SAME-SEX MARRIAGE: EUROPEAN COURT OF HUMAN RIGHTS’ JURISPRUDENCE AND CONFLICTS OF LAW - POSSIBLE MESSAGES FOR AND FROM THE SUPREME COURT OF ENGLAND AND WALES

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SAME-SEX MARRIAGE: EUROPEAN COURT OF HUMAN RIGHTS’ JURISPRUDENCE AND CONFLICTS OF LAW - POSSIBLE MESSAGES FOR AND FROM THE UK SUPREME COURT¹

BRIGITTE CLARK*

ABSTRACT
As more legislatures adopt marriage-like alternatives to same-sex marriage, international (and interstate) conflict of law issues take on additional significance. This paper debates the outcome of an appeal to the Supreme Court of the United Kingdom against the ban on same-sex marriage, especially those marriages validly celebrated in other jurisdictions on the basis of rights enshrined in the European Convention of Human Rights (ECHR) and Charter of Fundamental Rights of the European Union, with some comparative reference to the relevant legal positions in the United States, Canada and South Africa. At present, although Strasbourg jurisprudence has recognized the right of same sex couples to respect for family life in terms of Article 8, it is not yet in favor of the recognition of their right to marry in terms of Article 12. However, this paper submits that this ban could be held to constitute a breach of both Articles 8 and 12 of the ECHR when read in conjunction with Article 14 of the ECHR (the right not to be subject to discrimination on the grounds of sexual orientation). The Supreme Court could issue a declaration of incompatibility with regard to the English legislation banning same sex marriage for homosexual couples. In view of the increased likelihood of success at Strasbourg and changing public opinion in this regard, the English legislature should take cognizance of any such declaration of its Supreme Court and review its law in this regard. With reference to the variety of legal positions on this issue in Canada, South Africa and the United States, the paper concludes that it is discriminatory not to recognize the valid marriages of those same-sex couples from other jurisdictions.

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¹ All references to ‘Supreme Court’ will refer to the Supreme Court of the United Kingdom, unless otherwise stated, e.g. Supreme Court of the United States.
1. INTRODUCTION

By creating a separate but equal status for civil partners, did the legislature of England and Wales sound the death knell for gay marriage, in that gay couples now have the exclusive right to all the benefits and privileges of marriage and therefore cannot complain of discrimination? Is the present creation of a separate status for same-sex couples in England, whilst denying them the perceived ‘gold standard’ of civil marriage within the margin of appreciation permitted to States Parties or is it an unjustifiable breach of rights contained in the Human Rights Act 1998 (HRA)? Lawsuits demanding recognition of same-sex marriage have been increasingly brought in countries that offer marriage-like alternatives to same-sex marriage such as civil unions and domestic partnerships. How such nations and states, with such marriage-like alternatives, deal with conflict of law issues presents new rights-based arguments in favor of same-sex marriage.

In England, a marriage is void unless entered into by a man and a woman. Unless there has been a legal change of sex, then sex is

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3 Any references to England in the rest of the article include Wales.
6 But see J Carvel ‘Marriage falls to 100 –year low as more couples shun wedlock’ Guardian 28 March 2008.
9 Such arguments need to cover a wide canvas and include not only legalistic but also philosophical ones. Positivist or legalistic arguments would appear to be inseparable from wider philosophical debates when one enters the human rights arena where the Convention on Human rights is a living instrument requiring constant dynamic interpretation in a changing human rights context (See Nicholas Bamforth ‘The Role of Philosophical and Constitutional Arguments in the Same-Sex Marriage Debate: a Response to John Murphy’ (2005) Child and Family Law Quarterly 165.)
10 Section 11(c) of the Matrimonial Causes Act 1973.
still defined according to gonadal, genital and chromosomal tests.\(^\text{12}\) For gay couples exclusively, there is the option of civil partnership rather than marriage.\(^\text{13}\) The Civil Partnership Act (CPA) provides for the right to enter into a relationship with another member of the same sex, which is formed when the couple registers as civil partners of each other.\(^\text{14}\) Given the approach shown by the English court and the Government to the issue of same sex marriage,\(^\text{15}\) it might be argued that it would be more advantageous for a same-sex couple, who are seeking recognition of their ‘marriage,’ to take their case straight to the European Court of Human Rights, bypassing the Supreme Court and appeal courts in this country. There are, however, obvious dangers with the European Court of Human Rights (ECHR) allowing persons to gain rights in Strasbourg that they have been unable to obtain democratically and legislatively in their own country.\(^\text{16}\)

All relationships between same-sex partners are converted into civil partnerships in this country, regardless of the fact that they may have been regarded as marriages in the country in which they were celebrated.\(^\text{17}\) Furthermore, the ‘legal capacity’ rule in private international law holds that capacity to marry is covered by the law of each party’s country of domicile prior to the marriage.\(^\text{18}\) The


\(^{13}\) Section 3(1) of the Civil Partnership Act 2004.

\(^{14}\) Section 3(1) of the Civil Partnership Act 2004.

\(^{15}\) See the punitive costs award (all the life savings of the same sex couple) in the case of Wilkinson & Kitzinger [2007] 1 FLR 295. See too the intervention on two occasions of the English government in Schalk and Kopf v. Austria Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010. The English Government were strongly supportive of the Austrian Government’s opposition to same sex marriage (See Hansard 10 July 2008 col 843 when Lord Lester pointed out that the Government had not only confirmed its opposition to the right of such couples to marry, but had also stated that the court should not develop its case law so that same-sex partners living in an enduring family relationship were protected by Articles 8 and 14 of the Convention.)

\(^{16}\) P Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 Human Rights Law Journal 1 at p.3.


effect of this legal capacity rule is such that polygamous marriages might be recognized but not a marriage by same sex partners validly celebrated in a different jurisdiction because the jurisdiction of the parties does not permit it. Private international law does, however, permit a court to recognize or decline to recognize a marriage effected overseas for reasons of public policy.\textsuperscript{19}

In this article, the legal position with regard to same-sex marriages in England is examined with reference to private international law and the changing consensus in regard to such marriages across Europe, South Africa and Canada. Changing interpretations of Articles 8 and 12 in conjunction with Article 14 are discussed in relation to the Convention as a living instrument and the increasing recognition of each person’s right to dignity.

