

**MARRIAGE vs. REGISTERED PARTNERSHIP:  
FULL EQUALITY OR SEGREGATION FOR SAME-SEX COUPLES?**

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**"Against Sexual Apartheid: A ceremonial act to celebrate 15 years for the Right to Love, 15 years Rechtskomitee Lambda"**

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**Introduction**

Meinen Damen und Herren. Today, in the European Union, discrimination in the criminal law against sexual activity between men or between women is not permitted, thanks to the case law of the European Court of Human Rights, including the landmark age of consent cases brought by Rechtskomitee Lambda.<sup>1</sup> National legislation must ban discrimination based on sexual orientation in public and private sector employment and higher education, thanks to a European Community directive.<sup>2</sup> The focus of groups working for full legal equality for lesbian, gay, bisexual and transgender individuals has therefore shifted to the rights of same-sex couples, including equal access to marriage and joint adoption of children. This topic raises four questions I would like to address: (i) Is there an historical trend towards full equality in every country? (ii) Are there any strong arguments against allowing same-sex couples to marry? (iii) Is registered partnership enough to provide full equality? And (iv) is registered partnership a necessary intermediate step towards full equality?

**I. Is there an historical trend towards full equality in every country?**

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<sup>1</sup> [citation]

<sup>2</sup> Council Directive 2000/78/EC.

On the 21st of December 2005, I was a guest at one of the first civil partnership ceremonies held in the United Kingdom, under the new law creating a "separate but equal" institution for same-sex couples only.<sup>3</sup> My friends Adnan Ali from Pakistan, and Eric Stobbaerts from Portugal, asked me to give a short speech at their reception. I thanked them for allowing us to be part of history, and reflected on how far same-sex couples have come. As late as 1860, two men in London who loved each other, and expressed their love physically, risked being executed by hanging. In 2005, 145 years later, two men or two women in London who love each other became eligible to register their partnerships at the town hall.

Roughly the same historical progression can be seen in many countries in Europe, North America, Southern Africa, and Australasia: from the death penalty to demands for equal access to marriage. Indeed, as Helmut Graupner has pointed out,<sup>4</sup> the first country in the world to begin the process of law reform, by abolishing the penalty for same-sex "carnal knowledge" (death by decapitation), was Austria in 1787. Once a country has taken this step, others have followed, initially quite slowly, but later at an accelerating pace. In England and Wales, it took 106 years, from 1861 when the death penalty was abolished, to 1967, to decriminalise sexual activity between men,<sup>5</sup> and until 2000 to equalise the age of consent.<sup>6</sup> The first legislation against private sector discrimination entered into force in 2003,<sup>7</sup> followed by laws on civil partnership and joint adoption in 2005.<sup>8</sup> In a few countries or states, where same-sex couples may marry and adopt children jointly, the long struggle for full

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<sup>3</sup> Civil Partnership Act 2004.

<sup>4</sup> See Helmut Graupner, "The First Will Be The Last: Legal Recognition of Same-Sex Partnerships in Austria" in Robert Wintemute (ed.) & Mads Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001), p. 549.

<sup>5</sup> Sexual Offences Act 1967.

<sup>6</sup> Sexual Offences (Amendment) Act 2000.

<sup>7</sup> Employment Equality (Sexual Orientation) Regulations 2003.

<sup>8</sup> The Civil Partnership Act 2004 and the Adoption and Children Act 2002 both entered into force in Dec. 2005.

legal equality is largely over: the Netherlands, Belgium, Spain, Canada, South Africa (from the 1st of December), and the US state of Massachusetts (apart from federal law).

I would argue that the success of this slow, painful march towards full equality is inevitable, as a matter of social justice, and will eventually be repeated in every country in the world. It is as inevitable as the process of abolishing slavery, and granting the vote to women, which began in a few countries and then spread. This should give us the courage we will need to fight laws that still criminalise same-sex sexual activity in over 1/3 of the member states of the United Nations, especially those that impose the death penalty (as in, for example, Iran, Saudi Arabia, and some states of Nigeria).

## **II. Are there any strong arguments against allowing same-sex couples to marry?**

The first argument is often one of tradition: the definition of marriage as between one man and one woman has existed for thousands of years, and has served society well. It is for "the common good", as one Irish law professor put it. But, as I replied to him, which part of society and whose good has this definition served? Quite simply, the good of the heterosexual majority, who have no desire to marry a person of their own sex, not the good of the LGBT minority. The traditional definition of marriage cannot be viewed in isolation. It is part of a long history of discrimination against a despised minority by a powerful majority, and is merely one of the final forms of legal discrimination to be addressed. The history of this despised minority includes the fact that, in Nazi concentration camps, it qualified for its own category (*Homosexuell*) and symbol (the pink triangle). There is thus a strong analogy between discrimination based on sexual orientation and discrimination based on race, religion or sex. This

analogy has been recognised by the European Court of Human Rights, the Supreme Court of Canada, and the drafters of the constitutions of South Africa, Fiji, Ecuador, and Portugal, as well as the drafters of the EU's Charter of Fundamental Rights.

