

SEXUAL ORIENTATION AND FAMILY LAW

by

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PART I: INTRODUCTION

Introductory

On 29th March 2000 the Scottish Parliament passed its fifth piece of legislation, the Adults with Incapacities (Scotland) Act 2000. One small provision tucked away in this important legislation amends the definition of “nearest relative” in the Mental Health (Scotland) Act 1984, in order to include within that phrase members of conjugal same-sex couples¹. The relative obscurity of this provision must not hide its import, for this is the first time that legislation anywhere in the United Kingdom has expressly and intentionally² given recognition, for civil law purposes, to the existence of same-sex family relationships.

The readiness with which the Scottish Parliament accepted the need for this provision reflects a fundamental shift in social and legal attitudes towards sexual orientation though, so far, this shift has manifested itself in only isolated and, some might say, relatively unimportant ways. Whether the cracks that have thus appeared in the heterosexist hegemony of contemporary family law will develop into a full-scale flood of equality and justice, leading to a recognition of the inherent dignity of gay men and lesbians and the domestic relationships they enter into or are part of, remains to be seen.

¹ Adults with Incapacities (Scotland) Act 2000 (2000 asp 4), s. 87(2).

² There are other statutes, such as the (English) Rent Act 1977, the Rent (Scotland) Act 1984, the Children (Scotland) Act 1995 and the (English) Family Law Act 1996 in which concepts such as “family” and “household” are wide enough to allow the courts, if they are so minded, to include within their terms same-sex relationships: for a discussion from a Scottish perspective, see Norrie “We Are Family (Sometimes): Legal Recognition of Same-Sex Relationships After *Fitzpatrick*” (2000) 4 Edin. L.R. 256 at pp.??27-281.

There is, however, little doubt that sexual orientation law is fast developing and, notwithstanding inevitable setbacks, is doing so in the right direction. This of course is a value judgment, which would not meet with acceptance from those who cling to a belief in the inherent badness, or immorality, or social destructiveness, of homosexuality, but I think it is important to be entirely clear right at the beginning from what perspective this chapter is written. It will be the thrust of this chapter that sexual orientation, *per se*, is entirely irrelevant to all the issues that are encompassed within family law and that therefore the aim of policy-makers, legislators and judges should be to expunge from their thinking those assumptions, policies and rules which either discriminate directly against, or by refusing to recognise their existence or by assuming the unchallengeability of the heterosexist hegemony indirectly deny equal treatment to, gay men, lesbians and same sex relationships³. Nor is equality enough. The aim of the law should be to ensure justice and that notion is, I perceive, wider than equality which is a prerequisite to but not definitional of justice. Justice in this context includes, as well as equal treatment, a recognition of the validity and moral legitimacy of gay and lesbian lifestyles and families, and of the inherent human dignity of gay and lesbian persons. Relationships gain legitimacy and dignity, and should thereby demand the law's respect, not by being sanctioned by the state or sanctified by a religious body, nor by having procreational potential, but through the mutuality of respect each member of a relationship shows, as manifested through acts of support and commitment. Judicial and legislative progress towards accepting the demands of justice is well underway in most western legal systems but it is not of course complete nor even yet at the stage at which it is unstoppable. It has hardly, if at all, started in much of the non-western world.

The Steps Towards Recognition

³ It is not the place here to explore the question of the cause or causes of homosexuality (or, indeed, heterosexuality). Anyone who doubts the profound irrelevance of that question is referred to B. Macdougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (University of Toronto Press, 2000) at 31-47.

Kees Waaldijk, in an important study of most of the legal systems in Europe⁴, identifies what he calls a “standard sequence of steps” that legal systems take in their developing legal recognition and regulation of same-sex sexual acts and same-sex relationships. The first step is the removal of the criminality of (male) homosexual acts⁵ which existed in many legal systems for most of the 20th century⁶ (though not, interestingly, for many years before that⁷). Decriminalisation occurred in England and Wales in 1967⁸ and in Scotland in 1980⁹. Non-criminality is now widely seen in Europe as a definitional feature of a free and democratic society¹⁰; it is not yet perceived as such in many other countries, such as the United States. The second step, far less universal, is the enactment of non-discrimination legislation under which it becomes impermissible to discriminate against an individual on the ground of sexual orientation. The beneficiaries of this step are both men and women

⁴ See the self-described “sketch” of his on-going work in “Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe” (2000) 17 Rev. Can. Dr. Fam. 62, expanding on earlier work, “Standard Sequences in the Legal Recognition of Homosexuality - Europe’s Past, Present and Future” (1994) 4 Australasian Gay and Lesbian L. J. 50.

⁵ Female homosexual acts were never criminal in Scotland or England or in any other European country, not because such acts were acceptable but because they were, to male legislators, inconceivable. The injustice to men of criminalising their activity found an odd reflection in the (different and, surely, lesser) injustice to women by their being rendered entirely invisible to the law.

⁶ Waaldijk points out the historically interesting, though largely unexplained, fact that criminalisation occurred in the great 19th century empires of Britain, Russia, Austria and Germany, but did not occur in those countries, such as France, the Netherlands, and the Iberian and Scandinavian countries which did not develop into empires or (in the case of Spain) had by then lost their imperial pretensions. It may be speculated that the militarism essential to hold together vast empires of disparate peoples placed such a high premium on both masculinity and high birth rates that sexual acts perceived as being inimical to either were seen as a threat to the state’s ability to maintain its geopolitical position. To me this is a more convincing explanation than differences in religious moralities which, in an earlier age, would have been indistinguishable from political imperatives.

⁷ So for example in the United Kingdom while sodomy (same-sex or opposite-sex) was a common law crime, criminality (as opposed to moral opprobrium) was attached to all homosexual contact falling short of this only in 1885 with the Criminal Law Amendment Act of that year. For an early prosecution, see *Clark & Bendall v. Stuart* (1886) 1 White 191.

⁸ Sexual Offences Act 1967, s. 1

⁹ Criminal Justice (Scotland) Act 1980, s. 80. See now Criminal Law Consolidation (Scotland) Act 1995, s. 13, as amended by the Sexual Offences (Amendment) Act 2000, s. 1 (UK).

¹⁰ Within those countries that are signatories to the European Convention on Human Rights, decriminalisation was required after *Dudgeon v. UK* (1981) 3 EHRR 40, (1982) 3 EHRR 149. See also *Norris v. Ireland* (1991) 13 EHRR 186 and *Modinos v. Cyprus* (1993) 16 EHRR 485. In the United States of America, on the other hand, the Supreme Court held that it was not unconstitutional for states to criminalise a variety of homosexual sexual acts, collectively called, in that country, “sodomy”: *Bowers v. Hardwick* 478 US 186, 92 L Ed 2d 140 (1986). Decriminalisation of “sodomy” occurred in South Africa, unusually, as a result of rather than as a precursor to the enactment of anti-discrimination legislation: see *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517, 1999 (1) SA 6.

who may equally suffer individual discrimination in fact, irrespective of the criminal law's institutional discrimination. Such legislation exists, to a greater or lesser extent, in a number of countries¹¹, and in many countries where the legislature itself has failed to act, the courts have been able to fashion from existing provisions a principle of non-discrimination on the ground of sexual orientation.¹² The third step, which Waaldijk suggests is unlikely to be taken in any individual legal system without the taking of the first two steps, is for courts and legislatures to grant legal recognition and protection to the domestic relationships that gay men and lesbians enter into. Waaldijk, rationally but perhaps a touch optimistically, sees an internal logic in these steps which seems to make the progression inevitable. He says this:

“Once people engaging in homosexual activity are no longer seen as *criminals*, but instead as *citizens*, they can hardly be denied their civil rights, including their right not to be treated differently because of their (criminally irrelevant) sexual orientation. In this way the step of anti-discrimination not only follows, but builds on the step of decriminalisation. Similarly, the very idea of non-discrimination with regard to sexual orientation, simply demands that no one shall be disadvantaged by law because of the gender of the person he or she happens to love. In this way the links between the steps of

¹¹ See for example the New Zealand Human Rights Act 1993, s. 21(1)(m) of which prohibits sexual orientation discrimination in specified circumstances such as employment, provision of services, and access to education; the South African Constitution, s. 9(3) which prohibits sexual orientation discrimination in all circumstances (unless, under s. 9(5), this can be shown to be fair); and the Northern Ireland Act 1998, s. 75(1) which obliges public authorities in Northern Ireland to carry out their functions having regard to “the need to promote equality of opportunity - (a) between persons of different ... sexual orientation”.

¹² In Canada, the Supreme Court held in *Vriend v. Alberta* (1998) 156 DLR (4th) 385 that sexual orientation was a ground analogous to those expressly listed in s.15 of the Canadian Charter of Rights and Freedoms and that therefore it was unconstitutional for a province to omit sexual orientation discrimination from its non-discrimination provisions. In Europe, sexual orientation has been held to be implicitly included within the terms of art. 14 of the European Convention on Human Rights, with the result that it is an impermissible reason for discriminating in the application of the substantive rights contained in the European Convention: *da Silva Mouta v. Portugal* (2001) Fam. L.R. 2. On the other hand, the Inner House of the Court of Session refused to find that sexual orientation discrimination was included within the context of sex discrimination for the purposes of the Sex Discrimination Act 1975 (*MacDonald v. Ministry of Defence* June 1, 2001). This Act does not, of course, contain a general non-discrimination principle such as is found in the Canadian Charter or, to a more limited extent, the European Convention. Even within the terms of the Act that

decriminalisation, anti-discrimination, and partnership legislation are not only sequential (in the European countries that have gone that far), but also morally and politically compelling”.¹³

One might depart slightly from Waaldijk’s analysis by splitting the final step of relationship recognition into two. The earlier and easier part of this step (which is often taken before the stage of introducing anti-discrimination legislation) is to give *ad hoc* recognition for a limited number of carefully delineated and, by and large, uncontroversial purposes - this is the stage that the Scottish Parliament has now reached - and the later and politically more dangerous part of the step is to grant recognition to same-sex relationships in all circumstances in which opposite-sex relationships are recognised by the law. Only a very few countries in the world have gone this far.