**11. HUMAN RIGHTS ACT 1998 AND THE ENGLISH SUPREME COURT**

Most of the rights in the European Convention on Human Rights are, as a result of the English Human Rights Act (HRA) 1998, incorporated into legislation and the HRA authorizes English courts to enforce these rights by obliging courts, firstly, to decide all cases before them compatibly with Convention rights, unless prevented from doing so by primary legislation,\textsuperscript{20} secondly, to interpret existing and future legislation in conformity with the European Convention of Human Rights whenever possible,\textsuperscript{21} and, thirdly, to take the case law of the European Court of Human Rights and the European Committee on Human Rights into account in all cases, wherever relevant.\textsuperscript{22}

The Human Rights Act 1998 (HRA) thus requires a sensitive balancing act between the models of parliamentary and constitutional democracy, aiming to protect human rights whilst respecting parliamentary legislative supremacy and providing a dialogue between Parliament and the courts.\textsuperscript{23} It is clearly not a breach of the separation of powers doctrine for a court in expounding the common law, interpreting a statute or construing a statute to discharge the role of judicial law making.\textsuperscript{24} However, there is a necessary boundary, which judges must not cross if they

\textsuperscript{19} Sottomayer v De Barros (Queen’s Proctor Intervening) (1879) LR 5 PD 94 (PDA) 104.
\textsuperscript{20} Section 6 of the Human Rights Act 1998.
\textsuperscript{21} Section 3 of the Human Rights Act 1998.
\textsuperscript{22} Section 2(1) of the Human Rights Act 1998.
\textsuperscript{23} Nicholas Bamforth ‘Same sex partnerships: Some comparative constitutional lessons’ [2007] European Human Rights Law Review 47.
\textsuperscript{24} Michael Kirby Judicial Activism (Sweet and Maxwell) 2004 54.
are to adhere to their proper function.\textsuperscript{25} If they go too far, they risk damaging their independence and authority. Where the courts are constitutionally suited to protecting Convention rights, their power of interpretation comes into play but, where they are not, they need to resort to a declaration of incompatibility. This should alert Parliament who may remedy the statute in question.

Unlike the South African Constitutional Court\textsuperscript{26} and the Canadian Supreme Court,\textsuperscript{27} the Supreme Court does not have the power in terms of the HRA to strike down or invalidate the legislation if it is not possible to interpret the legislation in conformity with Convention rights. Rather in such cases, the higher Courts can make a 'declaration of incompatibility' which has no legal effect on the legislation but puts pressure on the executive and Parliament to amend the legislation.\textsuperscript{28} Two limits are set as to the range of possible interpretations. Firstly, Convention-compatible interpretations are impossible where they require the court to contradict a fundamental feature of the statute and, secondly, such interpretations are impossible when the interpretation covers an area that is unsuited to the court.

Although the judicial arm of the House of Lords, now the Supreme Court of England and Wales\textsuperscript{29} has been sensitive to the fact that, when interpreting legislation, courts should avoid crossing the boundary from interpretation to amendment, the House of Lords has agreed on the need to avoid the primacy of linguistic concerns when determining the range of possible Convention-compatible interpretations.

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\textsuperscript{26} Minister of Home Affairs and Another v Fourie and Another 2006 3 BCLR 355 (C.C.)[102].
\textsuperscript{27} Halpern et al 10 June 2003, 65 O.R. (3d) 161.
\textsuperscript{28} Section 4.
\textsuperscript{29} In terms of the Constitutional Reform Act 2005, the legal foundation of the Supreme Court of England replaced the judicial arm of the House of Lords, but did not alter the formal powers of the Justices of the House of Lords. However, the Supreme Court is a formally independent body with its own premises and is no longer a committee of the House of Lords, housed in the Palace of Westminster. When considered in the context of the Human Rights Act 1998 (HRA), the creation of the Supreme Court arguably marks the conversion of the judicial arm of the House of Lords into a type of constitutional court adjudicating on the rights of the individual against those of the state. Making the Supreme Court independent of Parliament also arguably confers greater legitimacy on the entire judicial process with the result that it acquires both a more powerful sense of legitimacy and a more creative stance in its interpretation of its powers towards the legislature than that of the Law Lords.
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interpretations, basing their conclusion on their analyses of the HRA. However, where the court was dealing with the clearly defined statutory definition of marriage in relation to the rights of transsexuals in *Bellinger*, all of the judges agreed that it would not have been possible to find a Convention-compatible interpretation. This suggests that, in such a case, the court reaches the limit of acceptable incremental judicial legislation and to go further would be a step too far into unacceptable wide-ranging judicial legislation. In such a case, the courts may only resort to a declaration of incompatibility.

111. CIVIL PARTNERSHIP – SEPARATE BUT EQUAL?

The Civil Partnership Act 2004 mirrors most aspects of the Matrimonial Causes Act 1973 and generally a civil partnership has identical requirements, and consequences to marriage. However, there are some differences between civil partnerships and marriage, in addition to nomenclature. This secular and signature-bound

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30 *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 where Lord Nicholls argued that possible interpretations went beyond the clarification of ambiguity and described the interpretative obligation decreed by section 3 as unusual and far reaching in character and one which may even require the courts to depart from the intention of the Parliament which created the legislation to fulfil the intention of Parliament found in the HRA. Lord Steyn, agreeing that section 3(1) goes beyond mere ambiguity, held that rights can only be 'brought home' (*White Paper Rights Brought Home* para 2.8) if section 3 is the prime remedial measure and section 4 a measure of last resort (*Ghaidan* at [49]). Lord Steyn concluded that the balance was being drawn in the wrong place as the courts were approaching the interpretative task under s 3(1) in too literal and technical a way. There was disagreement both surrounding the justification for these restrictions and the criteria of a Convention-compatible interpretation and when such interpretation becomes impossible (at para [49]).

31 Section 11(c) of the Matrimonial Causes Act 1973.

32 [2003] 2 AC 467 at [40] to [43].


34 Section 4 of Human Rights Act 1998.

35 The Act makes no statement as to what a civil partnership actually entails, nor for which, if any, specific group of people it is designed to aid and nor why one should wish to embark on such a union.

36 Such as the fact that more significant weight is given to registration of such a partnership than to exchange of vows as in marriage. In addition, at present, civil partnerships by law cannot be conducted in any places of religious worship and are essentially only permitted to be secular. However there are recent proposals by Government to make the changes necessary to allow civil partnerships to be registered on religious premises (*Consultation Paper 'Civil Partnerships on religious premises: a Consultation’ March 2011 Government Equalities Office.*).
process of civil partnership suggests the entry into a contractual arrangement rather than a public exchange of vows, as in a marriage ceremony.\textsuperscript{37} In addition, at present, civil partnerships by law cannot be conducted in any places of religious worship and are essentially only permitted to be secular.\textsuperscript{38} This secular and signature-bound process of civil partnership suggests the entry into a contractual arrangement rather than a public exchange of vows, as in a marriage ceremony.\textsuperscript{39} Furthermore, the legislature appears to have contemplated in the original civil partnership legislation not only essentially secular but also possibly platonic relationships.\textsuperscript{40} Failure to consummate the relationship, a requirement for marriage\textsuperscript{41} and a ground for an annulment order, is missing from the CPA. Owing to this total absence of reference to the intimate side of the civil partnership relationship, it would appear that any two people, provided they are not within the prohibited confines of the Civil Partnership Act\textsuperscript{42} can enter a civil partnership and benefit from it.\textsuperscript{43}

The most significant difference between civil partnership and marriage is in relation to private international law and conflict of law issues, as illustrated by the case of Wilkinson & Kitzinger.\textsuperscript{44} It might have been argued that public policy grounds could have been used in Wilkinson\textsuperscript{45} to cure the lack of capacity according the law of


\textsuperscript{38} But see recent proposals by Government to make the changes necessary to allow civil partnerships to be registered on religious premises (Consultation Paper 'Civil Partnerships on religious premises: a Consultation' March 2011 Government Equalities Office.)


