sup> HL Deb 25 January 2002, vol 630, col 1731.

<sup>76</sup> Bernard Levin, ‘Bring on the Gaystapo: The way we live now’ *The Times* (London, 28 December 1987)

<[www.lexisnexis.com/uk/legal/search/](http://www.lexisnexis.com/uk/legal/search/)> accessed 19 December 2013

faithful relationships,<sup>77</sup> thus resolving practical problems, combating promiscuity and being morally acceptable.<sup>78</sup>

The negativity surrounding the notorious ‘Clause 28’ that was introduced by the Thatcher Government<sup>79</sup> in 1988 remained on the statute books until 2003. This pernicious and homophobic piece of legislation<sup>80</sup> was drafted with the intention of preventing the ‘promotion of homosexuality’ by local authorities stating that a local authority should not:

‘(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship’<sup>81</sup>

In other words, removing or banning of books from schools that might ‘promote’ any positive aspects of homosexuality. MP David Wiltshire was in support of the ban against the promotion of homosexuality and claimed that; ‘Homosexuality is being promoted at the ratepayers’ expense and the traditional family as we know it is under attack’.<sup>82</sup> The Thatcher government made great attempts to advocate the return to ‘family values’, whilst homosexual relationships were expressly not to be promoted. However, the House of Lords voted to repeal ‘Clause 28’<sup>83</sup> which was taken off the statute books in September 2003 upon the Royal Assent of the revised Local Government Bill.

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<sup>77</sup> Stephen Cretney, *Same Sex Relationships: From ‘Odious Crime’ to ‘Gay Marriage’* (OUP 2006) 14.

<sup>78</sup> Jeffrey Weeks, *Against Nature. Essays on history, sexuality and identity* (Rivers Oram Press 1991) 111.

<sup>79</sup> Section 28, referred to as “Clause 28” by campaigners and opponents.

<sup>80</sup> Audrey Gillan, ‘Section 28 . . . Gone But Not Forgotten’ (*Guardian* 17 November 2003) <[www.theguardian.com/politics/2003/nov/17/uk.gayrights](http://www.theguardian.com/politics/2003/nov/17/uk.gayrights)> accessed 24 September 2013.

<sup>81</sup> Local Government Act 1986, s 2a inserted by Local Government Act 1988, s 28(1)(a)(b).

<sup>82</sup> Colin Spencer, *Homosexuality: A History* (Fourth Estate 1995) 383.

<sup>83</sup> HL Deb 10 July 2003, vol 651, cols 520-529.



### **The effect of cohabitation.**

The predicament of cohabiting heterosexuals was influential in the development of same-sex partnership legislation and the Family Law Committee of the Law Society presented a paper to its Council in 1999 to consider the reform of heterosexual cohabitation,<sup>84</sup> indicating that the law in this area had developed on an ‘ad-hoc’ basis. Debate highlighted the fact that when relationships broke down the current law offered very little protection to either partner. The paper recommended that any reforms made to the law should apply equally to both heterosexual and homosexual ‘cohabitees’, since drawing a logical distinction between the two was difficult.<sup>85</sup> The majority vote was to adopt and publish the paper,<sup>86</sup> although one member opined that reform would wrongly give equal rights to homosexual couples, predicting headlines such as; ‘Law Society endorses Queers’ Charter’.<sup>87</sup> The Chair of the Family Law Committee endorsed a positive vote for the opportunity and time for change.<sup>88</sup> The Solicitors Family Law Association supported the need for new cohabitation law to ‘achieve fairness and protect vulnerable cohabitants’ advocating that this could be a personal relationship between two adults, enshrined in a cohabitation contract, as opposed to an established legal marriage.<sup>89</sup> Here we see the roots of recognition of same-sex partnerships and positive consideration towards some form of legislation, albeit that this consideration has grown out of the predicament of cohabitating couples.

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<sup>84</sup> Sue Allen S, ‘Society Considers ‘Controversial’ Plan to Give Cohabitees Legal Rights’ (1999) 36 LS Gaz 5, 1.

<sup>85</sup> Sue Allen S, ‘Society Considers ‘Controversial’ Plan to Give Cohabitees Legal Rights’ (1999) 36 LS Gaz 5, 1.

<sup>86</sup> Neil Rose, ‘Cohabitation Vote’ (1999) 4 LS Gazette 4.

<sup>87</sup> Anne Johnson, ‘Strange Bedfellows’ (1999) 149 NLJ 1432.

<sup>88</sup> Mrs Hilary Siddle, Chair of the Family Law Committee of the Law Society.

<sup>89</sup> Madeleine Shaw, *The Relationships (Civil Registration) Bill and the Civil Partnerships Bill* (Research Paper 02/17, House of Commons Library 2001-02, HL 41, HC 36) 20.

## **Conclusion**

This chapter has illustrated the historical exclusion and the marginalisation of people with same-sex attractions at a period in time when same-sex partnerships and relationships were outlawed.<sup>90</sup> Life for gay men and lesbians was not easy and expressing your feelings or having sexual relations with others of the same-sex was a criminal offence. The *Wolfenden Report*<sup>91</sup> of 1957 prompted tolerance, becoming pivotal in the liberation of gay men.<sup>92</sup> A change in the law<sup>93</sup> occurred in 1967 and this contributed to the eventual legal recognition of LGBTQ people that was to follow. Challenges brought in accordance with the HRA 1998 and the ECHR advanced the equality agenda, but importantly provided recognition of same-sex relationships and ‘family’ units. The predicament of cohabitating heterosexual couples was instrumental in establishing formal recognition and legislation specific to same-sex partnerships. The next chapter will introduce opposite-sex Marriage to help understand its meaning and significance.

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<sup>90</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 173.

<sup>91</sup> Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) - named after Sir John Wolfenden who led the enquiry on behalf of the Government in 1954.

<sup>92</sup> ‘John Wolfenden comes 45th in a list of the top 500 lesbian and gay heroes’ *The Pink Paper* (London, 26 September 1997) 19.

<sup>93</sup> Sexual Offences Act 1967, s 1(1) – provided for the decriminalising of homosexual acts in private between consenting adults over the age of 21.

## Chapter 2.

### **Marriage (for opposite-sex partners)**

#### **Introduction**

Since this research is focussed upon same-sex relationships and the introduction of same-sex partnerships and marriage legislation, then it is important to consider just what is marriage? It is difficult to provide an actual definition of established marriage and the meaning of marriage, but marriage means different things to the differing partners (spouses) who are within it. Also, marriage today is very different from marriage and the historical definition of marriage.<sup>1</sup> Developments in State legislation and case law have defined and shaped marriage law in England and Wales. There is a long history, complexities and religious involvement in relation to the development of the institution of marriage, but to examine this in great depth would require a stand-alone volume of research. An overview is provided here to grasp the enormity of controlling law and its implications and a flavour for the institution that many LGBTQ people would like to enter into.

#### **Hardwicke's Marriage Act .**

For centuries people have become married to each other and often without formalised regulation, but the situation of 'informal' or clandestine 'irregular marriages' in England and Wales was commonplace up until the enactment of Lord Hardwicke's Marriage Act 1753.<sup>2</sup> The Act provided legislation requiring that a marriage would be made by formal ceremony, giving statutory force to the Church ensuring that all marriages performed would now conform to

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<sup>1</sup> Jonathan Herring, *Family Law* (5th edn, Pearson Education 2011) 41.

<sup>2</sup> Marriage Act 1753 coming into force 25 March 1754.

stringent requirements otherwise they would be void. Hardwicke's Act made far-reaching effect upon informal or clandestine marriages, whilst creating a gap between the social and legal definitions of marriage.<sup>3</sup> The Act placed existing Canon law on a legal footing and is said by *Probert* to have worked well for over 70 years<sup>4</sup> although previously argued by *John Gillis*<sup>5</sup> as a failure and that much of the legislation was ignored. The Act was drafted with the intention of standardising marriage and to ensure the required legislative formalities were complied with,<sup>6</sup> specifically that a marriage in England and Wales was performed within a nominated parish church and only according to the rites of the Church of England.

Hardwicke's Act, was repealed by the Marriage Act of 1823<sup>7</sup> seeking to address matters of consent, property and control, but also providing legal recognition for women and children within a marriage. The new Act of 1823 stipulated that a marriage would be rendered void if the parties to it 'knowingly and wilfully' avoided compliance with the law,<sup>8</sup> which is an element that is still enshrined within current marriage legislation. Matters of property and non-compliance *inter-alia* were subject to the 1823 Act in a manner similar to that of the Court of Chancery. An accommodating approach was taken towards the parties entering into a marriage, but a more constraining attitude was directed towards those set to gain from beneficial property transactions.<sup>9</sup> Patriarchal marriage, women in servitude as wives and

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<sup>3</sup> Stephen Parker, 'The Marriage Act 1753: A Case Study in Family Law Making' (1987) 1 *International Journal of Law and Policy and the Family* 133-154.

<sup>4</sup> Rebecca Probert, 'Control over Marriage in England and Wales 1753-1823: The Clandestine Marriages Act of 1753 in Context' (2009) 27 *Law and History Review* 413,414.

<sup>5</sup> John Gillis J, 'Married but not churched: plebeian sexual relations and marital non-conformity in eighteenth-century Britain' (1985) 9 *Eighteenth-Century Life* 32 as cited in Rebecca Probert R and Liam D'Arcy Brown, 'The Impact of the Clandestine Marriages Act: Three Case-Studies in Conformity' (2008) 23 *Continuity and Change* 209-330.

<sup>6</sup> J Masson and R Bailey and R Probert, *Cretney: Principles of Family Law* (8th edn, Sweet and Maxwell 2008) 17

<sup>7</sup> Marriage Act 1823 (4 Geo 4 c76)

<sup>8</sup> Marriage Act 1823 (4 Geo 4 c76), s 22.

<sup>9</sup> Rebecca Probert, 'Control over Marriage in England and Wales 1753-1823: The Clandestine Marriages Act of 1753 in Context' (2009) 27 *Law and History Review* 413,414.

mothers, issues of morality and Chancery matters were commonplace, but a flavour of what marriage was and meant during this period (to the more wealthier class) is perhaps best depicted in the novel *Pride and Prejudice* by Jane Austen.<sup>10</sup> However, the Women's Property Act 1882 would change the position regarding property, by removing legal hurdles for women and changing the entitlement to property, having the effect of formal equality between spouses.<sup>11</sup>

### **The Marriage Act 1836 and the Civil Marriage route.**

An important point in the development of marriage law was with the introduction of the 1836 Marriage Act that instigated major reform around the formation and registration of marriages. The 1836 Act created the civil registration route to marriage, now providing both the civil and religious institutions of marriage. The appointment of a 'Registrar'<sup>12</sup> was made and now provided the ability to have a civil as opposed to a church marriage for the first time in the history of marriage legislation. In addition to a marriage conducted within the rites of the Church of England, a civil marriage supervised by a Registrar could be contracted in 'registered places of religious worship' in accordance with the rituals of their religious belief, allowing Catholics and non-conformists to marry in their own churches.<sup>13</sup>

The civil route was an important milestone in the provision of a secular marriage, and today two distinct systems in operation; traditional Anglican; and the civil registration State administered system. Notably, the establishing of a superintendent 'Registrar' would become a key element in the future provision of the same-sex Civil Partnership<sup>14</sup> system, a modern development some 169 years later. However, the somewhat mixed up system of traditional

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<sup>10</sup> Jane Austen, *Pride and Prejudice* (London 1813) 1.

<sup>11</sup> Married Women's Property Act 1882, England and Wales.

<sup>12</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 53-54.

<sup>13</sup> Stephen M Cretney, 'Royal Marriages: some legal and constitutional issues' (2008) 124 LQR 218, 12.

<sup>14</sup> Civil Partnership Act 2004, s 2(1)(a).

marriage we have today can be discovered in the roots of the Marriage Act 1836 where changes to the law were made due to the incidence of ‘dissenting’ worship outside of the established Church of England. These changes in the law reflected religious toleration and provided a recognised route to marriage in Roman Catholic, Jewish and Quaker rites. A civil ceremony was now established and the post of ‘superintendent registrar of births, deaths and marriages’ was created in conjunction with the Birth, Deaths and Marriages Act 1836. Authorisation was given to issue a civil marriage certificate when the superintendent registrar, was satisfied that a wedding ceremony was performed in an appointed or registered building in accordance with State legislation.<sup>15</sup>

The civil ceremonies of the 1836 Marriage Act also allowed other religions and those classed as dissenters to register their marriages by obtaining a marriage certificate. Therefore, the civil marriage route provided the choice of a secular or a religious (spiritual) marriage for opposite-sex partners. An established Church of England ceremony enshrines both legal and spiritual requirements as one, whilst Roman Catholic and other denominations are simultaneously conducting the spiritual and civil legal elements as two components. The three main elements of preliminaries, ceremony and registration, can now be found in modern marriage law and are defined in the complexities of the Marriage Act of 1949.

The development of marriage and the act of marriage itself can include multiple considerations, notably those of property, social, moral, economic and religious values. Studying the exact reasons why people get married can be a broad and complex,<sup>16</sup> although there is one certainty and this is that marriage has always been a gender specific institution, exclusive to opposite

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<sup>15</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 53-54.

<sup>16</sup> JA Sharpe, *Early Modern England: A Social History 1550-1760* (2nd edn, Hodder Arnold 1997) 61.

sex partners, most accurately and classically defined some 145 years ago by Lord Penzance in 1866:

The position or status of ‘husband’ and ‘wife’ is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definitive lights upon their offspring. (...) I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others<sup>17</sup>

In this case of *Hyde v Hyde and Woodmansee*<sup>18</sup> there evolved four basic conditions that the marriage must be; voluntary, heterosexual, for life and monogamous. The affirmation of this basic premise was later reiterated in a leading 1996 case by Ward LJ stating that although some elements of the words of Lord Penzance ‘may have been eroded; bigamy and single-sex unions remain proscribed as fundamentally abhorrent to this notion of marriage’.<sup>19</sup> Ward LJ continued to say that marriage is ‘a contract according to the law of nature, antecedent to civil institutions, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together’ which he quoted from the 1795 dictum of the ‘master of ecclesiastical law’ Sir William Scott.<sup>20</sup> However, the definition from *Hyde* continued to be applied by the courts and as late as 2003 in the *Bellinger v Bellinger case*, Nicholls LJ said ‘Marriage is an institution, or a relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex’<sup>21</sup> Clearly, according to the law these historic conditions are specific in that marriage is an institution comprising of opposite-sex partners.

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<sup>17</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130 [133]

<sup>18</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>19</sup> *S-T (Formerly J) v J (Transsexual: Ancillary Relief)* [1997] 1 FLR 402: as cited in MDA FREEMAN, *Family Values and Family Justice* (Ashgate Publishing 2010) 290.

<sup>20</sup> *Lindo v Belisario* (1795) 1 Hag Con 216, 161 ER 53 as cited in MDA FREEMAN, *Family Values and Family Justice* (Ashgate Publishing 2010) 290.

<sup>21</sup> *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593 [46].

### **Divorce, separation and further legislation.**

The laws related to marriage have been extensive, but not only is the regulation of opt-in marriage important, there is also the issue of opt-out divorce and separation from a marriage, which occupies a particular thread of its own. The development in divorce law reform and the establishing of the MCA 1937 is attributed as being instrumental in paving the way for modern matrimonial and civil partnership legislation.<sup>22</sup> As we shall see in later chapters, in the dissolution of a civil partnership the legislation mirrors that of fault based divorce in a traditional marriage, although same-sex partners are not able to petition on the grounds of adultery, since it is problematic to apply the current legal definition of adultery to same-sex partners.<sup>23</sup> Historically, many concepts and precedents in relation to divorce law remained from earlier centuries and it was only in 1923<sup>24</sup> that either spouse could petition the court for a divorce based upon the adultery of the other, thus putting both partners on the same level.<sup>25</sup> However, one of the most important events in legislation was in 1937 with the development of the Matrimonial Causes Act that reformed and consolidated much of the earlier legislation.

*A P Herbert's Act*,<sup>26</sup> simplified divorce and separation, establishing adultery, cruelty and desertion as three further grounds for divorce. Additionally, there was the condition of 'incurable unsoundness of mind' and new grounds for nullity of marriage, some of which remain on the statute books today. The major development in divorce law reform and the establishing of the MCA 1937 is attributed as being instrumental in paving the way for modern matrimonial and civil partnership legislation.<sup>27</sup>

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<sup>22</sup> Philip Waller, 'Family: Going the Distance' 162 (2012) New Law Journal 604.

<sup>23</sup> Catherine Fairburn, 'Same-sex Marriage and Civil Partnerships' (HC Standard Note SN/HA/588202 19 June 2012) 3.

<sup>24</sup> Matrimonial Causes Act 1923.

<sup>25</sup> Jonathan Herring, *Family Law* (3rd edn, Pearson Education 2013) 99.

<sup>26</sup> Sir Alan Patrick Herbert. – Matrimonial Causes Act 1937.

<sup>27</sup> Philip Waller, 'Family: Going the Distance' 162 (2012) New Law Journal 604.



The Marriage Act 1949 defined both the procedure and premises where a heterosexual marriage can take place; also including the three main elements of preliminaries, ceremony and registration that have continued to remain central to most traditional marriages.<sup>28</sup> The law that related to the formalities of marriage was contained in over 40 statutes with the addition of the various interpretations that evolved through case law. The intention of the 1949 Act was to consolidate the various enactments into one single Act (although now amended by post 1949 Acts<sup>29</sup>), but also defined both the civil and religious routes to marriage. Entering into a marriage requires ‘opting-in’ and complying with the legislative formalities required by the state.<sup>30</sup> The Act also contains a schedule of ‘prohibited degrees’ with the purpose of prohibiting a marriage between relations who are connected through consanguinity (blood relatives) or affinity (marriage based)<sup>31</sup>, such as adoptive children and parents, grandparents and a former spouse or sibling, along with other specified relatives. This implies that marriage is expected to be a sexual relationship,<sup>32</sup> although there are some exceptions and restrictions, such as this extract from statute for example: ‘in the case of a marriage between a man and the former wife of his son, after the death of both his son and the mother of his son’.<sup>33</sup> The law relating to prohibited degrees was consolidated in the Marriage (Prohibited Degrees of Relationship) Act 1986 and now applies equally to those same-sex partners wanting to enter into a civil partnership.<sup>34</sup> A criticism here it is that the modern concepts of same-sex partnership and marriage contain

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<sup>28</sup> Marriage Act 1949.

<sup>29</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 54

<sup>30</sup> Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 24.

<sup>31</sup> Marriage Act 1949, sch 1(1).

<sup>32</sup> Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 25.

<sup>33</sup> Marriage Act 1949, s 1(5)(b).

<sup>34</sup> Civil Partnership Act 2004, sch 1(1).

legislation made many decades earlier and that aspects of divorce law date back to as early as the 18th century, but an opportunity was available to create a new approach and was ignored.

### **Modern Marriage.**

Marriage is both an opt-in and an opt-out institution, but its meaning and definition today has drastically changed from that depicted in the novel *Pride and Prejudice*, but has also moved on from the definition by Lord Penzance in *Hyde*. Marriage legislation has grown both in its volume and complexity, Thorpe LJ dissenting in the case of *Bellinger* inferred that marriage is ‘a contract for which the parties elect but which is regulated by the State, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations’<sup>35</sup> Here we see marriage described as an opt-in contract that is State regulated with procedures and obligations, both when entering into or ending a union. In living together as man and wife, the spouses to a marriage are considered equal in the eyes of the law, although a modern marriage is rich and diverse in its definition and not always seen or referred to in regulatory or a contractual nature.

For many the entity of marriage is the sphere to include children and raise their own family, whilst others view their union as economic or a passage into adulthood. In attempting to set out how the law now defines marriage Mr Justice Mostyn said that when two people get married they are likely to have little idea of the economic obligations and that the marriage certificate explains nothing regarding the terms of their agreement.<sup>36</sup> Explaining that almost every element identified by Lord Penzance (*in Hyde*) is questionable in the modern world he poised the

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<sup>35</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2001] 2 FLR 1048 [128].

<sup>36</sup> ‘What is Marriage? What should it be?’ (Family Law Week, 2010)  
<<http://www.familylawweek.co.uk/site.aspx?i=ed70850>> accessed 12 July 2014.

questions as to whether marriage 'is an economic union and should it be, or is marriage a union of trust and confidence?'<sup>37</sup> On the question of an economic union he said that marriage is a legally binding contract agreed and entered into by both parties, contracting into a legal package according to the law of the land. Marriage is also a status, with legal consequences for both everyone and the state, and that there is a mutual obligation of support which was the foundation of the sole economic rule of marriage from 1857 to 2000.<sup>38</sup>

Munby J summarised the duties and responsibilities that are normally attached to a marriage in the case of *Sheffield CC v E*, as:

Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.<sup>39</sup>

This summary has echoes of *Hyde*, although the *Hyde* decision is somewhat eroded and modern marriage such as *Sheffield* from 2004 can now be defined as including domesticity, mutuality and support in the lives of married partners. However, this view of marriage is not shared by all, such as feminists who view marriage in what *Auchmuty* describes as a controlling mechanism over women by 'endowing men with a better lifestyle, greater freedom and more power'. Marriage is considered to be 'an unattractive goal' despite the significant legal and social changes over the last 200 years, but *Auchmuty* suggests that those feminists who have

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<sup>37</sup> 'What is Marriage? What should it be?' (Family Law Week, 2010) para 8  
<<http://www.familylawweek.co.uk/site.aspx?i=ed70850>> accessed 12 July 2014.

<sup>38</sup> 'What is Marriage? What should it be?' (Family Law Week, 2010) para 19  
<<http://www.familylawweek.co.uk/site.aspx?i=ed70850>> accessed 12 July 2014.

<sup>39</sup> *Sheffield County Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326 [132].

chosen to marry will have to participate in a set of norms that they personally reject.<sup>40</sup> Likewise, lesbians and gay men who favour marriage have a different understanding of the meaning of marriage to those who oppose it. *Mc K Norrie* describes marriage as a ‘legal structure defined artificially by the law’ and that there is no universally accepted natural definition of marriage, but ‘by definition is heterosexual because that is how marriage is defined’.<sup>41</sup>

### **Conclusion**

Looking back at the historical roots of marriage and the legislation enacted to exert control over both the act of marriage and the condition of being in a marital relationship indicates that the institution of marriage mainly exists to serve the interests of society. Control over marriage was initially in the hands of the Church, but over a period of time became the purvey of the Government and the Law of the land, but the influence of the Church remained. Therefore, this particular social construction and the invention of man known as marriage, concerns patriarchal values, of property, moral, economic and matters of religion that are deeply rooted into the very fabric of life. The historical concern with the regulation of marriage and the ensuring that everyone is operating within legislative rules has been an ongoing matter of importance to both the Church and the Government of the United Kingdom. The institute of marriage and the background and complexities involved in traditional opposite sex marriage are immense, but the act of marriage has a different meaning to differing partners. However, this powerful institution along with its expertly drafted legislation has been pivotal in its contribution towards the exclusion of a consensual union or marriage between same-sex partners.

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<sup>40</sup> Rosemary Auchmuty, ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ (2004) 14 *Feminism & Psychology* 101, 105.

<sup>41</sup> Kenneth Mc K Norrie, ‘Marriage is for Heterosexuals – may the rest of us be saved from it’ (2000) 12(4) *CFLQ* 363.

## Chapter 3.

### **Civil Partnerships.**

#### **Introduction**

The previous chapter establishes the institution of heterosexual marriage and this chapter will discuss the development of the formal recognition towards same-sex partnerships, but also an indication of why actual same-sex marriage for LGBT people was not initially provided at this time. The decision to develop same-sex partnership legislation was influenced by the ECHR and the HRA 1998, but also by the prevalence of cohabitation and consideration of affording status to partnerships of all sexualities who were not in a marriage. The commencement and operation of the Civil Partnership Act 2004 (CPA) illustrates attitudes towards civil partners, also identifying that this is not marriage but a different legal institution to that of heterosexual marriage. Since the CPA 2004 is not same-sex marriage, then recognition of a same-sex marriage made outside of the UK presented a challenge to the courts, but also recognised an attempt to bring same-sex marriage inside of the norm of marriage. Civil Partnerships and reforms based upon sexuality have also fuelled a clash of rights between LGBTQ equality and religious belief and conscientious freedoms, which is discussed within this chapter.