It is the purpose of this chapter to explore, in Part II, the developing legal approach to same-sex relationships, primarily but not exclusively within the context of the law in the United Kingdom: it will be seen that legal systems across the world are responding, at an ever-quickening pace, to the social and moral changes in society which are leading to a rejection of the intolerance and even hatred to which gay men and lesbians, and same-sex couples, were commonly (and sometimes still are) subjected. The interesting questions, which will be addressed in Part III, are (i) why is this happening and (ii) what does this tell us about the nature and purpose of contemporary family law?

PART II: RECOGNITION: THE CURRENT SITUATION IN THE UK

Indirect Recognition of Same-Sex Relationships

conclusion was not inevitable, as shown by the fact that one judge dissented (on the question of the correct comparator to adopt in a case of discrimination).

¹³ Note 4 above, 17 Rev. Can. Dr. Fam. at 86.

Even before any explicit protections were extended to same-sex relationships, the law was being forced, if reluctantly, to acknowledge their existence and even to accept their validity. This occurred primarily in relation to disputes over children. It is one of the paradoxes of the law that while, as we will see, shielding children from homosexual influences has long been one of the main (though always spurious) arguments against the law legitimising same-sex relationships, and there are many provisions remaining in the law designed to make access to the status of “parent” difficult for gay people¹⁴, it was in child law cases that judges first had to deal, in family law terms, with gay men and lesbians¹⁵.

“Gay Parenting is Bad for Children”

Originally, and unsurprisingly, judges tended to consider it axiomatic that it was against the welfare of children to be brought up by gay men or lesbians or to be exposed to gay or lesbian lifestyles. The assumptions inherent in such a view have been well-exposed in the literature¹⁶. The beauty of an

¹⁴ Adoption by couples is available only to married persons (Adoption (Scotland) Act 1978, s. 14, Adoption Act 1976 (England), s. 14. Fostering of children by a same-sex couple is, in Scotland, prohibited (Fostering of Children (Scotland) Regulations 1996 (SI 1996 No 3263 (S.253)), r. 12(4)). Pregnancy as a result of donated sperm will help some lesbians become “parent” but their partners cannot adopt unless the birth parent gives up her rights, which would seldom be in the interests of the child and so seldom practically available (see *Re an Application by T* [1998] NZFLR 769); a parenting order after a surrogacy arrangement (which is likely to be used by male couples rather than female couples) is unavailable under s. 30 of the Human Fertilisation and Embryology Act 1990 since that order, like a joint adoption order, is available only to married couples (s. 30(1)). And initial access by either a single woman (of whatever sexual orientation) or a lesbian couple to infertility treatment is, while not prohibited, certainly inhibited by s. 13(5) of the 1990 Act which requires the provider of licenced infertility services to take account of the child’s need for a “father”. “Father” in this, and other, provisions in the 1990 Act means a chromosomally male person: *X, Y and Z v. UK* (1997) 24 EHRR 143.

¹⁵ Family law is not, however, the only area in which judicial fears for the safety of children manifest themselves. In *Saunders v. Scottish National Camps Association* [1980] IRLR 174 an Employment Appeal Tribunal upheld a decision of an Industrial Tribunal which refused to find unfair the dismissal of a man for being gay. They held that the Industrial Tribunal were entitled to find that a considerable proportion of employers would restrict the employment of homosexuals when required to work in proximity to children. The Court of Session found other reasons to uphold this wicked decision ([1981] IRLR 277) but they certainly did not distance themselves from these comments. The approach in *Saunders* is reflected in some jurisdictions’ statutory law, such as some Australian states, where anti-discrimination provisions sometimes contain exceptions in relation to work involving children: see for example s. 28 of the Anti-Discrimination Act 1991 (QLD) and s. 37 of the Anti-Discrimination Act 1992 (NT).

¹⁶ See, in particular, Boyd “What is a ‘Normal’ Family? (1992) 55 MLR 269, “Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?” (1997) 15 Can. J. Fam. L. 131; Reece, “Subverting the Stigmatisation Argument” (1996) 23 J. Law & Soc. 484; Millbank,

axiom, of course, is that it avoids the need for an explanation of the fears behind it. One could understand, without subscribing to, this assessment of welfare when the shadow of criminality hung over those bringing up children¹⁷, but once that shadow was removed it became all the more essential to subject judicial fears to rational scrutiny. And as this happened, these fears have been revealed as chimerae.

Helen Reece¹⁸ points out that until about the late 1970s the fear that children would be contaminated with homosexuality (i.e. would either be sexually abused or would become gay or lesbian themselves) was the main judicial concern lurking behind most of the decisions,¹⁹ but that since then the main concern has switched to the fear of the child being stigmatised and picked on and bullied as a result of a gay parent's sexuality. She suggests that the reason for this shift in approach was that the corruption argument was clearly judgmental (and unsustainable in the light of social and psychological research²⁰) while the stigmatisation argument appears to be benignly neutral

"Same-Sex Couples and Family Law", accessible at www.familycourt.gov.au/papers/html/millbank.html; Barton, "The Homosexual in the Family" [1996] Fam. Law 626.

¹⁷ Though criminality was never an issue in the UK with lesbians, and it is gay women who remain much more likely than gay men to be bringing up children, the criminality attached to men certainly affected the social and judicial perception of women in same-sex relationships. In some jurisdictions in the US anti-sodomy legislation survives, and "sodomy" is defined to mean all sexual activity except penile penetration of the vagina, with the result that lesbian sex is unlawful, and that fact has been used to deny lesbian women custody of their children: see for example *Bottoms v. Bottoms* 444 SE 2d 276 (Va. 1994).

¹⁸ "Subverting the Stigmatisation Argument" (1996) 23 J. Law & Soc. 484.

¹⁹ See e.g. *Re D (Adoption: Parent's Consent)* [1977] AC 602 where Lord Wilberforce was unwilling to contemplate a gay man bringing up his child because of the risk that this "may lead to severance from normal society, to psychological stress and unhappiness and possibly even to physical experiences which may scar them for life" (at 629). In *L & L* (1983) FLC 91-353 the High Court of Australia granted custody to a lesbian mother, but emphasised repeatedly that they were doing so because they were persuaded that she would "not encourage the children to become homosexual". In *JLP v. DJP* 643 SC 2d 865 (Mo 1982) the Missouri court said this (in the face of expert testimony that homosexual child abuse was uncommon): "Given the statistical incidence of homosexuality in the population ... homosexual molestation is probably, on an absolute basis, more prevalent" (in other words, gay men are, self-evidently, more likely to abuse children than non-gay men. The court continued: "Every trial judge ... knows that the molestation of minor boys by adult males is not as uncommon as the psychological expert's testimony indicated" (in other words, it is within judicial knowledge that homosexual child abuse is more prevalent than the evidence presented to the court showed).

²⁰ See in particular the important studies by Tasker and Golombok in the UK: "Children Raised by Lesbian Mothers: The Empirical Evidence" (1991) Fam. L. 184, and "Do Parents Influence the Sexual Orientation of their Children? Findings From a Longitudinal Study of Lesbian Families" (1996) 32 *Developmental Psychology* 3; and Patterson in the USA:

by focussing on the child itself and more appropriate, therefore, for judicial expression. But she also points out that the risk of stigmatisation is, according to the research, as illusory as the risk of corruption. And Susan Boyd makes the powerful point that the stigmatisation argument “allows one discriminatory act (homophobia in the community) to condone another (depriving lesbians and homosexual men of custody)”²¹. Yet the stigmatisation argument remains the preferred weapon of choice for judges seeking to deny gay parents residence of their children: because, Reece suggests, its very plausibility in theory dispenses with the need to prove it in reality.

This can be seen in a series of custody cases whose reasoning, from today’s perspective, appears deeply flawed. In *Re P (A Minor) (Custody)*²² a father sought to deprive a lesbian mother of custody while failing to offer the children a home himself - he argued that the children should be removed to local authority care. The Court of Appeal would not go that far but they did indicate that living in promimity to “sexual deviance” could “only be countenanced by the courts when it is driven to the conclusion” that there is no acceptable alternative. It was assumed, in other words, that living with a lesbian (or, presumably, a gay man) was the very last option (before local authority care) that ought to be considered. Eight years later the terminology of “deviance” had been dropped, but in *B v. B (Minors) (Custody, Care and Control)*²³ it was still assumed that the parent’s homosexuality was a strongly negative factor in a custody dispute. In that case Judge Callman awarded custody to the lesbian mother, having found no evidence in the literature or research to support fears for the child’s sexual orientation or for the risk of stigmatisation. However, he felt constrained to point out “categorically” that it was important

“Children of Lesbian and Gay Parents” (1992) 63 Child Development 1025. A wealth of research material has also been gathered together by McNeill, “The Lack of Differences Between Gay/Lesbian and Heterosexual Parents: A Review of the Literature” (1998) National Journal of Sexual Orientation Law, vol 4 issue 1, accessible at <http://metalab.unc.edu/gaylaw/issue6/Mcneill.htm>. Reece herself draws on an extensive array of this literature, not only to refute the corruption argument but to draw attention to some of the social benefits of gay parenting.

²¹ “What is a ‘Normal’ Family?” (1992) 55 Mod. L.R. 269 at 274.

²² (1983) 4 FLR 401.

²³ [1991] Fam. L. 174, [1991] 1 FLR 402.

to distinguish between, on the one hand, lesbians “who were private persons who did not believe in advertising their lesbianism” (like the mother in the present case)²⁴ and, on the other hand, “militant lesbians who tried to convert others to their way of life”. Not only does the judge explicitly prefer gay women to remain within a heterosexually imposed realm of invisibility but, having in one part of his judgment dismissed reliance on unprovable fears based on stereotyping, he falls precisely into that trap when faced with the hypothetical militant proselytising lesbian. The implicit message is clear even from this case in which the lesbian mother was awarded custody: it would be bad for a child to grow up gay, which is of course the central flaw in the “corruption/conversion/contamination” argument²⁵ which the judge purports to reject.