\textsuperscript{40} Baroness Scotland commented on the Civil Partnership Bill in the House of Lords that: '[W]e do not look into the nature of the sexual relationship that enters into the civil partnership (Hansard, Lords Debates, col. 1479 (17 November 2004). Following in this vein, dissolution on the grounds of adultery was not been included in the list of factors which indicate irretrievable breakdown.

\textsuperscript{41} Matrimonial Causes Act 1973, s. 12(a)).

\textsuperscript{42} Section 3(1)).

\textsuperscript{43} Older couples, with nothing but close friendship and companionship between them, could enter a civil partnership and benefit from exemptions from inheritance tax.

\textsuperscript{44} [2007] 1 FLR 295.

\textsuperscript{45} [2007] 1 FLR 295.
domicile, but in view of the fact that the institution of civil partnership was available, this line of argument was not sustained. Some same-sex couples (and couples previously married where one party is a transsexual recognised in terms of the Gender Recognition Act) consider the existing legal position as indefensible and discriminatory in its refusal to allow same sex marriage, especially where they have previously enjoyed the position of marital partners. In Wilkinson and Kitzinger the applicants found that offering the ‘consolation prize’ of a civil partnership to lesbians and gay men was offensive and demeaning. For Celia Wilkinson and Susan Kitzinger, an English lesbian couple married in Canada, civil partnerships represent a second rate status and not universally accepted. Many

47 The English law further discriminates against transgender persons who are forced to choose between their marriage and a change of gender. Where a spouse wishes to change his or her gender in terms of the Gender Recognition Act 2004, the law prescribes that the couple may no longer remain married if they wish to obtain a full legal change of gender with a Gender Recognition Certificate for one of the parties. In a case where such a couple raised the argument that the requirement that the couple annul their marriage was an interference with their fundamental religious beliefs, the court held that Article 9 does not regulate marriage in the religious sense and therefore the responsibility of the state under Article 9 was not engaged. The European Court concluded that it was the very historical and social value of marriage as recognised in national law, which excluded the couple, who could no longer remain married if they wished to obtain legal recognition that the party who had changed her sex was female ( Parry v United Kingdom (Application No. 42971/02 (Unreported) 28 November 2006. App No.42971/05. )This case illustrates the conflicting choice such couples face between the sanctity of their marriage or the recognition of their transsexuality in terms of the Gender Recognition Act.
48 Kees Waaldijk, ‘How the Road to Same-Sex Marriage Got Paved in the Netherlands’ in Legal Recognition of Same-Sex Partnerships; A Study of National, European and International Law, R. Wintemute and M. Andenæs (Eds.) (Hart) (Oxford-Portland Oregon) (2001), at page 450.
49 Parry v United Kingdom (Application No. 42971/02 (Unreported) 28 November 2006.
51 Paragraph 5 (submission paragraph 18).
53 In terms of Private International Law it may be argued that civil partnerships are in fact a lesser alternative, falling short of full marriage.
homosexuals feel humiliated by the difference in treatment meted out to them and many desire marriage both for symbolic and for practical reasons concerned with private international law.55

1V. CONFLICTS OF LAW

In English private international law, a marriage is formally valid when it is celebrated in accordance with the form required or recognised as sufficient by the law of the country where the marriage was celebrated.56 However, as a general rule, capacity to marry is governed by the law of each party’s ante-nuptial domicile.57 The capacity of the parties to marry may also depend upon the law of the intended matrimonial domicile of the parties.58 England, as the ante-nuptial domicile of the parties in Wilkinson59 did not permit same-sex marriage. Thus in terms of private international law, the parties were discriminated against, since, if they had been married in Canada as a heterosexual couple, their marriage would have been recognised in England.

As more legislatures choose to adopt marriage-like alternatives and to legislate in favour of same-sex marriage, this question will become increasingly significant and a survey of international and national jurisprudence on this issue will become increasingly important for the recognition of relationships and interstate travel. The private international law aspect may turn out to be dispositive on whether the court should require the state to recognize same-sex marriage. These conflicts will arise particularly among United State laws as some states decide whether or not to officially recognize same-sex marriages. Massachusetts60, Connecticut,61

54 Wilkinson & Kitzinger [2007] 1 FLR 295.
56 Rule 67 Dicey and Morris on the Conflict of Laws; see Berthiaume v Dastous [1930] A.C. 79 at 83, PC: “If a marriage is good by the laws of the country in which it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would not constitute marriage in the country of the domicile of one or other of the spouses.”
57 Rule 68.
58 Lawrence v Lawrence [1985] 2 All E.R. 733 at para [737c]; para [742a].
60 Goodridge v. Department of Public Health, 798 N.E.2d 941 (4-3) (2003) held that the Massachusetts Constitution required equal access to marriage for same-sex couples and on 3 Feb 2004 that civil unions are not an adequate substitute (In re Opinions of the Justices of the Senate 802 N.E. 2d 565 (4-3)).
61 Kerrigan v. Department of Public Health, 289 Conn. 135 (2008), the
Iowa, New Hampshire, Vermont and the District of Columbia have legalized same-sex marriage. The Supreme Court of California allowed same-sex couples to marry in California from 16 June to 4 November 2008 when 52% of the voters supported an amendment to the Californian Constitution (Proposition 8). In Goodridge the Massachusetts Court made it clear in its advisory opinion to the Senate, with regard to the two different institutions of marriage and civil partnership, that ‘separate’ is rarely, if ever, equal and that the dissimilitude between the terms civil marriage and civil union reflected a clear assignment of same-sex couples to second-class status. Goodridge had to determine not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens and withhold from that class the right to participate in the institution of civil marriage along with its tangible and intangible benefits. In Varnum v Brien the Supreme Court of Iowa held unanimously that constitutional principles required that the state recognize both opposite-sex and same-sex civil marriage.

The Full Faith and Credit Clause of the United States Constitution provides that ‘full faith and credit’ shall be given in each state to the

Connecticut Supreme Court held that it was unconstitutional to deny same-sex couples the right to marry. In a decision officially released on October 28, 2008 the Connecticut Supreme Court held, by a 4-3 margin, that the state constitution’s Equal Protection Clause prohibits the state from denying same-sex couples the right to marry. In reaching this conclusion, the majority (Justices Palmer, Katz, Norcott, and Harper) held that classifying people based on their sexual orientation triggers heightened judicial scrutiny and requires the government to prove that the challenged classification serves important governmental objectives and the discriminatory means employed are substantially related to those objectives. In its view, the government did not meet its burden and thus the plaintiffs were entitled to judgment as a matter of law.

63 Repeal is likely to occur by November 2012 because support for the exclusion of same-sex couples from marriage fell from 61% in 2000 to 52% in 2008 in the referendum on proposition 8.
64 798 N.E.2d 941 (2004).
66 No. 07–1499 Filed April 3, 2009.
public acts, records, and judicial proceedings of every other state. Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect of this. The Supreme Court of the United States has recognised a public policy exception to the Full Faith and Credit Clause. However, this public policy exception is applied differently for state judgments as compared to state laws. In cases of judgements of another state, the Supreme Court has stated that there may be exceptions to the enforcement and jurisdiction of those judgments but, unlike with legislation of another state, there is no public policy exception of the Full Faith and Credit Clause for judgments. After the 1996 Defense of Marriage Act (DOMA) 39 states passed laws defining marriage as consisting solely of opposite–sex couples. Many of these states also explicitly prohibited their own states from recognising same-sex marriages performed in other states and countries. The Supreme Court of the United States has not ruled on how these laws are affected by the Full Faith and Credit Clause. Those who favor same-sex marriages can powerfully argue that the public policy exception can only justify the invalidation of a same-sex marriage if the state has a legitimate interest in discouraging and punishing homosexuality.