#### **Development of formal recognition.**

The Greater London Authority became the first public body to recognise same-sex couples with the introduction of Ken Livingstone's 'London Partnerships Register'.<sup>1</sup> The register held no legal status but was open to both heterosexual and homosexual partners, the first registration of

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<sup>1</sup> Susannah Prain, 'Ian Burford One Half of the First Gay Couple to Sign the London Partnerships Register' *The Independent* (London, 8 September 2001) 20.

two male partners, Ian Burford and Alex Cannell took place in September 2001. The recognition provided to lesbian and gay partners was immense, since having the opportunity to register a union was considered to be a major step in moving towards equality, although the London Partnerships Register became redundant in 2004 upon the eventual introduction of the Civil Partnership Act.

Influenced by the 'London Register', the Labour member Jane Griffiths MP<sup>2</sup> introduced a Relationships (Civil Registration) Bill, into the House of Commons in October 2001. The Private Members Bill, constructed in three clauses was to allow single individuals, *who did not have to be of the opposite sex*, to register a relationship 'akin to marriage'.<sup>3</sup> Responsibilities and benefits, such as inheritance, housing succession, pensions and immigration were contained in the four-page Bill that culminated with a method for dissolution and provision for the future welfare of any children to the partnership.<sup>4</sup> However, the Bill ran out of time during the 2001-2 session, losing momentum in the house and was eventually withdrawn.

In January 2002, Lord Lester<sup>5</sup> introduced a new Private Members' Bill into the House of Lords<sup>6</sup> entitled the 'Civil Partnerships Bill' which was prepared on the joint initiative of the Odysseus Trust<sup>7</sup> and Stonewall. The twenty-five page Bill was 'designed to remedy the lack of protection for cohabiting couples (whether opposite sex or same-sex) in English Law'<sup>8</sup> and would 'enable them to live together within a stable and coherent framework of rights and responsibilities'.

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<sup>2</sup> Jane Griffiths, Labour MP for Reading East.

<sup>3</sup> Relationships (Civil Registration) HC Bill (2001-02) [36].

<sup>4</sup> Madeleine Shaw, *The Relationships (Civil Registration) Bill and the Civil Partnerships Bill* (Research Paper 02/17, House of Commons Library 2001-02, HL 41, HC 36) 21.

<sup>5</sup> Lord Anthony Lester of Herne Hill, QC.

<sup>6</sup> HL Deb 9 January 2002, vol 630, col 561.

<sup>7</sup> The Odysseus Trust, supporting the work of Lord Anthony Lester of Herne Hill QC, in the House of Lords.

<sup>8</sup> Explanatory Notes to the Civil Partnerships HL Bill (2001-02)

41 <[http://www.odysseustrust.org/civil\\_partnerships/cpb\\_explanatorynotes.pdf](http://www.odysseustrust.org/civil_partnerships/cpb_explanatorynotes.pdf)> accessed 14 December 2012.

This Bill provided a method to establish a legally recognised civil partnership, setting out in four parts the procedures for registration, effect and provision for ending a partnership.

The Bill was not without opposition and during its second reading, Lord Lester explained that his Bill may ‘actually promote marriage’ and that it would be ‘unjust to continue to penalise opposite sex couples for not choosing to marry’. He continued; ‘with all respect to the Christian Institute, which organises political lobbies, and to today's Daily Telegraph, the Bill is not a threat to marriage, since they (cohabitants) need legal protection and encouragement to live together as stable and loving families’.<sup>9</sup> The Lord Bishop of Winchester responded with discontent saying that the Bill ‘would undermine the institution of marriage and destroy the precious foundation and well-being of countless individuals, now and in the future’.<sup>10</sup> Lord Lester’s Bill was finally withdrawn upon the Government undertaking to develop its own consultation with the intention of providing a legally recognised union for same-sex partners.

The Law Society’s second cohabitation reform paper<sup>11</sup> had given recognition to same-sex partners, noting that public opinion had advanced and cohabitation was more widespread, advocating that a form of registration of relationships with equal protection, should be available to both same-sex and opposite-sex couples alike.<sup>12</sup> Jacqui Smith MP,<sup>13</sup> launched a first consultation paper in June 2003, entitled ‘Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’<sup>14</sup> on behalf of the Women and Equality Unit. The consultation was contained in 88 pages, providing positive reasons for new legislation and the

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<sup>9</sup> HL Deb 25 January 2002, vol 630, cols 1695-1696.

<sup>10</sup> HL Deb 25 January 2002, vol 630, cols 1704-1706.

<sup>11</sup> Law Society, ‘Cohabitation: The Case for Clear Law, Proposals for Reform’ (London, July 2002).

<sup>12</sup> Law Society, ‘Cohabitation: The Case for Clear Law, Proposals for Reform’ (London, July 2002) 7.

<sup>13</sup> Jacqui Smith MP, Labour Deputy Minister for Women and Equality

<sup>14</sup> Women and Equality Unit, ‘Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’ (London, Department of Trade and Industry June 2003).

need for legal recognition of couples in same-sex relationships. The consultation paper stated that ‘caring relationships and committed partnerships spanning over many years should be afforded equal recognition’ and that ‘culture change occurs not only by legal recognition but also by building on the significant and welcome change in attitudes towards lesbian, gay and bisexual people’.<sup>15</sup> The consultation document received a positive response of 83% supporting the principle of a civil partnership scheme,<sup>16</sup> with the largest campaign involvements by Stonewall in support and The Christian Institute who were against.<sup>17</sup>

The Queen’s speech of November 2003 affirmed the commitment to bringing forward legislation on the registration of civil partnerships between same-sex couples with the announcement; ‘My Government will maintain its commitment to increased equality and social justice by bringing forward legislation on the registration of civil partnerships between same sex couples’.<sup>18</sup> This was hailed as a step in the right direction for LGB equality, both by Stonewall and other supporters, but the group OutRage!<sup>19</sup> demanded marriage on the same terms as heterosexuals, claiming that the equal marriage was the only solution. Although later opinion shifted towards the inception of the Civil Partnership being a possible stepping stone towards an ultimate goal of same-sex marriage.<sup>20</sup>

Stonewall was in support of civil partnerships, arguing that this new modern concept would be a parallel legal institution of its own and considered preferable to changing the traditional

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<sup>15</sup> Women and Equality Unit, ‘Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’ (London, Department of Trade and Industry June 2003) 9.

<sup>16</sup> Women and Equality Unit, ‘Responses to Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’ (London, Department of Trade and Industry November 2003) 9.

<sup>17</sup> Women and Equality Unit, ‘Responses to Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’ (London, Department of Trade and Industry November 2003) 19.

<sup>18</sup> HC The Queens Speech 26 November 2003, vol 415, col 4.

<sup>19</sup> Ian Lucas, *Outrage! – an Oral History* (Cassell 1998).

<sup>20</sup> Jonathan Herring, *Family Law* (3rd edn, Pearson Education 2013) 66.



perception of marriage or the inclusion of lesbians and gay men within it. Simultaneously, this stance of supporting a new concept enabled Stonewall to avoid any conflicts with organised religion, but also avoiding or appearing to support the established patriarchal institution of marriage.<sup>21</sup> But Peter Tatchell and the group 'Outrage!' rejected the 'separate but different' approach taken by Stonewall, nor did he support the concept of both civil partnerships and marriage for LGBT people. Tatchell argued for a rejection of the oppressive and patriarchal institution of marriage since this represented the 'co-option of gays and lesbians into the value system of heteronormative society'. Instead Tatchell and Outrage! wanted an entirely new legal institution that would equally serve both LGBT people and heterosexuals alike.<sup>22</sup>

The Civil Partnership Bill gathered momentum, although somewhat turbulently advancing through Parliament. Lady Saltoun of Abernethy inferred that this was a political move saying 'Perhaps the Government think there are more gay and lesbian votes for them in the next election'<sup>23</sup> but in a later HL discussion Baroness Scotland announced:

We are trying to do something relatively straightforward and fundamentally decent; that is, to treat people equally. We are acknowledging for the first time in law that homosexual relationships exist. They have existed for a couple of hundred years. We are now just allowing people to acknowledge them. They have probably existed longer, since time immemorial. I think there is a reference to them in relation to Sodom and Gomorra.<sup>24</sup>

During the third reading in the Commons, Conservative MP Edward Leigh said that there was a fundamental dishonesty about the debate and that the Government are creating a 'homosexual

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<sup>21</sup> Beccy Shipman and Carol Smart, 'It's Made a Huge Difference: Recognition, Rights and the Personal Significance of Civil Partnership' (2007) 12 (1) Sociological Research para 2.5  
<[www.socresonline.org.uk/12/1/shipman.html](http://www.socresonline.org.uk/12/1/shipman.html)> accessed 8 October 2013.

<sup>22</sup> Beccy Shipman and Carol Smart, 'It's Made a Huge Difference: Recognition, Rights and the Personal Significance of Civil Partnership' (2007) 12 (1) Sociological Research para 2.7  
<[www.socresonline.org.uk/12/1/shipman.html](http://www.socresonline.org.uk/12/1/shipman.html)> accessed 8 October 2013.

<sup>23</sup> HL Deb 22 April 2004, vol 660, col 413.

<sup>24</sup> Baroness Scotland of Asthal, HL Deb 10 May 2004, vol 661, col GC21 cited in Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 185.

marriage Bill' but not calling it as such because of alienating public opinion. He continued 'Why do we not say to the British people that the Bill will create homosexual marriage? The Government do not dare do so, because it would be too politically controversial. Instead, they are creating this ridiculous beast (...)'.<sup>25</sup> In spite of the turbulence, the Bill passed successfully and in November 2004 received Royal Assent, becoming the Civil Partnership Act 2004, coming into force on 5th December 2005. The media announced a 'Rush of Gay Weddings'<sup>26</sup> whilst LGBTQ and human rights campaigner *Peter Tatchell*<sup>27</sup> took a more radical stance urging 'equal legal rights for all relationships of mutual care and commitment', declaring that the new Act was akin to sexual apartheid; 'Civil Partnerships are divorced from reality' and that equal marriage for all was the goal.<sup>28</sup>

An influencing factor in bringing about change for homosexual partners was the prevalence of cohabitation. Paradoxically the prompt that encouraged the Government to bring forward the original Civil Partnerships Bill was the concern to secure legal recognition for cohabiting heterosexual couples, whom due to a lack in the law, experienced immensely distressing difficulties.<sup>29</sup> However, upon its enactment two years later, the Civil Partnership Act<sup>30</sup> actually did nothing to alleviate the problems encountered by cohabiting heterosexual couples, nor did it apply equally to both same-sex and opposite sex partners as originally intended by Lord Lester.<sup>31</sup>

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<sup>25</sup> HC Deb 9 November 2004, vol 426, col 731.

<sup>26</sup> Louise Gray, 'December Set for Rush of "Gay Weddings" as New Law Takes Effect' *The Scotsman* (Edinburgh, 22 February 2005) 18; Stefanie Marsh, 'Festive season for gay weddings' *The Times* (London 22 February 2005) 24.

<sup>27</sup> Peter Tatchell, co-founder and spokesperson for OutRage! Lesbian, Gay, Bisexual, Transgender and Human rights campaigner since the early 1980s.

<sup>28</sup> Peter Tatchell, 'Civil Partnerships are Divorced from Reality: Today's Rich Variety of Relationships and Lifestyles is not Reflected by this New One-Size-Fits-All Legislation' *The Guardian* (London, 19 December 2005) 24.

<sup>29</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006) 15

<sup>30</sup> Civil Partnership Act 2004.

<sup>31</sup> HL Deb 9 January 2002, vol 630, col 561.

### **Registered partnerships but not same-sex marriage?**

Why did the Government not provide same-sex marriage legislation at this time, but instead the separate institution of the Civil Partnership? It was stated in 2000 by the Home Secretary that marriage is a union for procreation of children by heterosexual couples and could see no circumstances in which the Government would bring forward proposals for ‘so called gay marriages’.<sup>32</sup> Other clues are in the early HL debate of Lord Lester’s Bill in 2002, where religion has clashed with sexuality, for example where the Lord Bishop of Winchester voiced his concern over ‘the effect of further undermining (...) the "institution" of marriage’ and an ‘issue of public health that marriage should be supported and promoted; not undermined’<sup>33</sup> In June 2003 the civil partnership consultation document also stated that ‘it is a matter of public record that the Government has no plans to introduce same-sex marriage’.<sup>34</sup> But the ongoing reaction from religious organisations was that the formalising of same-sex partnerships would undermine marriage and this stance continued to be preserved in the debate of the Civil Partnership Bill of 2003-4.<sup>35</sup>

Over a period of two years debate had focussed upon the issue of ‘undermining marriage’ but Baroness Scotland stated that support for marriage would continue and there was no intention to undermine or weaken the importance of marriage, with no proposal to open civil partnerships to opposite-sex couples.<sup>36</sup> The Christian response was that the view of Church of England and

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<sup>32</sup> Andrea Babbington, ‘Straw says “No” to Gay Marriage’ *The Independent* (1 October 2000) <<http://www.independent.co.uk/news/uk/politics/straw-says-no-to-gay-marriage-634671.html#>> accessed 15 July 2014.

<sup>33</sup> HL Deb 25 January 2002, vol 630, cols 1704 -1705.

<sup>34</sup> Women and Equality Unit, ‘Civil Partnership: a Framework for the Legal Recognition of Same-sex Couples’ (London, Department of Trade and Industry June 2003) 13 [1.3].

<sup>35</sup> Civil Partnership HL Bill (2003-4) 53.

<sup>36</sup> Baroness Scotland of Asthal, HL Deb 22 April 2004, vol 660, col 388.

the General Synod is ‘that marriage is central to the stability and health of human society and warrants a unique place in the law of this country’.<sup>37</sup> However, there was recognition of a need for new rights for people whose relationships are not based on marriage. This turbulence and opposition from religious organisations was continually met with responses that same-sex partnerships were not intended and would not undermine the institution of marriage. However, Baroness O’Cathain quoted *The Lawyer* (law journal), saying:

The extent of the proposals raises the question as to why the Government did not just extend the right to marry to same-sex couples. The answer must be that to do so would be too controversial. By effectively achieving the same result under a different name, the Government has so far managed to avoid a public backlash.<sup>38</sup>

Would same-sex marriage have been too controversial in 2004? Upon its enactment the Civil Partnership Act is not the same as marriage by another name either. *Harding* suggests that political concerns including the continued opposition from religious organisations was instrumental in the creation of civil partnerships instead of same-sex marriage.<sup>39</sup> A conflict of rights between organised religion and LGBT struggles, created a barrier to same-sex marriage and the outcome is that whilst marriage is a religious concept, the same-sex civil partnership was secular – hence in the original enactment legislative requirements state that no religious service or use of religious premises were permitted.<sup>40</sup> Law reform based on sexual orientation and the quest for equality for LGBT people, has repeatedly clashed with religious and conscientious freedoms causing a clear conflict of rights. *Stychin* has discussed a comparison between the ‘belief and practice of religion’ against the ‘being and doing of homosexuality’ but in providing an inclusive public sphere, then religion like sexuality should be allowed space

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<sup>37</sup> Lord Bishop of Oxford, HL Deb 22 April 2004, vol 660, col 398.

<sup>38</sup> HL Deb 22 April 2004, vol 660, col 404.

<sup>39</sup> Harding R, ‘Recognizing (and Resisting) Regulation: Attitudes to the Introduction of Civil Partnership’ (2008) 11 *Sexualities* 740, 752.

<sup>40</sup> Civil Partnership Act 2004, s 2(5): s 6(1)(b).

within the public sphere, striving towards a balance of rights.<sup>41</sup> Applying this, the CPA 2004 appears to have achieved a balance of rights in providing formalised partnership rights for LGBTQ people, but also accommodating religious belief (to some degree) by not allowing any religious elements in the forming of partnerships.

### **Commencement of Civil Partnerships.**

The first civil partnerships commenced in Northern Ireland on Monday 19 December 2005 and Scotland followed suit the following day on Tuesday 20 December. Civil partnerships in England and Wales were conducted on what was termed ‘Pink Wednesday’ the 21st of December 2005, gaining wide media coverage,<sup>42</sup> although the civil partnership was not exactly the equal marriage that LGBTQ campaigners were seeking. Nonetheless, this was a notable step along the road to equality with this new form of registering a partnership welcomed by equality supporters and a large section of the LGBTQ community. The Government had intended that by making a public declaration of their relationships, lesbian, gay and bisexual people would feel more confident and respected by society.<sup>43</sup> Social acceptance of same-sex relationships would therefore reduce homophobia and discrimination, creating a more inclusive society that no longer treated same-sex relationships as second class.<sup>44</sup> Social research conducted by NatCen in 2009 indicated that civil partners were quoted as being ‘overjoyed’ and

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<sup>41</sup> Stychin CF, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) 29 *Oxford Journal of Legal Studies* 729.

<sup>42</sup> Louise France, ‘Lovers in Law: We Know About Elton and David, but What About Ben and Dick, Mark and Shaun, Karen and Joanne?’ *The Observer* (London, 6 January 2006) 8.

<sup>43</sup> Department of Trade and Industry, *Final Regulatory Impact Assessment: Civil Partnership Act 2004* (31 March 2004) 17 <

<http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file23829.pdf>> accessed 7 October 2013.

<sup>44</sup> Department of Trade and Industry, *Final Regulatory Impact Assessment: Civil Partnership Act 2004* (31 March 2004) 16 < <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file23829.pdf>> accessed 7 October 2013.

feeling like ‘mainstream citizens’,<sup>45</sup> whilst responses from those LGBTQ people not in partnerships felt ‘that Civil Partnership did not represent full equality’.<sup>46</sup>

Conversely, the first UK dissolution was announced by two women partners after their short civil partnership and dubbed by the press as; ‘Lesbian Couple plan first civil partnership divorce’,<sup>47</sup> although their separation was announced only three months after registration, the CPA 2004 legislation stipulates that a partnership cannot be dissolved within the first year.<sup>48</sup> Note the use of the word *divorce* which of course is technically incorrect, but the use of the correct legal term ‘dissolution’ would probably not catch the headlines.

The CPA 2004 is similar to the model of the Danish registered partnership<sup>49</sup>, but legislation to date not gathered substantial case law to equal that of the institution of heterosexual marriage. But since its enactment in December 2005, the *ONS* have recorded 60,454 Civil Partnership registrations in the UK up until the end of 2012.<sup>50</sup> The formation of Civil Partnerships peaked in 2006 with 16,000 registrations, mainly due to the initial take up rate by those wanting to formalise existing relationships. However, registrations have declined by more than a half since 2006, with a recorded 18 percent decrease between 2007 and 2008,<sup>51</sup> but a marginally

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<sup>45</sup> Martin Mitchell and Sarah Dickens and William O’Conner, *Same-Sex Couples and the Impact of Legislative Changes*. (National Centre for Social Research 2009) 34

<sup>46</sup> Martin Mitchell and Sarah Dickens and William O’Conner, *Same-Sex Couples and the Impact of Legislative Changes*. (National Centre for Social Research 2009) 37

<sup>47</sup> Mark Shoffman, ‘Lesbian Couple Plan First Civil Partnership Divorce’ (*Pink News* 18 May 2006) <[www.pinknews.co.uk/news/articles/2005-1511.html](http://www.pinknews.co.uk/news/articles/2005-1511.html)> accessed 16 September 2011.

<sup>48</sup> Civil Partnership Act 2004, s 41(1).

<sup>49</sup> The Danish *Registreret Partnerskab* enacted 7 June 1989.

<sup>50</sup> Office For National Statistics, ‘Statistical Bulletin: Civil Partnerships in the UK, 2012’ (*ONS* 8 October 2013) <[http://www.ons.gov.uk/ons/dcp171778\\_329457.pdf](http://www.ons.gov.uk/ons/dcp171778_329457.pdf)> accessed 24 December 2013.

<sup>51</sup> ‘Statistical Bulletin: Civil Partnerships in the UK, 2008’ (*ONS* 4 August 2009) <<http://www.ons.gov.uk/ons/rel/vsob2/civil-partnership-statistics--united-kingdom/2008/civil-partnerships-in-the-uk-2008.pdf>> accessed 24 September 2013.

small increase between 2010 and 2011.<sup>52</sup> In 2012, the number of civil partnerships formed in the UK saw a slight increase of 3.5% on the previous year, returning an average of 6,000 registrations a year.<sup>53</sup> In a 2003 briefing paper, Stonewall had predicted an approximate take up of 475,000 lifetime registrations, based upon a UK population of 57 million.<sup>54</sup> The *ONS* figures may indicate that although the Civil Partnership has been quoted as being popular and akin to marriage, perhaps it is not perceived as such by those partners who want to have their unions formally recognised (or be in a *real* marriage)? This ‘uneasy relationship’ between civil partnership and marriage’ is described by *Harding* as ‘not-marriage’ for same-sex couples, with empirical research identifying responses from those who felt that they were ‘being sold marriage’ and that the civil partnership could have been a better ‘more radical’ alternative to marriage. However, another response indicated a ‘lack or gap in the creation of a separate but equal status’ identifying a distinction between civil partnership and marriage, but overall felt that this was a ‘step in the right direction’ (*towards same-sex marriage?*).<sup>55</sup>

The ability to be able to be with partners, outwardly demonstrating love and commitment to each other is considered to be a central reason for entering into a formal same-sex partnership.<sup>56</sup> NatCen research has indicated that the formalising of relationships is regarded to be ‘the next logical step’<sup>57</sup> and same-sex partners said they have entered into periods of ‘engagement’ and ‘honeymoons’ much the same as heterosexual relationships. Although this heteronormative

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<sup>52</sup> ‘Statistical Bulletin: Civil Partnerships in the UK, 2011’ (*ONS* 31 July 2012)  
<[http://www.ons.gov.uk/ons/dcp171778\\_274464.pdf](http://www.ons.gov.uk/ons/dcp171778_274464.pdf)> accessed 24 September 2013.

<sup>53</sup> ‘Statistical Bulletin: Civil Partnerships in the UK, 2012’ (*ONS* 8 October 2013)  
< [http://www.ons.gov.uk/ons/dcp171778\\_329457.pdf](http://www.ons.gov.uk/ons/dcp171778_329457.pdf)> accessed 24 December 2013.

<sup>54</sup> Stonewall, *Civil Partnership – Legal Recognition for Same-Sex Couples* (Pre-White Briefing Paper, 2003) 4.

<sup>55</sup> Rosie Harding, ‘Recognizing (and Resisting) Regulation: Attitudes to the Introduction of Civil Partnership’ (2008) 11 *Sexualities* 740, 750.

<sup>56</sup> Martin Mitchell and Sarah Dickens and William O’Conner, *Same-Sex Couples and the Impact of Legislative Changes*. (National Centre for Social Research 2009) 49.

<sup>57</sup> Martin Mitchell and Sarah Dickens and William O’Conner, *Same-Sex Couples and the Impact of Legislative Changes*. (National Centre for Social Research 2009) 49.

terminology is shunned by some LGBTQ people because they consider it symbolises heterosexual values and does not challenge the accepted view of (patriarchal) marriage.<sup>58</sup> Obviously, there is a lack of terminology exclusive to LGBTQ partnerships, since the legal recognition of same-sex partnerships is a modern social and legislative development and non-heteronormative language may be seen to develop over a period of time?