Lord Davidson in the Outer House of the Court of Session did not even distinguish between the “good” (i.e. invisible) and the “bad” (i.e. public) lesbian in *Early v. Early*²⁶, when he removed an eight year old child from the mother who had always looked after him and awarded custody to his father, who had never looked after him and who had two convictions for child neglect²⁷. The judge said that he was concerned about the fact that the child, living in a lesbian household, would have no male role models and might be teased at school. This case is remarkable in that the stigmatisation argument was deployed even while it was accepted (notice the “might” at the end of the preceding sentence) that there was no evidence in the instant case that the fear had any basis in the reality of the life of the child whose future was being decided.

²⁴ This had been a concern also in *Re P* (above) where Arnold P (at 404) clearly warned to the mother because “she is not one of those homosexuals who, as many do nowadays, flaunt their homosexuality”. Such flaunting of judicial heterosexuality is not uncommon.

²⁵ Leaving aside entirely, as unworthy of comment, the assumptions (i) that conversion is possible and (ii) that attempts at conversion are ever actually made.

²⁶ 1989 SLT 114, affirmed 1990 SLT 221.

²⁷ Both the Outer House and the Inner House judges denied that the mother’s lesbianism was a decisive factor, but it is interesting to compare the minimal time both Lord Davidson and the Inner House spent worrying about the father’s convictions with the time they spent worrying about the mother’s lesbianism.

A rather different, but equally problematical, approach was adopted in the English decision of *C v. C (A Minor) (Custody: Appeal)*²⁸. Here Ward J had granted custody of a child to the mother, but was overruled for giving wholly inadequate weight to the fact that she had entered into a lesbian relationship. The Court of Appeal said that this fact would clearly have an effect on the child and that this had to be taken into account. The importance of that consideration turned on the issue of “normality” and its - again self-evident - attractions. Glidewell LJ said:

“Despite the vast changes during the last 30 years or so in the attitudes of society to the institution of marriage, to sexual morality and to homosexual relationships, I regard it as axiomatic that the ideal environment for the upbringing of a child is the home of loving and sensible parents. When a marriage breaks down and that ideal cannot be attained and the court is called upon to decide which of two possible alternatives is then preferable for the child’s welfare, its task is to choose the alternative which comes closest to that ideal”²⁹.

Leaving aside both the clumsy assumption that loving and sensible parents are always married and the fact that the axiom which founds the judge’s reasoning is empirically unsubstantiated, the flaw in this approach is that it is unworkable in the absence of an evaluation of the factors that make any particular family form “ideal”. Given that the family form of mother, father (married to each other) and child is not on offer, we cannot tell which is closer to that form if the options are either (i) mother, lesbian partner and child or (ii) single father and child, without making a value-judgment on single parenthood, sexual orientation, and even male parenting. This lack of evaluation permits the judge to hide his negative assumptions about sexuality. Balcombe LJ held³⁰ that the judge had to choose which of the two available

²⁸ [1991] Fam. L. 175, [1991] 1 FLR 223.

²⁹ [1991] 1 FLR at 228.

³⁰ At 231.

options “can offer the nearest approach to [the] norm” but that approach is flawed for the same reason. The fact that one option is closer to the “norm” than another is a matter of entirely neutral statistics. It is, for example, a departure from normality for a child to be brought up by a left-handed parent. But that tells us nothing about the child’s welfare until we put a value on left-handedness or right-handedness. Only once a value is attributed (preferably founded on empirical evidence rather than assumptions and preconceptions) are we able to use it in the welfare balance - and a zero value such as would be attributed to left- or right-handedness renders the matter irrelevant to the application of the welfare test. It is likewise a departure from the norm (given that, statistically, there are fewer gay people than non-gay people) for a child to be brought up by a gay or lesbian parent, or for that matter by a single father, but these matters are in themselves irrelevant to the welfare test until such time as a value other than zero is attributed to them. It is entirely illegitimate ever to assume a negative (or, for that matter, a positive) value as “axiomatic”.

“Gay Parenting is Bad ... Or Is It?”

From about the mid-1990s, courts in the United Kingdom began to be more sanguine at the idea of gay and lesbian parenting, and at co-parenting by same-sex partners. In *Re H (A Minor) (Section 37 Direction)*³¹ and *Re C (A Minor) (Residence Order: Lesbian Co-parents)*³² joint residence orders were made in favour of lesbian couples one of whom had each, through donor insemination, given birth to a child. And in *G v. F (Contact and Shared Residence: Applications for Leave)*³³ on the breakdown of the relationship between a lesbian couple the ex-co-parent was granted leave to make an application for contact and shared residence³⁴. The watershed case in judicial attitudes in the UK to gay and lesbian parenting in the 1990s is the Scottish

³¹ [1993] Fam. L. 205.

³² [1994] Fam. L.R 468, [1994] Practitioner’s Child Law Bulletin 95.

³³ [1998] 2 FLR 798.

³⁴ For an unreported Scottish case involving a lesbian mother in which an ex-partner was held to have title to seek a s. 11 order over a child, see *R v. F*, discussed by J. Fotheringham 1999

adoption case of *T, Petitioner*³⁵ in which the Inner House of the Court of Session granted an adoption petition made by a gay man notwithstanding that he shared his life with a male partner who would take an active part in the upbringing of the child. The judge at first instance (Lord Gill) had refused to grant the adoption (notwithstanding that it was opposed by no-one) on the basis that the fact that the petitioner was gay raised a “fundamental question of principle”. The Inner House held that there was no such fundamental question and that the judge was wrong to base his decision on his own unsupported “preconceptions about homosexuality”.³⁶ The importance of this decision lies in its rejection of the stereotyping to which gay men and lesbians had previously been judicially subjected³⁷. It explicitly rejects the convenience of axiom which assumes without proof that gay or lesbian parents constitute some threat of harm to their children. Since *T, Petitioner* and its English equivalent it ought not to be sufficient in a British court to raise the homosexuality of a parent or prospective parent and expect the court to assume some harm, though, of course, it always and rightly remains open to any party to lead evidence to show that a particular person constitutes a risk of harm to a particular child.

The approach exemplified by *T, Petitioner* ought now to be regarded as entrenched in British constitutional law with the incorporation by the Human Rights Act 1998 of the European Convention on Human Rights and the requirement on domestic courts to follow the jurisprudence of the European Court of Human Rights³⁸. That jurisprudence requires that discrimination in

SLT (News) 337.

³⁵ 1997 SLT 724. For comment, see K. Norrie, “Parental Pride: Adoption and the Gay Man” 1996 SLT (News) 321, and M. Ross, “Attitudes to Sexual Orientation in Adoption Law” (1997) 1 Edin. L.R. 370.

³⁶ Per Lord President Hope at 735L. The case was followed in England in *Re W (A Minor) (Adoption: Homosexual Adopter)* [1997] 3 All ER 620. See also *Re E (Adoption: Freeing Order)* [1995] 1 FLR 382 and the Canadian decision in *Re K and B* (1995) 125 DLR (4th) 653.

³⁷ It is stereotyping that, for reasons most eloquently explained by Ackermann J in *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs*, 1999 (3) BCLR 280 at para 44, constitutes the most direct attack on the human dignity of gay men and lesbians. Stereotyping of human beings was the basis of Nazi philosophy.

³⁸ Human Rights Act 1998, s.2 See I. Karsten, “Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same-Sex Couples and Transsexuals” (1999) EHRLR 195.

relation to the substantive rights contained in the Convention (including the right to respect for family life³⁹) be permitted only when it has an objective and reasonable justification, that is to say when it has a legitimate aim, and when there is a reasonable relationship of proportionality between that legitimate aim and the means employed to achieve it.⁴⁰ The doctrine of proportionality requires an examination of the facts in each individual case and a rejection of stereotypical assumptions that might not be relevant in the particular circumstances before the court. In *da Silva Mouta v. Portugal*⁴¹ the ECtHR held that while the identification and protection of a child's welfare was clearly a legitimate aim, the means adopted to further that end, being a blanket discrimination against gay men and lesbians in residence disputes, was unjustified⁴². Discrimination on the basis of sexual orientation, it was held (for the first time, incidentally), came within the terms of article 14 and could not possibly be justified.⁴³

So, from a position in the 1980s in which the courts regarded same-sex relationships as "deviance" from which children had to be protected, they are, at the turn of the 21st century, to be seen as in no way morally inferior to opposite-sex relationships, as an environment suitable for the bringing up of

³⁹ European Convention on Human Rights, art. 8(1). The European Court of Human Rights has not yet extended the right to family life to same-sex couples, but the House of Lords held that such a couple can be "family" within the terms of domestic legislation (*Fitzpatrick v. Sterling Housing Association* [1999] 4 All ER 707). The French *Conseil d'Etat* did, however, hold that same-sex couples come within "family life" for the purposes of art. 8 in *Prefet des Alpes Maritimes c. M. Marroussitch* April 28, 2000 (2000 Pub. L. 731) when it decided that deportation of a non-national in a stable and long-term relationship with a French person of the same sex was a disproportionate infringement of his art. 8 right to family life.

⁴⁰ *Marckx v. Belgium* (1979) 2 EHRR 330 at para. 33; *Inze v. Austria* (1987) 10 EHRR 394, para 41; *Schmidt v. Germany* (1994) 18 EHRR 513, para 24.

⁴¹ (2001) Fam. L.R. 2. See Norrie, "Stay Standing if you Like Gay People" (2000) SCOLAG 34.

⁴² The extent to which this case can be used by members of same-sex couples to access other family law rights and liabilities in Scots and English law is explored in Norrie "Constitutional Challenges to Sexual Orientation Discrimination" (2000) 49 ICLQ 755.

⁴³ The same constitutional entrenchment of protection from sexual orientation discrimination can be seen in *V v. V* 1998 (4) SA 169 where the South African court founded upon the South African Constitution (and, interestingly, the United Nations Convention on the Rights of the Child) to reject a father's claim for sole custody on the basis that the mother's lesbian relationship might affect the children's sexual orientation. This decision renders the dreadful decision of *Van Rooyen v. Van Rooyen* 1994 (2) SA 325 redundant.

children⁴⁴. Once that position has been reached, the way is open for same-sex relationships to attract in their own right, independently of children, legal recognition and protection.

