

# It's marriage Jim but not as we know it. Is the ban on same-sex marriage in the United Kingdom justified?

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## Introduction

December 5: an historic date. Not just because it was the day Christopher Columbus first set foot on the island of Hispaniola, nor because it is the day when The Netherlands celebrates the secret gift-giving of Saint Nicholas. On December 5, 2005, the Civil Partnership Act became effective across all three jurisdictions in the United Kingdom and brought with it a day of immense celebration for same-sex couples across the nation. This day heralded the creation of an institution open to same-sex couples that provided virtually all of the benefits previously restricted to married couples. Without wishing to curb the flow of champagne or the pulling of party-poppers, it is important to stop, reflect and assess the impact that this fundamental piece of legislation has had on the framework of British family law. In particular, although the introduction of civil partnership has redressed the vast majority of equality issues faced by same-sex couples across the United Kingdom, differences in treatment between same-sex and different-sex couples remain. This article seeks to identify and analyse some of the differences which arise between marriage, on the one hand, and civil partnership, on the other. Without seeking to plunge into the recurring debate surrounding the "equality through difference" and the "equality through sameness" ideologies, the question will be raised whether these differences are legally justifiable. Each of the areas of difference will be addressed in turn before focusing on the justifications identified for their continued existence. Special attention will be paid to the recent decision of the English High Court in *Wilkinson v Kitzinger*.<sup>2</sup>

## Religion

According to the provisional statistics currently available, of the 270,700 marriages celebrated in England & Wales in 2004, only 32.2 per cent (87,140) of them were religious in nature. This figure is thus surprisingly low compared to the equivalent figures of 50.5 per cent (16,243 of 32,154 marriages) in Scotland<sup>3</sup> and 68.5 per cent (5,704 of 8,328 marriages) in Northern Ireland.<sup>4</sup>

It is clear that civil marriage has provided the blueprint for civil partnership. Unlike legally binding, religious marriage ceremonies,<sup>5</sup> a religious civil partnership carries with it not only no legal effect, but is specifically prohibited by the CPA 2004.<sup>6</sup> Nevertheless, the law is silent on the possibility of arranging a religious ceremony subsequent to such a civil registration service. In this vein, solace may be sought from France, Belgium and The Netherlands where civil marriage ceremonies are often followed by religious

marriage services.<sup>7</sup> To muddy the waters still further, there would appear to be no sanction imposed should an officiating person act contrary to these provisions.

The temporal nature of civil partnership is also discernible through the absence of any form of religious ceremony and the prohibition imposed on civil partnership registrations in religious premises.<sup>8</sup> In England & Wales and Northern Ireland, a small difference in the wording of the relevant provisions does, however, create a difference in treatment. According to the relevant legislation in both jurisdictions, premises may only be approved if "the place has a recent or continuing connection with any religious body or religious practice which would be incompatible with the use of that place for the solemnisation of civil marriages".<sup>9</sup> Civil partnerships, on the other hand, may not be registered on religious premises if they are "used solely or mainly for religious purposes, or have been so used and have not subsequently been used solely or mainly for other purposes".<sup>10</sup> In practice, this means that if the premises being considered are used for religious purposes and the religion in question has no objection to the registration of a civil partnership, this will not be permitted, whereas celebration of a civil marriage under identical circumstances would be allowed. Although a seemingly insignificant detail, this has in Scotland led to legislative change. A recent amendment to the Scottish legislation has ensured that civil marriages and civil partnerships are treated in the same way. However, the amendments to the legislation have only ensured that the appropriate rules for the solemnisation of marriages have become more stringent.<sup>11</sup>

## Formalities

### *England & Wales*

Unlike marriages where a ceremony is required, the CPA 2004 provides for no such requirement, although parties are entitled to make use of a ceremony if permitted by the local authority.<sup>12</sup> Civil marriages, on the other hand, regardless of whether they take place in registered buildings,<sup>13</sup> registry offices<sup>14</sup> or approved premises,<sup>15</sup> must utilise the words:

"I do solemnly declare that I know not of any lawful impediment why I, *AB*, may not be joined in matrimony to *CD*.' And each of them shall say to the other:— 'I call upon these persons here present to witness that I, *AB*, do take thee, *CD*, to be my lawful wedded wife [*or husband*]'."<sup>16</sup>

Two people are regarded as having been registered as civil partners once each of them has signed the civil partnership schedule; the public affirmation of the other party is thus notably absent.<sup>17</sup>

### *Scotland*

The commencement of a civil partnership in Scotland is also characterised by the lack of ceremonial cladding. Section 85(1) states that a civil partnership is to be regarded as having been created once the civil partners have both signed the civil partnership schedule in the presence of each other, two witnesses and the authorised registrar. A marriage, on the

other hand, must satisfy the conditions laid down in the Marriage (Scotland) Act 1977 which specify that a marriage ceremony must include “(a) a declaration by the parties, in the presence of each other, the celebrant and two witnesses, that they accept each other as husband and wife and (b) a declaration by the celebrant ... that the parties are then [regarded as] husband and wife.”<sup>18</sup>

### *Northern Ireland*

According to art.19(2)(b) of the Marriage (Northern Ireland) Order 2003, a marriage may not be solemnised in Northern Ireland unless the ceremony includes an “appropriate declaration”. The term “appropriate declaration” refers to a declaration by the parties that they accept each other as husband and wife and must be done in the presence of each other, the person solemnising the marriage and at least two witnesses.<sup>19</sup> Although a similar provision is also included in s.137(1) of the CPA 2004 in relation to those who must be present when a civil partnership comes into existence, a civil partnership is regarded as having been created upon the signing of the civil partnership schedule and no declaration is required.

### **Parentage**

In all three jurisdictions, the birth mother is the legal mother of the child whether the child is born in or out of wedlock.<sup>20</sup> In cases where artificial reproductive techniques are employed, this position has also received statutory weight by virtue of s.27(1) of the Human Fertilisation and Embryology Act 1990.<sup>21</sup> The situation with respect to fathers is, however, somewhat more complicated. At common law the general position was that the biological father was the legal father.<sup>22</sup> This presumption could be proved in a number of ways, the easiest of which being the existence of a marriage, indicating that Scottish, English and Northern Irish parentage law all adhere to the maxim *pater est quem nuptiae demonstrant*.<sup>23</sup> This presumption is, however, not extended to children born during a civil partnership.<sup>24</sup> As a consequence, the female civil partner of the birth mother is not automatically regarded in British law as the legal parent. Moreover, under current law, it is impossible for two persons of the same sex to be legal parents over the same child, without resorting to adoption.