Recognition amongst peers and positive affirmation of their unification is significant to those who enter in civil partnerships, but not all. However, NatCen social research conducted in 2009 indicated that some partners have experienced negative reactions from friends, for example those ‘who were politically opposed to civil partnership (...) as an unwelcome and unnecessary attempt by the government to regulate their lives.’<sup>59</sup> Family recognition is most important to same-sex couples wanting acknowledgement from their ‘kin’ (parents, brothers, sisters) and seek acceptance into their respective families as other married family members. The term ‘gay marriage’ and the heteronormative language of weddings appears to be in colloquial use in relation to civil partnerships since this is familiar terminology for most, providing a more comfortable means of expression.<sup>60</sup> During his civil partnership, a Household Cavalry soldier is recorded as saying; ‘When I went to ask the Squadron Leader, (...) for permission to get *married*, he just said: “This is fantastic, congratulations”. His step-father also said: “This is our first *gay wedding*’.<sup>61</sup>

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<sup>58</sup> Carol Smart and Jennifer Mason and Beccy Shipman, *Gay and Lesbian ‘Marriage’: an Exploration of the Meanings and Significance of Legitimizing Same-sex Relationships* (Morgan Centre, Manchester University 2006) 2-3.

<sup>59</sup> Martin Mitchell and Sarah Dickens and William O’Conner, *Same-Sex Couples and the Impact of Legislative Changes*. (National Centre for Social Research 2009) 91

<sup>60</sup> Beccy Shipman and Carol Smart, ‘It’s Made a Huge Difference: Recognition, Rights and the Personal Significance of Civil Partnership’ (2007) 12 (1) *Sociological Research* para 4.8  
<[www.socresonline.org.uk/12/1/shipman.html](http://www.socresonline.org.uk/12/1/shipman.html)> accessed 8 October 2013.

<sup>61</sup> Terry Judd, ‘A Very Modern Military Partnership’ *The Independent* (London, 27 March 2010) 20 (emphasis added).



Celebrity ‘gay weddings’ including the wedding of Sir Elton John<sup>62</sup> and that of MP Chris Bryant,<sup>63</sup> received large press coverage, with headlines such as ‘Mr and Mrs Elton’s Big Fat Wedding’ and ‘I Find It All Distasteful’.<sup>64</sup> Likewise, the ‘unreasonable behaviour’ based ‘gay divorce’ of comedian Matt Lucas also made media impact.<sup>65</sup> On a smaller scale, same-sex couples can choose a simple registration or ostentatious celebrations, supported by commercial enterprises similar to those of traditional weddings.<sup>66</sup>

### **Civil Partnership legislation.**

The preamble to the Civil Partnership Act 2004 (CPA) simply reads; “An Act to make provision for and in connection with civil partnership” and the accompanying explanatory notes elaborate ‘The purpose of the Civil Partnership Act is to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership’.<sup>67</sup>

Same-sex registration can be easily achieved by registering as civil partners of each other, providing that the parties are of the same sex and not already in a civil partnership or lawfully married. Partners have to be aged 16 or over, must not be within the prohibited degrees of relationship<sup>68</sup> and if under the age of 18, parental consent has to be obtained. The cost of notice

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<sup>62</sup> Sean O’Neill, ‘It Was Emotional. There Were Tears. Elton and David Kissed at the End’ *The Times* (London, 22 December 2005) 7.

<sup>63</sup> Toby Helm, ‘Parliament Stages its First Gay Wedding’ *The Observer*. (London, 28 March 2010) 9.

<sup>64</sup> Peter Collins, ‘I Find It All Distasteful’ *South Wales Echo*. (Wales, 22 December 2005) 16 and Kathryn Knight, ‘Mr and Mrs Elton’s Big Fat Wedding’ *Daily Mail* (London, 17 December 2005) 34.

<sup>65</sup> Robert Verkaik, ‘Civil Partner of Lucas Set for £1m Payout After Split’ *The Independent* (London, 23 October 2008) 4.

<sup>66</sup> ‘Pink Weddings 2003-2004’ (*Pink Weddings online*) <[www.pinkweddings.biz/](http://www.pinkweddings.biz/)> accessed 24 September 2013.

<sup>67</sup> Department of Trade and Industry, *Explanatory Notes to the Civil Partnership Act 2004* <[http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen\\_20040033\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen_20040033_en.pdf)> accessed 11 August 2013.

<sup>68</sup> Civil Partnership Act 2004, sch 1.

and the presence of an official Registrar to a Civil Partnership is currently identical to that of Civil Marriage.<sup>69</sup>

No vows are exchanged in the formation of a civil partnership, but instead it is a simple matter of signing a register to create the legal partnership.<sup>70</sup> Initial civil partnership legislation stipulated that registration could not take place on religious premises, but this condition was amended by the Equality Act 2010 to allow registrations in religious buildings. However, no religious words of ceremony may be used, nor can any religious elements form part of the actual registration of a civil partnership, although religious organisations may include an isolated civil partnership registration within the overall framework of a religious service.<sup>71</sup> The Equality Act also provides that religious organisations *will not be obliged* to host the registering of civil partnerships on their premises if they choose not to do so, which once again illustrates adjustments made to accommodate the conflict of rights.

The Civil Partnership Act<sup>72</sup> itself establishes the legal framework and provides for such in-depth issues as voidable partnerships, gender implications, wills, family, prohibited degrees, social security, financial, immigration and legislation affecting those partners in the armed forces. Given consideration that this legislation is so far reaching in its provision rather than passion,<sup>73</sup> actual registration is a simple matter achieved by both parties upon signing the civil registration document.<sup>74</sup> Although original legislation stipulated that registration must not take

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<sup>69</sup> Notice of registration for Civil Partnership is £35.00 per person: Registrar fee of £45.00 and £4 for the certificate of registration. The costs are the same for Civil Marriage: ‘Marriages and Civil Partnerships in the UK’ (Gov.uk 30 May 2013) <<https://www.gov.uk/marriages-civil-partnerships/overview>> accessed 24 September 2013

<sup>70</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 79.

<sup>71</sup> Equality Act 2010, s 202 – Registration on religious premises in England and Wales, from December 2011.

<sup>72</sup> The Civil Partnership Act 2004, originally contained in 8 parts and 30 schedules, totalling 442 pages.

<sup>73</sup> Rebecca Probert, *Cretney and Probert’s Family Law* (7th edn, Sweet and Maxwell 2009) 29.

<sup>74</sup> By way of Civil Partnership Act 2004, s 2(1).

place in religious premises<sup>75</sup> and no actual words of ceremony or religious service are permitted,<sup>76</sup> but the Equality Act of 2010<sup>77</sup> has since allowed the choice of voluntary hosting of ceremonies on religious premises to denominations, such as the Quakers, Unitarians and those that practice Liberal Judaism.<sup>78</sup> This modern opt-in Act amalgamates consent, proof and ceremony all into one,<sup>79</sup> but how very different this is to the established act of Marriage with its moral, religious and longstanding legal complexities. Notably, prior to the introduction of the CPA 2004 it was suggested that the civil partnership “may well be no more than a stepping stone on the way to recognising same-sex marriage”, after which same-sex and opposite-sex relationships should be afforded equal value.<sup>80</sup>

In accordance with the CPA 2004, any marriage, partnership or civil union made by same-sex partners outside of the UK will be recognised within UK jurisdiction as a civil partnership in accordance with UK law. The Civil Partnership Act includes lengthy provision for the recognition and dissolution of same-sex partnerships created in foreign jurisdictions.<sup>81</sup> The provision in Part five<sup>82</sup> of the Act defines same-sex relationships that are legally acceptable in the UK. The partners must have been registered under the relevant law of ‘a responsible authority in a country or territory outside the UK’.<sup>83</sup> Schedule 20 contains the statutory listing of accepted ‘overseas relationships’ that would automatically fulfil the requirements of a

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<sup>75</sup> Civil Partnership Act 2004, s 6(1)(c).

<sup>76</sup> Civil Partnership Act 2004, s 2(5).

<sup>77</sup> Equality Act 2010, s 202(4).

<sup>78</sup> HC Deb 27 January 2011, vol 522, col 442.

<sup>79</sup> Rosie Harding, ‘Recognizing (and Resisting) Regulation: Attitudes to the Introduction of Civil Partnership’ (2008) 11 *Sexualities* 740.

<sup>80</sup> Jonathan Herring, *Family Law* (3rd edn, Pearson Education 2013) 66.

<sup>81</sup> Nichola Gray and Dominic Brazil, *Blackstone’s Guide to The Civil Partnership Act 2004* (OUP 2005) 4.

<sup>82</sup> Department of Trade and Industry, *Explanatory Notes to the Civil Partnership Act 2004*, 53

<[http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen\\_20040033\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen_20040033_en.pdf)> accessed 11 August 2013.

<sup>83</sup> Civil Partnership Act 2004, s 212.

recognised civil partnership.<sup>84</sup> The schedule was amended in 2005<sup>85</sup> to include a listing of 25 specified relationships,<sup>86</sup> then an additional amendment coming into force in 2013 indicating the growing numbers of same-sex partnerships and marriages on a worldwide scale.<sup>87</sup>

The UK allows ‘other’ relationships that meet the ‘general conditions’, effectively requiring that they must be monogamous, considered as married or a verified union and intended to continue for an indeterminate amount of time.<sup>88</sup> It is important to note that although certain same-sex relationships are recognised, existing legislation will only allow their recognition to have the effect of a civil partnership and not necessarily as a marriage or specific partnership created in the country of origin. Difference is not acknowledged but overseas relationships are masked by the UK, for example: a same-sex marriage made in Belgium, Canada, Netherlands or Spain, would only be recognised as a civil partnership in the UK even though originated ‘overseas’ as a marriage. The adverse effect of this is that LGBTQ same-sex partnerships can be perceived to be of a lesser value<sup>89</sup> than those of their heterosexual counterparts whose marriages are automatically recognised without reclassification. The difficulties encountered in *Wilkinson v Kitzinger*<sup>90</sup> as discussed later in this chapter highlight the extent of the inadequacies in the law and this case remains the most controversial in the recognition of a same-sex overseas marriage or partnership.

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<sup>84</sup> Civil Partnership Act 2004, s 213.

<sup>85</sup> Amended by way of the Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc. Amendments) Order 2005, SI 2005/3129 and the Civil Partnership Act 2004 (Overseas Relationships) Order 2005, SI 2005/3135.

<sup>86</sup> ‘Schedule 20 Countries – Overseas relationships automatically recognised as civil partnerships’ (*Government Equalities Office* 4 November 2010)  
< [http://www.equalities.gov.uk/what\\_we\\_do/sexual\\_orientation/schedule\\_20\\_countries.aspx](http://www.equalities.gov.uk/what_we_do/sexual_orientation/schedule_20_countries.aspx)> accessed 15 March 2011

<sup>87</sup> Civil Partnership Act 2004 (Overseas Relationships) Order 2012, SI 2012/2976.

<sup>88</sup> Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 185.

<sup>89</sup> Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 186.

<sup>90</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

At the time of writing, recognition of a union made overseas is confirmed by having the marriage or partnership documents accepted by process within the UK. Some countries where same-sex marriage is legal include Belgium, Canada, Spain and South Africa, and those with forms of legalised partnerships include, Austria, Germany, Ireland and Brazil.<sup>91</sup> Seven of the countries that allow same-sex marriage are member states of the European Union,<sup>92</sup> but some other EU states also have same-sex recognition systems in place that are similar to those of the UK civil partnership, whilst some states do not recognise same-sex partnerships at all.<sup>93</sup> However, most civil partnerships or an equivalent same-sex partnership that is registered in another EU member state is generally recognised in the UK.<sup>94</sup>

### **Recognition of same-sex unions made outside of the United Kingdom.**

In accordance with the MCA 1973 s 11 an amount of legislative control is exercised over those marriages conducted overseas and although this is a matter of concern of private international law,<sup>95</sup> a heterosexual marriage conducted overseas and wanting to be recognised in the UK is evaluated through current legislation but also subject to case law. The precedent in *Berthiaume v Dastous*<sup>96</sup> provides that a heterosexual marriage legally formed in any international jurisdiction is recognised in accordance with Private International Law as a legal marriage throughout the world. Lord Dunedin stated ‘If there is one question better settled than any other in international law, it is that as regards marriage (...) If a marriage is good by the laws

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<sup>91</sup> For a complete list see: Hannah Johnson and Heather Lyall ‘SPICe Briefing: Marriage and Civil Partnership (Scotland) Bill: 13/15’ (25 November 2013, Scottish Parliament Information Centre) 29.

<sup>92</sup> EU member states with same-sex marriage: Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France. (November 2013).

<sup>93</sup> EU member states that do not recognise registered same-sex partnerships: Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania and Slovakia. (November 2013).

<sup>94</sup> Civil Partnership Act 2004, sch 20.

<sup>95</sup> John Murphy J, *International Dimensions in Family Law* (Manchester University Press 2005): as cited in Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 77.

<sup>96</sup> *Berthiaume v Dastous* [1930] AC 79 (PC).

of the country where it is effected, it is good all the world over (...)'<sup>97</sup> The 'full faith and credit' principle where one state or jurisdiction generally respects the laws or decisions of another, providing cross border legal recognition would customarily be expected to include the institution of marriage. However, the recognition of an overseas marriage was not to apply in the case of a lawful same-sex marriage formed outside of the UK in British Columbia, Canada.

In the case of *Wilkinson v Kitzinger*,<sup>98</sup> two women had lawfully married in August 2003 as same-sex partners in Vancouver, BC. Upon their return to England and prior to the CPA 2004 coming into force, their marriage was only recognised as a civil partnership and not the marriage that they had contracted. A High Court application for a declaration of validity that their Canadian marriage be recognised in the UK was made under s 55 of the Family Law Act 1986.<sup>99</sup> In the witness statement of one of the partners' Susan Wilkinson is quoted as saying:

(...) I do not wish my relationship with Celia (Kitzinger) to be recognised in this way because we are legally married and it is simply not acceptable to be asked to pretend that this marriage is a civil partnership. While marriage remains open to heterosexual couples only, offering the "consolation prize" of a civil partnership to lesbians and gay men is offensive and demeaning.<sup>100</sup>

However, in accordance with the CPA 2004,<sup>101</sup> their Canadian marriage was treated as a civil partnership, which the women considered a 'downgrading' of their marriage. Celia Kitzinger expressed her personal feelings and expectation of marriage saying:

Marriage is a basic social institution and exclusion from it, whether on grounds of race or ethnicity, gender, religion, nationality or sexual orientation, means being deprived of full citizenship. It also leads to a sense of alienation and marginalisation which prevents Sue and me from feeling as though we are fully contributing members of society.<sup>102</sup>

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<sup>97</sup> *Berthiaume v Dastous* [1930] AC 79 (PC).

<sup>98</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

<sup>99</sup> Declaration as to Marital Status, pursuant to Family Law Act 1986, s 55.

<sup>100</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183 [5].

<sup>101</sup> Civil Partnership Act 2004, s 212.

<sup>102</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183 [8].

Counsel for the women said that by failing to allow LGBT persons to marry partners of choice and by treating a same-sex marriage made overseas as a civil partnership, that the law showed a lack of respect for the most intimate aspect of private life, namely sexual orientation and choice of partner. Also arguing an identified difference in treatment of lawful marriages, for example: where a British woman domiciled in the UK contracts an opposite sex marriage in Canada will be recognised, but a woman is deprived of marrying a partner of her choice in the UK and is also denied recognition of lawful same-sex marriage in Canada.<sup>103</sup>

Mrs. Wilkinson and Kitzinger were clearly challenging the UK in the exclusion of LGBT people from the institution of marriage, since there should be no acceptance of exclusion from any social institution, nor should any institution be reserved for heterosexuals only.<sup>104</sup> *Harding* describes *Wilkinson v Kitzinger* as ‘holding before the law legal consciousness’ identifying that the law has the power to recognise their relationship or not. However, ‘by asking the courts to recognise their Canadian marriage they were attempting to use the legal system’ - confronting and testing the law whilst bringing the subject of same-sex marriage into the public domain.<sup>105</sup>

Sir Mark Potter P<sup>106</sup> said that in recognising relationships between same-sex couples, that their unions had all the features and characteristics of marriage, but without the ability to procreate children. Also that, civil partnership was the same as civil marriage but ‘save the name’ and the distinctions in the CPA 2004 that discriminated against same-sex partners were justified

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<sup>103</sup> *Wilkinson v Kitzinger and another (No 2)* [2006] EWHC 222 (Fam), [2007] 1 FCR 183 [98], [101].

<sup>104</sup> Celia Kitzinger and Sue Wilkinson, ‘Social Advocacy for Equal Marriage: The Politics of “Right” and the Psychology of “Mental Health”’ (2004) 4 *Analysis of Social Issues and Public Policy* 173, 190.

<sup>105</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 55.

<sup>106</sup> Sir Mark Potter, President of the Family Law Division of the High Court.

as being reasonable and proportionate within the margin of appreciation of the ECHR.<sup>107</sup> In dismissing the application, the court held that the intention of the Government was not to create a second-class institution, but a ‘parallel and equalising institution’ to redress the ‘perceived’ inequality of same-sex relationships whilst demonstrating support for the long established institution of marriage. The alternative claim under the HRA 1998<sup>108</sup> that treating their Canadian marriage as a civil partnership breached their rights, in that the CPA 2004 was incompatible with UK obligations under the ECHR also failed and was dismissed by the court.<sup>109</sup>

*Wilkinson v Kitzinger* is particularly important in illustrating that resistance becomes possible through legal recognition. *Harding* says the argument provided for denying the case of the two women and the justification given for the existence of discrimination<sup>110</sup> under Article 14 identifies the legal ‘truth’ of marriage as perceived by Potter P as a ‘heterosexual, lifelong and monogamous union, legally supported for the benefit of children and heterosexual parents’. By failing to recognise the marriage of the two lesbians, they are categorised as civil partners instead of married, but additionally not recognised as subjects and outlawed from the institution of marriage. Notably, the legal ‘truth’ of marriage as perceived by Potter P as a ‘heterosexual, lifelong and monogamous union’, almost echoes the statement made by Lord Penzance in the historical case of *Hyde*.<sup>111</sup> The reasoning by Potter P in that civil partnership was the same as civil marriage but ‘save the name’ is questionable, because if the institutions are the same, then why not call them both marriage? This rebranding of same-sex marriages

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<sup>107</sup> *Wilkinson v Kitzinger and another (No 2)* [2006] EWHC 222 (Fam), [2007] 1 FCR 183.

<sup>108</sup> Human Rights Act 1998, s 4(2).

<sup>109</sup> Seeking a declaration that the Civil Partnership Act 2004, ch 2 (5) and the Matrimonial Causes Act 1973, s 11(c) were incompatible under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, arts 8: 12: 14.

<sup>110</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 54

<sup>111</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.



under another name is said by *Kitzinger and Wilkinson* to reserve the name of marriage for heterosexual unions only, having the effect of making same-sex unions second to different sex unions.<sup>112</sup> The ‘full faith and credit’ principle in recognising a marriage made in another jurisdiction has been disregarded in this case, albeit that perhaps only ‘part’ of their marriage was recognised, that part being what Potter J defined as being what he considers to be the elements of a civil partnership that he matched to the elements of a civil marriage? This non-recognition or lesser recognition clearly has the effect of civil partners feeling that their unions are of lower value than a ‘real’ marriage but although the two women were unsuccessful, *Harding* considers that another way of interpreting their case is that it ‘challenged the state to recognise a same-sex marriage relationship differently that the state had legislated for’.<sup>113</sup>

### **Discrimination and religious belief opposition.**

The CPA 2004 established itself as a vehicle for LGBTQ people and as previously explained the Act did not include any provision for a conducting a partnership on religious premises.<sup>114</sup> The Equality Act 2010 now permits the voluntary hosting of ceremonies on religious premises without religious service.<sup>115</sup> However, in spite of this relaxation and the support of some faith groups,<sup>116</sup> other main organised denominations continued to be vociferous in their views on same-sex partnerships.

The conflict of rights between religious belief and sexuality poses a challenge to Equality Law in the consideration of which of these two competing interests should take precedence and how

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<sup>112</sup> Celia Kitzinger and Sue Wilkinson, ‘Social Advocacy for Equal Marriage: The Politics of “Right” and the Psychology of “Mental Health”’ (2004) 4 *Analysis of Social Issues and Public Policy* 173, 180.

<sup>113</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 55.

<sup>114</sup> Civil Partnership Act 2004, s 6.

<sup>115</sup> Equality Act 2010, s 202(4) enacted 5 December 2011.

<sup>116</sup> Including Quakers in Britain, Liberal Judaism and Unitarianism.

is this justified in accordance with the law? *Cooper and Herman* discuss that this clash is not about conflicts or rights, but about ‘interests’ and ‘entitlements’ where each conflicting group (religion and sexuality) are seeking to protect their own valuable attachments.<sup>117</sup> Religious belief litigants are of the opinion that a power of exemption towards them should exist within equality law, which then raises the question of what actually constitutes *Christian belief*? However, ‘Christian litigation (...) can be read as a political response to equality laws’<sup>118</sup> but then a reduction in sexual equality laws would serve to restrict sexual expression, historically proven in maintaining gay inequality, but *Ryder, Stychin* suggest that this should not be used by supporters of gay equality against religious believers.<sup>119</sup> To date and in the absence of a balancing approach that gives importance to both sets of rights, we have seen that religion has been the loser.<sup>120</sup> The accommodation by employers and public bodies towards religious based objections in the provision of services to lesbians and gay men is explored by *Cooper and Herman*,<sup>121</sup> and central to the cases of *Ladele* and *McFarlane* is this conflict between religion and sexuality in the supply of services to same-sex partners.

In *Ladele v Islington LBC*<sup>122</sup> a conflict of rights arose when the registrar (Ms Ladele) who identified as a practising Christian, experienced difficulties due to her religious belief, refusing to conduct Civil Partnership Services in the course of her work. Ms. Ladele had for while made reasonable efforts to avoid conflict in conducting civil partnerships by swapping duties with

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<sup>117</sup> Davina Cooper and Didi Herman, ‘Up Against the Property Logic of Equality Law: Conservative Christian Accommodation of Claims and Gay Rights’ (2013) 21 *Feminist Legal Studies* 61, 67.

<sup>118</sup> Davina Cooper and Didi Herman, ‘Up Against the Property Logic of Equality Law: Conservative Christian Accommodation of Claims and Gay Rights’ (2013) 21 *Feminist Legal Studies* 61, 69.

<sup>119</sup> *Ryder B* (2006) and *Stychin CF* (2009) cited in Davina Cooper and Didi Herman, ‘Up Against the Property Logic of Equality Law: Conservative Christian Accommodation of Claims and Gay Rights’ (2013) 21 *Feminist Legal Studies* 61, 70.

<sup>120</sup> Carl F Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) 29 *Oxford Journal of Legal Studies* 729.

<sup>121</sup> Davina Cooper and Didi Herman, ‘Up Against the Property Logic of Equality Law: Conservative Christian Accommodation of Claims and Gay Rights’ (2013) 21 *Feminist Legal Studies* 61.

<sup>122</sup> *Ladele v London Borough of Islington* [2009] IRLR 154.

colleagues. However, Ms. Ladele religiously objected to 'gay marriage' as being 'contrary to God's law and a sin'<sup>123</sup> and this led to being disciplined by her employer for refusing to officiate partnerships. Claims of both direct and indirect discrimination under the Religion or Belief Regulations 2003 were brought against her employer Islington Council.<sup>124</sup> The initial Employment Tribunal said Ms. Ladele had:

(...) the orthodox Christian view that marriage is the union of one man and one woman for life', and she 'could not reconcile her faith with taking an active part in enabling same sex unions to be formed', believing it to be 'contrary to God's instructions (...)'<sup>125</sup>

Finding for Ms. Ladele the Tribunal decided that Islington Council had harassed and discriminated against Ms. Ladele on grounds of her religious belief, stating that 'The present dispute arises from a direct conflict between the rights of one protected group with the rights of another'<sup>126</sup> However, at a later Employment Appeal Tribunal (EAT) it was held that Islington Council did not discriminate on the grounds of religion and it was unlawful under the Equality Act (Sexual Orientation) Regulations 2007 for Ms. Ladele to refuse to perform her duties towards same-sex partners in what Neuberger MR described as a 'purely secular task'. The Court of Appeal upheld the decision of the EAT, supporting Islington Council and concluded that Ms. Ladele's desire to have her religious views respected should not be allowed.<sup>127</sup> An application by Ms. Ladele for leave to appeal to the Supreme Court was also refused<sup>128</sup> and a further complaint was then raised to the ECtHR that domestic law had failed adequately to protect her right to manifest her religion.<sup>129</sup>

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<sup>123</sup> *Ladele v London Borough of Islington* [2009] IRLR 154,156.