Direct Recognition of Same-Sex Relationships

Beyond the acceptance of same-sex relationships insofar as they involved children, the law in most jurisdictions until very recently simply ignored the fact that gay men and lesbians not only had sex with each other but also lived their lives together, undertook commitments towards each other and shared bonds of affection: these facts were of no concern to the law and carried no legal consequences. However, as the years passed from decriminalisation, and society's attitudes towards gay men and lesbians changed so that they came to be accepted in all walks of life - even at the highest levels of government - the issue moved from the private to the public, from the demand (now partially achieved⁴⁵) to allow individuals a private (sex) life without state interference when that did not infringe on the rights of others, to the demand (still remote from achievement) to allow individuals to enter into unions bearing the full civic rights and responsibilities that attach to opposite-sex relationships. At first, such a demand met with uncomprehending resistance. Statute declared in 1988, famously and ungrammatically, that "homosexuality" was a "pretended family relationship"⁴⁶, and any government

⁴⁴ There still remain, anomalously, statutory inhibitions on gay people accessing the status of "parent" - see n. 14 above.

⁴⁵ Decriminalisation of gay male sexual acts has only partially fulfilled the demand for sexual equality. There is in the first place the (important) symbolism of language. The Criminal Law (Consolidation) (Scotland) Act 1995, s. 13, which permits men to have sex with each other, permits what it describes as "sodomy" and "gross indecency" and "shameless indecency": by this means the criminal law continues to constitute gay men (and by implication lesbians) as "other": I make love, you have sex, he is grossly indecent. Secondly, sex between men remains more heavily regulated than sex between men and women (and far more regulated than sex between women), as is seen in Scotland by comparing s. 13 of the 1995 Act with the earlier provisions in the same act regulating (for purely protective reasons) non-gay sex. Thirdly, we continue to see a preference shown for non-gay sex in, for example, the mental health legislation where the criminality of sexual acts with those of compromised understanding is much more tightly drawn for non-gay sex than for gay (male) sex - compare s.106 of the Mental Health (Scotland) Act 1984 with s. 13(3) of the Criminal Law (Consolidation) (Scotland) Act 1995.

⁴⁶ Local Government Act 1986, s. 2A, inserted by Local Government Act 1988, s. 28; repealed (in Scotland) by the Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7) s. 34.

that passed such substantively meaningless⁴⁷ but symbolically malicious legislation was unlikely to enact other legislation conferring even the smallest degree of legitimacy on same-sex relationships. But governments, like walls, fall. Even before the eventual repeal (in Scotland) of the 1988 declaration, courts in the United Kingdom were able to fashion remedies out of the stuff of the common law which could be accessed by same-sex and opposite-sex couples alike, and even, in rare but significant situations, interpret the statutory law to apply to both types of couple.

In *Tilsley v. Milligan*⁴⁸, for example, the House of Lords accepted the existence of a “common intention constructive trust”⁴⁹ between two lesbians⁵⁰: this is an (admittedly clumsy) way of providing for property readjustment on the break up of a relationship. And in *Wayling v. Jones*⁵¹ the plaintiff successfully utilised the concept of proprietary estoppel to claim a portion of the estate of his deceased same-sex partner.⁵² In neither of these cases, however, did the sexual orientation of the claimant, or the same-sex nature of their relationships, have much bearing on the issue, which was whether the common law doctrines involved applied in the particular circumstances of these cases⁵³. All that can be taken from them is the dog (morality) that did not bark. Rather more significant is the case of *Fitzpatrick v. Sterling Housing*

⁴⁷ See Norrie, “Symbolic and Meaningless Legislation” (1988) 33 JLSS 310, and “How to Promote Homosexuality: A Guide for Schools and Colleges” 1989 SCOLAG 74.

⁴⁸ [1993] 3 All ER 65.

⁴⁹ Developed in the domestic relations context by the House of Lords in *Pettitt v. Pettitt* [1970] AC 777 and *Gissing v. Gissing* [1971] AC 886. That the unmarried nature of the relationship is irrelevant was confirmed in *Grant v. Edwards* [1986] 1 Ch. 638. For a discussion, see S. Gardner “Rethinking Family Property” (1993) 109 LQR 263 and J. Mee, *The Property Rights of Cohabitees* (Hart, 1999).

⁵⁰ See, to similar effect, the Canadian decision of *Anderson v. Luomo* (1985) 14 DLR (4th) 749 and the New Zealand decision of *Hamilton v. Jurgens* [1996] NZFLR 350.

⁵¹ [1995] 2 FLR 1029.

⁵² In the Australian case of *W v. G* (1996) 20 Fam. L.R. 49 (NSW) the doctrine of promissory estoppel was used by one ex-partner of a lesbian relationship against the other ex-partner to force the latter to contribute to the costs of bringing up the children born to the former during the course of the relationship. See J. Millbank “An Implied Promise to Parent: Lesbian Families, Litigation and *W v. G*” (1996) 10 Aust. J. Fam. L. 112, R. Bailey-Harris, “Equity Still Child-Bearing in Australia?” (1997) 113 L.Q.R. 227.

⁵³ The success of this approach depends, of course, on the existing legal environment and the legal materials available from which remedies can be fashioned. Scots law recognises constructive trusts and so property readjustment at the breakdown of a relationship might be possible in Scotland; proprietary estoppel and dependents’ claims to succession do not exist in Scotland and a claim such as in *Wayling* could not be made here.

*Association*⁵⁴ in which the House of Lords signals a more functionalist than formalist approach to family law. The plaintiff was the survivor of a same-sex couple, who sought to succeed to the tenancy held by his now-deceased partner on the basis that he was either the “spouse” of the deceased tenant or a “member of the tenant’s family”. His claim to be a “spouse” failed on the basis that the word is necessarily limited to a partner of the opposite sex, but he was successful in his claim to be a member of his partner’s family. The majority in the House of Lords interpreted “family” by looking at its function rather than at its form, with the important issue being how the relationship operates rather than its precise legal status. Though the technical effect of this decision was extremely limited, given that there are very few statutory benefits and liabilities accessed through the concept of “family”⁵⁵, its symbolic importance is profound. A “family” is a socially acceptable grouping of individuals and by accepting the concept of the gay family the House of Lords has conferred upon same-sex relationships a legitimacy (both social and legal) that they never had before. Further, in adopting a functionalist approach to determining which relationships are open to legal recognition and protection, the House of Lords is moving away from a status based approach to family law in general. This is a matter to which we shall return.

Developments Abroad

In 1999, as well as the non-constitutional decision of the House of Lords in *Fitzpatrick*, courts in three other English speaking jurisdictions handed down judgments, the importance of which it is difficult to overstate, in cases in which the different treatment afforded same-sex and opposite-sex couples was directly, and successfully, challenged as being unconstitutional⁵⁶. The Supreme Court of Canada held unconstitutional an Ontario provision⁵⁷ which provided for the awarding of financial readjustment on the breakup of both

⁵⁴ [1999] 4 All ER 707. For comment, see Norrie, “We Are Family (Sometimes): Legal Recognition of Same-Sex Relationships After *Fitzpatrick*” (2000) 4 Edin. L.R. 256; L. Glennon, “*Fitzpatrick v. Sterling Housing Association*: An Endorsement of the Functional Family” (2000) 14 Int. J. Law Pol. & the Family 226.

⁵⁵ See Norrie, above at 271-276.

⁵⁶ For a fuller discussion of these cases than is necessary here, see Norrie, “Constitutional Challenges to Sexual Orientation Discrimination” (2000) 49 ICLQ 755.

⁵⁷ The Ontario Family Law Act 1990, s. 29(1).

married relationships and unmarried but heterosexual relationships⁵⁸; the Constitutional Court of South Africa held unconstitutional an immigration law⁵⁹ which allowed entry into South Africa of “spouses” of South African citizens but excluded, through their inability to marry, the same-sex partners of such citizens⁶⁰; and the Supreme Court of Vermont held it to be unconstitutionally discriminatory for the state to confer on married couples a whole raft of rights and responsibilities while not providing any means by which same-sex couples could access the same rights and responsibilities⁶¹. The most interesting feature about these three cases is the similarity in the arguments that the state in each used to justify the difference in treatment between same-sex and opposite-sex couples⁶². In secular societies which had long since decriminalised gay male sexual acts, and in which non-discrimination legislation was well-embedded, the states could not argue on the basis of the inherent “wrongness” of same-sex relationships, though one is left with the impression, from the poverty of the arguments that were in fact advanced, that this was the underlying political stance. Predictably, the main justification put forward in all three cases was the need to protect children. This argument is illogical in those jurisdictions, like Vermont, which allow same-sex couples to adopt, and it was summarily dismissed as such there. But it is also illogical in any jurisdiction which countenances gay or lesbian people bringing up children, for this is an acceptance, as explained above, that children do not need to be protected from gayness *per se*. Another argument common to all three cases was that the exclusion of same-sex couples from legal recognition is necessary to protect the “traditional” family. There is no substance to this argument either since the legal rights and liabilities of those entering into “traditional” relationships are entirely unaffected by extending the rights and liabilities to others. In truth, those who claim to “protect” the traditional family

⁵⁸ *M v. H* (1999) 171 DLR (4th) 577.

⁵⁹ The Aliens Control Act 96 of 1991.

⁶⁰ *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs* 1999 (3) BCLR 280. For comment, see R. Louw, “Gay and Lesbian Partner Immigration and the Redefining of Family” (2000) 16 SAJHR 313; S. Motara, “Making the Bill of Rights a Reality for Gay and Lesbian Couples” (2000) 16 SAJHR 344; de Vos “Sexual Orientation and the Right to Equality in the South African Constitution” (2000) 117 SALJ 17; and Pantazis, “Lesbian and Gay Youth in Law” (2000) 117 SALJ 51.

⁶¹ *Baker v. Vermont* 744 A2d 864 (1999).

⁶² See further, Norrie, “Constitutional Challenges”, n. 56 above at 762-766.

are seeking to preserve its special and preferred status⁶³, but since non-marital relationships have long been given some protection the argument resolves into one of maintaining an institutional preference for heterosexuality and has little to do with “family” as such.