If one examines the public policy exception in relation to standard conflict of law principles, it is clear that procreation, childrearing, paternalism, and homophobia have been considered by some United States’ courts and legislatures to be sufficiently strong state interests in prohibiting same-sex marriage. All of these reasons are generally unconstitutional but the courts will probably

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68 See Article 1V, section 1 of the United Stated Constitution.
72 Lynn D. Wardle, "Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution’ (2010) 58 Drake L. Rev. 951-1103 where he attempts to explain why the provision of DOMA that forbids recognition of same-sex marriage in federal law is constitutional - an issue that has become quite controversial since the U.S. Attorney General and President announced that they would no longer defend this provision.
73 For example, the First Amendment protects the freedom of association of gay men and lesbians by preventing states from placing restrictions on the formation of gay and lesbian organizations or businesses that cater to lesbians and gay men. Perhaps a marriage celebrated under the law of one of the states clothes even a same-sex couple in privacy and equal protection rights, since marriage is one of the most constitutionally protected forms of association, and since the federal Constitution lacks a means for determining which states' marriages are worthy of
continue to apply a confusing conglomeration of conflicts law to determine which state’s law governs, which will result in a lack of uniformity in state marriage laws for the future. The Constitution limits the extent to which a state may seek to discourage homosexuality - a Federal Appeals court has held that the Full Faith and Credit clause does require states to recognise adoption by same-sex couples that has been finalised in another state.74 Arguably, once one state has granted the couple the protection of marriage, no other state could impose hostile regulation on the basis of the homosexual relationship embodied in the marriage.75 Thus, any state policy of punishing homosexuality would be impermissible as applied to lawfully married same-sex couples and the state could not retroactively apply its prohibition of same-sex marriages to a couple validly married in another state. If the policy against homosexuality cannot be advanced without violating the couple’s constitutional rights, then the public policy exception cannot apply, and the state must recognize the out-of-state same-sex marriage. In the event that a state or private party invokes the public policy exception to void a same-sex marriage, the outcome will turn on the strength of the state’s policy against same-sex marriage and homosexuality in general. The party asserting the validity of the same-sex marriage might rely on a state constitutional guarantee of privacy, as evidence that the state does not in fact have a strong policy against homosexuality. The threshold would appear to be high for those attempting to demonstrate public policy strong enough to warrant invalidation of a marriage.

V. ARTICLE 12 OF THE ECHR AND ARTICLE 9 OF THE CHARTER

A. Marriage as the ‘gold standard’

constitutional protection. This might preclude a state from punishing homosexuality at the expense of a legally married couple’s constitutional rights.

74 See Finstuen v Crutcher (10th Cir.2007).
Does marriage have sanctity and does it still represent the 'gold standard' of lifestyles in the twenty-first century? What is the sociological effect of the exclusion of a traditionally stigmatised group (even when this group has the tangible benefits of the relationship by means of civil partnership legislation)? Whilst marriage is perceived in some quarters as a bastion of heterosexual privilege and declining in popularity amongst heterosexual couples, some gay and transsexual couples value marriage both symbolically and as an institution.

B. Marriage as an Essential Right

Whilst providing that men and woman of marriageable age have the right to marry and to found a family, Article 12 has been qualified by the fact that this right is to be exercised according to the national laws. Widely recognized limitations such as capacity, consanguinity, consent and the prevention of bigamy are usually held to be compatible with the Convention. However, the limitation must not restrict or reduce the right so that the 'very essence of the right' is impaired. Although there are further difficulties trying to bring such a claim within the ambit of the right to marry (Article 12), there are judicial statements which indicate that the same-sex relationship is 'marriage-like'. On this basis, restricting the very essence of the relationship between homosexual couples could be held to be within the ambit of Article 12. Furthermore, in R (Balai) v Secretary of State for the Home Department, the Court of Appeal emphasized that the last words of article 12 do not constitute a general power to derogate from its terms on the

76 Rosemary Auchmuty 'What’s so Special about Marriage? The Impact of Wilkinson v Kitzinger' [2008] CFLQ 475.
77 Social Trends 40 [2010].
78 In the Netherlands, before the legalisation of gay marriage in 2001, a survey was commissioned by the Ministry of Justice, aimed at couples who had utilised the Registered Partnership legislation which found that 80 per cent of same-sex partners who had entered into registered partnerships would have chosen marriage, if the option had been available to them. A further 62 per cent would have liked to convert their partnerships into marriages- should that option become available. Most respondents’ reasoning in favour of marriage was that ‘full equality’ would result from the conversion and that ‘marriage has more significance’ than a Registered Partnership (Y Scherf, Registered Partnerships in the Netherlands. A Quick Scan (Amsterdam, Van Dijk, Von Someren en Partners, 1999))
80 Rees v UK 9 EHRR 56.
82 [2007] EWCA Civ 478.
grounds of public interest, in the manner of article 8(2). Article 12 is directed at a specific and limited social situation and is a significant and fundamental right, of the sort that the courts must be vigilant to protect. Given the importance of the right protected by Article 12, careful scrutiny is required of any interference with it, even where that interference is based on a matter of broad social policy.\textsuperscript{83}

\section*{C. Marriage - link to Procreation?}

In \textit{Goodwin},\textsuperscript{84} the European Court of Human Rights had rejected as justifications both absence of procreative capacity, and the fact that Ms. Goodwin was legally male and able to marry a woman, holding that Art. 12 secures the fundamental right of a man and woman to marry and to found a family: the second aspect of the right was not a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as \textit{per se} removing their right to marry. Following on \textit{Goodwin},\textsuperscript{85} \textit{Ghaidan v Godin-Mendoza},\textsuperscript{86} held that the possibility of parenthood or the presence of children in the home was not a precondition of succession to a tenancy under the Rent Act 1977, and that it should not be used as a ground to distinguish between heterosexual and homosexual couples.\textsuperscript{87} Baroness Hale pointed out that both homosexual and heterosexual couples may bring up children together.\textsuperscript{88} Furthermore, there is no limit on the age parties may marry: many marriages are celebrated after the childbearing capacity of the bridal couple has ceased: the capacity to bear children has never been a prerequisite of a valid marriage in English law.\textsuperscript{89} The assertion\textsuperscript{90} that marriage was by definition and acceptance a formal relationship between a man and a woman primarily (though not exclusively) with the aim of producing and rearing children disregards the fact that the interpretation of the European Court of Human Rights of Article 12 in \textit{Goodwin}\textsuperscript{91} allows for the recognition of marriages contracted between parties who cannot procreate. Procreation has not been an essential prerequisite for a valid marriage in England for many years.\textsuperscript{92}