If, however, the parties are not married, then a number of other options exist in order to establish paternity. If the child was conceived naturally, then no presumption of paternity arises in England & Wales or Northern Ireland.<sup>25</sup> However, entry of the man’s name as that of the father at the registration of the child’s birth is *prima facie* evidence of paternity.<sup>26</sup> Since only a male may be registered as the father on the child’s birth certificate, it is therefore impossible for a female civil partner to use this method to assert “paternity” over a child. Although resort may be made to DNA profiling or a judicial determination, these procedures still regard paternity as a male, singular concept, which cannot thus be exercised either by a female or a second male.<sup>27</sup> In Scotland, a man who is not married to the mother of the child will be presumed to be the father of the child if both he and the mother of the child have acknowledged that he is the father

of the child and he has been registered as such in the Register of Births.<sup>28</sup> However, once again no alteration to this statute has been made by the passage of the CPA 2004.

Further provisions in the Human Fertilisation and Embryology Act 1990 also determine that where a man has donated sperm to be used for licensed treatment with his consent, he will not be deemed to be the legal father of the child.<sup>29</sup> The same is also true where a man’s sperm is used after his death.<sup>30</sup> The Human Fertilisation and Embryology Act 1990 goes on to provide that where donated sperm is used for a woman in the course of licensed treatment services provided for her and a man together,<sup>31</sup> then this man will be deemed to be the legal father of the child.<sup>32</sup> Once again, no amendments to this provision have been made, thus prohibiting a female civil partner from becoming the “legal father” of the child via this procedure. In summary and in contrast to married couples, no presumption or method is available in any of the countries of the United Kingdom to allow for both civil partners to become the legal parents of the child.<sup>33</sup>

It should however be noted that in accordance with the recent review of the Human Fertilisation and Embryology Act 1990, the Human Fertilisation and Embryology Authority, amongst other consultees, is in favour of amending the current law so as to ensure that where one of the civil partners carries a child as a result of assisted reproductive treatment, the other civil partner is treated in law as the parent of the child.<sup>34</sup>

### **Parental responsibilities**

In England & Wales and Northern Ireland, the term “parental responsibility” is used to delineate the package of rights, responsibilities, duties and obligations inherent upon a parent of a child.<sup>35</sup> In Scotland the term “parental rights and responsibilities” is used as an overarching term to describe both parental rights and parental responsibilities.<sup>36</sup>

#### *By operation of law*

In all three jurisdictions, statutory legislation provides that where the legal father and legal mother of the child were married to each other at the time of the child’s birth,<sup>37</sup> they will have joint parental responsibility.<sup>38</sup> These provisions have not been amended to allow for the automatic acquisition of parental responsibility by civil partners. However, should the law on parentage be amended in line with the recommendations of the Human Fertilisation and Embryology Authority, this provision would also need to be amended.

If the mother is unmarried, or is involved in a civil partnership, at the time of the child’s birth, then she and only she will be vested with parental responsibility.<sup>39</sup>

#### *Upon request*

Besides the automatic ways in which a person may be vested with parental responsibility, other possibilities are available.<sup>40</sup> The possibilities vary depending on the status of the applicant. Three categories are discernible: unmarried fathers, step-parents and other interested parties. Unmarried fathers have the greatest number of routes open to them in order to

acquire parental responsibility over the child of their partner. As a result of the CPA 2004, civil partners have been placed on an identical footing to step-parents, who in turn are offered fewer opportunities than unmarried fathers, but more opportunities than those offered to other interested parties.

Those options only available to unmarried fathers, and thus not open to civil partners, are: (1) subsequently marrying the mother,<sup>41</sup> or (2) becoming registered<sup>42</sup> as the child's father.<sup>43</sup> Option (1) is only open to different-sex couples, whilst option (2) assumes that the applicant is the biological father of the child, thus excluding the possibility that same-sex couples (and hence civil partners) can benefit from these provisions.<sup>44</sup>

Due to a number of recent legislative amendments, the position of step-parents has been radically improved. Step-parents, and of course unmarried fathers, may now be vested with parental responsibility by: (1) obtaining a parental responsibility order,<sup>45</sup> or (2) obtaining a residence order (in which case a separate parental responsibility order must be made).<sup>46</sup> As a result of the passing of the CPA 2004, these options have all been extended to civil partners.<sup>47</sup> In all three jurisdictions of the United Kingdom, the unmarried father is also entitled to make a parental responsibility agreement with the mother.<sup>48</sup> However, only in England & Wales, is this ability extended to step-parents.<sup>49</sup> In summary, although a civil partner is not entitled to be vested with parental responsibility automatically, he or she is able to acquire parental responsibility over the child of his or her partner either by virtue of an agreement (in England & Wales), by a court order or by obtaining a residence order (both available throughout the entire United Kingdom).

## Adoption

The recent enactment of the Adoption and Children Act 2002 has been the first major overhaul of English adoption law since the passing of the Adoption Act 1976.<sup>50</sup> Although the House of Lords eventually passed the Bill,<sup>51</sup> the debate surrounding the passage of the legislation was fervent with one Cabinet Minister resigning over the use of the three-line whip.<sup>52</sup> The furore centred on widening the scope of those entitled to adopt. Although these legislative amendments have made a fundamental impact to the landscape of adoption law in England & Wales, these changes have as yet not been replicated in Northern Ireland or Scotland.<sup>53</sup> However, the CPA 2004 has slightly amended Northern Irish legislation with respect to adoption.<sup>54</sup> The end result is thus a complicated patchwork of provisions.

As a result of these legislative amendments in England & Wales, it is now possible for married couples, civil partners and unmarried couples "living as partners in an enduring family relationship" to jointly adopt.<sup>55</sup> Furthermore, adoption orders may be made on the application of one person who has attained the age of 21 and is not married or in a civil partnership.<sup>56</sup> The amendments made to the adoption law of England & Wales by virtue of the Adoption and Children Act 2002 signalled a vast departure from the previous law, which although it had held that a homosexual should not be prevented from adopting as an individual under s.15(1) of the Adoption Act 1976,<sup>57</sup> had prevented same-sex couples

from submitting a joint application.<sup>58</sup> Nonetheless, single-parent adoptions are not generally regarded as favourably by adoption agencies as adoption by couples, and tend only to be used to care for children with special needs who are otherwise difficult to place.<sup>59</sup>

In Northern Ireland and Scotland, civil partners are not, however, equated to spouses. As a result, civil partners are not entitled to apply for a joint adoption order, which is restricted to married couples.<sup>60</sup> In Scotland, persons involved in a civil partnership are nonetheless entitled to apply to adopt individually.<sup>61</sup> This is, however, prohibited in Northern Ireland.<sup>62</sup> As a result, although either party involved in an unregistered same-sex relationship is entitled to avail himself or herself of an individual adoption order application, those involved in a civil partnership are totally prevented from adopting in Northern Ireland. Nonetheless, a joint adoption order granted to a same-sex couple in England & Wales will be recognised in Scotland and Northern Ireland.<sup>63</sup> Although individual adoption orders are less favoured than joint adoption applications, the British courts have taken an increasingly progressive approach, emphasising the parenting commitment of the same-sex adopters, and have increasingly stressed the need to interpret adoption legislation in a non-discriminatory way.<sup>64</sup> In one noteworthy Scottish case, an adoption order was made in favour of a gay male living in a long-term relationship.<sup>65</sup> The judgment of the Scottish Court of Session was notable for its rejection of homophobic preconceptions and for taking judicial notice of the lack of evidence on negative aspects of same-sex parenting, *i.e.* the lack of substantiation for assertions that children will be stigmatised by peers, that they are more likely themselves to be homosexual, or that same-sex families are intrinsically less stable or supportive than their heterosexual counterparts.