Other legal systems have granted comprehensive statutory recognition of same-sex relationships to the extent of putting them in the same legal position as opposite-sex, though unmarried, couples. This is the case, for example, in New South Wales⁶⁴, New Zealand⁶⁵, in the Canadian provinces (following the decision of the Supreme Court of Canada in *M v. H*)⁶⁶, and in the Spanish autonomous regions of Aragon and Catalonia⁶⁷. Some jurisdictions have gone significantly further and created an institution for same-sex couples which has more or less all the legal consequences of the opposite-sex institution of marriage. Denmark, as is well known, was the first country in the world to do so, calling the institution (in English translation) “Registered Partnerships”⁶⁸,

⁶³ In some countries marriage itself is given a special constitutionally preferred status. This is the case, for example, in Germany where art. 6 of the *Grundgesetz* requires the state to give the institution of marriage “special” (*besonderen*) protection. This has been interpreted to mean, for example, that in tax law married couples must be treated more favourably than single persons or unmarried couples: see D. Hesselberger, *Das Grundgesetz*, vol. II, pp. 104-107. Art. 12 of the ECHR protects the “right to marry” but while marriage for that purpose is the “traditional” monogamous heterosexual union (see *Rees v. UK* (1987) 9 EHRR 56 and *Cossey v. UK* (1990) 13 EHRR 622) there is no implication that the state must give preferential treatment to such traditional unions as opposed to other unions, just as the right to found a family in the same article does not require the state to treat groupings of individuals better than individuals. Similarly, the limitation of art. 12 to “traditional” unions does not inhibit the state conferring identical - or even, for that matter, greater - rights on other unions (otherwise we get the implausible result that those countries that have extended the consequences of marriage to cohabitants and registered partnerships are in breach of art. 12). Nor does the limitation of art. 12 to marriage as presently understood inhibit any state’s right to vary its rules of entry: if the Netherlands is in breach of art. 12 by opening up marriage to same-sex couples then so too was the United Kingdom when it opened up marriage between ex-in-laws (Marriage (Prohibited Degrees of Relationship) Act 1986.

⁶⁴ See the Property (Relationships) Legislation Amendment Act 1999 (NSW), which amends the previously titled De Facto Relationships Act 1984 (now the Property (Relationships) Act 1984).

⁶⁵ See the Property (Relationships) Amendment Act 2001, the Administration Amendment Act 2001 and the Family Protection Amendment Act 2001.

⁶⁶ (1999) 171 DLR (4th) 577

⁶⁷ See Roca, “Regulation of Same-Sex Partnerships from a Spanish Perspective”, in *Making Law for Families*, ed Maclean, (Hart 2000) at 95 et. seq.

⁶⁸ For a discussion of these provisions, see L. Nielsen, “Family Rights and the ‘Registered Partnership in Denmark’” (1990) 4 Int. J. Law & Fam. 297; M. Broberg, “The Registered Partnership for Same-Sex Couples in Denmark” (1996) 8 C. & Fam. L. Q 149. It should be noted that the rule described in these articles prohibiting registered partners from jointly adopting was removed in 1999.

and this lead has been followed by Iceland, Sweden, Norway⁶⁹ and the Netherlands⁷⁰. France too has created an institution of registered cohabitation⁷¹, open to same-sex and opposite-sex couples. As a result of the case of *Baker v. Vermont*, the state of Vermont became the first in the United States to introduce a similar institution, called there “civil unions”⁷².

Marriage

So far, only one country in the world has taken what some see as the ultimate family law step and opened up its definition of marriage to include same-sex couples⁷³. This occurred on April 1, 2001 in the Netherlands⁷⁴. But claims by same-sex couples to access that institution have been made in many countries and are not new. As early as 1971 attempts were being made to persuade US courts that statutes limiting marriage to opposite-sex couples were unconstitutional.⁷⁵ These attempts were at that time uniformly unsuccessful, usually on the basis that marriage is an institution for

⁶⁹ See I. Lund-Andersen, “Cohabitation and Registered Partnership in Scandanavia: The Legal Position of Homosexuals”, in J. Eekelaar & T. Nhlapo, eds, *The Changing Family: Family Forms and Family Law* (Hart, 1998).

⁷⁰ See W. Schrama “Registered Partnerships in the Netherlands” (1999) 13 Int. J. Law Pol. & the Fam. 315.

⁷¹ See C. Martin and I. Thery, “The PACS and Marriage and Cohabitation in France” (2001) 15 Int. J. Law, Pol. & the Fam.” 135.

⁷² Bill H847 (2000).

⁷³ Marriage in every other jurisdiction is regarded as an institution ring-fencing heterosexual relationships. This is understood at common law (see *Corbett v. Corbett* [1970] 2 All ER 33 (England) and, to the same effect in South Africa, *W v. W* 1976 (2) SA 308), under statute (see, in Scotland, s. 5(4)(e) of the Marriage (Scotland) Act 1977 and in England s. 11(c) of the Matrimonial Causes Act 1973) and under European Human Rights Law (*Rees v. UK* (1987) 9 EHRR 56; *Cossey v. UK* (1990) 13 EHRR 622).

⁷⁴ See Waaldijk at <http://ruljis.leidenuniv.nl/user/cwaaldijk/www/NHR/news.htm>.

⁷⁵ See M. Dupuis “The Impact of Culture, Society and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark” (1995) 9 Int. J. L and the Fam. 86 at 88 - 95 for a discussion of the most important cases: *Baker v. Nelson*, 191 NW 2d 185 (1971, Supreme Court of Minnesota); *Jones v. Hallahan* 501 SW 2d 588 (1973, Court of Appeals of Kentucky); *Singer v. Hara* 522 P2d 1187 (1974, Court of Appeals of Washington). In *Adams v. Howerton* 673 F2D 1036 (9th Cir, 1982), unlike the other cases which sought to force the issuing of marriage licences, a marriage licence was actually issued to two men, but when legal recognition of the union was requested for practical purposes (in this case, immigration) the court refused. The main social policy which justified giving marriage protected status was stated to be procreation. *De Santo v. Barnsley* 476 A2d 952 (1984) is interesting - a petition for divorce was raised by one man against another, the petitioner claiming that there existed a “common law marriage” (which seems to be half way between cohabitation and the Scottish concept of marriage by cohabitation with habit and repute) and claiming thereby financial provision. The petition was rejected on the basis that “common law marriage” had to be identical, except in the lack of ceremony, to statutory marriage.

procreation and the rearing of children⁷⁶. More successful was the Hawaii case of *Baere v. Levin*⁷⁷ in which the Hawaii Supreme Court held that the state had to produce compelling reasons why marriage should be limited to opposite-sex couples. When it was unable to do so⁷⁸, the way might have been open to same-sex marriage in that state, but for the fact that the Legislature responded by changing the constitution of Hawaii⁷⁹. In New Zealand an attempt was made in *Quilter v. Attorney General*⁸⁰ to persuade the court that the Marriage Act 1955 was worded in gender-neutral terms and that it would be contrary to the New Zealand Bill of Rights Act 1990 to interpret it in such a way as excluded same-sex marriage. That attempt failed too. It would seem that constitutional challenges through the courts to the very definition of marriage are unlikely to be successful⁸¹. More successful, however, have been claims that it is discriminatory to deny same-sex couples some or all of the legal rights and liabilities that can be accessed by married couples: in other words claims to access the individual incidents of marriage, rather than the institution itself, are more likely to be successful. The interesting feature about the Netherlands is that the marriage debate was played out - relatively uncontentiously⁸² - in the legislature rather than the courts.

⁷⁶ *Baker* at 186, *Singer* at 1195.

⁷⁷ 852 P2d 44 (Hawaii 1993). For analysis, see Dupuis above at 95-98.

⁷⁸ *Baere v. Miike* 910 P2d 112 (Hawaii 1996).

⁷⁹ That change was retrospective: *Baere v. Anderson* 9 Dec. 1999. The same occurred in Alaska after a case there called *Brause v. Bureau of Vital Statistics* 1998 WL 88743. Around the same time as the Hawaii and Alaska cases, courts in the District of Columbia and New York State rejected marriage claims, on similar grounds to the earlier cases: see *Dean v. District of Columbia* 653 A2d 307 (1995) and *Storrs v. Holcomb* 168 Misc. 2d 898 (1996).

⁸⁰ [1998] 1 NZLR 523. For comment, see Butler, "Same-Sex Marriage and Freedom from Discrimination in New Zealand" [1998] PL 396.

⁸¹ This conclusion is not inevitable. The so-called "traditional" definition of marriage is simply the one that is accepted by the law of any legal system at any particular point in its history, and that definition is not immutable. Not only do different countries define marriage differently (e.g. western countries normally define it as a monogamous union while some countries with a Muslim tradition define it to include polygamous unions) but single systems also change both their definitions (e.g. marriage was originally defined as a union for life, but that definition changed in Scotland in 1567 and in England in 1857 when divorce was introduced) and their rules for entry (e.g. the rules on a man marrying his deceased wife's mother were changed in the UK by the Marriage (Prohibited Degrees of Relationship) Act 1986, and the bar on interracial marriage in some states in the USA was declared unconstitutional in *Loving v. Virginia* 388 US 1 (1967)).

⁸² Waaldijk, n. 74 above, makes the revealing point that the Parliamentary debates were taken up mostly with concerns of whether Dutch same-sex marriages would be recognised abroad, and what would happen if one of the Royal Princes (or Princesses?) wanted to enter into such a marriage.