<sup>124</sup> Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 3(1)(b).

<sup>125</sup> *Ladele v London Borough of Islington (Liberty intervening)* [2009] EWCA Civ 1357, [2009] All ER D 148 [7].

<sup>126</sup> *Ladele v London Borough of Islington* [2009] IRLR 154,161.

<sup>127</sup> *Ladele v London Borough of Islington (Liberty intervening)* [2009] EWCA Civ 1357, [2009] All ER D 148 [73]-[76].

<sup>128</sup> Application to the Supreme Court refused on 4 March 2010.

<sup>129</sup> *Eweida and others v UK (App nos 48420/10:59842/10:51671/10:36516/10)* (2013) ECHR 37, para 3.

The complaint to the ECtHR was made under Article 14, taken in conjunction with Article 9,<sup>130</sup> rather than Article 9 alone because Ms. Ladele felt that she had been discriminated against on grounds of religion and that the ‘objection was to participating in the creation of a legal status based on an institution that she considered to be a marriage in all but name’.<sup>131</sup> The ECtHR held by five votes to two that there was no violation of Article 14 taken in conjunction with Article 9 and that the local authority and the domestic courts had ‘exceeded the margin of appreciation available to them’<sup>132</sup> Whilst the majority verdict of the court held that there had been no violation in the case of Ms. Ladele, Vučinić J and De Gaetano J joint partly dissenting said Ms. Ladele’s case:

(...) is not so much one of freedom of religious belief as one of conscience – that is, that no one should be forced to act against one’s conscience or be penalised for refusing to act against one’s conscience. ... Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil.<sup>133</sup>

The two Judges disagreed with the majority judgment and opined on the issue of ‘moral quality’ whilst expressing a need to protect freedom of conscience. Reference was made to the words of the writer John Henry Cardinal Newman in 1895: ‘...Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word’<sup>134</sup> The UK Government accepted that Ms. Ladele objections to conducting same-sex ceremonies were seriously genuine and that she believed it was against God’s law. Additionally, the analysis by Vučinić J and De Gaetano J in their argument on how the conflict of rights should be balanced is defined through their

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<sup>130</sup> ECHR Article 14, the right not to be discriminated against: Article 9, the right to freedom of thought, conscience and religion.

<sup>131</sup> *Eweida and others v UK* (App nos 48420/10:59842/10:51671/10:36516/10) (2013) ECHR 37, paras 70-72.

<sup>132</sup> *Eweida and others v UK* (App nos 48420/10:59842/10:51671/10:36516/10) (2013) ECHR 37, para 106.

<sup>133</sup> *Eweida and others v UK* (2013) ECHR 48420/10, Judgment - Separate Opinions, para 2.

<sup>134</sup> John Henry Cardinal Newman in *A letter to his Grace the Duke of Norfolk* (Catholic Publishing Society 1895) 71: as cited in *Eweida and others v UK* (2013) ECHR 48420/10, Judgment - Separate Opinions, para 2.

claim that ‘(...) a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured “gay rights” over fundamental human rights) eventually led to her dismissal.’<sup>135</sup> An interpretation of the two judges’ statement indicates that a conscientious objection to homosexuality is a ‘fundamental human right’ that has a greater value than ‘gay rights’, although the judges were in the minority in this case, but their approach serves to continue to fuel the discussion in the conflict of rights between religious belief and sexuality.

Religious belief conflict emerged again in the case of *McFarlane*<sup>136</sup> where discrimination was alleged in the refusal to provide relationship counselling services. The claimant Gary McFarlane was a Christian and an elder of a Bristol multicultural church, but he was unwilling to endorse same-sex sexual activity since he believed it was against Biblical teaching. This case had similarities to the case of *Ladele* in that the complaint concerned sanctions taken against them by their employers for not wanting to perform services in which the complainants considered to condone homosexual unions.<sup>137</sup> Mr McFarlane’s complaint of direct and indirect discrimination<sup>138</sup> was rejected by the Employment Tribunal, then by the EAT, but his permission to appeal was initially refused by the Court of Appeal, however, on second request his permission application was accepted to be heard by the CA in April 2010. Mr McFarlane’s appeal was dismissed by the CA since his case could not be ‘sensibly distinguished’ from *Ladele*.<sup>139</sup>

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<sup>135</sup> *Eweida and others v UK* (2013) ECHR 48420/10, Judgment - Separate Opinions, para 5.

<sup>136</sup> *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106 DA, [2010] IRLR 196.

<sup>137</sup> *Eweida and others v UK (App nos 48420/10:59842/10:51671/10:36516/10)* (2013) ECHR 37, para 3.

<sup>138</sup> Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660; Equality Act (Sexual Orientation) 2007, SI 2007/1263.

<sup>139</sup> *Eweida and others v UK (App nos 48420/10:59842/10:51671/10:36516/10)* (2013) ECHR 37, para 40.

A former Archbishop, Lord Carey<sup>140</sup> had written to the CA providing a witness statement for Mr McFarlane, disputing both that the manifestation of Christian faith in relation to same-sex unions is discriminatory and that a person's religious views are considered to be disreputable and those of a bigot or homophobe. He expressed a concern that Judges were unaware and had a lack of knowledge of the basic issues on the Christian faith, requesting that Mr McFarlane's appeal be heard by a renewed set of CA Judges and that a special panel of judges be established to hear future cases engaging in religious rights.<sup>141</sup>

Laws LJ responded, saying that Lord Carey's observations were misplaced and he had a misunderstanding of the legal meaning of discrimination, explaining that discriminatory conduct is measured 'by reference to the *outcome* of the acts or omissions (of a person)'<sup>142</sup> Also challenging that religious belief should be given protection, explaining a 'distinction between the law's protection to hold and express a belief and the law's protection of that belief's substance or content'. However, since we do not live in a society where we all share one religious belief, then no religion should be louder within the law than another.<sup>143</sup> In response to the suggestion of a special panel of judges to hear cases engaging in religious rights, Laws LJ disagreed with this concept in that this would be harmful to the public interest.<sup>144</sup>

Mr McFarlane did not succeed with his case, nor did Ms. Ladele or the similar cases of *Ewieda* and *Chaplin*, where all the Christian litigants have claimed a failure to accommodate their religious beliefs, which in their opinion is discriminatory in accordance with equality law. The

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<sup>140</sup>Lord Carey of Clifton, former Archbishop of Canterbury.

<sup>141</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR. 872 [17].

<sup>142</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR. 872 [19].

<sup>143</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR. 872 [22]-[24].

<sup>144</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, [2010] IRLR. 872 [26].

ECtHR joined the applications of *Eweida, Ladele, McFarlane* and *Chaplin*<sup>145</sup> since the common thread was that all four applicants ‘complained that domestic law failed adequately to protect their right to manifest their religious beliefs’.<sup>146</sup> Mr McFarlane brought his complaint under Article 9 of the Convention, but additionally complained under Article 14 in conjunction with Article 9, claiming *inter-alia* that his refusal to provide counselling to same-sex partners ‘was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships’<sup>147</sup> However, the ECtHR concluded that they agreed with the refusal of the domestic courts and held unanimously that there had been no violations of Article 9 alone, or in conjunction with Article 14.<sup>148</sup> The conjoined ECtHR cases did not succeed, identifying that a complex and ongoing issue exists in the clash of rights between religious belief and sexuality, but also the court’s interpretation and depiction of Christian belief, as indicated in *McFarlane*. This conflict will be seen to continue (discussed in chapter 5) in the later development of same-sex marriage legislation,<sup>149</sup> where special allowances have been made to accommodate both religion and sexuality.

### **Conclusion.**

We have seen the development of the CPA 2004 and the influence of cohabitation, but also gains made via the ECHR and the HRA 1998. The initial CPA model was similar to that of Denmark and the Government did not initially provide same-sex marriage, but a different legal institution that was mainly due to opposition and fear of undermining marriage. The CPA 2004 was ‘not marriage’ with LGBT people feeling like they were ‘being sold marriage’, with the civil partnership being perceived of lesser status. However, it was felt that a better more radical

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<sup>145</sup> *Eweida and others v UK* (App nos 48420/10: 59842/10: 51671/10: 36516/10) (2013) ECHR 37.

<sup>146</sup> *Eweida and others v UK* (App nos 48420/10:59842/10:51671/10:36516/10) (2013) ECHR 37, para 2.

<sup>147</sup> *Eweida and others v UK* (App nos 48420/10:59842/10:51671/10:36516/10) (2013) ECHR 37, paras 107-108.

<sup>148</sup> *Eweida and others v UK* (App nos 48420/10:59842/10:51671/10:36516/10) (2013) ECHR 37, para 110.

<sup>149</sup> Marriage (Same Sex Couples) Act 2013.

alternative to marriage could have been provided by the Government, although the CPA 2004 was providing a step forward.<sup>150</sup> The case of *Wilkinson v Kitzinger*,<sup>151</sup> highlighted legislative inadequacies in their challenge concerning the exclusion of LGBT people from the institution of marriage and the attempt to bring same-sex marriage inside of the norm of marriage. However, this would not be successful and it would be some years later before same-sex marriage legislation was enacted in the UK. The competing interests in the conflict of rights between religious belief and sexuality, poses an ongoing issue for supporters of LGBT equality and those of religious faith and belief, but it will be seen that religion has generally been the loser, although consideration has been made in legislation to attempt to accommodate both parties.<sup>152</sup>

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<sup>150</sup> Rosie Harding, 'Recognizing (and Resisting) Regulation: Attitudes to the Introduction of Civil Partnership' (2008) 11 *Sexualities* 740, 750.

<sup>151</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

<sup>152</sup> Carl F Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29 *Oxford Journal of Legal Studies* 729.



## Chapter 4.

### **Civil Partnership and Marriage.**

#### **Introduction.**

The development of the CPA 2004 is discussed in chapter three and to date has been in operation for nine years. Comparatively the establishment of marriage has been with us for centuries, but what are the normative and regulatory differences between heterosexual Marriage and a Civil Partnership? Looking back at the definitive case of *Hyde v Hyde and Woodmansee*<sup>1</sup>, Lord Penzance indicated that a marriage must be; voluntary, heterosexual, for life and monogamous. Although some elements of this statement from almost 150 years ago have been eroded in the modern evolvement of marriage, it is difficult to give a legal definition of modern marriage due to its enormity.<sup>2</sup> Defining the regulatory registration system of the CPA 2004 is simpler and drafted with the intention of providing the equivalent of a marriage whilst mirroring the same rights and responsibilities to that of civil marriage.<sup>3</sup> The CPA 2004 did not create same-sex marriage, for political reasons it created a separate entity and in doing so, avoiding any major opposition during its introduction<sup>4</sup> although many LGBT people view the civil partnership as a second-class alternative to marriage. Currently, there is no provision for opposite-sex partners within the CPA 2004 and complications are also encountered by transgender people within both marriage and civil partnership legislation.

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<sup>1</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>2</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 48.

<sup>3</sup> Department of Trade of Industry, *Explanatory Notes to the Civil Partnership Act 2004*

<[http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen\\_20040033\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/33/pdfs/ukpgaen_20040033_en.pdf)> accessed 11 August 2013.

<sup>4</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 77

**Two different sets of partners; two different legal identities.**

During the consultation and development of the CPA 2004 (as discussed in chapter 3), the Civil Partnership Bill<sup>5</sup> was debated in the House of Lords with the Joint Committee on Human Rights publishing their report on compatibility of the Bill with Human Rights. The question of discrimination against opposite-sex couples arose, because confining the Bill to same-sex couples would give less favourable treatment to unmarried heterosexual couples.

The original purpose of the Bill was ‘to remove discrimination between the way that the law treats the relationships of married heterosexual couples and the way it treats same-sex relationships’<sup>6</sup> By providing the same rights and protections that come from a marriage, giving State recognition and respect, and no longer violating the human dignity of same-sex partners by denying the existence of their relationships, is stated not to be contrary to human rights law since these rights and protections are already available to heterosexual couples who would like to marry each other.

The Bill is clear that no opposite-sex couples can register as civil partners and it was argued that excluding opposite-sex couples did not breach Article 14 (prohibition of discrimination) because:

[H]eterosexual unmarried couples, unlike same-sex couples, are eligible to marry, ( ...), which will give their relationship legal recognition as does civil partnership. The government argues that heterosexual couples who are unmarried have therefore opted for a lesser degree of legal recognition by choice<sup>7</sup>

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<sup>5</sup> Civil Partnership HL Bill (2003-4) 53.

<sup>6</sup> Joint Committee on Human Rights, *Civil Partnership Bill: Fifteenth Report of Session* (2003-04, HL 136, HC 885) 13.

<sup>7</sup> Joint Committee on Human Rights, *Civil Partnership Bill: Fifteenth Report of Session* (2003-04, HL 136, HC 885) 10.

This response by the Government indicates the option for heterosexuals is established marriage whilst simultaneously its policy of ‘promoting marriage’ for ‘stable family relationships’. However, this only appears to provide an answer in that unmarried heterosexual couples are ‘eligible to marry’ to gain legal recognition, but does not directly address the question of the Government’s reason for *not allowing* unmarried heterosexual couples to register as civil partners?<sup>8</sup> The justification in that unmarried heterosexual couples ‘are free to marry’ but have *chosen* the lesser legal alternative of remaining as unmarried cohabitants does not seem sufficient? The Government stance of ‘choice’ was highlighted in the Canadian case of *Miron v Trudel*<sup>9</sup> that identified problems with the issue of ‘supposed elements of choice’; thus indicating that heterosexuals may not want to marry for reasons of ‘conscience and belief’ or ‘that being unmarried may not always be a choice made by both partners’<sup>10</sup> Further justification for excluding opposite-sex partners from becoming civil partners was offered by the Government, indicating law reform in relation to cohabitation and an intention to refer to the Law Commission.

Debate continued around the issue of marriage and civil partnership both in the Lords and afterwards in the Commons, but the Bill was clearly singled out to be applicable to same-sex couples only. Jacqui Smith MP announced during the last debate of the Bill prior to receiving Royal Assent:

[W]e have used civil marriage as the template for creating a completely new legal relationship, that of the civil partnership (...) and our view was that, unless there was an objective justification for a difference in the approaches taken to civil marriage and civil partnership, no difference should exist. (...) The whole point, however, is that civil partnership is not civil marriage, for a variety of reasons, such as the traditions and history—religious and

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<sup>8</sup> Joint Committee on Human Rights, *Civil Partnership Bill: Fifteenth Report of Session* (2003-04, HL 136, HC 885) 33.

<sup>9</sup> *Miron v Trudel* [1995] 2 SCR 418 [2] (Supreme Court of Canada)

<sup>10</sup> Joint Committee on Human Rights, *Civil Partnership Bill: Fifteenth Report of Session* (2003-04, HL 136, HC 885) 11.

otherwise—that accompany marriage. It is not marriage, but it is, in many ways—dare I say it?—akin to marriage. We make no apology for that.<sup>11</sup>

The intention of the Government was explicit in that the civil partnership was for same-sex relationships only. However, the denial of civil partnerships to heterosexuals was challenged in 2009 when two opposite-sex partners Katherine Doyle and Tom Freeman applied to register a civil partnership. Tom Freeman said: ‘The “separate but equal” system which segregates couples according to their sexuality is not equal at all. All loving couples should have access to the same institutions, regardless of sexuality. There should be parity of respect and rights’<sup>12</sup> The couple believed that in the same way lesbian and gay partners should be entitled to a civil marriage, that civil partnerships should be available to opposite-sex partners who do not want the institution of marriage.<sup>13</sup> However, Islington Council refused the application in accordance with the CPA 2004<sup>14</sup>, and their intention was to pursue the case in joint applications to the ECHR to secure full equality for all partnerships.

The civil partnership is not available nor designed to accommodate opposite-sex partners (who are ideally heterosexual). Section 1(1) of the CPA 2004 states that ‘A civil partnership is a relationship between two people of the same sex’ and further definition occurs in s 3(1) of the Act, stating that: ‘two people are not eligible to register as Civil Partners (...) if they are not of the same sex (...)’<sup>15</sup> Alternatively in the case of Marriage, this is not available to same-sex partners by virtue of Section 11(c) of the Matrimonial Causes Act 1973, where it is stated that

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<sup>11</sup> HC Deb 9 November 2004, vol 426, col 776.

<sup>12</sup> Adam Sherwin, ‘Straight Couple Vow to Fight for Civil Partnership’ *The Times* (London, 25 November 2009) 28.

<sup>13</sup> Nick Britten, ‘Heterosexuals Want to Have “Gay Marriage”’ *The Daily Telegraph* (London, 14 November 2009) 17.

<sup>14</sup> Civil Partnership Act 2004, s 1(1).

<sup>15</sup> Civil Partnership Act 2004, s 3(1).

‘A Marriage shall be void (if ...) the parties are not respectively male and female (...)’<sup>16</sup> *Wintemute*<sup>17</sup> has said that this discriminatory practice is the ‘segregation of couples in UK law, based on sexual orientation’<sup>18</sup> and that this violates Article 14 of the ECHR.

Marriage is a single institution of its own and the Civil Partnership is a separate institution with its own legislation. However, an application to challenge the discriminatory position in relation to the legal definition of a Marriage and the definition of a Civil Partnership was lodged in February 2011 to the European Court of Human Rights in (*Ferguson and Others*) v *United Kingdom*, where sixteen applicants are represented by *Prof. Robert Wintemute*.<sup>19</sup> This application was taken to the ECHR by sixteen individuals comprising of; four lesbian women who wish to marry each other; four gay men who wish to marry each other and four heterosexual women who wish to have civil partnerships with four heterosexual men.<sup>20</sup> The argument is that by not allowing the homosexual marriages and the heterosexual civil partnerships, this constitutes a violation of Article 14 of the Convention, along with Article 12 and Article 8. Respectively these Articles are the ‘prohibition of discrimination’, the ‘right to marry’ and the ‘respect for family life’ with the application to the ECHR outlining that the current legal stance being ‘direct discrimination based on sexual orientation’.

Although a decision from the ECtHR regarding the predicament of not allowing opposite-sex partners to enter into a civil partnership and the overall response to the *Ferguson* application

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<sup>16</sup> Matrimonial Causes Act 1973, s 11(c).

<sup>17</sup> *Professor Robert Wintemute*.

<sup>18</sup> ‘The Legal Case - (*Ferguson and Others*) v *United Kingdom*’ (*Equal Love* 2 February 2011) para 143 <[www.equallove.org.uk/wp-content/uploads/2011/02/equalloveapplicationtoechr.pdf](http://equallove.org.uk/wp-content/uploads/2011/02/equalloveapplicationtoechr.pdf)> accessed 20 November 2011.

<sup>19</sup> Peter Tatchell, ‘Equal Love application to the ECHR’ (*Peter Tatchell* 2 February 2011 <[www.petertatchell.net/campaigns/Equal%20Love/Equal\\_Love\\_ECHR\\_Application\\_2\\_Feb.pdf](http://www.petertatchell.net/campaigns/Equal%20Love/Equal_Love_ECHR_Application_2_Feb.pdf)> ) accessed 9 December 2011.

<sup>20</sup> (*Ferguson and Others*) v *UK* App no 8254/11.

was anticipated, the outcome was not positive. The application was declared as inadmissible in December 2013 by Judge Päivi Hirvelä of Finland, almost three years later than *Ferguson* was first filed. The full details of inadmissibility are not known at present, but the ECtHR claimed that ‘the application did not fulfil the admissibility criterion, Article 34 (individual cases) and Article 35 (admissibility criteria) of the European Convention on Human Rights. In the light of the enactment of same-sex marriage, the Government Equalities Office have announced a review of the Civil Partnership Act 2004 and a public consultation to review the operation and the future of the CPA 2004 is scheduled for publication by winter 2014.<sup>21</sup>

### **The differences between same-sex partnerships and Marriage.**

Examining the four conditions laid down in *Hyde*<sup>22</sup> of voluntary, heterosexual, for life and monogamous,<sup>23</sup> we can revisit these basic principles and apply them to the two current systems of same-sex and opposite-sex partnerships (*same-sex marriage is excluded from this evaluation since it is not yet in operation*).

*Voluntary*: This rests on the premise that a marriage or civil partnership is entered into upon the notion of ‘giving yourself voluntarily’, where the parties voluntarily enter into a marriage of their own accord. Neither of the intended spouses or partners are to be under any form of duress, or for any reason to benefit themselves or their intended partner or family. The Matrimonial Causes Act 1973<sup>24</sup> (MCA) defines that if either partner did not validly consent to the marriage, through either duress, mistake, unsoundness of mind or otherwise; including

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<sup>21</sup> Government Equalities Office, ‘Civil Partnerships Review Terms of Reference and Timetable’ (2013) Policy Paper 13 June 2013 <<https://www.gov.uk/government/publications/civil-partnerships-review-terms-of-reference-and-timetable>> accessed 27 September 2013.

<sup>22</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>23</sup> Accepted definition by Lord Penzance in *Hyde* [1866] is that a marriage as known in Christendom is “the voluntary union for life of one man and one woman to the exclusion of all others”.

<sup>24</sup> Matrimonial Causes Act 1973, s 12(c)(d).

giving consent when legally incapable of giving valid consent because of mental disorder,<sup>25</sup> this would be grounds for a voidable marriage. This principle and rules apply to a civil partnership and mirrored in the CPA 2004<sup>26</sup>, therefore making a requirement that both same-sex parties to a civil partnership or opposite-sex parties to a marriage are at liberty to contract and do so voluntarily.

Likewise, all parties must have the capacity to marry each other and an almost parallel rule applies to civil partners, establishing that no intended spouses or partners are in any categories of prohibited degrees. The main differences in the capacity requirements for both forms of legal partnership are those that are gender specific in the definition of the parties to a marriage or civil partnership.<sup>27</sup>

*Heterosexual*: The technical requirement of ‘one man and one woman’ in accordance with MCA 1973 s 11(c) provides that where ‘the parties are not respectively male and female’ then the marriage is void under the doctrine of nullity. The specification of gender is clear when defining an opposite-sex marriage, but there have been challenges and legislative complications, mainly in the consideration of trans people to a marriage. However, in the case of a civil partnership, the requirements are also gender specific in that ‘a civil partnership is a relationship between two people of the same sex’.<sup>28</sup> Consequently, it follows that when an individual (or couple) discloses that they are in a civil partnership, a disclosure of their sexuality is simultaneously given. Although a declaration of sexuality does not automatically occur when an individual announces they are ‘married’ since this term generally implies heterosexual

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<sup>25</sup> As defined by the Mental Health Act 1983.

<sup>26</sup> Civil Partnership Act 2004, s 50(1)(a),

<sup>27</sup> Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (10th edn, OUP 2007) 45 and 95

<sup>28</sup> Civil Partnership Act 2004, s 1(1).

marriage. But this definition begins to be somewhat blurred where heteronormative marriage terminology is put to into colloquial use by same-sex partners who often refer to themselves as both being 'married' to each other, although technically they are not.<sup>29</sup>

*For life:* This concept centres upon the longevity of a marriage and the giving of oneself for life, or technically having the 'intention of' in modern terms to a future spouse. Most importantly, the 'for life' concept is tied in with the notion of a long-term monogamous relationship that relies upon the expectation of both partners subscribing to the concept of sexual fidelity.

Whether this is true of modern marriages is a subject for debate, but a correlation exists between the concepts of 'for life', 'monogamous' and 'faithful' since non-compliance of these elements can form the basis of adultery as a ground for divorce. Within the CPA 2004 there is no concept of adultery or 'for life' definition, but an underlying expectancy exists for the partnership to continue. Adultery is clearly absent from the CPA 2004, but comparisons of same-sex and opposite-sex requirements and the role of actual sex per se in the breakdown of either type of partnerships is discussed in further paragraphs.