As a result of s.246(1), all references to the term "step-parent" listed in Schedules 21 and 22 include a person who is the civil partner of a child's parent.<sup>66</sup> Despite having wide-ranging implications across a spectrum of British legislation, this amended interpretation does not apply to adoption orders.<sup>67</sup> Nonetheless, in England & Wales, the civil partner of a parent may apply to adopt his or her partner's child on the basis of s.51(2) of the Adoption and Children Act 2002, as long as he or she has attained the age of 21.<sup>68</sup>

## Artificial insemination

The regulation of and access to artificial insemination is a reserved matter and thus legislated by Westminster and not by the devolved Parliaments and Assemblies in Scotland, Northern Ireland and Wales. The passage of the CPA 2004 has, however, left the regulation of artificial insemination unaltered, with no consequential amendments being made to the Human Fertilisation and Embryology Act 1990. Although attempts to explicitly prevent lesbians and single women having access to donor insemination services were defeated, the Human Fertilisation and Embryology Act 1990 contains the provision that clinics are not allowed to provide donor insemination services without taking into account "the welfare of any child who may be born as a result, including the need of that child for a father".<sup>69</sup> This provision obviously

has a detrimental effect on an application by a lesbian couple. Since 1995, the Code of Practice of the Human Fertilisation and Embryology Authority has been liberalised in order to focus on the individual clinic's assessment of the particular case. Although this has inevitably improved the situation somewhat, there still remains a discrepancy in practice, as Bailey-Harris states: "a same-sex couple's access to reproductive technology services is permitted but not guaranteed".<sup>70</sup>

### Dissolution

In England & Wales and Northern Ireland, a distinction is drawn between void and voidable marriages and civil partnerships, whereas in Scotland such a distinction is not evident.<sup>71</sup> It is therefore more appropriate to consider the laws of England & Wales and Northern Ireland together and that of Scotland separately.

In England & Wales and Northern Ireland, if either of the parties was not eligible to enter into a civil partnership or celebrate a marriage or did not comply with the formalities of the registration, their registered relationship will be void *ab initio*.<sup>72</sup> The grounds are identical with respect to civil partnerships and marriages. In terms of voidable civil partnerships and marriages, all the grounds available to civil partners in England & Wales and Northern Ireland are likewise open to spouses.<sup>73</sup> However, three further grounds open to spouses wishing to annul their marriage are not extended to civil partners, namely, non-consummation owing to incapacity,<sup>74</sup> non-consummation owing to the wilful refusal of one of the parties,<sup>75</sup> and that at the time of the marriage one of the parties was suffering from a venereal disease.<sup>76</sup>

In Scotland, the grounds for annulling a marriage or civil partnership are identical, save for one exception.<sup>77</sup> Section 5(4)(f), M(S)A 1977 states that a legal impediment to a marriage will exist if one or both of the parties is, or are, not domiciled in Scotland and, on a ground other than one mentioned in ss.5(4)(a)–(e), a marriage in Scotland between the parties would be void *ab initio* according to the law of the domicile of the party or parties as the case may be. This ground has not been extended to civil partnerships. Furthermore, unlike marriage where impotency is a ground for a marriage to be declared voidable at common law, no such ground exists for civil partners.<sup>78</sup>

Furthermore, unlike marriage, which can be dissolved on the ground that one party has committed adultery,<sup>79</sup> a civil partnership may not be dissolved on this ground. The reason for the absence of this ground is simple to explain. The term "adultery" according to English, Scottish and Northern Irish law means "voluntary sexual intercourse by a married person with a person of a different sex to the marriage partner".<sup>80</sup> It would therefore require statutory amendment to the common law notion of adultery for this ground to be extended to civil partners. Instead, the Government has expressly allowed for voluntary sexual intercourse by a person involved in a civil partnership with a person other than the civil partner to be subsumed under the ground of unreasonable behaviour.<sup>81</sup> In this way, the common law notion of adultery is preserved and infidelity is dealt with in the same way for both sets of couples. This has been welcomed by many not only because

of the significant number of divorce petitions submitted on this ground, but also because it sends out a message that infidelity in a civil partnership will also not be tolerated.<sup>82</sup>

### Peerage, Knightage and Baronetage

In the United Kingdom peers are divided into five ranks: Duke and Duchess, Marquess and Marchioness, Earl and Countess, Viscount and Viscountess, and Baron and Baroness. According to British custom, the wife of a peer is entitled to a courtesy title based on her husband's rank, unless she herself has a higher title. In this way a baron's wife is called a baroness. The situation is, however, somewhat different for the family of a woman who is a peeress in her own right (that is, who holds a substantive title). Although her children gain courtesy titles, her husband receives no special distinction. The same rules also apply with respect to British knightage and baronetage, where the male holder of the title is called Sir and a female holder Lady.<sup>83</sup> With respect to civil partners, the question can be posed whether the civil partner of a peer, knight or baronet is also entitled to a courtesy title. Although it might seem a rather incidental problem, this issue has in fact already arisen within the first nine months since the introduction of civil partnership.<sup>84</sup>

Furthermore, the Royal Marriages Act 1772 has also not been amended, thus leaving it open for a member of the Royal Family to lawfully enter into a civil partnership without the permission of the reigning monarch. Such a move would also, in theory, not result in the forfeiture of rights and privileges, as is the case when a member of the Royal Family marries without permission or contrary to the laws of the Church of England. What exactly the consequences would be if a member of the royal Family were to enter into a civil partnership are difficult to predict.

### International issues

According to the provisions of the CPA 2004, "overseas relationships" will be recognised throughout the United Kingdom as civil partnerships. An overseas relationship is one either classified as such according to the specified relationships listed in Sch.20, or one which satisfies the general conditions listed in s.214. The effect of these provisions is to ensure that *all* registered same-sex relationships, regardless of their classification in the country of origin, are classified as civil partnerships in the United Kingdom. Same-sex marriages celebrated in Canada, Belgium, The Netherlands or Massachusetts will thus be recognised in the United Kingdom as civil partnerships.