PART III: SEEKING MEANING

The narrative above shows that from about the mid-1990s on there has been an ever-increasing movement throughout the western world towards the legal recognition of same-sex relationships, starting with *ad hoc* recognition in limited circumstances, through an equiporation with cohabiting opposite-sex couples, and culminating, in some countries, in the introduction of institutions which, in all but name, are legal marriages⁸³ and, in the Netherlands, is called marriage. How are we to explain this sudden explosion of judicial and legislative right-thinking? Part of the explanation must lie, of course, in the increased social acceptability and, vitally, social visibility of gay men and lesbians, and same-sex relationships, itself probably a consequence of decriminalisation, without which the environment of ignorance and distrust of “other” could never truly dissipate. It is probably now not possible to separate out legal changes and social changes and to identify one as leading to the other - rather it is likely that they fed off and justified each other, but the catalyst for change, in either aspect, remains obscure. Waaldijk, in his study of the sequenced steps towards legal recognition taken in the European countries⁸⁴ explicitly locates the decriminalisation and anti-discrimination legislation which occurred in Europe primarily in the late 1960s and in the early 1980s, within the context of the civil rights movements seeking equality and justice for racial minorities and, latterly, of a more current international human rights movement. Accessing this analogy is easy given that gay men and lesbians have little difficulty in pointing to a history of prejudice and discrimination; those who oppose them have substantial difficulty in distinguishing between race and sex discrimination (the moral and political arguments against which have long since been won⁸⁵) and sexual orientation

⁸³ Though names are important in law. If benefits are given to “spouses” and registered partnership is a separate institution from marriage, courts may choose, if they so desire (like the European Court of Justice in *D. v. Council* Case C-122/99P, May 31, 2001), to limit spousal benefit to institutions called marriage.

⁸⁴ See n. 4 above.

⁸⁵ I accept that actual discrimination on these grounds continues to exist and that the law’s response remains inadequate. But the point is that it is morally and politically unacceptable to

discrimination (the arguments in favour of which remain in the eyes of many - even those who disagree - within the bounds of morally and politically acceptable debate). Edwin Cameron, one of the most cerebral of writers on South African law⁸⁶ denies that it is possible so to distinguish the various forms of discrimination⁸⁷. He points out that, historically, a variety of arguments were deployed in the effort to justify the oppression of women and blacks - there were naturalistic/biblical arguments (the bible says that women have a different place in society from men, so the law must say so too⁸⁸); arguments concerning "inherent" impediments (women have less judgment, and are weaker; blacks have less well-developed social and physical abilities); and arguments which sought to show that granting equality would change the existing order and would, therefore, be a precursor to social and moral disintegration. In the light of this historical analysis, Cameron offers this insight: "It is striking how many of these arguments, now superseded in the case of women or blacks, are still employed against gays [sic] and lesbians". The more sexual orientation discrimination is identified with race and sex discrimination, the less easy it is to justify it. There is cause to hope that this fact is being recognised at both a judicial and a legislative level. True it is that in some countries, such as Canada, South Africa and Vermont (and in the future, probably, the UK) the hand of the legislature has been (or will be) forced by the judiciary's interpretation of constitutional/human rights requirements; but this is not a universal truth and in many other countries, such as those European countries which have introduced registered partnerships, and Australian states like New South Wales and the ACT which have greatly enhanced the position of cohabitants and extended the definition thereof to include same-sex couples, the legislatures have, *ex proprio motu*, granted more and more rights and responsibilities to same-sex couples. In any case, constitutional development can become a tool of the judiciary only

argue in favour of such discrimination.

⁸⁶ And now a judge of the Constitutional Court.

⁸⁷ (1993) 110 SALJ 450 at 461-2.

⁸⁸ The biblical arguments deployed in *Loving v. Virginia* 388 US 1 (1967) to justify bars on interracial marriage are typical of such arguments which attempt to justify racial discrimination.

when advanced by the legislature. But it remains true that appropriate political will is a prerequisite to informed legislative change.⁸⁹

Political Considerations

The change in political will leading to unexpected progress is, perhaps, most striking in South Africa. Ronald Louw suggests⁹⁰ that the granting of constitutional protection was arguably the most significant reason behind changed public attitudes towards gay men and lesbians. It has certainly been the factor which, in that country, has led to the most significant legal developments, but the question remains: where did the political impetus to grant constitutional protection come from? It is this question that is addressed by Carl Stychin, in a study of the political tactics adopted (with phenomenal success) by gay rights organisations in South Africa⁹¹. He reminds us of the unique situation in that country where it was the politically dominant regime that came to realise (with the realisation of its own utter unsustainability) the necessity, in a democratic society, for protection of minorities to be constitutionally entrenched. “Moreover”, he adds, “the political climate of South Africa remains one in which it is ‘politically incorrect’ for mainstream constitutional players to oppose the granting of equality rights to a group which can claim a history of social exclusion”⁹². Yet there were countervailing considerations which made the ultimate victory in South Africa (which became the first country in the world explicitly to make sexual orientation discrimination unconstitutional⁹³) by no means certain. The strongly Calvinist tradition of the white community was reflected in the sexual conservatism of both the black

⁸⁹ Dupuis (above, n. 75) at 100 quotes the attorney in *Baere v. Lewin* (the Hawaii marriage case) pointing out the limitations to the legislative process in the absence of political will: “If Martin Luther King had gone to the Alabama State Legislature for help, the schools would still be segregated today”.

⁹⁰ “Gay and Lesbian Partner Immigration and the Redefining of Family” (2000) 16 SAJHR 313 at 319.

⁹¹ “Constituting Sexuality: The Struggle for Sexual Orientation in the South Africa Bill of Rights” (1996) 23 J. Law and Soc. 455.

⁹² *Ibid.*, at 461.

⁹³ South African Constitution, s. 9(3). Among the notable legal consequences of this provision were the striking down of the statute criminalising sodomy (*National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517, 1999 (1) SA 6) and the extension of marital rights to same-sex couples for immigration purposes (*National Coalition for Lesbian and Gay Equality v. Minister for Home Affairs* 1999 (13) BCLR 280).

and the Asian communities⁹⁴; in addition, as Stychin notes, the incoming democratic government had greater priorities than gay law reform, including the dismantling of apartheid and the tackling of the economic injustices endemic throughout South African society. But in the end, the rhetoric of minority rights was simply too powerful to resist.

Though there are few countries in the world today in which such rhetoric is as irresistible as in South Africa, in the wider legal community (at least within the western world) it is exactly this rhetoric of rights that is, more and more, informing the manner in which legal claims are being made. John Dewar⁹⁵, writing on changes in family law in general, sees same-sex relationship recognition as symptomatic of an increased contractualisation of family relationships and of an increasing constitutionalisation, through international human rights instruments, which is being brought to bear on issues which traditional family law saw as entirely within the realms of private law. That constitutionalisation is even more apparent in the United Kingdom than Australia (from which perspective Dewar is primarily writing): the Human Rights Act 1998, the Scotland Act 1998 and the Northern Ireland Act 1998 are already resulting in court arguments being presented in a very different manner. They have clearly raised the rights-consciousness of both litigants and individuals who perceive that they are not being treated fairly by the law. "Rights demand vindication", says Dewar⁹⁶: they trump other considerations such as welfare, family privacy, parental authority, and even the traditional place of marriage. This constitutionalisation of rights overlaps with the increased contractualisation of families for, according to Dewar, rights by definition are individual and therefore their concern is not with the institution but with the individual's claims upon the institution: the right of non-discrimination, for example, is a direct challenge to the present definition of marriage. Dewar's thesis is to some extent vindicated by the fact that when the institution of marriage itself has been challenged by gay men and

⁹⁴ See as an example of this conservatism translating into judicial decision the case of *Van Rooyen v. Van Rooyen* 1994 (2) SA 325, and its discussion by E. Bonthuys in "Awarding Access and Custody to Homosexual Parents of Minor Children: A Discussion of *Van Rooyen v. Van Rooyen*" (1994) 3 Stellenbosch L.R. 298.

⁹⁵ "Family Law and its Discontents" (2000) 14 Int. J. Law Pol. and the Fam. 59.

lesbians, the law (as was seen above) has been able to see off the challenges without much difficulty, but when the individual rights flowing from that institution are sought, as for example spousal support in *M v. H*, succession rights as in *Fitzpatrick*, immigration rights as in *National Coalition*, or even all the individual attributes of marriage as in *Baker v. Vermont*, the law has been unable to resist the rationalist arguments and success has been extraordinary.

Political advancement is, of course, usually the result of pragmatism and compromise, and while increased recognition of same-sex relationships is broadly to be welcomed, there are dangers to the gay and lesbian community in accepting recognition on other people's terms - even when these are the only terms on offer. Stychin⁹⁷ makes a valid point when he says that the conservative rhetoric that gay and lesbian activists in South Africa adopted (such as that gayness is immutable and fixed at birth and that therefore gay people pose no threat to the general population in terms of conversion or promotion of their orientation) limits its own radical agenda by its acceptance of categorisations that might not reflect reality⁹⁸. A similar argument to Stychin's is made in the American context by Nancy Polikoff⁹⁹. She points out that the struggle for recognition of gay and lesbian relationships becomes more successful the more it denies its own social transformative agenda, and she draws an interesting analogy with the struggle for abortion law reform. That was originally argued on the basis of women's liberation and women's entitlement to sexual fulfilment, access to abortion being presented as part of a larger struggle to end male dominance; but access to abortion was only gained, and it seems can only be preserved, by adopting a much more conservative "pro-choice" rhetoric which implies that abortion is an evil, though a necessary one. Her worry is that we get what we ask for - access

⁹⁶ Ibid at p. 72.

⁹⁷ Above, n. 91.

⁹⁸ He also warns (ibid., at 464) that since sexual orientation protection can, like other protections, be removed from the Constitution, its very inclusion acts as a conservatising force, requiring gay men and lesbians to act moderately and reasonably in their future demands in order to consolidate their existing gains.

⁹⁹ "We Will Get What We Ask For: Why Legalising Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'" (1993) 79 *Virg. L.R.* 1535.

to a necessary evil rather than the end of male dominance, access to an inherently gendered institution rather than the breakdown in all relationships which depend upon and are defined by gender-allocated roles. For this reason, it is all the more important that the tactics adopted by those seeking justice and equality for gay men and lesbians eschew the institutionalisation of relationships. This is a matter to which I shall return at the end of this chapter.