*Monogamous:* 'The practice of marrying or state of being married to one person at a time; the practice or state of having a sexual relationship with only one partner'<sup>30</sup> The word 'married' may be a conservative description but a same-sex partner is perhaps included in this description? However, the Christian definition of monogamous falls within the ambit of being

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<sup>29</sup> Beccy Shipman and Carol Smart, 'It's Made a Huge Difference: Recognition, Rights and the Personal Significance of Civil Partnership' (2007) 12 (1) Sociological Research  
<[www.socresonline.org.uk/12/1/shipman.html](http://www.socresonline.org.uk/12/1/shipman.html)> accessed 8 October 2013.

<sup>30</sup> 'Definition of Monogamy' (*Oxford Dictionaries* 10 November 2013)  
<[www.oxforddictionaries.com/definition/english/monogamy](http://www.oxforddictionaries.com/definition/english/monogamy)> accessed 10 November 2013.



‘faithful’ whilst the concept of marriage between one man and one woman is also an indication that marriage is monogamous.<sup>31</sup> The MCA 1973 s 11(c) stipulates in simple terms, that you cannot marry if you are already married, but only after being divorced and/or the first marriage is dissolved. Otherwise, the offence of Bigamy<sup>32</sup> would be committed, with the marriage declared void since a polygamous marriage cannot be contracted under English Law.<sup>33</sup> Sexual fidelity is a requirement of a monogamous relationship and infidelity is a prominent element within the definition of adultery when used as a ground for divorce. Adultery is a condition that is not available to same-sex partners within the CPA 2004 and sexual infidelity cannot be cited as adulterous in the same manner as that of heterosexual divorce. However, a civil partner may rely on the fact of ‘unreasonable behaviour’ to support a dissolution since the only ground for dissolution of a civil partnership is the irretrievable breakdown of the relationship.<sup>34</sup>

The intention of the CPA 2004 was to provide equal treatment for both marriage and civil partnerships, conveying the same rights and responsibilities found within a civil marriage. However, what is the reason for excluding the condition of Adultery in the CPA 2004 and since the government intended the civil partnership to mirror the provisions found within a civil marriage, then for what reason is this particular element omitted? It is evident that a heterosexual marriage can take advantage of the provision of divorce under ‘irretrievable breakdown’<sup>35</sup> or the marriage can be voidable due to a lack or refusal of consummation.<sup>36</sup> But both these elements are missing from the CPA 2004 and no mention of a sexual element or

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<sup>31</sup> Jacqueline Humphries, ‘The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England’ (2006) 8 Ecclesiastical Law Journal 289, 299.

<sup>32</sup> Offences Against the Person Act 1861, s 57.

<sup>33</sup> There are some exceptions to this rule, where overseas marriages are conducted outside of England and Wales.

<sup>34</sup> Civil Partnership Act 2004, s 44(5)(a).

<sup>35</sup> Matrimonial Causes Act 1973, s 1(1).

<sup>36</sup> Matrimonial Causes Act 1973, s 12(a)(b).

definition of a sexual act within the CPA 2004 exists, but importantly adultery is not a ground for a dissolution (since divorce is not available within a civil partnership anyhow). In fact there is no mention of sex whatsoever in the CPA 2004 and likewise there is no requirement for consummation of the partnership either.<sup>37</sup>

Adultery is defined as ‘voluntary sexual intercourse between two persons of the opposite sex, of whom one or both are married but who are not married to each other’<sup>38</sup> Divorce in accordance with the MCA 1973 can be achieved by proving one or more of the five facts<sup>39</sup> to establish the ‘irretrievable breakdown’<sup>40</sup> of a marriage.

Likewise, consummation of a marriage exists when sexual intercourse has taken place or is taking place, but the non-existence or lack of heterosexual penetrative sexual intercourse (consummation) is a ground to render the marriage voidable and put an end the marriage. There are no such requirements in the CPA 2004 and neither of these grounds are applicable as causes for the dissolution of a civil partnership.

Any references to sex or sexual acts in regards to LGBTQ people is left unmentioned in the definition or regulation of civil partnerships, perhaps because of the difficulties in establishing a clear definition of non-penetrative sex and the realities of same-sex relationships where monogamy can be considered to be less insignificant than in opposite-sex relationships.<sup>41</sup> This lack of provision for adultery and non-consummation in the CPA 2004 is criticised by

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<sup>37</sup>Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 4

<sup>38</sup> *Dennis v Dennis* [1955] P 153: as cited in Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (10th edn, OUP 2007) 267.

<sup>39</sup> Matrimonial Causes Act 1973, s 1(2).

<sup>40</sup> Matrimonial Causes Act 1973, s 1(1).

<sup>41</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 4-5.

*Crompton* in that it has rendered the civil partnership as ‘legally asexual’,<sup>42</sup> but partners to a traditional opposite-sex marriage are legislatively contracted to a legally sexual partnership.

However, prior to the introduction of the CPA 2004 the government had initially debated the prospect of adultery being a cause for dissolution under the behavioural definition of ‘the applicant cannot be reasonably be expected to live with the respondent’.<sup>43</sup> *Barker* explains that a definition of both the absence of adultery and the correlation of the specific definition of the sexual component of adultery<sup>44</sup> (penetration of the vagina by the penis) is perhaps best defined by Baroness Scotland in the House of Lords:

It is right to say that the Bill is silent on the nature of the sexual relationship that exists between the couple, save to require that they must be of the same sex. We have not replicated in the Bill the grounds of adultery. Those who have had the delight of dealing with adultery litigation will remember all those tests, such as whether penetration took place. The Bill will address none of those issues. There is no adultery in it.<sup>45</sup>

Leaving LGBTQ sex invisible and unspoken can be interpreted as an assumption that sexual monogamy will not exist or form a major concern within a civil partnership. But this condition can also be read as homophobic in the denial of sexuality, reinforcing the heteronormative assumption that sex in the form of penetration is ‘the’ definition of sex.<sup>46</sup> The discussion of LGBTQ sexual practices both within a defined monogamous relationship and those who are at liberty to engage in sexual practices on a public scale comparable to heterosexuals is not

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<sup>42</sup> Lucy Crompton, ‘Where’s the Sex in Same-Sex Marriage?’ (2013) 43 Family Law 564.

<sup>43</sup> Civil Partnership Act 2004, s 44(5)(a).

<sup>44</sup> Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 185.

<sup>45</sup> Baroness Scotland of Asthal, HL Deb 10 May 2004, vol 661, col GC21 in Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 185.

<sup>46</sup> Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013) 186.

covered within this research, but an acknowledgment of the existence of difference sexual practice should be stated.<sup>47</sup>

In summary, the main differences between a marriage and the civil partnership are discussed above; but in addition to the absence of adultery, there is the omission of the ground of non-consummation and the element of venereal disease from the CPA 2004, whereas in a marriage these elements could render the union voidable.

### **Transgender Partnerships and Marriages.**

In mapping out the development of LGBT reform, same-sex partnerships and the position in relation to marriage, a consideration of transgender relationships must be included since it could be said that many transgender partners have been in same-sex marriages since the 1960s (and even earlier) in what *Whittle* has described as a ‘very British farce’.<sup>48</sup> Although this issue has been somewhat sidestepped and left mainly unrecognised until around the late 1990s with number of high profile cases providing acknowledgement.

The focus of this research has largely been upon the dichotomous model of sexuality (homosexual and heterosexual) in the discussion of the recognition and regulation of partnerships. However, in addition to this polarised view of partnerships there is the subject of how the law has not been accommodating towards transgender (trans) people and those who identify as intersex. During the course of the Civil Partnership Bill it was intended that the civil partnership would remove ‘legal disabilities which have previously afflicted those who have

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<sup>47</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 182-183.

<sup>48</sup> Stephen Whittle, ‘Sex, Love & Consent; Gender Recognition in the Marriage (Same Sex Couples) Act 2013’ (Whittlings, 3 November 2013) <<http://whittlings.blogspot.co.uk/2013/11/sex-love-consent-gender-recognition-in.html>> accessed 27 June 2014.

been effectively unable to contract a marriage, for example transsexuals<sup>49</sup> supporting new and non-marital forms of relationships whilst being compatible with Convention rights. Discourse around trans relationships have clearly identified problems with the law for those partners wanting to be in a marriage recognised as a heterosexual marriage for all intents and purposes. Marital restrictions in the Matrimonial Causes Act stipulating that the parties to a marriage must be respectively male and female<sup>50</sup> have been central to the establishing of marital status whilst intrusively identifying the gender of the parties concerned.

The definition of marriage in the 1866 case of *Hyde v Hyde*<sup>51</sup> is retained in the words ‘the voluntary union for life of one man and one woman to the exclusion of all others’. But the issue of the validity of a marriage and the parties being respectively male and female was determined in the well documented case of *Corbett v Corbett*.<sup>52</sup> Although this probate case was primarily concerning the mutual dissolution and inheritance rights of the marriage, the case was of legal significance to the position of ‘transsexual’<sup>53</sup> people and marital status.

Arthur Corbett persuaded model, dancer and trans woman April Ashley to marry him in Gibraltar, September 1963, fully knowing that April was registered as male at birth and living as a woman having undergone ‘sex change’ surgery. By December 1963, the pair had been together for no longer than 14 days and Arthur Corbett alleged that the marriage was ‘null and void’ because the pair were of the same sex, or alternatively that their marriage was voidable

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<sup>49</sup> Joint Committee on Human Rights, *Scrutiny of Bills: Private Members Bills and Private Bills (fourteenth report); Civil Partnerships Bill* (2001-02, HL 93, HC 674) 16-17

<sup>50</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 61

<sup>51</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>52</sup> *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All ER 33.

<sup>53</sup> The term ‘Transgender’ supersedes the term Transsexual.

because April was incapable of ‘consummating’ it.<sup>54</sup> Corbett petitioned to the court that their marriage was ‘null and void and of no effect’ because April (at the time of the ceremony) was a male. The court deliberated and hearing statements from *nine* professional experts on the subject, were divided in their decisions, but importantly Ormrod J created an intrusive medical test now known as the *Corbett test*<sup>55</sup> that was based upon psychological, chromosomal, gonadal and genital sex evaluation. It was recognised that April was outwardly living as a woman and ‘the pastiche of femininity was convincing’, but in determining her gender and since April was registered as male at birth, the court deemed that April should remain as such (male) for marriage purposes.

Ormrod J also discussed the relevance of sex to legal relationships and he identified three categories ‘irrelevant, relevant or an essential determinant of the nature of the relationship’, placing marriage in the latter ‘essential’ category because ‘it is the institution on which the family is built, and in which the capacity for *natural* heterosexual intercourse is an essential element’.<sup>56</sup> It was held that ‘Marriage being essentially a relationship between man and woman, the validity of the marriage depended on whether the respondent was or was not a woman (...)’ The final decision in the case was on two grounds; the parties were of the same sex; and that a female-to-male transsexual was incapable of consummating the marriage.

The judgment of the *Corbett* case became the precedent for determining legal sex and established that for legal purposes the medical *Corbett test* would evaluate the gender of a trans person but with the initial reliance on the original birth certificate to identify gender at

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<sup>54</sup> Gail Brent, ‘Some Legal Problems of the Postoperative Transsexual’ (1972-1973) 12 Family Law Journal 405, 417.

<sup>55</sup> The *Corbett test*, *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All ER 33.

<sup>56</sup> *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All ER 33 [48]

birth.<sup>57</sup> Ormrod J argued that the sex of an individual is fixed at birth, therefore defining a trans person by what was printed on their birth certificate as opposed to their acquired gender.<sup>58</sup> This is of significance since prior to the decision of Ormrod J it was common practice to make unofficial amendments to birth certificates to show acquired gender. Additionally, it was clear by the court that there was to be no derogation from statute in the opposite sex requirements to a valid marriage and that the normative model of sexuality would prevail.

Following the logic from *Corbett*, a trans female (male to female - MTF) could not legally marry another biological male (cis male), but instead could legally marry a biological female (cis female) or a trans male (female to male FTM) in accordance with birth certificate and the *Corbett test*. Although this would have been voidable because of not being consummated *prima facie* it would be valid. The marriage would be treated as valid unless annulled, with only the partners to the marriage being able to bring a challenge, during their lifetime. In other words, according to *Brent* ‘if a person wishes to live in an unconsummated union, the law would not interfere and the marriage would be valid for all purposes’.<sup>59</sup> The scenario of a trans female (MTF) possibly marrying a biological female (cis female), would appear on the face of it to be a marriage of two women. Adversely, this could equally be a trans male (FTM) marrying a cis male, which would appear to be two men.<sup>60</sup> However, in the case of Arthur Corbett where he knew that April Ashley was registered as male at birth and living as a

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<sup>57</sup> Stephen Whittle and Lewis Turner, “‘Sex Changes’? Paradigm Shifts in “Sex” and “Gender” Following the Gender Recognition Act?” (2007) 12(1), 5.7 Sociological Research Online <<http://www.socresonline.org.uk/12/1/whittle.html>> accessed 30 June 2014.

<sup>58</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 60

<sup>59</sup> Gail Brent, ‘Some Legal Problems of the Postoperative Transsexual’ (1972-1973) 12 Family Law Journal 405, 420.

<sup>60</sup> Gail Brent, ‘Some Legal Problems of the Postoperative Transsexual’ (1972-1973) 12 Family Law Journal 405, 420, citation 44.

woman, they were both males according to the law. Here they both could have continued in an ‘unconsummated union’ without any interference and participating in essentially what would have been a same-sex partnership (or marriage).

The case of *Bellinger v Bellinger*<sup>61</sup> concerned Mrs Elizabeth Bellinger who petitioned the court to recognise her ceremony of marriage, seeking a declaration of legal validity of the marriage in her acquired gender as a woman. Elizabeth was registered as a male at birth in 1946, but she perceived herself as female, continuing to live and dress as a woman from 1975 onwards. She had undergone the process of surgery removing genitals and creating an artificial vagina, but Elizabeth was without other biological characteristics of a woman (uterus, ovaries). In 1981 she contracted a Register Office marriage to Michael Bellinger and as in the case of *Corbett*<sup>62</sup> Mr Bellinger was aware that she was registered as a male at birth and had been in a previous marriage as a male in 1967 that was dissolved in 1975. The Registrar was aware of Elizabeth’s status and they were married with their marriage certificate describing her as a ‘spinster’. However, after their marriage the Bellinger’s lived outwardly as a happy ‘husband and wife’ together,<sup>63</sup> but the uncertainty in English law of the true status of their marriage had proved troublesome. Mrs Bellinger had campaigned and sought recognition of their marriage for herself and others in the same position who wanted to be recognised as female.

The High Court referred to the *Corbett test* (although some thirty years after it was first introduced), where Johnson J decided that ‘the medical criteria set of by Ormrod J in *Corbett*

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<sup>61</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] 1 All ER 311.

<sup>62</sup> *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All ER 33.

<sup>63</sup> Stephen Gilmore, ‘*Bellinger v Bellinger* – Not quite between the ears *and* between the legs – Transsexualism and marriage in the Lords’ (2003) 15(3) CFLQ 295, 296.



is valid today'<sup>64</sup> Reinforcing the statutory requirement that the parties to a legal marriage must be male and female, but if the parties are 'not respectively male and female'<sup>65</sup> this would cause the marriage to be void, determined by way of section 11(c) of the Matrimonial Causes Act 1973. However, refusing the petition, Johnson J said he recognised a marked change in social attitudes, but had to follow the law as it is. The case continued to the Court of Appeal<sup>66</sup> where the court heard the submission *inter alia* for Mrs Bellinger claiming that using the case of *Corbett* from thirty years earlier in determining the outcome of her case was wrong and there should be a consideration of current social conditions and improved medical knowledge. The appeal was dismissed.

The *Bellinger* case was referred to the House of Lords in 2003 where the appeal failed and the marriage was declared not valid, but an alternative claim stating that s 11(c) of the MCA 1973 was incompatible with Articles 8 and 12 of the ECHR succeeded. A Declaration of Incompatibility<sup>67</sup> was made in accordance with the Human Rights Act 1998 declaring that s 11(c) of the MCA 1973 is not compatible with Articles 8 and 12 of the ECHR. Most importantly this highlighted that legislation was needed to enable trans people to marry in their acquired gender.<sup>68</sup> However, the controversial *Corbett test* remained as a starting point in the approach of the law, although the outcome of *Bellinger* was that the Government must take the declaration seriously. This led to the consideration of trans people being recognised and able to marry in their acquired gender, with the provision of new birth certificates and the ability to claim their relevant State pensions.

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<sup>64</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2002] 1 All ER 311, [9].

<sup>65</sup> Matrimonial Causes Act 1973, s 11(c).

<sup>66</sup> *Bellinger v Bellinger* [2001] EWCA Civ 1140, [2001] 3 FCR 1 CA.

<sup>67</sup> In accordance with s 4 of the Human Rights Act 1998.

<sup>68</sup> *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593.

Just prior to the HL case of *Bellinger* was the 2002 case of Christine Goodwin,<sup>69</sup> and the case of an anonymous woman known as 'I' - *Goodwin and 'I' v United Kingdom*<sup>70</sup> which were instrumental in the recognition of trans people, but more importantly in consideration of the right to marry. There have been a number of other legal challenges from both trans males and females that were based upon the issue of recognition of their acquired gender<sup>71</sup> However, in the dual ECtHR cases of *Goodwin and 'I' v United Kingdom*<sup>72</sup> the court had to consider complaints under Article 8 (right to private life) and Article 12 (right to family life), the latter being specific to the right of the two women to marry.

The complaint under Article 8 concerned the fact that the UK did not recognise or provide legal recognition of the acquired gender of the two women, which has the effect of leaving postoperative trans people in a grey area defined as neither one gender or the other. This situation has caused continuing discriminatory and humiliating experiences for trans people, affecting their everyday life, especially regarding official documents such as birth certificates, passports, NI contributions and State retirement pensions but also problems when applying for life insurance, mortgages, private pensions or car insurance.<sup>73</sup> The ECtHR ruled that the UK cannot be allowed to exercise a margin of appreciation in this matter and that English Law did not respect the dignity of trans individuals, since revealing their original birth certificate caused great distress and intrusion whilst also restricting them from living in their acquired gender.<sup>74</sup> The court found that in the case of Christine Goodwin there had 'been a failure to

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<sup>69</sup> Trans Campaigner: Christine Goodwin, 1937 – 2014.

<sup>70</sup> *Goodwin v UK* (2002) 35 EHRR 18; *I v UK* (2003) 36 EHRR 53.

<sup>71</sup> *Sheffield and Horsham v UK* (1999) 27 EHRR 163, *Rees v UK* (1987) 9 EHRR 56, *Cossey v UK* (1990) 13 EHRR 622.

<sup>72</sup> *Goodwin v UK* (2002) 35 EHRR 18.

<sup>73</sup> *Goodwin v UK* (2002) 35 EHRR 18, paras 60-62.

<sup>74</sup> Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 47.

respect her right to private life in breach of Article 8 of the Convention'.<sup>75</sup> Therefore, the failure of the UK to alter and issue new birth certificates was a breach of the ECHR. Consequently, the Government were requested to accommodate trans people by issuing new birth certificates and recognise acquired gender for all legal purposes.

In previous cases it was found by the ECtHR that where trans people were unable to marry a person of the sex opposite to their reassigned gender, there was no breach of Article 12. Where Article 12 reads: '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'.<sup>76</sup> But the *national laws* of the UK state that a marriage is void if not between a man and women, as defined by the MCA 1973 which was enacted after the biological test in *Corbett* by Ormrod J.<sup>77</sup> The UK government argued that trans people were not deprived of the right to marry because they were at liberty to marry a person opposite to their former sex. However, in the case of 'I' the court in considering this logic, said that 'the very essence of (her) right to marry has been infringed'.<sup>78</sup>

Additionally, in *Goodwin* the court said that in observing Article 12 the 'right to marry and found a family', did not infer that the inability of a couple to conceive or parent a child would remove their right to marry.<sup>79</sup> In other words, people do not have to produce children to enjoy the right to marry and no justification was found by the court for barring a trans person from marriage, since anyone may want to marry and not necessarily want or be able to conceive a

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<sup>75</sup> *Goodwin v UK* (2002) 35 EHRR 18, para 93.

<sup>76</sup> *I v UK* (2003) 36 EHRR 53, paras 77-78

<sup>77</sup> *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All ER 33.

<sup>78</sup> *I v UK* (2003) 36 EHRR 53, para 81.

<sup>79</sup> *Goodwin v UK* (2002) 35 EHRR 18, para 98.

family. *Goodwin and I v United Kingdom*<sup>80</sup> established the right for the recognition of trans people and also that there should be no bar to marriage in their acquired gender. The rulings in both cases and the HL case of *Bellinger* indicated a distinct moving away from the earlier biological testing and medical evidence of *Corbett* and the somewhat outdated definition of marriage in *Hyde*. The daily lives of trans people was considered more important and this was to become instrumental in the approach of the UK, paving the way towards the introduction of the Gender Recognition Act 2004, intended to give trans people the legal recognition that was deserved.

### **The Gender Recognition Act.**

The GRA 2004<sup>81</sup> came into force in April 2005 as a response to the violation of the rights of trans people and incompatibility of s 11(c) MCA 1973 with Articles 8 and 12 of the ECHR. This gives trans people a right to privacy and to form families (married or in civil partnerships),<sup>82</sup> but most importantly to obtain legal recognition within their acquired gender, although the GRA 2004 is considered heteronormative regulation of gender and sexual identity, still requiring opposite gender to a marriage.<sup>83</sup> The legislation provides a thorough method of application and approval to obtain a Gender Recognition Certificate establishing the new acquired gender as the legal gender.<sup>84</sup> This provides an individual over 18 to obtain *inter-alia*, state and survivor pension benefits, a new birth certificate and a legal right to marry in their acquired gender. A ‘full’ Gender Recognition Certificate (GRC) indicating that the change of

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<sup>80</sup> *Goodwin v UK* (2002) 35 EHRR 18; *I v UK* (2003) 36 EHRR 53.

<sup>81</sup> Gender Recognition Act 2004.

<sup>82</sup> Stephen Whittle, ‘Sex, Love & Consent; Gender Recognition in the Marriage (Same Sex Couples) Act 2013’ (*Whittlings*, 3 November 2013) <<http://whittlings.blogspot.co.uk/2013/11/sex-love-consent-gender-recognition-in.html>> accessed 27 July 2014.

<sup>83</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 176.

<sup>84</sup> Upon application and approval by the Gender Recognition Panel. Gender Recognition Act 2004, s 1.

gender is recognised in law will be issued to successful applicants, who can then obtain a replacement birth certificate in their new gender, but not revealing any details of the original birth certificate.

However, a full GRC will not be granted to any trans partners who are in an existing marriage, because the condition of male and female to a marriage still exists in law. The effect of the GRA 2004 causes those trans partners in a marriage who wish to be legally recognised in their acquired gender to take the somewhat drastic step of terminating their marriage (to avoid any accidental same-sex marriage). In the meantime the trans partner may be granted an 'interim' GRC and a decree of nullity can be applied for within a six month time limit, then on terminating the marriage a full GRC will be given. Here, the spousal rights can be secured almost immediately by registering a same-sex Civil Partnership, or alternatively registering a civil marriage upon receipt of a full GRC. The effect this has had on marriage is that a trans person may now marry in their acquired gender providing that their gender has been legally recognised.

The CPA 2004<sup>85</sup> together with the GRA 2004 forces same-sex civil partners wanting to continue in their relationship after one of the partners acquires a new gender, to dissolve their partnership (to avoid any accidental opposite-sex partnership) and enter into a civil marriage to continue a recognised partnership together. Alternately, in the case of married partners who have also had their marriage stolen from them, where one spouse acquires a new gender, this will have the effect of annulling the marriage and the partners will have to enter into a civil

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<sup>85</sup> Civil Partnership Act 2004.

partnership together.<sup>86</sup> Presumably, a farcical situation would arise in the scenario of both partners to either a civil partnership or marriage acquiring new gender; would this have the effect of leaving their marital/partnership status as it already is or would this effect a dissolution or annulment?