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\textsuperscript{83} [2008] UKHL 53, [15], per Lord Bingham and [46] per Baroness Hale.
\textsuperscript{84} \textit{Goodwin v United Kingdom} (Application No. 28957/95) (2002) 35 EHRR 18.
\textsuperscript{85} (2002) 35 EHRR 18.
\textsuperscript{86} [2004] UKHL 30.
\textsuperscript{87} [2004] UKHL 30 (paragraphs 16-17).
\textsuperscript{88} [2004] UKHL 30; [2004] 2 AC 557 at para [141].
\textsuperscript{89} [2004] UKHL 30; [2004] 2 AC 557 at para [141].
\textsuperscript{90} \textit{Wilkinson v. Kitzinger} [2007] 1 FLR 295, at para [61].
\textsuperscript{91} Application No. 28957/95) (2002) 35 EHRR 18, at para 98.
\textsuperscript{92} \textit{Baxter v. Baxter} [1948] AC 274; \textit{Parry v United Kingdom} (Application
However, this argument was refuted by Potter P who held that the court in *Goodwin*\textsuperscript{93} took only an incremental step in widening the breadth of the right to marry because, although its reasoning no longer requires that the parties are of opposite biological genders at the time of entering into a marriage, their relationship must still be a sexually dimorphic one. Permitting transsexuals to marry in their reassigned gender was clearly regarded by Potter P as significantly different to sanctioning same-sex marriage.

### E. Lack of European Consensus on Article 12

There would appear to be little or no European consensus regarding same-sex marriage. As a result, *Goodwin*,\textsuperscript{94} (in which the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender), does not apply. Moreover, *Goodwin*\textsuperscript{95} was concerned with the marriage of partners who were of different gender, if gender is defined not by purely biological criteria but by taking other factors into account, including gender reassignment of one of the partners. In *Schalk*,\textsuperscript{96} the First Section Chamber correctly found that neither Article 12 of the Convention nor Article 9 of the Charter imposed an obligation on the Austrian Government to grant a same-sex couple access to marriage, especially as the couple had the alternative of a registered partnership which bestowed similar rights to marriage. The applicants conceded that the difference between *Goodwin*\textsuperscript{97} and their case was determined by the state of European consensus. However, they argued that, in the absence of any objective and rational justification for the difference in treatment, considerably less weight should be attached to European consensus.\textsuperscript{98}

Considering the comparison between Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union (the Charter), it was noted that the Charter had deliberately dropped the reference to ‘men and women’ and that the

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No. 42971/02 (Unreported) 28 November 2006.


98 Reference was made to judgments from the Constitutional Court of South Africa, the Courts of Appeal of Ontario and British Columbia in Canada, and the Supreme Courts of California, Connecticut, Iowa and Massachusetts in the United States, which had found that denying same sex couples access to civil marriage was discriminatory.
commentary to the Charter, which became legally binding in December 2009, confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to individual States. However, the Court reiterated that it would not rush to substitute its own judgment in place of that of the national authorities, who were best placed to assess and respond to the needs of society.

In the light of this recent European jurisprudence, it would not be possible at present for an English court to find a breach of Article 12 standing alone. Since Article 12 is not widely interpreted by the European states to include the right of men and women of marriageable age to marry other men or other women and with this lack of European consensus, the First Section Chamber was at liberty to make this decision.

F. Article 12 read with Article 14

When Article 12 is read in the context of Article 14, the human rights’ aspect alters. In order for an issue to arise under Article 14, there must be a difference in treatment of persons in relevantly similar situations. In Wilkinson and Kitzinger, Sir Mark Potter held that whilst the right to marry in article 12 meant marriage in its traditional, heterosexual sense, article 12 was not engaged on its own but, for the purposes of Article 14, it was engaged since there was a difference in treatment of same-sex and opposite sexual couples in relation to their ability to marry. He was required therefore to consider whether the discrimination against same-sex couples in this regard was justified in pursing a legitimate aim, with necessary and proportionate means chosen to achieve that goal. He held that it was proportionate to create an entirely separate institution such as civil partnership which was ‘marriage in all but name’ in order to protect the traditional heterosexual family and

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99 [2010] EHRR 995 para [60].
103 Ibid at para [88].
that this met the rigorous standard required for the justification of
difference in treatment based on sexual orientation alone.\textsuperscript{104}

In the same way, the First Section Chamber in \textit{Schalk} accepted that
same-sex couples were just as capable as opposite-sex couples of
entering into stable, committed relationships, so that they were ‘in
a relevantly similar situation [for Article 14 purposes] to a different-
sex couple as regards their need for legal recognition and protection
of their relationship’.\textsuperscript{105} However, the First Chamber found itself
constrained by the ‘margin of appreciation’ doctrine and was wary
of going too far ahead of European consensus on this issue.\textsuperscript{106}
As a national court, \textit{Wilkinson}\textsuperscript{107} did not need to be constrained by
the ‘margin of appreciation.’ It is doubtful whether the reasons
advanced were justifiable or legitimate or even public policy in
these circumstances. In \textit{Ghaidan v Mendoza}\textsuperscript{108} Baroness Hale had
interpreted ‘protection of the traditional family’ as mentioned in
\textit{Karner v Austria}\textsuperscript{109} as a possible justification for the encouragement
of people to form traditional families and the discouragement of
people from forming others, but pointed out that it did not protect
the traditional family to grant it a benefit denied to those who could
not or would not become such a family. On appeal the Supreme
Court could well overrule \textit{Wilkinson & Kitzinger}\textsuperscript{110} on these grounds
and on the inapplicability of the margin of appreciation in this
domestic jurisprudence.

\section*{V1. ARTICLE 8 OF ECHR}

\textbf{A. Same Sex couples and their right to a home}

The majority of successful complaints brought before the European
Court on grounds of sexual orientation relate to violation of Article 8
(right to respect for private life, family life, home and
correspondence.)\textsuperscript{111} In \textit{Karner v. Austria},\textsuperscript{112} the European Court

\begin{thebibliography}{99}
\bibitem{104} \textit{Ghaidan v Mendoza} [2004] 2 AC 557 at 608, per Baroness Hale.
\bibitem{105} [2010] ECHR at para [99].
\bibitem{106} Ibid at para [105].
\bibitem{107} [2007] 1 FLR 295.
\bibitem{108} [2004] UKHL 30; [2004] 2 FLR 600 at para [143].
\bibitem{109} (Application No. 40016/98) [2003] 2 FLR 623.
\bibitem{110} [2007] 1 FLR 295.
\bibitem{111} See Irish High Court case of \textit{McD v. L} Unreported, Highh Court, 16
April 2008, at p. 17. Hedigan J held that where a lesbian couple live
together in a long term committed relationship of mutual support
involving close ties of a personal nature which, were it a heterosexual
relationship, would be regarded as a \textit{de facto} family, they must be
regarded as themselves constituting a \textit{de facto} family enjoying rights as
such under Article 8. This decision was last year overruled by Ireland’s

held that where domestic legislation allows an opposite-sex partner yet precludes a same-sex partner from succeeding to a tenancy, it will be in breach of Articles 8 and 14 of the European Convention on the grounds that it constitutes an interference with a homosexual individual's right to respect for his *home* under Article 8 on the grounds of sexual orientation, which is contrary to the non-discrimination provision contained in Article 14.\textsuperscript{113} The Court stressed that 'differences based on sexual orientation require particularly serious reasons by way of justification' and that States had only a narrow margin of appreciation in this context. However, the Court also held that 'protection of the family in the traditional sense' was a legitimate reason which might justify a difference in treatment' in appropriate circumstances.