The Privatisation of Family Law

Other writers suggest that the increased legal recognition of same-sex relationships is not a result of the constitutionalisation of family law (i.e. turning the subject into an aspect of public law) but exactly the reverse. Family law is, according to Susan Boyd¹⁰⁰, primarily concerned with the privatisation of social welfare and she suggests that the legal recognition of same-sex relationships must be seen in that light and perhaps even explained by that imperative. She points out¹⁰¹ that the trite statement that the family is the basis of society is in fact founded on a privatisation model where the family is allocated the costs of producing and rearing children and of caring for dependent family members. Queer theorists, she argues, should resist the “family” since it reflects heteronormativity where society is still, if to a lesser degree than before, structured around a norm whereby women assume greater responsibility than men for these caring roles, which fact is itself both reflected and perpetuated in the labour market. In many areas of family law the state is stepping back¹⁰² and encouraging individuals to seek private remedies rather than state ones: it is the public purse that is served by allowing same-sex couples to seek, for example, support from each other. Commenting on an earlier stage of *M v. H*, in which the Supreme Court of Canada recognised a same-sex couple explicitly because (inter alia) to do otherwise would throw the cost of maintaining the applicant onto the public purse, Boyd says this: “The more decisions such as *M v. H*, which privatize responsibility for financial well-being, are applauded, the more the tide of

¹⁰⁰ “Family, Law and Sexuality: Feminist Engagements” (1999) 8 Soc. & Leg Stud 369; “Best Friends or Spouses? Privatisation and Recognition of Lesbian Partnerships in *M v. H*” (1996) 13 Rev. Ca. Dr. Fam. 321; and “Expanding the ‘Family’ in Family Law: Recent Ontario Proposals on Same-Sex Relationships” (1994) 7 Can. J Women and the Law 545.

¹⁰¹ (1999) 8 Soc. & Leg. Stud at 377.

shrinking public responsibility and expanded private responsibility is invited into our homes and families”¹⁰³. There is a paradox here, of course, in that the law is pursuing (or at least drifting into) a right-wing model of society in which the role of the state is progressively diminished and individuals are encouraged to take more and more responsibility for themselves (leaving those unable to do so more and more vulnerable), while at the same time the right-wing tendency to sanctify the “traditional” family is, together with religious arguments, the main source of opposition to equality and justice for gay men and lesbians.

Another Canadian writer, Claire Young¹⁰⁴, makes similar points to those made by Boyd but addresses in addition some unpalatable consequences to legal recognition of same-sex relationships. She points out that recognition in the tax and welfare regime might result in disadvantage overall, particularly in the case of low-income couples, where aggregation of income for means-tested benefits is presently avoided¹⁰⁵. The benefits of recognition will go to those already economically advantaged and, given the gendered structures of property ownership and wealth creation that persist in all modern societies, that means that recognition is likely to benefit men at the expense of women. The gay male agenda, which is driving reform, may not, Young implies, reflect the needs of lesbian women. Boyd does not go quite this far, but she concludes that recognition is not about redistribution of wealth, either amongst the sexes, or amongst the different economic strata in society. She does not, of course, suggest that this is a reason to oppose recognition and her aim, I think, is simply to point out its limitations: “my key concern”, she says¹⁰⁶ “is that lesbian/gay struggles for legal recognition of relationships, while clearly

¹⁰² An example is the no-order principle in child law.

¹⁰³ “Best Friends ...”, above, n. 100 at 338. Millbank, n. 16 above at para 25, makes the same point in commenting on the Australian case of *W v. G* (n. 52 above) where a lesbian used promissory estoppel to oblige her ex-partner to contribute to the costs of bringing up her children: “It is possible that the imperative to hold Grace financially liable was not so much law’s desire to validate a lesbian family as a somewhat more fiscal impulse to find a source of private support, whatever the gender of the source”.

¹⁰⁴ “Taxing Times for Lesbians and Gay Men: Equality at What Cost?” (1994) 17 Dalhousie LJ 534-559.

¹⁰⁵ Exactly the same position would occur in the United Kingdom if recognition occurs before tax law reform (which, in truth, is likely).

¹⁰⁶ (1999) 8 Soc. & Leg. Stud. 369 at 378.

necessary, ought not to be seen as *sufficient* to achieve social equality across class, race and gender differences as they intersect with sexuality". If this is so, then the reform agenda which aims to rid the law of distinctions based on sexual orientation rather than on other grounds serves lesbians as well as it serves gay men and, in further answer to Young's concerns, recognition serves lesbians proportionately better than it serves gay men in parenting issues where, for entirely practical reasons, access is easier for women than for men. While the battles for recognition have been fought in primarily economic terms (spousal support, succession to tenancies etc) it is submitted that the real point of these battles has been to achieve equality, justice and dignity for gay men and lesbians generally rather than economic advantages for individual pursuers. One can understand Susan Boyd's sardonic reaction to the success of *M v. H*: "Oh good", she tartly remarks, "now we get to sue each other"¹⁰⁷. But the point is that, other than in cases involving children, family law is by and large a system for redistributing property. Equality, justice and dignity are advanced if the same access to courts and to legal remedies is granted to gay as to non-gay people - and, crucially, if the same economic disadvantages as well as advantages are obtained. To put it crudely, equality requires taking the rough with the smooth.¹⁰⁸

The Threat of Assimilation

While most queer theorists and gay activists welcome the increasing legal recognition of same-sex relationships described above many, as we have already seen, do not welcome all the possible implications. There is a particular resistance by some writers (myself included) to a strategy that seeks recognition through the medium of "marriage"¹⁰⁹ because of the danger that institution poses of "assimilation". I have argued previously¹¹⁰ that

¹⁰⁷ (1996) 13 Rev. Can. Dr. Fam. at 324.

¹⁰⁸ Part at least of Boyd's worries (ibid. at 337) is that the law seems to have been more ready to grant recognition when it saves the state money (e.g. spousal support) than when it might cost the state money (pensions and immigration).

¹⁰⁹ The marriage debate is played out more vigorously in the USA than elsewhere, probably because the status has more significance (in the sense of many more legal consequences) there than it has elsewhere: see R. Baird and S. Rosenbaum (eds) *Same-Sex Marriage - the Moral and Legal Debate* (Prometheus Books, 1997), and A. Sullivan (ed) *Same-Sex Marriage - Pro and Con* (Vintage Books, 1997).

¹¹⁰ "Marriage is for Heterosexuals: May the Rest of Us Be Saved from It" (2000) 12 C. & Fam.

“marriage” ought not to be the primary goal for gay activists since it is, inherently, a heterosexist institution which will respond to the needs and aspirations of the heterosexual majority rather than, where different, the needs and aspirations of gay men and lesbians. Nancy Polikoff¹¹¹ similarly argues against same-sex marriage on the ground that recognition of same-sex marriage will do nothing to challenge the present opposite-gendered characteristics of marriage, and she fears that the influence will in fact be the other way around, with same-sex couples facing social as well as legal pressure to conform to the heterosexual ideal. She points out that recognition of same-sex relationships, where it has occurred, tends to be accorded to those relationships which are closest in form to opposite-sex relationships, and which follow the normative rules evolved in that context¹¹². Other writers too make similar points¹¹³. Katherine O’Donovan¹¹⁴, for example, points out the paradox that both registered partnerships and increased recognition of cohabitation take (heterosexual) marriage as the unquestioned model to aspire to and she pertinently asks¹¹⁵ what it is about “marriage” that so attracts those, such as gay or lesbian couples, who are currently excluded. Her answer is that it is the mythology behind marriage that is being sought, its “status as icon”¹¹⁶ and, though she does not use this language, she warns gay men and lesbians against whoring after false gods. Eric Clive, many years ago, gave what remains one of the most convincing rationalist arguments why the law should withdraw from marriage, leaving it as a sacrament for those wishing religious approval, rather as baptism is, and conferring legal consequences on relationships for reasons other than the entry into the

L. Q. 363.

¹¹¹ Above, n. 99.

¹¹² *Fitzpatrick v. Sterling Housing Association* [1999] 4 All ER 707 is a clear, but by no means the only, example illustrating this point.

¹¹³ See Boyd (1996) 13 Rev. Can. Dr Fam 321, esp at 326 and (1999) 8 Soc. & Leg. Stud. 369 esp at 379; and Millbank “‘Which, then, Would be the “Husband” and Which the “Wife”?’ Some Thoughts on Contesting the ‘Family’ in Court” (1996) 3 Murdoch University Electronic Journal of Law, No., 3: www.murdoch.edu.au/elaw/issues/v3n3/millbank.html; D. Herman, “Are We Family? Lesbian Rights and Women’s Liberation” (1990) 28 Os. H. L. J. 789; G. Brodsky, “Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law” (1993) 31 Os. H. L. J. 589.

¹¹⁴ “Marriage: A Sacred or Profane Love Machine?” [1993] 1 Fem. Leg. Stud. 75 at 85.

¹¹⁵ *Ibid.*, at 81.

¹¹⁶ *Ibid.*, at 86.

institution¹¹⁷. Yet, as O'Donovan¹¹⁸ is at pains to point out, few people enter marriage for rationalist reasons¹¹⁹. It may well be difficult to resist the argument that justice requires equal access to even a flawed and mythologised institution, but it is not impossible. I suspect that true justice, cutting across sex, gender and orientation, requires the demythologising not only of marriage, but of the family itself. For the "family" too, as a *legal* institution, carries assimilationist risks.

It has already been seen how legislative advancement, even short of marriage, has, by and large, been possible only by minimising the differences between same-sex and opposite-sex relationships. The same phenomenon can be seen in the strategies adopted by litigants seeking family rights less than marriage, whose success is more often than not founded upon the presentation of the same-sex couple as one emulating the heterosexist norm. Jenni Millbank¹²⁰ illustrates this point starkly with an Australian case¹²¹ in which one member of a same-sex couple sought to be regarded as a "spouse" of the other and resorted to arguing that he was the "husband" because he took the "active" or "masculine" role in the relationship, as opposed to the "effeminate or female-acting partner" who took the "traditional female role". The attempt to access relationship rights failed in this case and the queer theorist's response is equivocal. Millbank comments that "as a litigative strategy it was oppressive not only to the diversity and originality of lesbian and gay relationships, positing them as mere mimics; it was also oppressive to gender equality within heterosexual relationships". The fact that the litigative strategy of emphasising similarities has been largely successful obscures but does not subvert Millbank's point - that emulation of the most obvious features of opposite-sex relationships, which are not necessarily the most attractive (e.g. inequality, dependency, dominance), tends to validate them. Not only is such an approach a direct threat to the queer world (for it has the effect of skewing

¹¹⁷ "Marriage: An Unnecessary Legal Concept?", in Eekelaar and Katz, *Marriage and Cohabitation in Contemporary Societies* (Butterworths, 1980) at 71 - 82.