To summarise by example; a marriage of a trans female (MTF) and a woman before the GRA 2004 - would be valid under the MCA 1973 or previous common law and the *Corbett test*, because the parties would both be determined as male. A marriage after the GRA 2004 of a trans female (MTF) where change of gender *has not been recognised*, to a woman – the MTF is still male according to the law and able to contract a heterosexual marriage with the woman, although outwardly appearing to be a union of the same-sex. The marriage of a trans female (MTF) where change of gender *is recognised* under the GRA 2004, to a man – this marriage would be legally valid and the MTF is able to contract a marriage in the acquired gender where a full gender recognition certificate was in place.<sup>87</sup>

### **Restrictive freedoms and religious conscientious objection.**

Although the GRA provides a right to privacy in relation to acquired gender with personal information becoming protected information and criminal penalties for disclosure, there is the issue of ‘disclosure for religious purposes’<sup>88</sup> which literally refers to legal disclosure to organised religions. This is where religious organisations can legally share protected information for the purpose of decision making in relation to a marriage, appointment,

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<sup>86</sup> Jacqueline Humphries, ‘The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England’ (2006) 8 Ecclesiastical Law Journal 289, 298.

<sup>87</sup> Rebecca Probert, ‘How would *Corbett v Corbett* be decided today?’ (2005) 35 Family Law 382.

<sup>88</sup> Gender Recognition (Disclosure of Information)(England, Wales and Northern Ireland) (2) Order 2005, SI 2005/916, art 4.

employment or membership of their religious organisation.<sup>89</sup> Whilst a member of the clergy can inquire into any notion of acquired gender, there is no legal obligation on the parties to answer or to reveal this. The church have the legislative opportunity to refuse a marriage where one of the intended spouses has an acquired gender:

‘A clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person’s gender has become the acquired gender under the Gender Recognition Act 2004’<sup>90</sup>

Why is there a conscientious objection clause in the GRA 2004 and a right to disclosure enshrined in a Standing Instrument in relation to marriage? It is understood that the Church of England and in Wales have a duty to marry their parishioners, but this has some exceptions including legislative freedom to decline marriage solemnisation and use of religious buildings, for instance in the case of divorcees where their spouse is still living<sup>91</sup> and also where there are degrees of affinity.<sup>92</sup>

The Church of England Canons place the decision to solemnise a marriage upon the clergy with the guidance ‘that marriage is in its nature a union permanent and lifelong, (...), of one man with one woman’<sup>93</sup> Therefore, legislative provision is made in the GRA 2004 and the Gender Recognition Order<sup>94</sup> to enable clergy to make a decision in accordance with Canon law, upholding the practice of the church in its refusal of marriage. This crafting of the law allows legal discrimination by the clergy to conduct or refuse a marriage (or other decision connected to the church) where it is established that a person has an acquired gender. Whilst

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<sup>89</sup> Gender Recognition (Disclosure of Information)(England, Wales and Northern Ireland) (2) Order 2005, SI 2005/916, 4(2).

<sup>90</sup> Gender Recognition Act 2004, sch 4(1)(3) by way of amendment to Marriage Act 1949, s 3(5b)(1)

<sup>91</sup> Matrimonial Causes Act 1965, s 8(2).

<sup>92</sup> Marriage Act 1949, s 5(a); and Canons of the Church of England: ‘B31 Of certain impediments to marriage’.

<sup>93</sup> Canons of the Church of England: ‘B30 Of Holy Matrimony’.

<sup>94</sup> Gender Recognition (Disclosure of Information)(England, Wales and Northern Ireland) (2) Order 2005, SI 2005/916.

accommodating to the church, this is not so accommodating to those couples who may (or may not) be members of the church or religious organisation who want to be married in the same manner as others in society. Also, the issue of refusing a marriage is legislatively different in the case of England and Wales, where the Church of England although they have the benefit of a conscience clause are not allowed to prohibit the use of the church buildings for marriages under the ambit of the GRA 2004. However, this does not apply just over the border in Wales, where the Church of Wales may refuse the use of church buildings.<sup>95</sup> The intention here is to provide a margin of appreciation upon Church of England clergy where a decision might involve known devout parishioners of their own, but this is disregarded for Wales where the law is clearer in its provision.

The opposing of LGBT rights by religious organisations invokes 'religious liberty of conscience' and historical use of conscience clauses have been commonplace in the UK when there appears to be a moral dimension in the making of legislation.<sup>96</sup> In accordance with the Equality Act 2010, gender reassignment (the process of transitioning from one gender to another) is a protected characteristic,<sup>97</sup> however due to religious 'conscientious objections' the EA 2010 did not address this and provide equality for trans people in relation to marriage, leaving the changes made to the Marriage Act<sup>98</sup> by the GRA 2004 in force.

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<sup>95</sup> Gender Recognition Act 2004, sch 4(1)(3) by way of amendment to Marriage Act 1949, s 3(5b)(2).

<sup>96</sup> Stephen Hunt, 'Sexual Minority Rights and 'Religious Clauses' of Conscience: The UK Case' (*Critcom – Council for European Studies*, 8 May 2014) < <http://councilforeuropeanstudies.org/critcom/sexual-minority-rights-and-religious-clauses-of-conscience-the-uk-case/> > accessed 1 July 2014.

<sup>97</sup> Equality Act 2010, pt 2(1)(4).

<sup>98</sup> Marriage Act 1949.



### **Effect of the Marriage (Same Sex Couples) Act 2013.**

The GRA 2004 upheld the requirement of a man and a woman to a marriage, causing a marriage or a civil partnership to be terminated upon change of gender. However, with the advent of the Marriage (Same Sex Couples) Act 2013, there is provision to benefit trans people who are in a partnership or marriage by allowing them to stay together without terminating their union when applying for a Gender Recognition Certificate. The MSSCA 2013, schedule 5 includes provisions to streamline existing marital problems in relation to trans people, but there is a new element of 'spousal consent' where the spouse or partner of a trans person is being asked to recognise the change of gender but most importantly consent to their union continuing in a legal capacity.<sup>99</sup> The Marriage (Same Sex Couples) Act 2013, will be discussed at length in the following chapter.

### **Conclusion.**

It is evident that the distinctly separate (and perhaps discriminatory) civil partnership and marriage systems can present problems in seeking to accommodate all sexualities and genders. Particularly so in relation to trans people and those that do not fit into the normative view of established partnerships. The term 'different-sex relationships' may be more appropriate in the definition of relationships of different sex/genders, since an opposite-sex heterosexual relationship definition excludes bisexuals, whilst a same-sex relationship defines gay men or lesbian women but in both cases offers no definition to bisexual or trans parties within a recognised relationship.<sup>100</sup> There are notable differences between the civil partnership and a civil marriage, both in perception and status, albeit that the two only appear to have small

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<sup>99</sup> Marriage (Same Sex Couples) Act 2013, sch 5.

<sup>100</sup> Victoria Clarke and others, *Lesbian, Gay Bisexual, Trans and Queer Psychology: An Introduction* (Cambridge University Press 2010) 173-175.

legislative differences. Therefore, in consideration of same-sex and trans partners to a marriage would it not have been simpler to remove the MCA 11(c) provision to accommodate different-sex relationships, rather than enact new legislation? Would the future be no marriage at all, but instead, a simple form of universal registration that would act as a binding legal contract between the parties to the relationship, as opposed to oppressive legislation that serves to reinforce the outlawing of particular groups of people through the imposition of heteronormative values? The position of trans people within formal relationships has improved and the introduction of the GRA 2004 has provided legislative equality, albeit that a conscientious objection clause exists within the legislation. However, as we will see in the next chapter, a positive amendment in accordance with the MSSCA 2013 will enable partners to stay within their respective legal unions.

## Chapter 5.

### Same-sex Marriage.

#### Introduction.

Previous chapters have provided a view of established marriage and illustrated the development of the CPA 2004 and its operation. Although the CPA 2004 was applauded as a major gain for LGBT people and the intention by the legislature was to mirror civil marriage, it treats LGBT people differently than a civil marriage. The CPA 2004 has been referred to as holding second-class status and *Tatchell* has described the CPA as discriminatory and akin to sexual apartheid.<sup>1</sup> Many LGBT people wanted actual same-sex marriage and not the lesser CPA, but the ECtHR would influence the LGBT equality agenda in furthering the recognition of same-sex relationships in the decision of falling within the definition of family life. The case of *Schalk and Kopf*<sup>2</sup> was central to the debate to enact same-sex marriage, along with the UK keeping in step with Europe and other countries who had same-sex marriage legislation. Political influence would support a move towards consultation and the introduction of a same-sex marriage Bill, although heated debate in Parliament would also focus on striking a balance in the conflict of rights between sexuality and religion. This chapter will aim to plot the development and discussion surrounding the enactment of legislation specific to same-sex marriage in the UK.

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<sup>1</sup> Peter Tatchell, 'Civil Partnerships are Divorced from Reality: Today's Rich Variety of Relationships and Lifestyles is not Reflected by this New One-Size-Fits-All Legislation' *The Guardian* (London, 19 December 2005) 24.

<sup>2</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

### **The influence of relationships falling within the definition of family life.**

The European Convention on Human Rights (ECHR) has influenced the equality agenda contributing towards the advancement of LGBTQ rights both across the UK and within member states. The enactment of the Human Rights Act 1998<sup>3</sup> has had effect on a domestic level, and LGBTQ people have taken advantage of exercising their right to petition on the violation of the qualified right of Article 8, the ‘right to respect for private and family life’.<sup>4</sup> However, there has been a steady emergence of member state consensus moving towards the legal recognition of same-sex relationships and in particular, this is identified in the case of *Schalk and Kopf*<sup>5</sup> which influenced the UK decision to enact same-sex marriage.

The ECtHR decision in the case of Horst Schalk and Johan Kopf is an important one in the recognition that a stable same-sex relationship can fall within the definition of a family life in the same way as that of an opposite sex relationship. Schalk and Kopf were a same-sex male couple resident in Vienna, when no provision existed in Austrian law for same-sex partnership or marriage. In autumn 2002 Schalk and Kopf made an application to the *Standesamt*<sup>6</sup> to request that they could be married. However, their request was refused upon the grounds that ‘marriage could only be contracted between two persons of the opposite sex’<sup>7</sup> and in keeping with domestic case law; a marriage contracted between persons of the same sex was null and void. Since they were both of the same sex, they lacked the capacity to marry and this decision was upheld by the courts. The Austrian Civil Code stipulated ‘The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise

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<sup>3</sup> Human Rights Act 1998, implemented 2 October 2000.

<sup>4</sup> European Convention on Human Rights, art 8 (1).

<sup>5</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

<sup>6</sup> Office for matters of Personal Status.

<sup>7</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20, para 9.

children and support each other.<sup>8</sup> However, the two men brought a complaint to the Austrian Constitutional Court stating that they were denied the right to marry because of the legal impossibility caused by the Civil Code, violating their right to respect for private and family life and of the principle of non-discrimination.

The Austrian Court rejected the case and an application was made to the ECtHR under Article 12 (the right to marriage) claiming that the two men were denied the right to marry. An additional complaint was made in accordance with Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) setting out that they were discriminated against because of their sexual orientation. However, during the course of the ECtHR proceedings the Austrian Government introduced a Registered Partnerships Act<sup>9</sup> allowing a same-sex partnership much along the same lines of other European States. Schalk and Kopf maintained that prior to the introduction of the new Act of 2010 no provision existed in domestic law for them to have their same-sex relationship recognised, either as a marriage or form of civil partnership.

The ECtHR noted that this was the first time that the court had to consider whether two same sex partners could marry, but found that there had been no violation of Article 12 and no violation Article 14 in conjunction with Article 8 of the ECHR. The court did consider that in relation to Article 12 which gives the right to men and women to marry, that this should not just be limited to couples of opposite sex, but that same-sex couples should be included. In relation to Article 8 it was held that a same-sex relationship was within the bounds of ‘family

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<sup>8</sup> Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), art 44: in force 1 January 1812.

<sup>9</sup> Registered Partnership Act: FLG (*Bundesgesetzblatt*) vol I, 135/2009: EPG (*Eingetragene Partnerschaft Gesetz*) in force 1 January 2010.

life' just as a heterosexual relationship would be. However, the Convention did not force a member State to offer same-sex marriage and that the respective national authorities were best placed to deal with this within the 'margin of appreciation' allowed between the differing societies. This causes a slight oxymoron since this decision by the ECtHR appears to be in conflict with the freedom to marry, but the outcome in *Schalk and Kopf* places the responsibility with the member State? Notably, same-sex marriage is not available in Austria and during this case the UK intervened on the side of Austria,<sup>10</sup> whilst four NGOs including *Professor R. Wintemute*<sup>11</sup> intervened for the benefit of the partners Schalk and Kopf.

The overall effect of *Schalk and Kopf* was that a stable same-sex relationship is considered to fall within the definition of a family life much in the same way as that of an opposite sex relationship would be. Therefore this decision extends the recognition of 'a family' by the ECtHR beyond the boundaries of heteronormative definition, whilst also indicating that the law of the ECtHR is an evolving law in step with modern development.

Another important case concerning the equal treatment of same-sex couples is the pending ECtHR case of two French gay men Stéphane Chapin and Bertrand Charpentier,<sup>12</sup> in a longstanding relationship that contained no children. The two men wished to get married and did so with the support of the local Mayor, causing a political storm in 2004 by making the headlines as the 'first gay marriage in France'. The Mayor of Bègles, Bordeaux conducted a marriage between the two men, claiming that there was nothing in French law to prohibit it, but

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<sup>10</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20, para 45.

<sup>11</sup> Professor Robert Wintemute, Kings College London. Counsel.

<sup>12</sup> *Chapin & Charpentier v France* App no 40183/07, communicated case introduced 6 September 2007.

the marriage was declared as null and void by the French High Court since ‘the traditional function of a marriage is commonly considered to be the founding of a family’.<sup>13</sup>

However, French law at the time provided for a civil union (*PACS*)<sup>14</sup> which since 1999 was available to both same-sex and opposite-sex partners and currently still is, although the civil union (*PACS*) has a lesser status than established marriage in terms of rights and benefits. Chapin and Charpentier were adamant that they wanted a same-sex marriage as opposed to the lesser civil union and in doing so were challenging the French Civil Code<sup>15</sup> that stipulates ‘marriage is the union of a man and a woman’.<sup>16</sup> The outcome as to the validity of this marriage and related questions have been raised under Article 14 (prohibition of discrimination), in conjunction with Article 12 (right to marriage) and in conjunction with Article 8 (right to respect for private life) of the Convention. However, whilst this action is ongoing, the French Government enacted same-sex marriage in France in May 2013,<sup>17</sup> but this was not without national protest and objections from the many French Mayors who opposed the conducting of same-sex marriage claiming it is in direct conflict with their conscience or religious beliefs.<sup>18</sup>

The significance of *Chapin & Charpentier* was that it raises questions concerning the equal treatment of same-sex couples, either married, officially partnered or not. But particularly the issue of whether two same-sex partners who lived together as an unmarried couple without any children enjoy family life under the scope of Article 8. The ECtHR have accepted that ‘family

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<sup>13</sup> John Henley, ‘Court Annuls France’s First Gay Marriage: Couple Vow to Fight to the End as Issue Causes Political Storm’ *The Guardian* (London, 28 July 2004) 14.

<sup>14</sup> PACS: *Pacte civil de solidarité*, French Civil Union available to homosexual and heterosexual partners introduced 1999.

<sup>15</sup> French Civil Code (*Code civil des Français*) 1804

<sup>16</sup> According to the Code civil des Français 1804, art 75: “le mariage est l’union d’un homme et d’une femme”.

<sup>17</sup> Same sex marriage allowed in France since 18 May 2013.

<sup>18</sup> ‘ France Mayors “Cannot Block Gay Marriage”: top court’ (*BBC News*, 18 October 2013)

<[www.bbc.co.uk/news/world-europe-24579037](http://www.bbc.co.uk/news/world-europe-24579037)> accessed 26 October 2013.

life' already extends beyond that of the traditional heterosexual definition and now encompasses other relationships. However, since the judgment in *Shalk and Kopf* the ECtHR decided that the marriage rites contained in Article 12 are no longer restricted to opposite sex couples, but that the decision to allow same-sex marriage is now left to the decision of each individual member state. An important point is that whilst no actual right to same-sex marriage exists under Article 12, then this leaves the church in a position where it is not wholly obligated to perform a same-sex marriage.<sup>19</sup> However, since the French Government have already enacted same-sex marriage and if *Chapin & Charpentier* is heard and not sidestepped by the ECtHR, this may lead to further positive developments in case law appertaining to wider consideration of same-sex relationships.

### **Regulation in other countries.**

On an international scale the common law countries Canada and South Africa both have legislation in place to allow same-sex marriage. The province of Quebec prohibited sexual orientation discrimination in 1977 and individual provinces of Canada had enacted same-sex marriage legislation as early as 2004. The decision in *Haig v Canada* was a turning point in amending the federal Canadian Human Rights Act to include discrimination based on sexual orientation.<sup>20</sup> Discriminatory treatment based on sexual orientation is now prohibited in all Canadian jurisdictions in accordance with the *Canadian Charter of Rights and Freedoms*<sup>21</sup> which includes equality rights for LGBT people.<sup>22</sup> Cohabitation between same-sex partners was recognised since the mid-1990s and the issue of whether the concept of 'spouse' only

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<sup>19</sup> PBC Deb (Bill 126) 28 February 2013, col 121: MB38 Memorandum submitted by the Catholic Bishops' Conference of England and Wales 27 February 2013

<<http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m38.htm>>

<sup>20</sup> *Haig v Canada*, [1992], 94 DLR (4th) 1, 9 OR (3d) 495 (Ont. CA).

<sup>21</sup> The *Canadian Charter of Rights and Freedoms* became part of the Constitution of Canada in 1982.

<sup>22</sup> Mary C Hurley, 'Sexual Orientation and Legal Rights' (2007) Parliamentary Information and Research Service (Canada) 92-1E, 5.



applied to heterosexual partners would become central to challenges in the courts.<sup>23</sup> The decision in the 1999 Ontario case of *M v H*<sup>24</sup> and federal legislation of 2000 would influence almost all jurisdictions in extending marriage to same-sex couples.<sup>25</sup> Gender-neutral definitions replaced the opposite-sex requirement for a legal marriage, widening the institution of marriage to same-sex partners in the majority of provinces across Canada.<sup>26</sup> In July 2005, Canadian same-sex couples had the right to marry upon Royal Assent of the federal *Civil Marriage Act*.<sup>27</sup>

In South Africa, one of the first nations to embrace same-sex marriage on December 2006, in the Western Cape Province, in accordance with the Civil Union Act 2006. One year earlier, the Constitutional Court of South Africa had recognised that same-sex couples were treated as ‘outsiders’ by the law in their exclusion from marriage, violating the SA constitution of equal rights. The court instructed Parliament to change the legal definition of marriage of ‘husband and wife’ and replace with the word ‘spouse’ which was considered a more inclusive term; *although this term had been the subject of challenge in Canada*. The intention of the court was that the existing Marriage Act should be amended with minimal alteration and as an indication; the Civil Union Bill itself was contained within only eight pages long.<sup>28</sup> There is no obligation in the Act for religious organisations and officers to conduct same-sex marriages, accommodating a balance of rights, but the Act contains measures of equality that have been

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<sup>23</sup> Mary C Hurley, ‘Sexual Orientation and Legal Rights’ (2007) Parliamentary Information and Research Service (Canada) 92-1E, 6.

<sup>24</sup> *M v H* [1999], 2 SCR 3.

<sup>25</sup> Mary C Hurley, ‘Sexual Orientation and Legal Rights’ (2007) Parliamentary Information and Research Service (Canada) 92-1E, 15.

<sup>26</sup> Mary C Hurley, ‘Sexual Orientation and Legal Rights’ (2007) Parliamentary Information and Research Service (Canada) 92-1E, 11.

<sup>27</sup> C-38 Civil Marriage Act, 2005.

<sup>28</sup> Civil Union Bill, Republic of South Africa (2006) [26B] < <http://www.southafrica.to/people/Marriage/Gay-Marriage/Civil-Union-Act-2006.pdf> > accessed 27 August 2014.

frequently cited in UK debate in the development of both the CPA 2004 and the MSSCA 2103.<sup>29</sup>

Marriage inconsistency exists across the globe and inequality between LGBTQ partners and heterosexual partners is evident throughout Europe too. Prior to the UK Civil Partnership Act some same-sex partners with a more pragmatic approach took advantage of residing in other countries and registering their unions in a more liberal society. In Europe, Denmark was the first country to champion same-sex partnerships in 1989 allowing couples to formally register their relationships in a civil partnership system,<sup>30</sup> a model that became influential in the formation of the CPA 2004 in the UK. The Danish civil partnership only allowed for registrations and did not allow a religious ceremony in the *Folkekirken* national church because of similar religious opposition to that we have seen in the UK. In June 2012, the Danish Government amended their marriage act to allow equal marriage for both opposite-sex and same-sex couples. The amendment sparked controversy because it applied to all marriages and not just civil marriage, but included the established *Folkekirken* national church too, causing a separation between the State and the church in securing equal rights for all Danish citizens. The State had not sought a balancing of rights as we have seen in the UK, but whilst the Danish State were said to be intervening in affairs of the church, (presuming that marriage belongs to the church?) the outcome has been formal marriage equality for all Danish citizens.

Prior to France enacting same-sex marriage in 2013, a secular system colloquially known as *PACS*<sup>31</sup> allowed all genders and sexualities to enter into a type of ‘lesser civil marriage’ that

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<sup>29</sup> HC Deb 5 February 2013, vol 558, col 141: Marriage Same-Sex Couples Bill PBC Deb (MB 25) 27 February 2013, para 44.

<sup>30</sup> The Danish *Registreret Partnerskab* enacted 7 June 1989.

<sup>31</sup> PACS: *Pacte civil de solidarité*, French Civil Union available to homosexual and heterosexual partners introduced 1999.

occupies an intermediate position between ‘concubinage’ and established marriage.<sup>32</sup> A similar system has existed in Belgium and in the Netherlands which was considered the most liberal of European countries where Dutch law allowed same-sex registrations from as early as 1998 with the *Geregistreerde Partnerschap*<sup>33</sup> intended for both same and opposite sex couples. The Same-Sex Marriage Act in 2001<sup>34</sup> provided a Dutch marriage akin to any heterosexual marriage and it is notable that all these various unions now confer the same rights. The only stipulation being that Dutch residency status is to be established by one of the parties to either of the two unions.<sup>35</sup> However, whilst lesbians and gay men have generally enjoyed the liberalism of the Netherlands, the Roman Catholic Church has been instrumental in marring some spiritual and religious freedoms. Those in same-sex relationships have encountered historical exclusions by the church and found themselves denied any participation in places of worship.<sup>36</sup> Evidently, the same religious dogma that has played an active part in frustrating relationships within the UK has also been prevalent in providing opposition in other jurisdictions.

### **Reform, political influence and public consultation.**

The gradual movement towards acceptance and the recognition of same-sex partnerships by the ECtHR and the successive gains in the LGBTQ equality agenda supported by the previous Labour Governments eased the way towards instigating social change in relation to same-sex

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<sup>32</sup> Daniel Borillo & Eric Fassin, ‘The Pacts, Four Years Later: A Beginning or an End?’ in Marie Digoix and Patrick Festy (eds), ‘Same Sex Couples Same-Sex Partnerships & Homosexual Marriages, A Focus on Cross National Differentials’ (conference, Stockholm, September 2003) 19.

<sup>33</sup> Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 185

<sup>34</sup> ‘Dutch Gay Couples Exchange Vows’ (*BBC News*, 1 April 2001)

< <http://news.bbc.co.uk/1/hi/world/europe/1253754.stm>> accessed 8 Feb 2011.