This classification has, however, recently come under fire. On July 31, 2006, Sir Mark Potter, President of the Family Division of the High Court, delivered his judgment in the case of *Wilkinson v Attorney-General*. The case revolved around two English domiciliaries, Susan Wilkinson and Celia Kitzinger, who had celebrated their marriage in British Columbia on August 26, 2003. Upon their return to the United Kingdom, they sought a declaration that their marriage was a valid marriage at its inception in accordance with s.5 of the Family Law Act 1986, and a declaration that s.11(c) of the Matrimonial Causes Act 1973 is incompatible with s.4 of the Human Rights Act 1998. After outlining the

current sources of both substantive marriage law and private international law in the field of marriage, Sir Potter went on to discuss the substantive merits of the case. Having analysed the respective ambit of Arts 8 and 12 of the ECHR, Sir Potter concluded that the protection afforded by the Convention did not cover the right of same-sex couples to marry. With *M v Secretary of State for Work and Pensions* as the backbone to his argument,<sup>85</sup> Sir Potter argued that the protection afforded by Art.8 must be read with caution and should not be applied in an unrestrained, unfettered or unprincipled fashion. In focusing on the *de facto* situations rather than the *de jure* categories, Potter concluded that the decision of the British Government to withhold the status and name of marriage from same-sex couples, whilst granting them virtually all of the material, legal rights and duties associated with that institution, was not contrary to Art.8.

Sir Potter went on to find that although within the context of Art.14, it could be held that the facts of the case fell within the ambit of a Convention right, namely Art.12, the difference in treatment was objectively justifiable. He held that civil partnerships are not “inferior” to marriage, nor is that the intention of the English legislature. He thus summarised:

“With a view (1) to according formal recognition to relationships between same sex couples which have all the features and characteristics of marriage save for the ability to procreate children, and (2) preserving and supporting the concept and institution of marriage as a union between persons of opposite sex or gender, Parliament has taken steps by enacting the CPA [Civil Partnership Act] to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homosexuals who wish to join stable long-term relationships. To the extent that by reason of that distinction it discriminates against same-sex partners, such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States.”

### **Analysis of the differences and their justifications**

It is clear that the introduction of civil partnership in the United Kingdom has alleviated many of the legal problems faced by same-sex couples. The vast majority of the legal rights and responsibilities which hinge on the institution of marriage are now equally available to couples of the same-sex, should they register a civil partnership. In eradicating this discrimination, the British Government should be praised. The rights of same-sex couples have been respected and their position in society has been strengthened by this legislation.

Nonetheless, the enactment of the CPA 2004 has also served to highlight the continued differential treatment of different-sex couples and same-sex couples. If all the legal rights, benefits, duties and responsibilities attached to

marriage can be accessed by same-sex couples by means of the registration of a civil partnership, the question should, and indeed must, be posed why the institution of marriage remains “off limits” to couples of the same-sex. In light of the Human Rights Act 1998, could it not be argued that same-sex couples are being discriminated against in terms of their right to marry?

Imagine the following: In a small city in the north of England, a water fountain has been in operation since the days of the Romans. Ever since its inception, it has been understood that only English citizens could use this fountain. Originally this caused no problem. There was no real demand from others to gain access to fresh drinking water. However, over time the number of foreigners in the city began to increase and thus the demand for fresh drinking water also began to increase. Eventually the city council decided to take action and installed a second water fountain immediately next to the first. Around the first fountain hung the sign “only citizens of this country may drink from this fountain” and upon the other hung the sign “only foreign nationals may drink from this fountain”. Both fountains are functionally identical; both are served through the same water-main, both are available at the same times of day and both are inspected and guaranteed by the same local authority. Is it therefore discriminatory that a differentiation is made between which fountain either of these two groups uses?

In order to answer this question, a number of steps must first be performed. Sir Potter in *Wilkinson*, referring to the judgments of *Wandsworth London Borough Council v Michalak*<sup>86</sup> and *Ghaidan v Godin-Mendoza*,<sup>87</sup> dealt with five questions related to the alleged violation of Art.14, ECHR:

- (1) Do the facts fall within the ambit of one or more of the Convention rights?
- (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
- (3) Were those others in an analogous situation?
- (4) Was the difference in treatment objectively justifiable, *i.e.* did it have a legitimate aim and bear reasonable relationship or proportionality to that aim?
- (5) Was the difference in treatment based on one or more of the grounds proscribed—whether expressly or by inference—by Article 14?

In returning to the question posed above in relation to the water fountain, the imperative question is whether the reason for the difference in treatment, irrespective of whether the rights and benefits associated with drinking from the water are the same, can be objectively justified. The same is also true when attempting to answer the question whether denying same-sex couples the right to marry is discriminatory.

According to the judgment of Sir Potter in *Wilkinson v Kitzinger*, the first question can be answered in the affirmative. Article 12, ECHR protects the right to marry in

the wide, abstract sense when dealing with Art.14. In citing the words of Lord Nicholls in *M v Secretary of State for Work and Pensions*, Sir Potter argued that “the more directly a discriminatory provision impinges on ‘the values underlying the particular substantive Article’ or its core values, the more readily it will be regarded as falling within the ambit of the Article.”<sup>88</sup> Article 12, being concerned with *de jure* rights and the question of status, must thus be so construed. At any rate, and in accordance with the *Abdulaziz*, *Belgian Linguistics* and *Petrovic* cases, if a State of its own volition decides to introduce or enact legislation which it is not required to do according to the Convention, it may not do so in a discriminatory manner.<sup>89</sup>

With regards the second and third questions, it is clear that the UK Government has already taken the step to equalise the position of spouses and civil partners in virtually all areas of the law. The policy of the CPA 2004 is that civil partners should be treated equally to spouses wherever possible and that any differences to marriage must be objectively justifiable.<sup>90</sup> As seen above, the question whether same-sex couples should be entitled to marry boils down to whether or not the continued discrimination is objectively justifiable. In order to answer this question, it is this author’s opinion that one must analyse the current differences independently of one another and undertake a more substantive analysis of the justification than that which was done by Sir Potter in *Wilkinson*.

The first such group of rights and responsibilities relates to children. It is here where *sameness* transcends into *similarity*. Despite the fact that a same-sex couple may well assert a desire to raise a child, the fundamental difference between a same-sex couple and a different-sex couple with respect to children lies firmly rooted in biology, in that a third party is *always* required where same-sex couples are concerned. Although in certain circumstances, different-sex couples may also require the assistance of a third party, as a rule of thumb, this is not the case. With regards this category of rights and duties, one must also take into account that the rights of the child must be the paramount consideration.

There are, for this reason, those who would argue that the reproductive *potential* of a difference-sex couple objectively justifies the difference between marriage and civil partnership. This argument is, however, fundamentally flawed in that one cannot begin to compare two groups on the basis of future variables, which may or may not occur. Should one take into account the *possibility* that a person might renounce his or her nationality when ascertaining whether there is a case of discrimination on grounds of nationality? Should one take into account the possibility that a person *may* apply for gender reassignment surgery in determining whether there is a case of sex discrimination? Future variables should never play a role in determining whether discrimination has already occurred. The determination of comparability is a task of assessing past facts through present-day glasses.