In the aftermath of this decision, in *Ghaidan v. Mendoza*\textsuperscript{114} the House of Lords interpreted Schedule 1 of the Rent Act 1977 as embracing both a same-sex and an opposite-sex partner's right to succeed to a tenancy in order to bring the statute in line with the UK's obligations under the Convention.\textsuperscript{115} The aim of discouraging homosexual relationships was clearly found to be inconsistent with respect for private life under Article 8.

**B. Same Sex couples and their right to private and family life**

In *Fretté v France*\textsuperscript{116} the European Court had ruled that the applicant's 'avowed homosexuality' was the decisive factor in

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Supreme Court which held that the Irish Constitution does not recognize that a lesbian couple with a child constitutes a "family," and there is no recognition of a fabricated "de facto family" (either homosexual or unmarried heterosexual) in Irish law. Convention on Human Rights jurisprudence, given that the European Court has yet to find that same-sex partnerships fall within Article 8 of the Convention. This decision may be distinguished from the position in England and Wales where there is no entrenched constitutional definition of marriage.

\textsuperscript{112} Karner v. Austria Application No. 40016/98) [2003] 2 FLR 623.

\textsuperscript{113} Karner argued that the Austrian government's refusal to allow him to succeed to his deceased partner's tenancy was in breach of his individual 'right to respect for ... his home' under Article 8.


\textsuperscript{116} Fretté v. France, no. 36515/97, ECHR 2002-I. See Paul Johnson 'An essentially private manifestation of human personality': constructions of homosexuality in the European Court of Human Rights *Human Rights Law Review* 2010, 10(1), 67-97 who points out that the European Court tends to emphasise the formal distinction between the rights associated with
determining the rejection of a homosexual applicant from the adoption process. Yet, in considering the ‘delicate issue’ of whether the grounds for this rejection were proportionate, the ECHR ruled that because it pursued a legitimate and necessary aim, and, due to the absence of a European consensus on adoption by homosexual parents, there was no violation of Articles 8 and 14. However, in *E.B. v France*, the Court upheld Ms E.B.’s complaint that refusing an application to adopt based on a consideration of the applicant’s sexual orientation amounts to unacceptable discrimination under Article 14 taken in conjunction with Article 8. *E.B.* undoubtedly addressed the interrelationship between the ‘private’ and ‘family’ rights guaranteed by Article 8 and, in doing so, widened the scope in respect of homosexuality. In upholding the applicant’s claim that she had a right not to be discriminated against on the basis of her sexual orientation, the ECHR recognized that this right applies not simply to ‘privacy’ in the narrow sense, but to the wider sphere of ‘family life’ that Article 8 protects.

In *Schalk and Kopf v Austria*, the First Section Chamber of the ECHR accepted that it was undisputed in this case that the relationship of a same-sex couple fell within the notion of “private life” within the meaning of Article 8. In addressing the issue of whether their relationship also constitutes “family life,” the First Section held that the notion of family under this provision is not

private sexual practice and the rights associated with institutional participation.

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119 Although there was significant disagreement in the Court as to whether *E.B* (Application No. 43546/02) (Unreported), 22 January 2008) overturns Fretté given the different grounds for the complaints.


121 C.f. M v. Secretary of State for Work and Pensions ([2006] 2 AC 91, at para [13]) where the majority of the House of Lords found that a difference in treatment between unmarried same-sex couples and unmarried opposite sex couples could not be challenged under Article 14 of European Convention on Human Rights because it did not fall ‘within the ambit’ of another Convention right. Baroness Hale (dissenting) was in no doubt that family life was established between the mother, father and their child and did not come to an end when the parents separated and should continue to exist even when parents and children are apart.

confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock 123 and considered that, in view of the social changes which have taken place since 2001, it was artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. 124

The First Section Chamber of the Court recognised that, on the one hand, the European Court has held repeatedly that differences based on sexual orientation require particularly serious reasons by way of justification. 125 On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.

A national or domestic or state court of appeal in these circumstances would not need to be constrained by the conservative approach of the majority of the court in Schalk and would therefore be able to find in favor of a same sex couple’s right to marriage. The dissenting judgment in Schalk & Kopf 126 is a significant indicator of changing interpretations of Article 8 when read in conjunction with Article 14. 127 In all cases, domestic courts should be required to show that the aim was legitimate and the means

123 Elsholz v. Germany [GC], no. 25735/94, ECHR 2000-VIII; Keegan v. Ireland, 26 May 1994, Series A no. 290. A child born out of such a relationship is ipso jure part of that “family” unit from the moment and by the very fact of his birth.

124 Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, fell within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

125 See Karner v Austria Application No. 40016/98) [2003] 2 FLR 623.

126 Schalk and Kopf v Austria Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010 at Paragraph 99

127 The dissenting judges held that it was only in the event that the national authorities offered grounds for justification that the Court could be satisfied, taking into account the presence or the absence of a common approach, that they were better placed than the European Court to deal effectively with the matter. Consequently, in the view of the dissenting judges, there had been a violation of Article 14 in conjunction with Article 8 of the Convention.
proportionate. The approach of the dissenting judges is more convincing, especially in terms of private international law where the marriage has already been validated. These dissenting judgments could be of some comparative use to other domestic courts in deciding whether it is legitimate to outlaw recognition of same-sex marriage validated by another state.

V11. MARGIN OF APPRECIATION

This term implies that, by reason of their direct and continuous contact with their countries, State Parties are in a better position than the international judges to give an opinion on the exact content of the requirements of Convention rights, as well as on the necessity of a restriction or penalty intended to meet them. Where the law and practice differ widely among the Contracting States, individual countries will, as a result, be afforded a wider margin of appreciation by the European Court of Human Rights. However, the margin of appreciation should not be confused with the discretionary area, which is the freedom of action open to institutions such as Parliament, or state legislatures in North America. The margin focuses on the consensus, which prevails in Convention signatory States and is not concerned with the position in an individual Convention State.

Although from the 1990s the possibility of a harmonisation and liberalisation of family law in Europe became more positive, the body of European family law (like the United States’ jurisprudence) is acknowledged to be largely incoherent on the issue of same sex marriage, developed through the European Convention on Human Rights, the Charter, EU legislation and the jurisprudence of the European Court of Human Rights and the European Court of Justice. The discretion given to Contracting States reflects the assumption that they are best placed to assess the needs of society and to prescribe the regulatory framework and requisite formalities for marriage within their own country – a type of ‘cultural constraints

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argument’\textsuperscript{132} – but justification is always needed to show that the means used are proportionate and the measure necessary to achieve the aim.