¹¹⁸ *Op. cit.* at 86-87.

¹¹⁹ Not that O'Donovan is disagreeing with Clive's basic premise: see her own review of books on cohabitation: "Legal Marriage - Who Needs it?" (1984) 47 *Mod. L.R.* 111.

¹²⁰ *Op. cit.* at paras 16 - 17.

¹²¹ *Brown v. Commissioner for Superannuation* (1995) 21 *AAR* 378.

the reality of individual relationships, by the imperative - for entirely understandable tactical reasons - of presenting to the world a facade of heteronormativity within a homosexual environment), but it also ill-serves the straight world. For a less recognised but no less real danger in assimilation is that it denies access to what the queer has to offer to the straight - a practical illustration of the fact that diversity and originality is not destructive but is liberating. Equality, says Judge Sachs of the Constitutional Court of South Africa, demands not the suppression but rather the celebration of differences¹²².

The underlying assumption, which it is certainly no part of my task here to challenge, is that the loss of a gay cultural identity¹²³ would impoverish society; in addition, there is the other danger that assimilation would simply shift the goal-posts for those relationships that are outwith the law's ken. Drawing gay and lesbian relationships within a family norm, as presently understood, would as Boyd points out "draw lines between good homosexuals (middle-class, monogamous, double income) and bad homosexuals (gays who cruise the bars, baths and parks, and dykes who ride motorcycles topless)".¹²⁴ Currently, except in limited circumstances, the law recognises and legitimises opposite-sex relationships only. If recognition is extended to same-sex relationships only in those circumstances in which they look, to all intents and purposes, to be identical to opposite-sex relationships except in the gender mix, then the law really has not progressed very far at all. It will continue to benefit long-term, stable, monogamous relationships in which the parties share a home and accept long-term emotional and financial obligations towards one

¹²² *National Coalition for Lesbian and Gay Equality v. Minister of Justice* 1998 (12) BCLR 1517 at 1534, para 22.

¹²³ Gay "culture" is very much a late-20th century phenomenon and, by and large, is western in orientation. This highly modern development has little to do with the long history of same-sex sexual and emotional life-relationships (see J. Boswell, *The Marriage of Likeness: Same-Sex Unions in Pre-modern Europe* (Fontana, 1996)) and it seems likely that this now-distinctive culture evolved as a response to the criminalisation of gay male sexual acts in the late 19th century. The consequence of criminalisation was to create an underworld society in which like-minded individuals banded together not only for sexual fulfilment, but also for protection and support; their commonality of experience as "other", as an excluded and despised minority created a mindset, from which developed common hopes, aspirations and experiences; their feelings of apartness motivated a search for stereotypically determined tastes in looks, dress, music - role-models, in other words. This is the stuff of which "culture" is made.

another. But, those relationships which do not, or will not, fit into that norm (established by and for heterosexuals), will continue to be excluded for all purposes whether or not, for particular purposes, it would be fair, just and reasonable to include them¹²⁵. And the law will continue to legitimise (and benefit) certain forms of family relationship while at the same time ignoring (and disadvantaging) others¹²⁶. Boyd's point is that this imperative comes not from the concept of "family" but from capitalism itself, and she concludes that "unless lesbian and gay efforts to achieve symbolic recognition of their families are accompanied by trenchant critiques of the limits of such recognition in delivering a redistribution of economic well-being, they will remain incomplete as political strategies, while they may simultaneously be the only *legal* strategies available"¹²⁷. Recognition of same-sex relationships, she fears, is only likely on heterosexual terms, which challenges neither heteronormativity nor present socio-economic structures. It may be responded to this that it is not the purpose of same-sex relationship recognition to challenge capitalism, but it is, surely, its purpose to challenge heteronormativity, in the sense of questioning why one family structure should be preferred over another. And if heterosexuality as the identifier of rights and liabilities can be successfully challenged then the way is open to challenge other identifiers whose only justification lies in normativity, conformity, and history.

Family Law as a Maineian Movement

In 1861, Sir Henry Maine published his best-known work, *Ancient Law*, and there he argues¹²⁸ that the movement of legal systems from the primitive to

¹²⁴ (1996) 13 Rev. Can. Dr. Fam. 321 at 326.

¹²⁵ See further, L. Glennon, "Fitzpatrick v. Sterling Housing Association: An Endorsement of the Functional Family?" (2000) 14 Int. J. Law Pol. & the Family 226, esp at p. 240 et seq, who is particularly concerned that platonic relationships are excluded from "family" by *Fitzpatrick*. Interestingly, platonic relationships are included in the New South Wales legislation which extends recognition to same-sex relationships: see Property (Relationships) Act 1999 (NSW).

¹²⁶ Didi Herman, "Are We Family? Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall LJ 789 was one of the first to make this point when she said that validating same-sex couples who look like opposite-sex couples necessarily excludes other family modes, such as non-monogamous or non-cohabiting couples.

¹²⁷ (1999) 8 Soc. & Leg. Stud. 369 at 381.

¹²⁸ *Everyman's Library* edn. (1972), at 99. For an examination of the influence of Maine and his works, see Cocks, "Sir Henry Maine: 1822 – 1888" (1988) 8 Leg. Stud. 247. On Maine's

the progressive has been uniform in one respect, that is to say by the gradual dissolution of family dependency and the growth of individual obligation in its place. “The Individual”, he says, “is steadily substituted for the Family, as the unit of which civil laws take account.” The legal ties between people become progressively governed by Contract, rather than by the reciprocity of rights and duties that make up Family; and in his famous epigram Maine concludes that the movement from ancient to modern law can be characterised as a movement “from *Status to Contract*”¹²⁹. For over 100 years after these words were written, the family, as a source of rights and obligations, remained stubbornly a status-based institution. Automatic rights and liabilities, powers and responsibilities, continued to be drawn from status-defined institutions, most importantly marriage (for the domestic relations between adults) and legitimacy (for the domestic relations between adults and children). Marriage remains the primary source of automatic rights and duties between adults, and while legitimacy as a status has all but disappeared, it has been replaced by the (admittedly more acceptable but still problematical) status of Parent. Succession rights, maintenance obligations, criminal and evidentiary immunities and all the other legally imposed consequences of family life remain by and large dependent on the status of marriage or parent.

However, the law of domestic relations in the United Kingdom is showing some evidence of escaping from the shackles of status, at least in respect of adult-adult relationships. The new constitutionalism introduced at the turn of the 21st century, with its emphasis on individuality, rationality and the need to identify the legitimate purpose behind the law, is likely to speed the process. As well as the tax and social security legislation, where it has long been in the state’s (financial) interest to recognise non-marital conjugal cohabitation, there have been a few statutory provisions extending rights and liabilities to non-marital couples, for sometimes the very purpose of the law would be subverted if it insisted on tying in legal consequences to status. A relatively early example of statutory recognition of non-marital relationship for this

views on “Status”, see G. McCormack, “Status: Problems of Definition and Use” (1984) CLJ 361.

¹²⁹ Ibid. at 100.

reason is found in the domestic violence legislation. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 grants various forms of protection from domestic violence to the parties to a marriage, but since these protections (limited, be it admitted) can be accessed only when individuals can prove that their personal circumstances require it there was no institutional need automatically to deny access to those who did not evidence the appropriate status. So the protections could be, and were, extended to the parties of non-marital (opposite-sex) couples. The following year the Administration of Justice Act 1982 amended the Damages (Scotland) Act 1976 and the (English) Fatal Accidents Act 1976 to include within the definition of “relative” who could sue for negligently caused death of another the survivor of a non-marital (opposite-sex) couple. Again such legislation, requiring as it does proof of negligence, never was based on status alone and there is no reason in practicality, therefore, to deny a claimant a right to prove the appropriate relationship at the same time as also proving the other elements necessary for the claim. Though in its terms the 1981 legislation is limited to opposite-sex couples, there is no rational basis upon which same-sex couples should be excluded from the protections contained therein and the Act is, for that reason, clearly incompatible with the ECHR. The Damages (Scotland) Act 1976 can, for reasons explored elsewhere¹³⁰ be reinterpreted consistently with the ECHR so that same-sex couples can be brought within its terms. The law has, however, proved far more resistant to extending recognition of non-marital relationships to areas of the law in which proving status is all that is required to access a benefit (such as, for example, in the law of succession or of maintenance¹³¹).

Dewar¹³², we saw above, pointed out the opportunities for recognition of same-sex couples in this movement from status to individuality. He suggested that as we come to recognise rights inhering in individuals it is the individual who becomes the focus of the law’s attention rather than the

¹³⁰ Norrie, “Constitutional Challenges to Sexual Orientation Discrimination” (2000) 49 ICLQ at 776.

¹³¹ Scotland is unusual in the extent to which it ties in maintenance obligations to a legally determined status rather than a more factually determined factor such a dependency.

¹³² Above, n. 95.

institutions they are part of and from which they derive status. This does, of course, come at a cost. Rebecca Bailey-Harris points out¹³³ that moving from status to individuality involves a movement from a system of absolute rules to one of discretionary or evaluative rules, and that this in turn involves a diminution in both predictability and, consequentially, the chances of extra-judicial settlement of disputes. However, if the end-result is justice and equality for gay men and lesbians, as well as a more equitable approach to all family disputes, then it is suggested that this is a price well worth paying.

Conclusion

I promised to address two questions in this third part of this chapter: how to explain the sudden burgeoning of advances in legal recognition of same-sex relationships, and what that tells us about contemporary family law. The explanations, as we have seen, are primarily political and constitutional. What it tells us about family law is that the law is moving away from “family” as a source of rights and liabilities. The logical end-result of this movement would be the withering of any legal doctrine known as “family law”, as the individual aspects of property law, unjustified enrichment, obligations, and domestic violence law take on lives of their own. It is, admittedly, odd for a self-confessed family lawyer to regard this as a good thing, but there it is: for better or for worse, I do.

¹³³ “Law and the Unmarried Couple - Oppression or Liberation?” (1996) 8 C & Fam. L. Q 137.