Further objection to this argument is founded in the need to disentangle the “right to marry” and the “right to found a family”. Article 9 of the Charter of Fundamental Rights and Freedoms of the European Union serves as the ultimate

indication that these two rights should be interpreted as independent of one another.<sup>91</sup> With this, and cases such as *Goodwin* in mind, it is clear that any difference in the treatment of same-sex couples and different-sex couples with respect to children should not influence the parties’ right to solemnise their relationship in the form which they desire.

The second category of differences relates to the dissolution of the relationship. As has, however, already been explained above, this should be regarded as a purely technical difference. Although, in this author’s mind, sending an incorrect signal to couples who wish to register that infidelity is acceptable in same-sex relationships, yet not acceptable in different-sex relationships, the difference can be solved by reference to the “unreasonable behaviour” clauses.<sup>92</sup>

The third and final category relates to ceremony, symbolism and tradition. The absence of a verbal affirmation and prohibition of registration in religious premises are indications that the civil partnership has been stripped of the traditional, symbolic elements commonly associated with marriage. As a result, the question which Sir Potter should have asked was whether it is objectively justifiable that same-sex couples be denied the ceremonial, symbolic and traditional aspects inherent to civil marriage.

Is it objectively justifiable that same-sex couples be obliged to “register” their emotional bond, whereas different-sex couples are permitted to “celebrate” theirs?<sup>93</sup>

“**celebrate:** 1. mark (a significant or happy day or event), typically with a social gathering; do something enjoyable to mark such an occasion. 2. perform (a religious ceremony) publicly and duly. 3. honour or praise publicly.”<sup>94</sup>

“**register:** enter or record in an official list as being in a particular category, having a particular eligibility or entitlement, or in keeping with a requirement.”<sup>95</sup>

Can this difference really be justified? Is this difference based on fundamental values so intrinsically associated with the institution of marriage that they cannot be extended to civil partners? In order to properly answer these questions one would have to undertake detailed sociological research to fully appreciate the reasons and motives for couples deciding to marry or register their civil partnership. Nonetheless, even without this sociological research, it is possible to answer these questions from a purely legal point of view. Is it *legally* justifiable to uphold a difference with regards to the moment at which and the form by which formalised relationships between different-sex couples and same-sex couples become effective? In answering this question one must take the point of view that the Government’s original aim was to introduce civil partnership from “strong equality and social justice imperatives”.<sup>96</sup>

In his pursuit of an objective justification, Sir Potter states that although he recognises that by “downgrading” their marriage to a civil partnership the petitioner suffers “hurt, humiliation, frustration and outrage”, it is “certainly not clear that these feelings are shared by substantial number of same-

sex couples content with the status of same-sex partnership”.<sup>97</sup> He then goes on to state that as a matter of “legislative choice and method”, the provisions of the CPA 2004 do not represent an unjustifiable exercise in differentiation. Attempting to quantify the discrimination suffered by denying same-sex couples the tradition and symbolism encapsulated by marriage in terms of hurt and pain will never fully capture the true element of the discrimination. The question, in this author’s opinion left unanswered by Sir Potter, is whether the Government can provide an objectively justifiable reason for maintaining the existing discrimination. The argument that this is not suffered by a “substantial number of same-sex couples” is in my opinion irrelevant.

Marriage entails the public acknowledgment of one’s intimate relationship and the verbal declaration of the acceptance of the rights and duties associated with the chosen institution. This public affirmation contributes to the symbolism intrinsically coupled to the entry into a State-

regulated institution such as marriage. To deny this to same-sex couples is not objectively justifiable. To open *civil* marriage to same-sex couples will not undermine an institution that is “valued and valuable, respectable and respected”. Instead it will send a signal to society and the world at large that the United Kingdom recognises that preventing same-sex couples the ability to celebrate the public declaration of their emotional bond through marital unity is simply discriminatory.

In opening civil marriage to same-sex couples, questions can obviously be raised concerning the future of the institution of civil partnership: abolition of the institution or extension to different-sex couples? Would it be better to maintain two fountains open to all with exactly the same benefits, or would it be better to remove one fountain and simply have one fountain open to all? That choice is ultimately a political one, but one which should not stand in the way of the legal and moral obligation to open civil marriage in the United Kingdom to same-sex couples.