Unfortunately, in \textit{Schalk and Kopf}, there was very little discussion about the proportionality of the measures concerning marriage during the Chamber's assessment of whether the exclusion of same-sex couples from marriage was justifiable.\textsuperscript{133} The majority judgment focused rather on the 'margin of appreciation' and emerging 'social consensus' within the States Parties.\textsuperscript{134} However, the judges did not deny that Article 12 might in some circumstances be applicable to a claim by same-sex partners. The majority of the First Chamber acknowledged that the scope of the 'margin' varied according to the circumstances, the subject matter and its background.\textsuperscript{135} However, while previous cases made it clear that differences of treatment based on sexual orientation required particularly serious reasons by way of justification, the First Section Chamber concluded that a wide 'margin' was allowed in relation to general matters of economic or social strategy and therefore this decision on same sex marriage was considered to be within that wide margin.\textsuperscript{136}

Domestically, in the event of an appeal to the Supreme Court, issues such as the margin of appreciation should not arise. The matter will fall within the discretionary area of consideration and the court would need to assess the matter simply in terms of a possible violation of human rights and public policy. Once the Supreme Court finds a violation which was neither justifiable\textsuperscript{137} nor

\textsuperscript{132} Masha Antokolshaia, ‘Harmonisation of Substantive Family Law in Europe: Myths and Reality’ [2010] 22 \textit{Child and Family Law Quarterly} 397 at 401. Antokolshaia argues convincingly that the main assumptions of this argument (based on the fact that laws are ingrained in the culture of a country and each county has its own particular national culture which is unique are based on incorrect assumptions.)

\textsuperscript{133} [2010] ECHR 995 para [91].

\textsuperscript{134} [2010] ECHR 995 para [92].

\textsuperscript{135} Ibid para [98].

\textsuperscript{136} Ibid at para [94].

\textsuperscript{137} It is always arguable that in religious terms, such discrimination in marriage in justifiable. Marriage is deeply embedded in the religious culture of England. For many organized religions, marriage is a traditional, normative heterosexual institution: it is impossible to divorce the institution of marriage entirely from its religious roots in this country (\textit{Bellinger v Bellinger} [2003] AC467 at 480; see too \textit{Wilkinson & Kitzinger} [2007] 1 FLR 295 at para [45]) However, the lack of European consensus on this issue has not prevented many Christian countries from allowing same sex marriage such as Catholic Spain, Portugal and Belgium and Lutheran Norway, Sweden and Iceland.
legitimate, it may make a declaration of incompatibility without needing to consider the margin of appreciation permitted to individual states.

**V111. THE CONVENTION AS A LIVING INSTRUMENT**

Over the past thirty years, as the European Convention has been interpreted in relation to contemporary social relationships, Strasbourg jurisprudence has indicated that the Convention is to be used by the court a ‘living instrument’ that should become subject to reinterpretation in the light of present day conditions. Describing itself as the ‘conscience of Europe’, it has been perceived as actively engaged in molding the view of ‘present-day conditions.’ In this vein, there is a growing consensus in European and other democratic societies that same-sex couples must be provided with some means of qualifying for rights or benefits.

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138 Many opponents of legalizing same-sex marriage in England have made no secret of the fact that their opposition is rooted in the belief that their religion prohibits it (*Hansard* (Lords) 17 November 2004, Col 1462; see too ‘Bishop Rebukes Growing Threat to Britain’s Christian Identity’ *Christian Today* 13 November 2011). This religion-based opposition takes two basic forms. Firstly, it might be argued by such groups that intimate same-sex relationships are inherently unnatural and that the legalization of same-sex marriage wrongly recognizes such relationships. The General Assembly of the United Reform Church adopted in 2007 a ‘commitment’ to remain and work together despite recognizing that there is a wide range of convictions on human sexuality leading to the view that some people are called by God into intimate committed loving same-sex committed relationships *Report to Assembly 2007* and Resolution 44. The congregation strand in the polity of the United Reformed Church means that decisions reflecting such a view will not necessarily be taken at the national as opposed to the local church level. A second argument focuses on the impact of legalizing same-sex marriage on religious individuals and institutions and maintains that legalization is incompatible with respect for such individuals’ and institutions' religious liberty.

139 Parliament has the freedom to ignore such a declaration, but the attitude of the Coalition Government towards same-sex civil marriage suggests that this would be unlikely:’ (http://www.telegraph.co.uk/news/politics/liberaldemocrats/8016642/Liberal-Democrat-Conference-party-backs-same-sex-marriage.html accessed on 8 May 2011) and see ‘David Cameron backs same-sex marriage at http://www.christian.org.uk/news/david-cameron-backs-same-sex-marriage/ accessed on 9 May 2011.

140 See *Tyrer v UK* Ref A 26 1978; 2 EHR 1 at para.31. The First Chamber in *Schalk* failed to refer to the fact that the European Court has repeatedly pointed out that the Convention has to be interpreted and applied in the light of current circumstances.

attached to marriage: thus far Belgium, Norway, South Africa, Spain, Argentina, Iceland, six of the Northern American states, Canada, the Netherlands and Sweden\textsuperscript{142} have introduced same sex marriage, which indicates a developing trend towards lifting the ban both in and outside contracting States.\textsuperscript{143}

1X. THE RIGHT TO DIGNITY

The essence of the European Convention is respect for human dignity and freedom.\textsuperscript{144} Human dignity is an increasingly significant concept in many European constitutions and enshrined in the European Union Charter of Rights and the Lisbon Treaty, and developed by the European Court of Justice and the European Court of Human Rights. Claims to give same sex couples rights on a par with heterosexual couples have tended to be expressed in the language of equality.\textsuperscript{145} Equality arguments depend on recognition of each person’s right to autonomy and dignity.\textsuperscript{146} Dignity rests on the recognition that each person has the right to be treated as of equal value to another and to be respected in terms of his or her

\textsuperscript{142} In 2009, Sweden did so through legislative change to the Marriage Code to include two persons who enter into marriage. Even though same sex couples had been put into almost the same legal position as opposite couples, the question of opposite sex marriage was a source of diverse opinions. One of the core difficulties was the right to solemnise legal binding marriage, which was bestowed upon most religious communities. The right of religious communities to perform binding marriage has been retained and it is left to the communities to decide whether they wish to marry a couple or not.

\textsuperscript{143} In South Africa, the Constitutional Court (\textit{Minister of Home Affairs and Another v. Fourie and Another} 2006 3 BCLR 355) was required to interpret Article 16 (1) of the Universal Declaration on Human Rights. In a Court that was unanimous on all matters except as to the remedy, Justice Sachs, relying on the express protection of sexual orientation under the South African Constitution (Chapter 2, section 9 of Act 96 of 1994) held that South Africa has a multitude of family formations that are evolving rapidly as society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The Court was interpreting the Constitution as a living document.

\textsuperscript{144} See \textit{SW v UK} (1996) 21 EHRR 363; \textit{Pretty v UK} 2002 35 EHRR 1, 37 Para 35.