<sup>35</sup> Rebecca Probert, *Family Life and the Law: Under One Roof* (Ashgate Publishing 2007) 185

<sup>36</sup> ‘Dutch Gay Catholics Challenge Exclusion From Mass’ (*Ekklesia* 1 March 2010)

<[www.ekklesia.co.uk/node/11379](http://www.ekklesia.co.uk/node/11379)> accessed 12 December 2013.

marriage.<sup>37</sup> Although the original position of Labour whilst in support of civil partnerships, was that marriage was reserved for opposite sex couples. The introduction of the CPA 2004, was considered a milestone in terms of equality for LGBTQ people, but the discussion regarding the longstanding quest for same-sex marriage has always been at the forefront of the agenda for pressure groups and supporters. As far back as 1996, Stonewall held a same-sex marriage debate, when at a time according to *Auchmuty* it was difficult to summon up any enthusiasm due to the patriarchal and oppressive nature of the institution of marriage; a feminist view that is still shared by others today.<sup>38</sup> For personal and political reasons not everyone viewed the stance for same-sex marriage as progressive and instigating social change, but instead considered it ‘normalising and assimilationist’.<sup>39</sup> Potter P, in *Wilkinson v Kitzinger* said that civil partnership was the same as civil marriage but ‘save the name’,<sup>40</sup> which we know is not wholly true. In earlier chapters, we have seen that civil partnerships were not enough for many people since they wanted *real marriage* like their heterosexual counterparts, along with the social status and approval that this confers, instead of a *partnership* that is distinctly different and referred to as holding second-class status.<sup>41</sup>

Although the Conservatives did not have a positive track record regarding LGBT equality, David Cameron<sup>42</sup> voiced his support at their 2006 Party conference saying ‘There's something special about marriage’ and ‘it means something whether you're a man and a woman, a woman and a woman or a man and another man’, indicating support for both civil partnerships and

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<sup>37</sup> Yvette Cooper MP: HC Deb 11 December 2012, vol 555, col 157.

<sup>38</sup> Rosemary Auchmuty, ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ (2004) 14 *Feminism & Psychology* 101, 104.

<sup>39</sup> Kath Browne, K. ‘By Partner we mean...’: ‘Alternative Geographies of ‘Gay Marriage’’ (2011) 14 *Sexualities* 100.

<sup>40</sup> *Wilkinson v Kitzinger and another (No 2)* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

<sup>41</sup> Rosemary Auchmuty, ‘Same-sex Marriage Revived: Feminist Critique and Legal Strategy’ (2004) 14 *Feminism & Psychology* 101, 102.

<sup>42</sup> David Cameron at the first Conservative Party Conference after being declared party leader.

marriage.<sup>43</sup> This was interpreted to be a positive step forward at a time when civil partnerships had only been in operation for less than one year.<sup>44</sup> A populous poll conducted for the Times newspaper in 2009 revealed that 61% of respondents agreed: ‘that gay couples should have an equal right to get married, (and) not just to have civil partnerships’<sup>45</sup>

However, whilst political tide appeared to be favouring equal marriage this was not supported by Stonewall and its chief executive Ben Summerskill ‘defended his organisation’s refusal to campaign for marriage equality’. Peter Tatchell said ‘Stonewall does not represent LGBT opinion on this issue. It is out of touch’ and that it is ‘actively undermining the campaign for marriage equality’. Summerskill claimed that there was little LGBT support for same-sex marriage and that it would be too costly to implement.<sup>46</sup> This is a different stance to their support of civil partnerships, where Stonewall considered the CPA preferable to changing the traditional perception of marriage or including lesbians and gay men within it, whilst simultaneously not supporting the established patriarchal institution of marriage and avoiding any conflict with organised religion.<sup>47</sup>

In the run up to the General Election 2010, Nick Clegg leader of the Liberal Democrats supported same-sex marriage by saying that civil partnerships should be replaced by true marriage, but also challenged David Cameron and the Conservatives to prove that they really

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<sup>43</sup> ‘Conservative Conference: Full text of David Cameron's speech’ *The Guardian* (London 4 October 2006) <<http://www.theguardian.com/politics/2006/oct/04/conservatives2006.conservatives>> accessed 31 December 2013.

<sup>44</sup> The CPA 2004, commenced in England and Wales with the first Civil Partnerships on 19 December 2005.

<sup>45</sup> Populus, *Gay Britain Survey: CATI Fieldwork: Prepared on behalf of the Times* (9-10 June 2009) T1, Q1 <[http://www.populus.co.uk/uploads/download\\_pdf-100609-The-Times-The-Times-Gay-Britain-Poll.pdf](http://www.populus.co.uk/uploads/download_pdf-100609-The-Times-The-Times-Gay-Britain-Poll.pdf)> accessed 14 February 2011.

<sup>46</sup> ‘Stonewall undermines campaign for gay marriage’ *Outrage! 20 Years of Angry Queers* (21 September 2010) <<http://outrage.org.uk/2010/09/stonewall-undermines-campaign-for-gay-marriage>> accessed 15 June 2014

<sup>47</sup> Beccy Shipman and Carol Smart, ‘It’s Made a Huge Difference: Recognition, Rights and the Personal Significance of Civil Partnership’ (2007) 12 (1) *Sociological Research* para 2.5 <[www.socresonline.org.uk/12/1/shipman.html](http://www.socresonline.org.uk/12/1/shipman.html)> accessed 8 October 2013.

supported full gay equality, since they had previously voted against gay rights. Clegg was referring *inter-alia* to Section 28 and the ban on promoting homosexuality, whilst inferring that Cameron was ‘very difficult to trust’ on the issue of gay rights.<sup>48</sup> Support for allowing LGBT people the same marital rights as heterosexuals, including the symbolic right to use the word ‘marriage’ was also given support by Clegg. The *Independent* reported that ‘a Tory Government are unlikely to give full marital rights to gay couples’ and of the three main parties running for election, the ‘Lib Dem’s had the most openly progressive stance’, although the current Labour Government introduced the CPA 2004 they ‘stopped short of allowing gay couples to call themselves married because of a backlash from religious leaders’.<sup>49</sup>

The Conservative 2010 election manifesto included a commitment to equalities, to make ‘Britain fairer and safer; a country where opportunity is more equal’.<sup>50</sup> The manifestos from the other main parties remained silent on the subject of same-sex marriage reform, although the Conservative document ‘A Contract for Equalities’ published in advance of the election, included ‘Action on LGBT issues’ and a commitment to ‘consider the case for changing the law to allow civil partnerships to be called and classified as marriage’.<sup>51</sup> The outcome of the General Election 2010 was the Conservative - Liberal Democrat Coalition Government and enshrined in the coalition agreement was a commitment proposed by the Liberal Democrats to further LGBT equality.

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<sup>48</sup> Jerome Taylor and Andrew Grice, ‘Clegg lays down the law to Cameron on gay rights’ (*The Independent* 13 January 2010) <<http://www.independent.co.uk/news/uk/politics/clegg-lays-down-law-to-cameron-on-gay-rights-1866116.html#>> accessed 27 August 2013.

<sup>49</sup> Jerome Taylor and Andrew Grice, ‘Clegg lays down the law to Cameron on gay rights’ (*The Independent* 13 January 2010) <<http://www.independent.co.uk/news/uk/politics/clegg-lays-down-law-to-cameron-on-gay-rights-1866116.html#>> accessed 27 August 2013.

<sup>50</sup> ‘The Conservative Manifesto’ (April 2010, Conservative Party April) 35.

<sup>51</sup> ‘A Contract for Equalities’ – ‘We’re all in this together’ (2010, Conservative Party) 14.

The announcement of consultation on 'gay-marriage' was made at the Conservative conference by David Cameron (referring back to his 2006 speech):

Five years on, we're consulting on legalising gay marriage. (...) Yes, it's about equality, but it's also about something else: commitment. Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay marriage because I'm a Conservative.<sup>52</sup>

'Equal civil marriage: a consultation'<sup>53</sup> was published by the Government Equalities Office in March 2012 seeking the view of the public specifically on 'how to provide access to civil marriage for same-sex couples' but not provide wider reforms to marriage, nor religious marriage and that civil partnerships would continue but not for opposite-sex couples. The consultation document was clear in the Government's recognition of same-sex commitment in that it was the same as opposite-sex commitment and that the ban on same-sex marriage, denying the right to marry should not continue. However, this consultation did not refer to traditional marriage, but instead specifically referred to removing the ban on civil marriage and not actually considering full equal marriage in the sense of a marriage that may be contracted by opposite-sex partners on religious premises.

The consultation ran for 13 weeks and the responses published in December 2012,<sup>54</sup> with the overall finding that the majority (53%) of interested parties supported the introduction of same-sex civil marriage.<sup>55</sup> Over 228,000 responses and 19 petitions were received, being the largest ever response to a Government consultation, indicating just how important an issue this was to

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<sup>52</sup> 'David Cameron's Conservative party conference speech in full' *The Guardian* (London 5 October 2011) <<http://www.theguardian.com/politics/2011/oct/05/david-cameron-conservative-party-speech>> accessed 29 December 2013.

<sup>53</sup> 'Equal Civil Marriage: A Consultation' (March 2012 Government Equalities Office).

<sup>54</sup> 'Equal Marriage: The Government's Response' (December 2012 Government Equalities Office).

<sup>55</sup> 'Equal Marriage: The Government's Response' (December 2012 Government Equalities Office) 39.

people. Those already in civil partnerships said they would have chosen a marriage if this was possible and the majority of interested respondents would convert their existing civil partnerships into a marriage if this was made available.<sup>56</sup> Various denominations were in support of the keeping of traditional marriage, as was the *Coalition for Marriage* an umbrella group that opposes the redefinition of marriage, providing a 509,800 signature petition ‘(We are) In support of the legal definition of marriage which is the voluntary union for life of one man and one woman’.<sup>57</sup> Whilst the *Church Leaders of Tunbridge Wells* petition read:

Marriage is a union between one man, one woman ordained by God, teachers will face conflicts in schools, parents will be labelled homophobic for upholding religious beliefs, expensive and time consuming for parliament, only gain is a word: CPs are already the same as marriage legally, disregard for due process of consultation / undemocratic<sup>58</sup>

The majority of petitions were from religious organisations and all opposed same-sex marriage, whilst one petition read ‘It is not the role of the state to redefine marriage’ and another ‘(The) Majority of British people are against changing the definition of marriage’<sup>59</sup> – however, the majority of respondents indicated support for change. Stonewall had conducted its own independent survey ‘Gay in Britain’ revealing that in contrast to claims made by anti-gay campaigners, there was overwhelming support (91%) from LGBT people for equal (civil) marriage, with a rise to 96% amongst those under 35.<sup>60</sup> Fierce debate surrounded the imminent introduction of a same-sex marriage Bill, with reports of a ‘Tory backlash’. Bob Stewart MP, accused the Government of ‘being hell-bent on upsetting so many thousands of our citizens in normal marriages’. Whilst proponent Peter Bottomley MP accused the Coalition for Marriage

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<sup>56</sup> ‘Equal Marriage: The Government’s Response’ (December 2012 Government Equalities Office) 42.

<sup>57</sup> ‘Equal Marriage: The Government’s Response’ (December 2012 Government Equalities Office) 36.

<sup>58</sup> ‘Equal Marriage: The Government’s Response’ (December 2012 Government Equalities Office) 36.

<sup>59</sup> ‘Equal Marriage: The Government’s Response’ (December 2012 Government Equalities Office) 36.

<sup>60</sup> ‘Gay in Britain’ (December 2012, Stonewall) 2: GB Survey of 300,000+ LGBT people.



of sending out thousands of letters to persuade MPs that they would lose their support if they supported gay marriage.<sup>61</sup>

### **Passage of the MSSC Bill.**

The Coalition Government introduced the Marriage (Same Sex Couples) Bill into Parliament on 24 January 2013, with a statement on the first page of the Bill declaring that under the Extension of Marriage to same sex couples: “Marriage of same-sex couples is lawful”.<sup>62</sup> In the HC, Yvette Cooper MP,<sup>63</sup> expressed support for the introduction of same-sex marriage legislation and referred to the many gains already made by the previous Government in the areas of LGBT equality. Including; ‘an equal age of consent; ending the ban on serving in the armed forces; ending discrimination in adoption and fertility treatment; and abolishing section 28’<sup>64</sup> that were all subject to strong opposition and controversy at the time, but now accepted and taken for granted as regular occurrences. She continued to say that opponents of these reforms that are of benefit to LGBT people were proven wrong and that the predicted doom caused by introducing new and fair legislation never actually happened. Expressing that the issue of same-sex marriage should not become polarised between the Church and the State, and that ‘We should not prevent people from getting married and gaining recognition from the state on grounds of gender or sexuality (...) Parliament should not say that some loving relationships have greater value than others.’<sup>65</sup>

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<sup>61</sup> ‘Tory Backlash Against Same Sex Marriage’ *The Guardian* (London 10 December 2012)

<<http://www.theguardian.com/society/2012/dec/10/gay-marriage-tory-backlash>> accessed 14 July 2014

<sup>62</sup> Marriage (Same Sex Couples) HC Bill (2012-13) [126], s 1(1).

<sup>63</sup> Yvette Cooper Labour MP for Normanton, Pontefract and Castleford.

<sup>64</sup> HC Deb 11 December 2012, vol 555, col 157

<sup>65</sup> HC Deb 11 December 2012, vol 555, col 156

MPs expressed an amount of adverse opinion in both Houses prior and during the journey of the same-sex marriage Bill. The more heated debate centred upon the subject of religious freedoms, and whilst Yvette Cooper MP expressed her opinion that ‘freedom of religion is important’ and that ‘No one faith, group or organisation owns marriage’ this appears not to be the view shared by all the members of the Houses.<sup>66</sup> Dissenting statements were heard in mockery of the introduction of same-sex marriage legislation such as, what would become in the future of regular words such as ‘husband and wife’ and what popular support had been received for erasing these from our laws and customs?<sup>67</sup> In defence of wanting to keep the traditional institution of opposite-sex marriage, MPs continued to uphold the exclusivity of the role of the church and remained adamant that there is and always should be only one form of marriage; that is the marriage of two opposite-sex partners. Conservative MP Laurence Robertson said that ‘The Government are hiding behind triple locks and quadruple locks on what may or may not happen in churches. (...) there is only one marriage, and many people of all faiths and no faith are deeply offended (...) by these proposals.’<sup>68</sup>

The Prime Minister David Cameron may have garnered more LGBTQ appeal for the Conservative party by shifting towards the centre and projecting new conservatism by embracing same-sex marriage, but the support of his MPs in the House were in decline. Conservative traditionalists mainly take the Christian view of defending the family and the institution of heterosexual marriage and not wanting to support any erosion of marriage, since the ‘family’ is central to classical conservatism. In the HC third reading an amendment was proposed by a Conservative member to open up ‘Civil Unions’ to opposite or same-sex

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<sup>66</sup> HC Deb 11 December 2012, vol 555, col 156

<sup>67</sup> HC Deb 11 December 2012, vol 555, col 163

<sup>68</sup> Laurence Robertson, Conservative MP for Tewkesbury: HC Deb 11 December 2012, vol 555, col 169

partners.<sup>69</sup> However, this wrecking amendment would have the effect of abolishing Marriage and Civil Partnerships and replacing them with a Civil Union – but obviously jeopardising the passage of the current Bill. David Cameron was to find that, in the free vote because this was seen as an issue of conscience, more of his party voted against the Bill than for it, and he was to rely on the opposition to continue with the legislation.<sup>70</sup> More heated debate followed in the HC and Greg Mulholland MP in discussing ‘equality’ said although the Bill may be ‘progressive in terms of marriage legislation’, it does ‘not provide marriage equality’, but also that we should have equal religious and belief systems but the Bill does not achieve that either.<sup>71</sup>

The moral and legal complexities caused mainly by the historical connections of the Church of England and in Wales have gone to very core of our law making process, and with it brought the doubt that the very nature of marriage itself may be transformed. The UK Joint Committee on Human Rights considered and approved the human rights issues arising from the Bill,<sup>72</sup> but where interference with Article 9 rights do exist, there will not be discrimination under Article 14.<sup>73</sup> The contrary issue of the function of the church opting-in to provide same-sex marriages was discussed by the Government and it was decided that this was a public function (for the purposes of the Equality Act 2010). It was decided that a religious organisation is not a public authority and that the decision on opting-in is not a public function, but a purely internal decision based upon religious doctrine.<sup>74</sup> In other words, the Government have stated that

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<sup>69</sup> New Clause 14 amendment – Civil Union: HC Deb 21 May 2013, vol 563, col 1073.

<sup>70</sup> Tim Ross, ‘David Cameron facing Commons defeat over gay marriage plans’ *The Telegraph* (London 20 May 2013) <http://www.telegraph.co.uk/news/politics/conservative/10067511/David-Cameron-facing-Commons-defeat-over-gay-marriage-plans.html> accessed 14 July 2014.

<sup>71</sup> HC Deb 21 May 2013, vol 563, col 1073.

<sup>72</sup> ‘Note for the Joint Committee on Human Rights: Marriage (Same Sex Couples) Bill’ HL (2012-13) 126 (February 2013 Government Equalities Office: 2013) para 2

<[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/142636/1385\\_001.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/142636/1385_001.pdf)>

<sup>73</sup> ECHR Art 9, freedom of thought, conscience and religion: Art 14, prohibition of discrimination.

<sup>74</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Marriage (Same Sex Couples) HC Bill (2013-14) [041]: Government response to Joint Committee on Human Rights: Second Report of Session: (2013-14) 9.*

‘religion is not a public service’ and additionally that ministers and other authorised persons can refuse to marry or not be compelled to conduct a same-sex marriage, in accordance with the exemptions made under the Equality Act 2010 (EA). In summary, it was made clear that ‘We consider it could not be proportionate to interfere with the religious freedom of religious organisations by requiring them to solemnize marriages that they consider to be doctrinally impermissible’<sup>75</sup>

The Government stated that a ‘religious marriage solemnised in a church or other religious building is wholly different to the position considered by the ECtHR in the case of *Ladele*,<sup>76</sup> and that Registrars are public servants with statutory duties and when providing their services as Registrars they should not be able to discriminate against members of the public.<sup>77</sup> The justification for this difference between an individual registrar such as *Ladele*, and a religious organisation was explained in that ‘a religious body or individual solemnising a marriage is, at least in the eyes of some, celebrating a sacrament’.<sup>78</sup> Also, that marriages solemnised by religious rites made within religious buildings are able to legally create binding marriages in accordance with the Marriage Act 1949, but most importantly ‘acts of worship or devotion forming part of the practice of a religion or belief’ would fall within the protection of Article 9.<sup>79</sup>

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<sup>75</sup> ‘Note for the Joint Committee on Human Rights: Marriage (Same Sex Couples) Bill’ HL (2012-13) 126 (February 2013 Government Equalities Office: 2013) para 30

<[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/142636/1385\\_001.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/142636/1385_001.pdf)>

<sup>76</sup> *Eweida and others v UK (App nos 48420/10:59842/10:51671/10:36516/10)* (2013) ECHR 37.

<sup>77</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Marriage (Same Sex Couples) HC Bill* (2013-14) [041]; *Government response to Joint Committee on Human Rights: Second Report of Session*: (2013-14) 25.

<sup>78</sup> ‘Note for the Joint Committee on Human Rights: Marriage (Same Sex Couples) Bill’ HL (2012-13) 126 (February 2013 Government Equalities Office: 2013) para 31

<[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/142636/1385\\_001.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/142636/1385_001.pdf)>

<sup>79</sup> ‘Note for the Joint Committee on Human Rights: Marriage (Same Sex Couples) Bill’ HL (2012-13) 126 (February 2013 Government Equalities Office: 2013) para 31

<[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/142636/1385\\_001.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/142636/1385_001.pdf)>

The risk of any challenges from same-sex couples under Article 9 were considered as ‘negligible in significance’ and that ‘the domestic courts (and also the ECtHR) would give priority to the rights of the religious organisations under Article 9’, in preference to any same-sex couples because this would otherwise breach the rights of the religious organisations. Therefore, it was considered that any interference with the rights of the same-sex couples would be justified and that the ECtHR would most likely find for the religious organisation.<sup>80</sup> The stance of the Government is clear in its obligation to provide for the church and religious organisations, whilst also providing a balance in relation to same-sex couples, who may take the opportunity to bring a challenge via the domestic courts and the ECtHR, which is a development we may see within the future operation of the MSSCA 2013.

### **The partnership of the Church and the State.**

Opposition by the Church of England and in Wales is by way of Canon law, but this has caused conflict in the common law duty to marry their parishioners if they are couples of the same-sex, since this duty does not extend to them. During the introduction of the Marriage (Same Sex Couples) Bill the Government proposed a ‘quadruple lock’ that is a system of locks designed to protect those religious organisations opposed to same-sex marriage, and ensuring that those who do not want to conduct same-sex marriages will never be forced to do so. The Rt. Hon. Maria Miller announced that MSCC Bill would declare ‘that no religious organisation, or individual minister, can be forced to marry same-sex couples or permit that to happen on their premises’<sup>81</sup> and *inter-alia*, recognition that the Canon law of the church prohibits same-sex

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<sup>80</sup> ‘Note for the Joint Committee on Human Rights: Marriage (Same Sex Couples) Bill’ HL (2012-13) 126 (February 2013 Government Equalities Office: 2013) para 33

<[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/142636/1385\\_001.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/142636/1385_001.pdf)>

<sup>81</sup> Rt. Hon. Maria Miller, Minister for Women and Equalities: HC Deb 11 December 2012, vol 555, col 156

marriage in accordance with Canon 30(1) and that the Churches of England and in Wales stated that they did not wish to conduct marriages to those of the same-sex.

The Church of England *Canon 30(1)*<sup>82</sup> bears striking resemblance to the definition in *Hyde*,<sup>83</sup> where Lord Penzance indicated that a marriage must be; voluntary, heterosexual, for life and monogamous. However, this particular Canon forms part of the basis of objection from the Church of England and consequently the Church in Wales. The Church of England occupies a unique position within the Law of England in that the Canons of the church also form the basis and part of the law of the land. The exclusivity of the Church of England is different from the other religious denominations within the UK, since the other denominations are not the established church of the land and whilst they may influence both houses of Parliament via representation, they do not wield the same power as the Church of England. Through its Synod, the Church of England may exercise the right to amend or repeal primary legislation in accordance with the procedure and subject to approval by the House of Lords and the House of Commons. Notably, the Church of England have a common law duty to marry their parishioners within the respective church of their parish and in accordance with the Marriage Act of 1949 that specifies the act of solemnization, giving legal effect to a church marriage.<sup>84</sup>

The common law areas of conflict with the Church of England and the Church in Wales are addressed within the final publication of the Marriage (Same-Sex Couples) Act 2013 (MSSCA) and the new legislation now has specific provisions within the Act that provide religious protection for the church and other religious organisations. The proposed ‘quadruple lock’<sup>85</sup>

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<sup>82</sup> Canons of the Church of England, s B(30)(1) – *Of Holy Matrimony*.

<sup>83</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>84</sup> Marriage Act 1949, s 5.

<sup>85</sup> HC Deb 11 December 2012, vol 555, col 156

protection system has developed a number of legal measures including the opt-in system whereby the church will elect to opt-in to conduct same-sex marriages within a church or religious premises. No minister or authorised person of the church may conduct a ceremony for same-sex couples, nor can any act of marriage take place without the consent of the governing body of the organisation.<sup>86</sup> The Act also ensures that there is no compulsion for any religious organisation or individual to opt-in, or be forced to conduct or solemnize a religious same-sex marriage within any nominated place of worship. Most accommodating to the church and probably most contentious is the agreement by Parliament to provide express exemption from the EA 2010<sup>87</sup> in that it would not be ‘unlawful or discriminatory for a religious organisation or individual to refuse to marry a same-sex couple in a religious ceremony’.<sup>88</sup> An amendment to Schedule 3 of the EA 2010 (services and public functions: exceptions) contains an exclusion clause to protect the church from any future claims of discrimination being brought under Equalities law, but it remains to be seen whether a future claim would be brought to the ECtHR. The other protections contained within the Act ensure that the MSSCA 2013 does not have any legislative influence to interfere with Anglican Canon law or any ecclesiastical law of the church. Also, that the common law duty of the Church of England and the Church in Wales to marry their parishioners, will not apply to any same-sex couples that would like to benefit from this longstanding common law rule. Religious organisations such as the Quakers (Society of Friends), Reform Judaism and Unitarians have all shown support for same-sex marriage and have expressed their intention to opt-in to conducting marriages, however the Roman Catholic Church in addition to the Church of England and the Church in Wales have made their opposing stance clear.