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- <sup>2</sup> All references to section numbers in this article refer to the Civil Partnership Act 2004 (“the CPA 2004”) unless otherwise stated.
- <sup>3</sup> The provisional Scottish statistics for 2005 have also been released which indicate that 50.5 per cent of all marriages celebrated in Scotland in 2005 were civil in nature (15,510 of 30,881). The trend is thus towards increased use of the civil form of marriage. For more statistics concerning the celebration of marriages, see <http://www.gro-scotland.gov.uk/statistics/library/vital-events/index.html>.
- <sup>4</sup> The statistics for England & Wales are available at <http://www.statistics.gov.uk/>, for Scotland at <http://www.gro-scotland.gov.uk/statistics/library/index.html>, and for Northern Ireland at <http://www.nisra.gov.uk/>.
- <sup>5</sup> N. Lowe and G. Douglas (eds), *Bromley’s Family Law* (9<sup>th</sup> ed., Butterworths, London, 1998), pp.38–43; S. Cretney *et al.*, *Principles of family law* (Butterworths, London, 2003), pp.14–15, §1-011; L. Edwards and A. Griffiths, *Family Law*, (W. Green, Edinburgh, 1997), pp.269–271, §9.38; J.M. Thompson, *Family Law in Scotland* (3<sup>rd</sup> ed., Butterworths/LexisNexis, Edinburgh, 1996), pp.11–12; K. O’Halloran, *Family law in Northern Ireland* (Gill & Macmillan, Dublin, 1997), pp.8–9.
- <sup>6</sup> England & Wales: s.2(5); Scotland: This is not specifically regulated in Scottish legislation, in line with the legislation relating to marriage. This stems from the rather different role of the Church of Scotland, compared to the Church of England. The author wishes to thank Professor Kenneth McK. Norrie for his assistance on this point; Northern Ireland: s.137(5).
- <sup>7</sup> In all three countries, it is forbidden to hold a religious ceremony prior to a civil registration of the marriage: *e.g.* Art. 1:68, Dutch Civil Code.
- <sup>8</sup> Scotland, s.93(3).
- <sup>9</sup> England & Wales: Reg.5(4), Marriages (Approval of Premises) Regulations 1995, S.I. No. 510; Northern Ireland: Reg.20(2)(b), Marriage Regulations (Northern Ireland) 2003, S.R. No. 468.
- <sup>10</sup> England & Wales: s.6(1)(b); Northern Ireland: ss.144 and 159, Civil Partnership Act 2004, and Regs 7(1) and 12(1), Civil Partnership Regulations (Northern Ireland) 2005.
- <sup>11</sup> Prior to February 1, 2006, this area of law was regulated by Reg.7(2)(b), Marriage (Approval of Places)(Scotland) Regulations 2002, S.S.I. No. 260, where it was stated that a civil marriage may not be celebrated in any place which “has a recent or continuing connection with any religion or religious practice which would be incompatible with the use of that place for the solemnization of civil marriages”. Since the coming into force of Reg.7(2), Marriage (Approval of Places)(Scotland) Amendment Regulations 2005, S.S.I. No. 657, this has been amended so as to mirror the existing provision for civil partnership.
- <sup>12</sup> CPA 2004, s.2(1).
- <sup>13</sup> Marriage Act 1949, s.44(3).
- <sup>14</sup> Marriage Act 1949, s.44(5).
- <sup>15</sup> Marriage Act 1949, s.46B(3).
- <sup>16</sup> An alternative phrasing is also provided in the Marriage Act 1949, s.44(3A).
- <sup>17</sup> CPA 2004, s.2(1).
- <sup>18</sup> Marriage (Scotland) Act 1977, s.9(3).
- <sup>19</sup> Marriage (Northern Ireland) Order 2003, art.19(3).
- <sup>20</sup> *The Amphill Peerage Case* [1977] A.C. 547 at 577.
- <sup>21</sup> This Act extends to Scotland and Northern Ireland: Human Fertilisation and Embryology Act 1990, s.48. For a detailed overview of the exceptions to the rule, see A.B. Wilkinson and K. McK. Norrie, *The law relating to parent and child*, (W. Green, Edinburgh, 1993), pp.123–125.
- <sup>22</sup> Regardless of how fertilisation took place: *Re B (Parentage)* [1996] 2 F.L.R. 15 at 21, *per* Bracewell J.
- <sup>23</sup> England & Wales and Northern Ireland: *The Amphill Peerage Case* [1977] A.C. 547 at 577, *per* Lord Simon, *Gardner v Gardner* (1877) 2 App. Cas. 723, *per* Lord Gifford; Scotland: Law Reform (Parent and Child) (Scotland) Act 1986, s.5(1)(a). This presumption has also received added support in cases of artificial reproduction where even if the sperm was not that of the birth mother’s husband, he will still be regarded to be the legal father of the child if he consented to the treatment: Human Fertilisation and Embryology Act 1990, s.28(2). See further, England & Wales: N. Lowe and G. Douglas (eds.), *Bromley’s Family Law* (9<sup>th</sup> ed., Butterworths, London, 1998), p.266; S. Cretney *et al.*, above, n.22, p.524, §18-003; Scotland: A.B. Wilkinson and K. McK. Norrie, above, n.22, pp.136–140; Northern Ireland: K. O’Halloran, above, n.6, p.68.
- <sup>24</sup> This obviously is restricted to the case of a female civil partnership, since a child cannot be born “to” a male civil partnership. It is interesting to note that the opposite conclusion has been reached in California where in the case of *Elisa B v The Superior Court of El Dorado* (2005) 37 C4th 108, the California Supreme Court held that the presumption of paternity could be analogously applied to the female partner of the birth mother.
- <sup>25</sup> England & Wales: N. Lowe and G. Douglas (eds), above, n.6, p.274; Northern Ireland: K. O’Halloran, above, n.6, p.50.
- <sup>26</sup> *Brierley v Brierley* [1918] P. 257. England & Wales: Births and Deaths Registration Act 1953, s.34(2); Northern Ireland: Births and Deaths Registration (Northern Ireland) Order 1976, art.14(3).
- <sup>27</sup> S. Cretney *et al.*, above, n.22, pp.526–533, §18-004–§18-009.
- <sup>28</sup> Law Reform (Parent and Child) (Scotland) Act 1986, s.5(1)(b), A.B. Wilkinson and K. McK. Norrie, above, n.20, pp.133–136.
- <sup>29</sup> Human Fertilisation and Embryology Act 1990, s.28(6)(a).
- <sup>30</sup> Human Fertilisation and Embryology Act 1990, s.28(6)(b), as in the case of *R v Human Fertilisation and Embryology Authority, ex parte Bland* [1997] 2 F.L.R. 742.
- <sup>31</sup> The precise meaning of the phrase “treatment together” is unclear. See *Re Q (Parental Order)* [1996] 1 F.L.R. 369 at 372, *per* Johnson J.
- <sup>32</sup> Human Fertilisation and Embryology Act 1990, s.28(3).