\textsuperscript{146} See Nicholas Bamforth ‘The Role of Philosophical and Constitutional Arguments in the Same-Sex Marriage Debate: a Response to John Murphy’ (2005) \textit{Child and Family Law Quarterly} 165.)
rights to caring relationships.\textsuperscript{147} The Ontario Court of Appeal in \textit{Halpern}\textsuperscript{148} held that gay and lesbian exclusion from the right to marry perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships and offends the dignity of persons in same-sex relationships.\textsuperscript{149} In \textit{Halpern}\textsuperscript{150} marriage was perceived as a legal institution, as well as a religious and a social institution, one of the most significant forms of personal relationships through which individuals can publicly express their love and commitment to each other and through which society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple.\textsuperscript{151} Marriage was portrayed as reflecting society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships, enhancing an individual’s sense of self-worth and dignity.\textsuperscript{152}

In the South African Constitutional Court in \textit{Minister of Home Affairs v Fourie},\textsuperscript{153} the Court, interpreting the Constitution\textsuperscript{154} (which recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected) held that to deny gays and lesbians the right to marry was to convey the message that gays and lesbians lacked the inherent humanity to have their family lives respected and was an invasion of their dignity. The Court held that, if heterosexual couples had the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples.\textsuperscript{155}

In the United States, the Supreme Judicial Court of Massachusetts, in \textit{Goodridge},\textsuperscript{156} held that the Massachusetts Constitution supported the dignity and equality of all individuals and forbade the creation of second-class citizens. The court recognised that marriage was a social institution of the greatest importance and without the right of

\textsuperscript{147} See \textit{Minister of Home Affairs v Fourie} 2006 1 SA 523 (CC) at [50].
\textsuperscript{148} 10 June 2003, 65 O.R. (3d) 161.
\textsuperscript{149} \textit{Law v. Canada (Minister of Employment and Immigration)} [1999] 1 S.C.R. 497 at 530.
\textsuperscript{150} 10 June 2003, 65 O.R. (3d) 161 at para [5].
\textsuperscript{151} Ibid at para [71].
\textsuperscript{152} Ibid at para [5].
\textsuperscript{153} 2006 3 BCLR 355 (C.C).
\textsuperscript{154} Section 10.
\textsuperscript{155} \textit{Minister of Home Affairs v. Fourie, Lesbian & Gay Equality Project} 2006 3 BCLR 355 (C.C). Sexual orientation was a ground expressly listed in the South African Constitution (section 9(3) and discrimination was unfair unless the contrary was established.
\textsuperscript{156} 798 N.E.2d 941 (2004).
choice in whom to marry, a person was excluded from the full range of human experience and human dignity.

X. CONCLUSION

Does ‘marriage’ offer and connote a symbolic significance that civil partnership lacks? If the title of marriage is not symbolic, then refusal of that title is not discriminatory, provided one has the benefits and advantages in terms of another title. Whether refusal of marriage to homosexual couples\(^{157}\) is discriminatory or not largely depends on which concept of marriage is adopted. At one end of the spectrum is the belief\(^ {158}\) that there is nothing special or particularly symbolic about marriage. At the other end, are the submissions of Celia Kitzinger and Susan Wilkinson that marriage represents the ‘gold standard.’\(^ {159}\) If it is accepted that marriage possesses symbolic value in our society, then refusal of that title is clearly discriminatory. Marriage has the connotations of recognition, security, permanence, duration, stability, interdependence, love, caring, sharing, commitment and support. It is for these implications that marriage is highly valued by society.\(^ {160}\) Even Auchmuty acknowledges that simply because they are different, civil partnerships are unlikely to be seen as truly ‘equal’ to marriage.\(^ {161}\)

In the United States, Marshall CJ stated in Goodridge\(^ {162}\) that, where an important constitutional right such as equal access to marriage was at stake, judicial deference was not an appropriate response from the courts. The court found that the distinction between civil marriage and civil unions assigned same-sex couples to second-class status. In 2005, South Africa’s Constitutional Court concluded that the remaining statutory obstacle to marriage for same-sex couples was discriminatory and that the concept of ‘separate but equal’ served as a threadbare cloak for covering distaste for the

\(^{159}\) Wilkinson v Kitzinger [2007] 1 FLR 295.
\(^{162}\) 798 N.E.2d 941 (2004).
group subjected to segregation. Some grounds of discrimination, including sexual orientation, are more serious than others and a higher burden has to be met before such discrimination can be justified in terms of Article 14.

In respect of Article 8, the European jurisprudence is now conclusive that same sex couples fall within the ambit of family life. Furthermore, the European Court has held that ‘private life’ is ‘a concept which covers the physical and moral integrity of the person, including his or her sexual life’ and that there must be ‘particularly serious reasons’ for a state to interfere with matters of sexuality. Reliance on a historically exclusionary definition of marriage cannot meet the standard required to justify a difference in treatment based on sexual orientation alone. The ban on same-sex marriage and the creation of a parallel institution that bestows the same rights and privileges is prima facie discriminatory in terms of Article 8 and Article 14 and particularly from the perspective of private international law. The refusal to recognize same-sex marriage validated in another state in these circumstances cannot be held to be a legitimate or proportionate aim. The approach of the Supreme Court could justifiably be to find that the exclusion of same-sex couples from marriage and opposite-sex couples from civil partnerships incompatible with rights under article 14 taking

165 Schalk and Kopf v Austria Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010.
166 Pretty v UK (2002) 35 EHRR 1, 37, para 65.
167 If marriage were to be made available to same-sex couples in England, issues such as the use of church buildings and the services of an authorised persons and the registration of marriages by authorised persons would need to be considered in relation to the Equality Act 2010, which contains no general exemption, although there is such an exemption clause in the Civil Partnership Act (section 6 (3A)). Schedule 23 of the Equality Act would determine the use of premises, provided that exemption from compliance with same sex marriage is deemed necessary to comply with the religious conviction of a significant number of the religious followers (para 2(7) and 9(a) of the Equality Act). An authorised person declining to perform or officiate at a same sex marriage would also be immune under Schedule 23 and orthodox Jews would be immune, if opposed to same sex marriage. Thus, generally individuals in the Church could use their faith as a reason to avoid being involved in the celebration of a union to which they were religiously opposed (article 7 of ECHR). However, where couple have been validly married in other jurisdictions, these issues will not arise and the church need not be involved at all.
168 Matrimonial Causes Act 1973 section 11(c).
169 Civil Partnership Act 2004 section 1(1)(b), Part 5, chapter 2.
in conjunction with articles 8 and 12. Furthermore, exclusion of those same-sex couples who have legitimately been allowed to marry in another jurisdiction may be argued to be against public policy.\(^\text{170}\) This approach to this issue, particularly by the newly constituted Supreme Court, would appear to be a legitimate judicial response and in line with the Human Rights Act 1998, European jurisprudence and private international law.\(^\text{171}\)


\(^{171}\) Parliament is, of course free to ignore such a declaration, but the attitude of the Coalition Government towards same-sex civil marriage suggests that this would be unlikely:’ (http://www.telegraph.co.uk/news/politics/liberaldemocrats/8016642/Liberal-Democrat-Conference-party-backs-same-sex-marriage.html accessed on 8 May 2011) and see ‘David Cameron backs same-sex marriage at http://www.christian.org.uk/news/david-cameron-backs-same-sex-marriage/ accessed on 9 May 2011.