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<sup>86</sup> Marriage (Same Sex Couples) Act 2013, s 2.

<sup>87</sup> Equality Act 2010, sch 3(6).

<sup>88</sup> Marriage (Same Sex Couples) Act 2013, s 2(6).

The effect of this accommodating legislation is that any same-sex partners will be denied access to a church marriage and there will be no right to exercise the common law duty to be married in their parish church. For those same-sex partners of faith (or those wanting a religious ceremony), the choices are: a civil marriage in a register office or licenced premises, hotel, etc and a separate blessing on or off religious premises if the religious organisation agrees to this; or revert to a civil partnership registration on religious premises if agreed by the organisation (with no religious elements as part of the service). However, a marriage contracted by opposite-sex couples can be conducted with religious service and premises, or on secular premises with a civil ceremony.

Parliament spent some six months debating and refining the MSCCA 2013, but have we ended up with a slight case of the 'Emperor's New Clothes' because this not truly and wholly equal to that of established heterosexual marriage? The MSSCA 2013 is an extension of marriage and an amending Act<sup>89</sup> that brings with it a whole new set of provisos that allow a difference of treatment and discriminatory protection to the Church of England and the Church in Wales, merely because of the sexual orientation of the parties that would like to join together in the entity of marriage. The outcome is not equal marriage for all, but instead we have platform for differing unions. Those wishing to have their unions formally recognised are faced with a choice of full religious or secular civil marriage for opposite-sex couples; a same-sex civil marriage, that can be secular or quasi-religious if allowed, or the lesser civil partnership (registration) which is also secular but may become quasi-religious if allowed, for same-sex couples. On a positive note, these 'marriages' or 'registrations' all amount to formal recognition

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<sup>89</sup> The Act makes amendments to other primary legislation.



of relationships by the State, but for many couples the status of the great 'aisle, alter, flowers and cake' weddings are considered top of the list in terms of marriage recognition.

### **Marriage for same-sex couples.**

The Marriage (Same Sex Couples) Act 2013 was given Royal Assent on 17 July 2013 and has been described as being mainly an amending Act, whereas the CPA 2004 is a standalone piece of legislation. The MSSCA 2013 contains three parts and seven schedules totalling 64 pages with the function of addressing various pieces of primary legislation including; the Marriage Act 1949; Equality Act 2010; Marriage (Registrar General's Licence) Act 1970; Matrimonial Causes Act 1973; Domicile and Matrimonial Proceedings Act 1973; Social Security Contributions and Benefits Act 1992; Pension Schemes Act 1993; Civil Partnership Act 2004 and the Gender Recognition Act 2004.

Provision is made within the MSSCA 2013 to amend the Gender Recognition Act 2004 to allow transgender couples to remain in an existing marriage,<sup>90</sup> if one or both of the partners decides to change gender (since couples of the same-gender can now marry), providing that the union is registered in England and Wales (or outside the UK).<sup>91</sup> This amendment also applies to existing civil partnerships and addressing the previous law where transgender people who are married or in a civil partnership had to end their legal unions before a full gender recognition certificate could be issued. However, the non-trans spouse has to give written spousal consent to confirm that they want their marriage to continue now that their partner has changed gender. There is a conflicting view of why the needs of one spouse should legally take precedence over the other in the preservation of the status quo of marriage, against and above the human right

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<sup>90</sup> Marriage (Same Sex Couples) Act 2013, sch 1(1).

<sup>91</sup> Marriage (Same Sex Couples) Act 2013, sch 5(1)(14).

of the other to claim their own identity and to live as they wish?<sup>92</sup> Spousal consent may appear harsh and considered a possible restriction over a partners right to change gender, but instead *Whittle* sees this as a ‘mechanism to protect non-trans spouses who do not want to face reality’<sup>93</sup> (as in the historical case of *Corbett* where no knowledge of trans status was claimed?).

The issue of adultery in the MSSCA 2013 as a fact for divorce remains as previous and does not apply to any same-sex partners, either married or in a civil partnership. The Government have retained the existing definition of adultery, which will only apply to opposite-sex partners where sexual intercourse between a married person and another of the opposite-sex will constitute adultery.<sup>94</sup> Consummation of the marriage, will not apply to same-sex couples but will remain as a ground, through the lack of sexual intercourse (by capacity or wilful refusal) to make an opposite-sex marriage voidable.<sup>95</sup> Clearly, the retention of adultery and consummation within opposite-sex marriages, but not including them in same-sex marriage regulation, for the various reasons discussed in earlier chapters, only serves to compound the inequality between the two types of marriage. This also indicates the discriminatory position that there are fewer mechanisms for annulling marriages made between same-sex couples in comparison to their opposite-sex counterparts.<sup>96</sup>

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<sup>92</sup> ‘The Equal Marriage Act and Transgender Rights. The prejudice below’ (*Image Not Available*, 22 June 2013) <<http://image-not-available.blogspot.co.uk/2013/06/the-equal-marriage-act-transgender.html>>accessed 27 June 2014.

<sup>93</sup> Whittle S, ‘Sex, Love & Consent; Gender Recognition in the Marriage (Same Sex Couples) Act 2013’ (*Whittlings*, 3 November 2013) <<http://whittlings.blogspot.co.uk/2013/11/sex-love-consent-gender-recognition-in.html>> accessed 27 June 2014.

<sup>94</sup> Explanatory Notes to the Marriage (Same Sex Couples) Act 2013, para 114.

<sup>95</sup> Marriage (Same Sex Couples) Act 2013, sch 4(4).

<sup>96</sup> Carolyn Naughton, ‘Equal Civil Marriage for all Genders’ (2013) 43 Family Law 426.

Under ‘extra-territorial matters’<sup>97</sup> in almost a reverse scenario to that of *Wilkinson v Kitzinger*,<sup>98</sup> there is a reclassification of a union (partnership or marriage) when entering into another jurisdiction that does not recognise the union. The schedule stipulates that when same-sex marriage is legal in England and Wales, any marriage made in this jurisdiction, would be reclassified and recognised as a civil partnership in the jurisdiction of Scotland.<sup>99</sup> Therefore, until same-sex marriage is lawful in Scotland, any marriages made in London for example, will not be recognised over the border in Edinburgh. The same rule will also apply to Northern Ireland where a separate arrangement for marriage is in operation.<sup>100</sup>

Same-sex marriage consultation began in Scotland in September 2011 seeking the views on ‘the possible introduction of religious ceremonies for civil partnerships and the possible introduction of same sex marriage’.<sup>101</sup> The consultation findings announced in 2012 were negative towards changes to civil partnership legislation<sup>102</sup> and an overall majority (67%) opposed to changing the law to allow same-sex marriage.<sup>103</sup> Although the findings in Scotland were contradictory to those in England and Wales, a Marriage and Civil Partnership (Scotland) Bill was introduced in June 2013 with the rationale for change being one of equality for LGBT people.<sup>104</sup> The Bill was similar to proposals in England and Wales, but *inter-alia* included freedom of expression protections for religious belief and those people critical of same-sex marriage; also provision for a one-step process that would not require couples to divorce before

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<sup>97</sup> Marriage (Same Sex Couples) Act 2013, sch 2.

<sup>98</sup> *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FCR 183.

<sup>99</sup> Marriage (Same Sex Couples) Act 2013, sch 2(1).

<sup>100</sup> Marriage (Same Sex Couples) Act 2013, sch 2(2).

<sup>101</sup> ‘The Registration of Civil Partnerships, Same Sex Marriage, A Consultation’ (September 2011, Scottish Government) 1.

<sup>102</sup> ‘Registration of Civil Partnerships, Same Sex Marriage: Consultation Analysis’ (June 2012, Scottish Government) 80.

<sup>103</sup> ‘Registration of Civil Partnerships, Same Sex Marriage: Consultation Analysis’ (June 2012, Scottish Government) 37, 85.

<sup>104</sup> Hannah Johnson and Heather Lyall, ‘SPICe Briefing: Marriage and Civil Partnership (Scotland) Bill: 13/15’ (25 November 2013, Scottish Parliament Information Centre) 8-9.

obtaining a full gender recognition certificate.<sup>105</sup> Other differences include provision for religious or belief organisations (ie: Humanists) to conduct the whole marriage ceremony for opposite or same-sex couples and also civil partnerships to anyone over the age of 16.

Opponents of same-sex marriage made a similar response to that below the border, and the Catholic Church in Scotland declared 'War on Gay Marriage' describing same-sex marriage as a 'grotesque subversion' stating that the law should never facilitate harmful same-sex relationships. The Scottish Equality Network accused the Church of a wider 'anti-gay agenda' since they previously opposed the equal age of consent, the repeal of Section 28, civil partnerships, and same-sex adoption.<sup>106</sup> The Bill itself is similar to that of England and Wales although it contains some more progressive elements in that a civil partnership registered in England and Wales can be changed into a marriage and also recognises same-sex marriages from all of the UK and overseas. Additionally it enables all marriages to continue where one or both spouses change their gender and they want to remain married.<sup>107</sup> At the time of writing the Bill has progressed to stage two of its journey through Parliament, but is predicted that the Bill will become legislation in 2014, which is the same year as the Scottish referendum on Independence.

Northern Ireland remains out of step with England and Wales, and is behind Scotland in terms of any same-sex marriage legislation. The NI Assembly voted against the introduction of same-

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<sup>105</sup> Hannah Johnson and Heather Lyall 'SPICe Briefing: Marriage and Civil Partnership (Scotland) Bill: 13/15' (25 November 2013, Scottish Parliament Information Centre) 3.

<sup>106</sup> Dan Littauer, 'Scotland: Catholic Church Declares War on Gay Marriage' (*Pink News* 8 July 2012) <<http://www.pinknews.co.uk/2012/07/08/scotland-catholic-church-declares-war-on-gay-marriage>> accessed 12 July 2014.

<sup>107</sup> Legislative Consent Memorandum (S4): Marriage (Same Sex Couples) Bill, 23.1 (May 2013 Scottish Government)

sex marriage in April 2013<sup>108</sup> and since legislation has not been progressed and opposition remains, the civil partnership is currently the only same-sex option in Northern Ireland. Any same-sex relationship made out of NI either as a civil partnership or same-sex marriage whether that be in England, Wales, Scotland or overseas will only be recognised as a civil partnership in Northern Ireland. Additionally, partners in an opposite-sex marriage or same-sex partnership will have to dissolve their union for a full gender recognition certificate to be issued to the partner who wants to change gender.<sup>109</sup> However, the commencement of same-sex marriage in England and Wales, with the later addition of Scotland, may change the position of Northern Ireland being the only part of the UK not to be developing legislation.

### **Conclusion.**

This chapter has outlined the influences in the development of an Act specific to same-sex couples who want to get married on equal terms as their heterosexual counterparts. Judgments of the EtCHR and the influence of cases such as *Schalk and Kopf*<sup>110</sup> and the effect other countries moving towards the recognition of same-sex marriage have been instrumental in bringing in legislation. The role of the Coalition Government was an additional catalyst, although perhaps supporting the equality agenda for political reasons. The conflict of rights between religious belief and sexuality has proved difficult in establishing which right takes precedence over the other, but Parliament have introduced a series of measures within the MSSCA 2013 to accommodate both sets of interests. The Act is both an amending and accommodating Act and contains positive consideration towards trans people in that they no

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<sup>108</sup> Marriage Equality at the Constitutional Convention (*Northern Ireland Assembly* 29 April 2013) <<http://www.niassembly.gov.uk/assembly-business/minutes-of-proceedings/monday-29-april-2013>> accessed 12 July 2014

<sup>109</sup> NI Assembly: Committee for Finance and Personnel, *Report on the Legislative Consent Motion: Marriage (Same Sex Couples) Bill* (NIA 118/11-15, 2013) para 26.

<sup>110</sup> *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

longer have to end their partnerships or marriages when acquiring new gender, but the issue of 'spousal consent' prima facie may have negative implications, although this mechanism can be seen as unmistakably beneficial to spouses or partners. Whilst marriages will begin in March 2014 in England and Wales,<sup>111</sup> the situation in Scotland may change in 2014, but also NI may begin to develop legislation in due course.

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<sup>111</sup> Marriage (Same Sex Couples) HC Bill Lords Amendments (2013-14) [94]: Royal Assent 17 July 2013.

## Chapter 6.

### Conclusion.

This research commenced at a point in time when LGBTQ people who wished to commit to a legally recognised union together could only do this by entering into a Civil Partnership in accordance with the CPA 2004. The initial purpose was to examine why LGBTQ people are statute barred from the established act of marriage and only able to enter into a recognised legal partnership that has been described as holding second-class status in comparison to that of established marriage. The intention here is to contribute to existing knowledge in this subject and where possible give a deeper insight into the development and effect of same-sex partnership and marriage legislation, than that which is currently available where discussion of LGBTQ people and their relationships is relatively absent. Same-sex registration was formalised in 2004, but it was nine years later that a same-sex marriage Bill was introduced into Parliament. After a short journey of around six months, the Bill had received Royal Assent and the Marriage (Same-Sex) Couples Act 2013 would come into force in March 2014 allowing same-sex partners to marry under new legislation.<sup>1</sup>

However, in defining the reform of same-sex partnerships and by looking back at the first chapter of this work, the influence of the *Wolfenden Report*<sup>2</sup> is apparent in that it promoted tolerance and was pivotal in reforming the law that would contribute to the eventual legal

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<sup>1</sup> Marriage (Same Sex Couples) HC Bill Lords Amendments (2013-14) [94]: Royal Assent 17 July 2013.

<sup>2</sup> Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957) - named after Sir John Wolfenden who led the enquiry on behalf of the Government in 1954.

recognition of LGBTQ people.<sup>3</sup> The HRA 1998 and the ECHR advanced the equality agenda in providing recognition of same-sex relationships and ‘family’ units. But one of the main catalysts for change and the bringing of formalised same-sex legislation was the predicament of cohabitating heterosexual couples.

Since ‘marriage’ for LGBTQ people is the subject of this research then it was necessary to look at the institution of marriage itself. The most notable of legislation by the State was the Marriage Act 1753<sup>4</sup> providing the requirement that a marriage was to be made by formal ceremony, thus giving statutory force to the Church and historically creating a gap between the social and legal definitions of marriage.<sup>5</sup> None of this early legislation would obviously be of future benefit to any intended same-sex couples, but the research shows where a change incurred in 1836 upon the creation of the post of a ‘superintendent registrar of births, deaths and marriages’ who was authorised to perform a wedding ceremony in a registered or appointed building.<sup>6</sup> Here we see the inception of the civil marriage route that provided the choice of a secular or a religious (spiritual) marriage for opposite-sex partners. This route was later to assist in forming the foundation that the administration of the civil partnership for same-sex partners was based upon. The existence of the Church as partners of the State, whereby the State grants the power to marry and register marriages to religious organisations, has resulted in conflict where the Church of England and in Wales refuse to conduct any same-sex marriages and consequently have been given legislative exclusion. It is important to be aware of the influence of the Church and the State that have legislatively prohibited LGBTQ people from entering into

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<sup>3</sup> Sexual Offences Act 1967, s 1(1): the SOA 1967 formulated on the findings of the *Wolfenden Report* 1957.

<sup>4</sup> Marriage Act 1753 enacted 25 March 1754.

<sup>5</sup> Stephen Parker, ‘The Marriage Act 1753: A Case Study in Family Law Making’ (1987) 1 *International Journal of Law and Policy and the Family* 133-154..

<sup>6</sup> Nigel Lowe and Gillian Douglas, *Bromley’s Family Law* (10th edn, OUP 2007) 53-54



a legally recognised same-sex partnership and the not so distant eventuality of same-sex marriage.

The gender specific institution of marriage traditionally reserved for opposite sex partners was defined for legal purposes some 145 years ago by Lord Penzance in 1866 in *Hyde*<sup>7</sup> establishing the four conditions that a marriage must be; voluntary, heterosexual, for life and monogamous. This basic premise was reiterated again in 1996 by Ward LJ who added that ‘single-sex unions remain proscribed as fundamentally abhorrent to this [the] notion of marriage’.<sup>8</sup> However, in spite of the rejection of allowing same-sex couples into the institution of marriage, a compromise was made in the introduction of the CPA 2004 which is discussed in the third chapter of this research. At the time of its inception, the civil partnership was hailed as a great leap in terms of equality for LGBTQ people, but after its initial introduction its popularity began to decline and this is reflected in *ONS* statistics.<sup>9</sup> The civil partnership was intended to mirror the same rights and responsibilities found within a civil marriage, but it did not and consequently certain elements of marriage are missing from the partnership legislation of the CPA 2004. There is no mention of any sexual element or definition of a sexual act at all, with an absence of the condition of adultery and no requirement for consummation of the partnership either.<sup>10</sup> Although in contrast to this, an opposite-sex marriage can take advantage of the provision of divorce under the heading of ‘irretrievable breakdown’<sup>11</sup> or the marriage can be voidable due to a lack or refusal of consummation.<sup>12</sup> In chapter four, *Crompton* is quoted as saying that this lack of provision for adultery and non-consummation in the CPA 2004 has

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<sup>7</sup> *Hyde v Hyde and Woodmansee* [1866] LR 1 P&D 130.

<sup>8</sup> *S-T (Formerly J) v J* [1998] 1 FLR 402 (CA) as cited in MDA FREEMAN, *Family Values and Family Justice* (Ashgate Publishing 2010) 290

<sup>9</sup> Office for National Statistics, see chapter 3, Civil Partnerships.

<sup>10</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 4

<sup>11</sup> Matrimonial Causes Act 1973, s 1(1).

<sup>12</sup> Matrimonial Causes Act 1973, s 12(a)(b).

rendered the civil partnership as ‘legally asexual’.<sup>13</sup> However, this condition can be found being repeated again in the newly released MSSCA 2013,<sup>14</sup> suggesting that the subject of LGBTQ sex is perhaps best not mentioned or not palatable to be discussed in Parliament, or be committed to paper either? This then leaves us with the discriminatory position of fewer mechanisms for annulling marriages made between same-sex couples in comparison to those marriages made between opposite-sex couples.<sup>15</sup>

From an equality point of view, the establishing of a same-sex marriage Act is considered to be a marker for LGBTQ people who have wanted to achieve equality for many years,<sup>16</sup> but is this the final hurdle in equality? Perhaps the commencement of the MSSCA 2013 is not the last hurdle for activists and pressure groups, and the persistent campaigning for marriage that is ‘equal’ to the heterosexual definition of marriage was the wrong route to take? Equality in the form of assimilation into the heteronormative values of marriage can only lead to the channelling of different genders and sexualities into distinctly different types of legally recognised marriage.<sup>17</sup> The conflict of rights between religion and sexuality, has shaped legislative exclusion within the MSSCA 2013 for certain religious organisations, creating a power to refuse to conduct a same-sex marriage and this could have the effect of constructing an allowance in the selection of the type of marriages that a church or organisation may eventually wish to conduct. However, the religious organisations that refuse LGBTQ couples have the legislative assurance that they will not be subject to any claims of discrimination

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<sup>13</sup> Lucy Crompton, ‘Where’s the Sex in Same-Sex Marriage?’ (2013) 43 Family Law 564.

<sup>14</sup> Marriage (Same-Sex) Couples Act 2013.

<sup>15</sup> Carolyn Naughton, ‘Equal Civil Marriage for all Genders’ (2013) 43 Family Law 426.

<sup>16</sup> Kath Browne, K. ‘By Partner we mean...’: ‘Alternative Geographies of ‘Gay Marriage’’ (2011) 14 Sexualities 100.

<sup>17</sup> Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge 2011) 177

because legal protection is provided by way of the MSSCA 2013 and amendments to the Equality Act 2010.

We can begin to understand the conflict and the line of argument expressed by people of religious or spiritual belief, but it is important that their right to freedom of thought, conscience and the expression of religion or personal belief be respected without contributing to the discrimination of others.<sup>18</sup> During debate, issues of concern appear to have centred upon the dilution and consecration of the institution of heterosexual marriage as depicted in the Canon laws of the church, and in accordance with the religious teaching specific to each denomination. The Government have attempted to achieve a balance between being not wanting to be discriminatory towards religious organisations, whilst at the same time seeking to address the issues of discrimination in relation to LGBTQ people. Whether fairness has been achieved through the MSSCA 2013 is a matter of both personal and academic opinion. Although the new Act has provided a number of benefits to LGBTQ people it has simultaneously allowed religious organisations the autonomy to be excluded from legislation that is intended to eliminate existing discrimination contained within the institution of marriage.

The new institution of same-sex marriage may be 'equal' but by its very nature it is different and stands alone from established marriage, firstly because this amending Act can be distinguished by its very title of 'Marriage (Same Sex) Couples Act'. Secondly, the fact that the Act contains exclusions in the form of legislative discrimination allowed for the Church, in fact a large portion of the Act appears to concern the avoidance of any abrasion with the established Church and other religious denominations. Notwithstanding the lengthy definitions in the

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<sup>18</sup> European Convention on Human Rights, art 9.

various schedules and in particular a section of the Act that provides guidelines on the usage of existing marriage terminology such as ‘husband and wife’.<sup>19</sup> How very different is the spectre of what has been dubbed ‘equal marriage’ from ‘normal’ marriage and why would sexually liberated LGBTQ people really want to subscribe to a patriarchal system where the very nature of marriage is based upon the values of power, property, economic, social and moral values?

The introduction of a universal equality based marriage in the form of a ‘one-size-fits-all’ marriage that would accommodate those in ‘different relationships’ would surely be a more progressive route to follow, or perhaps abolish legal marriage totally?<sup>20</sup> Although this too has deep opposition from traditionalists, the Church and those with a vested interest or wish to preserve marriage as an exclusive institution reserved for heterosexual couples only. A secular civil system of marriage such as the *PACS*<sup>21</sup> system in France, that separates the Church from the State in the formation of marriages would have the benefit of removing all the complexities and future exemptions that involve the Church and the State here in the UK. The *PACS* system, although it may be seen as a lesser alternative to marriage, allows all genders and sexualities to enter into an independent secular system of civil marriage that shows no discrimination, where partners are offered the opportunity of holding a second ceremony or celebration of religious or spiritual beliefs as they choose. A system such as this would mean constitutional changes in the partnership between the UK Church and State, but the secular route can provide distinctly obvious advantages whilst eliminating the need for a hierarchical set of legally recognised partnerships. This system of civil marriage would not be new to the UK since the

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<sup>19</sup> Marriage (Same Sex Couples) Act 2013, sch 3.

<sup>20</sup> Jonathan Herring, *Family Law* (6th edn, Pearson Education 2013) 106

<sup>21</sup> PACS: *Pacte civil de solidarité*, French Civil Union available to homosexual and heterosexual partners introduced 1999.

Muslim, Sikh, Hindu and the Humanist religions for example, already hold a civil marriage registration prior to a spiritual or religious celebration.

The position of LGBTQ people has evolved in a positive way and are no longer criminals because of their sexuality and the addition of marriage can be interpreted as adding another notch on the equalities ladder. However, the MSSCA 2013 is not exactly wholly equal to that of established opposite-sex marriage, although many LGBTQ couples will be elated to become legally married and formally recognised in accordance with new legislation from March 2014.<sup>22</sup> However, future research may focus on and critically explore the broader outcomes and the experiences of those same-sex partners who have opted to take advantage of the Marriage (Same Sex) Couples Act 2013.

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<sup>22</sup> HC Deb 16 July 2013, vol 566, col 1032.