- <sup>33</sup> This is obviously subject to the provisions on adoption as outlined above.
- <sup>34</sup> HFE Authority, *Response by the Human Fertilisation and Embryology Authority to the Department of Health's consultation on the review of the Human Fertilisation and Embryology Act*, November 24, 2005. <http://www.hfea.gov.uk>.
- <sup>35</sup> N. Lowe in: K. Boele-Woelki, B. Braat and I. Curry-Sumner (eds), *European Family Law in Action. Volume III: Parental Responsibilities* (Intersentia, Antwerp, 2004), p.5–6.
- <sup>36</sup> Parental responsibilities defined in Children (Scotland) Act 1995, s.1(1), and parental rights defined in Children (Scotland) Act 1995, s.1(2). See also A.B. Wilkinson and K. McK. Norrie, *The law relating to parent and child*, (W. Green, Edinburgh, 1993), p.163.
- <sup>37</sup> Also if the child was born as a result of artificial insemination: Human Fertilisation and Embryology Act 1990, s.29(1).
- <sup>38</sup> England & Wales: Children Act 1989, s.2(1); Scotland: Children (Scotland) Act 1995, s.3(1)(b) (for pre-Children (Scotland) Act 1995 see A.B. Wilkinson and K. McK. Norrie, above, n.20, p.167 and Law Reform (Parent and Child) (Scotland) Act 1986, s.2(1)(a); Northern Ireland: Children (Northern Ireland) Order 1995, art.5(1).
- <sup>39</sup> England & Wales: Children Act 1989, s.2(2)(a); Scotland: Children (Scotland) Act 1995, s.3(1)(a); Northern Ireland: Children (Northern Ireland) Order 1995, art.5(2)(a).
- <sup>40</sup> J. Masson, "The impact of the Adoption and Children Act 2002. Part 1 – Parental responsibility", 2003 Fam. Law 581–583.
- <sup>41</sup> By subsequently marrying the mother, the father brings himself within the scope of s.2(1) of the Children Act 1989, s.3(1)(b) of the Children (Scotland) Act 1995 or art.5(1) of the Children (Northern Ireland) Order 1995: England & Wales: Family Law Reform Act 1987, s.1; Scotland: Law Reform (Parent and Child) (Scotland) Act 1986, s.1(1); Northern Ireland: Matrimonial and Family Proceedings (Northern Ireland) Order 1989, art.32(2)(a).
- <sup>42</sup> Registered in terms of s.10(1) of the Births and Deaths Registration Act 1953, s.18 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or art.14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976. The Adoption and Children Act 2002 implements this new scheme for acquisition of parental responsibility for unmarried fathers, although distinctions still exist between parental responsibility acquired via this provision and that acquired by married fathers. Parental responsibility acquired by virtue of registration at the child's birth may be removed without an adoption order: J. Masson, above, n.39, at p.581; S. Cretney *et al.*, above, n.22, pp.557–558, §18-036.
- <sup>43</sup> England & Wales: Children Act 1989, s.4(1)(a), as amended by the Adoption and Children Act 2002; Scotland: Children (Scotland) Act 1995, s.3, as amended by the Family Law (Scotland) Act 2006, s.23; Northern Ireland: Children (Northern Ireland) Order 1995, s.7(1)(a), as amended by the Family Law Act (Northern Ireland) 2001.
- <sup>44</sup> A person may also be vested with parental responsibility upon taking office as a formally appointed guardian of the child. However, such an appointment can only take effect after the mother's death. England & Wales: Children Act 1989, s.5(1); Scotland: Children (Scotland) Act 1995, s.7(1); Northern Ireland: Children (Northern Ireland) Order 1995, art.159.
- <sup>45</sup> England & Wales: Children Act 1989, s.4(1)(b) (parents) and Children Act 1989, s.4A(1)(b), as amended by Adoption and Children Act 2002 (stepparents); Scotland: Children (Scotland) Act 1995, s.11(2)(b) (parents and stepparents); Northern Ireland: Children (Northern Ireland) Order 1995, art.7(1)(b) (parents) and Children (Northern Ireland) Order 1995, s.7(1A) (stepparents).
- <sup>46</sup> England & Wales: Children Act 1989, s.12(1); Scotland: Children (Scotland) Act 1995, s.11(2)(c); Northern Ireland: Children (Northern Ireland) Order 1995, art.12(1).
- <sup>47</sup> England & Wales: Children Act 1989, s.4A(1), as inserted by the Adoption and Children Act 2002, and amended by the Civil Partnership Act 2004, s.75(1); Scotland: No legislation was necessary in Scotland, since the Children (Scotland) Act 1995 already provided for such situations; Northern Ireland: Children (Northern Ireland) Order 1995, s.7(1C), as inserted by the Family Law Act (Northern Ireland) 2001, and amended by the Civil Partnership Act 2004, s.199(4).
- <sup>48</sup> England & Wales: Children Act 1989, s.4(1)(c); Scotland: Children (Scotland) Act 1995, s.4(1); Northern Ireland: Children (Northern Ireland) Order 1995, art.7(1)(c).
- <sup>49</sup> Children Act 1989, s.4A(1), as amended by Adoption and Children Act 2002 (step-parents).
- <sup>50</sup> This road to reform has however been a long one, beginning in 1992 and eventually culminating in the 2002 Act. See further, C. Bridge and H. Swindels, *Adoption. The modern law* (Jordans, Bristol, 2003); S. Cretney *et al.*, above, n.22, pp.794–796, §23-004.
- <sup>51</sup> *British House of Lords*, Vol. 640, Cols. 567–634 (November 5, 2002). 215 votes to 184. See also J. Herring, *Family law* (Pearson Publishing, Harlow, 2003), pp.587–592.
- <sup>52</sup> "Three-line whips" are imposed on important occasions, such as second readings of significant Bills and motions of no confidence. Failure by a Member of Parliament to attend a vote with a three-line whip is usually seen as a rebellion against the party and may eventually result in disciplinary action.
- <sup>53</sup> Adoption and Children Act 2002, s.149. Only certain provisions are applicable in Northern Ireland and Scotland. Scottish adoption law is, however, currently under review with the second phase of the Adoption Policy Review having taken place: Scottish Executive, *Adoption policy review group. Choices for children in fostering and adoption*, (Scottish Executive, Edinburgh, 2003), pp.94–98. A recent announcement by the Scottish Executive indicates the Scottish Parliament's intention to open adoption to same-sex couples. This has subsequently been concretised and according to ss.31(3)(b) and (d) of the Adoption and Children (Scotland) Bill currently before the Scottish Parliament, civil partners and those living as though they were civil partners would be equally entitled to joint adoption.
- <sup>54</sup> By virtue of the Civil Partnership Act 2004, s.203.
- <sup>55</sup> Adoption and Children Act 2002, s.50(1), in conjunction with the Adoption and Children Act 2002, s.144(4), as amended by the Civil Partnership Act 2004, s.79(12).
- <sup>56</sup> Adoption and Children Act 2002, s.51(1), as amended by the Civil Partnership Act 2004, s.79(4). An exception to this rule is made by virtue of the Adoption and Children Act 2002, s.51(3A), as amended by the Civil Partnership Act 2004, s.79(5). See J. Herring, above, n.50, pp.592–593.
- <sup>57</sup> *Re W (A Minor) (Adoption: Homosexual Adopter)* [1998] 2 Fam. 58.
- <sup>58</sup> Adoption Act 1976, s.14(1A).
- <sup>59</sup> R. Bailey-Harris, "Same-sex partnerships in English family law", in R. Wintemute and M. Andenæs (eds.), *Legal recognition of same-sex partnerships* (Hart, Oxford, 2001), pp.605–619.
- <sup>60</sup> Scotland: Adoption (Scotland) Act 1978, s.14(1A); Northern Ireland: Adoption (Northern Ireland) Order 1987, art.14. This is currently under debate in both jurisdictions. According to the Adoption and Children (Scotland) Bill 2006, s.31(3), adoption will be opened to civil partners and those living together as though they were civil partners. In Northern Ireland, a consultation process has commenced with an identical end result in mind. See further, Northern Ireland Department of Health, Social Services and Public Safety, *Adopting the Future*, Belfast, 2006, pp.48–49.
- <sup>61</sup> Adoption (Scotland) Act 1978, s.15.
- <sup>62</sup> Adoption (Northern Ireland) Order 1987, art.15, as amended by the Civil Partnership Act 2004, s.203(4).
- <sup>63</sup> Adoption (Scotland) Act 1978, s.38(1)(c) and Adoption (Northern Ireland) Order 1987, art.53(1).
- <sup>64</sup> *Re W (Adoption: Homosexual Adopter)* [1997] 2 F.L.R. 406; *Re E (Adoption: Freezing Order)* [1995] 1 F.L.R. 382.
- <sup>65</sup> *AMT (Known as AC) (Petitioner For Authority to Adopt SR)* [1997] Fam. 225.
- <sup>66</sup> By virtue of the Civil Partnership Act 2004, ss.247 and 248.
- <sup>67</sup> Sch.21 includes references to Acts of the Scottish Parliament (Civil Partnership Act 2004, s.247(9)). There has thus been no amendment to Scotland: Adoption (Scotland) Act 1978, s.15(1)(aa); Northern Ireland: Adoption (Northern Ireland) Order 1987, art.15(4). In Scotland, step-parent adoption is also under review: Scottish Executive, *Adoption policy review group. Choices for children in fostering and adoption*, (Scottish Executive, Edinburgh, 2003), pp.111–114.
- <sup>68</sup> Adoption and Children Act 2002, s.51(2).
- <sup>69</sup> Human Fertilisation and Embryology Act 1990, s.13.
- <sup>70</sup> See R. Bailey-Harris, above, n.58, p.610.
- <sup>71</sup> In Scotland, impotency is retained as a ground for a marriage to be declared voidable. However, the consequences of a voidable marriage are identical to those of a void marriage: See Edwards and Griffiths, above, n.6, p.266, §9.31. Void marriages and civil partnerships are deemed never to have existed and since they are void *ab initio* require no decree to annul them. Voidable marriages and civil partnerships on the other hand are deemed to be valid relationships up until a court pronounces a decree absolute (Matrimonial Causes Act 1973, s.15); Matrimonial Causes Act 1973, s.16, see Lowe and Douglas, above, n.6, pp.78–80.; see O'Halloran, above,



- n.6, p.11.
- <sup>72</sup> England & Wales: Matrimonial Causes Act 1973, s.11, in conjunction with Marriage Act 1949, s.49 (marriage) and Civil Partnership Act 2004, s.49 (Civil Partnership); Northern Ireland: Matrimonial Causes (Northern Ireland) Order 1978, art.13(1), in conjunction with Marriage (Northern Ireland) Order 2003 (marriage) and Civil Partnership Act 2004 (Civil Partnership), s.173.
- <sup>73</sup> England & Wales: Matrimonial Causes Act 1973, ss.12(c), (d), (f) and (g), as amended by the Gender Recognition Act 2004 (marriage) and the Civil Partnership Act 2004, s.50(1) (Civil Partnership); Northern Ireland: Matrimonial Causes (Northern Ireland) Act 1978, ss.14(c), (d), (f) and (g), as amended by the Gender Recognition Act 2004 (marriage) and the Civil Partnership Act 2004, s.174(1).
- <sup>74</sup> England & Wales: Matrimonial Causes Act 1973, s.12(a); Northern Ireland: Matrimonial Causes (Northern Ireland) Order 1978, art.14(a).
- <sup>75</sup> England & Wales: Matrimonial Causes Act 1973, s.12(b); Northern Ireland: Matrimonial Causes (Northern Ireland) Order 1978, art.14(b).
- <sup>76</sup> England & Wales: Matrimonial Causes Act 1973, s.12(d); Northern Ireland: Matrimonial Causes (Northern Ireland) Order 1978, art.14(d). This point received debate during the debates in the Standing Committee, where it was noted that this provision should also be removed from the laws on marriage: *British House of Commons*, Standing Committee D, Cols. 159–163 (October 26, 2004 [a.m.]).
- <sup>77</sup> Marriage: Marriage (Scotland) Act 1977, s.5(4); Civil Partnership: Civil Partnership Act 2004, s.123.
- <sup>78</sup> Edwards and Griffiths, above, n.6, p.266, §9.31.
- <sup>79</sup> England & Wales: Matrimonial Causes Act 1973, s.1(2)(a); Scotland: Divorce (Scotland) Act 1976, s.1(2)(a); Northern Ireland: Matrimonial Causes (Northern Ireland) Order 1978, art.3(2)(a).
- <sup>80</sup> England & Wales: Lowe and Douglas, above, n.6, p.228; Scotland: E. Clive, *The law of husband and wife in Scotland* (W. Green, Edinburgh, 1992), p.403; J.M. Thomson, above, n.6, p.101; *MacLennan v MacLennan* (1958) S.C. 105; Northern Ireland: O'Halloran, above, n.6, p.176.
- <sup>81</sup> Women and Equality Unit, *Responses to the civil partnership. A framework for the legal recognition of same-sex couples* (Department of Trade and Industry, London, 2003), p.36.
- <sup>82</sup> According to the most recent statistics (2003): England & Wales: 32,035 (20.9%); Scotland: 413 (3.7%); Northern Ireland: 138 (5.5%). If the Family Law (Scotland) Bill 2005 is enacted, this ground will be abolished in Scotland. See also I. Curry-Sumner, *All's well that ends registered? The substantive and private international law aspects of non-marital registered relationships in Europe* (Intersentia, Antwerp, 2005), pp.246–247.
- <sup>83</sup> For further details regarding British titles, see C. Mosley (ed.), *Burke's Peerage, Baronetage & Knightage*, 107<sup>th</sup> Edition.
- <sup>84</sup> See <http://news.bbc.co.uk/2/hi/entertainment/4549626.stm> concerning the civil partnership of Sir Elton John.
- <sup>85</sup> *M v Secretary of State for Work and Pensions* [2006] U.K.H.L. 11.
- <sup>86</sup> [2003] 1 W.L.R. 617.
- <sup>87</sup> [2004] 2 A.C. 557.
- <sup>88</sup> §109, *Wilkinson v Attonery-General* [2006] E.W.H.C. 2022 (Fam.).
- <sup>89</sup> *Petrovic v Austria* (2001) 33 E.H.R.R. 14, §27–30, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) A 94 §§65 and 71–72 and *Belgian Linguistics* (1968) A 6, §9.
- <sup>90</sup> M. Harper *et al.*, *Civil Partnership. The new law* (Family Law, Bristol, 2005), p.124, §8.99.
- <sup>91</sup> C. de Torella and E. Reid, “The changing face of the European family and fundamental rights” (2002) *European Law Review* p.80.
- <sup>92</sup> See n.76.
- <sup>93</sup> One “celebrates” a marriage (in French *célébrer*, in Spanish *celebrar*, in German *schließen* or in Dutch *voltrekken*) whereas one “registers” (in French *enregistrer*, in Spanish *inscribir*, in German *eintragen* or in Dutch *registreren*) a non-marital registered relationship. In French, an entirely new verb has been created to cater for the entry into a *pacte civil de solidarité*, namely *pacser*.
- <sup>94</sup> *New Oxford Dictionary of English*, 1998.
- <sup>95</sup> *New Oxford Dictionary of English*, 1998.
- <sup>96</sup> Northern Ireland Office of Law Reform, “Civil Partnership: A legal status for committed same-sex couples in Northern Ireland. Analysis of responses” (Northern Ireland Department of Finance and Personnel, Belfast, 2004), p.8, §2.1.3.
- <sup>97</sup> *Wilkinson v Attonery-General* [2006] E.W.H.C. 2022 (Fam.), §119.