The second argument is that marriage is intended for couples with the capacity to procreate without assistance from third parties. Only different-sex couples have this capacity, therefore only they can marry. This argument collapses under close scrutiny. Different-sex couples are allowed to marry whether or not they have any capacity to procreate without assistance, whether or not they are willing to exercise their capacity, and whether or not they are raising children. Same-sex couples are not allowed to marry, even if they have procreated with assistance, or are otherwise raising children. The European Court of Human Rights made it clear in 2002, in *Christine Goodwin v. United Kingdom*, that the procreation argument cannot be accepted in Europe. The Court said, with regard to a transsexual woman with no capacity to procreate who wished to marry a non-transsexual man, that: "the inability of any couple to conceive or parent a child cannot be regarded as ... removing their right to [marry]", under Article 12 of the European Convention on Human Rights.

The third argument is that marriage is both a legal and religious institution. Because many religious bodies are unwilling to marry same-sex couples, the State must not do so either. To accept this argument is to ignore the separation of law and religion, and to impose the religion or religions of the heterosexual majority on the LGBT minority. The State may decide to marry same-sex couples and, in countries where religious marriages can count simultaneously as legal marriages, allow religious bodies that wish to do so to marry same-sex couples. But the human right to freedom of religion will protect any religious body that chooses not to marry same-sex couples. Canada's 2005 legislation makes this clear. Eventually, there will be no

need for this exemption, because all religions that discriminate against LGBT individuals and same-sex couples will acknowledge their error and stop doing so. But it could take hundreds of years for all religions to catch up with secular society, so we must not wait on them before changing the law.

### **III. Does registered partnership provide full equality?**

In a growing number of countries or states, the heterosexual majority has said to same-sex couples: "Yes, we understand that it is unjust to deny you access to the rights and obligations attached to marriage. You can have them all (or all except access to adoption and donor insemination). But you'll have to take them without the name 'marriage'." Laws allowing same-sex couples, and only same-sex couples, to enter a new, "separate but equal" institution, known as "registered partnership", "civil union" or "civil partnership", can be found in Denmark, Norway, Sweden, Iceland, Finland, the United Kingdom, and Switzerland, as well as the US states of Vermont and Connecticut. While politicians often think that same-sex couples should be satisfied with this compromise, in 2003, two Canadian courts responsible for applying constitutional principles of equality found it inadequate. Three judges of the British Columbia Court of Appeal concluded that: "Any other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality." Three judges of the Ontario Court of Appeal stressed that: "[S]ame-sex couples are excluded from a fundamental societal institution – marriage. ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships."

In 2004, four of seven judges of the Massachusetts Supreme Judicial Court advised the legislature that creating "civil unions" for same-sex couples only would

not discharge the State's constitutional obligation to allow them to marry: "Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance ... the [State's] legitimate interests ... The history of our nation has demonstrated that separate is seldom, if ever, equal. ... '[C]ivil union' ... is a considered choice of language that reflects a demonstrable assigning of same-sex ... couples to second-class status. ... The bill would have the effect of maintaining ... a stigma of exclusion .... [and] an unconstitutional, inferior, and discriminatory status for same-sex couples ..."

In her dissenting opinion, Justice Martha Sosman asked "what's in a name?", and described the difference between the names "marriage" and "civil union" as "insignificant". I wonder what Justice Sosman would think if male judges in Massachusetts were called "judges", and female judges were called "senior legal secretaries", but enjoyed exactly the same pay and benefits as male judges. Would that be an "insignificant" difference?

Legal marriage is a public institution. LGBT persons can never be fully equal if they do not have equal access to all of the same public institutions as heterosexual persons. A sign saying "Same-Sex Couples May Not Enter" is a form of segregation or apartheid, whether the sign is in front of the federal Parliament building, or the waiting room for civil marriages at the town hall. In the United Kingdom, some town halls have made the segregation almost invisible. The civil partnership ceremony of my friends Adnan and Eric at Chelsea Town Hall was virtually identical to a civil marriage: the official, the room, the music, the flowers, the readings, the love and the tears were the same, and the vows were almost identical. But the certificate they received at the end read "civil partnership", not "marriage". This insistence on withholding a word seen as belonging to the heterosexual majority is both amazingly

petty, and extremely harmful. It is harmful even if the majority of same-sex couples prefer a different name, and do not want access to marriage. It is enough that there is even one same-sex couple who would like to have the same option to marry as different-sex couples, whether or not they ever choose to exercise it.

#### **IV. Is registered partnership a necessary intermediate step towards full equality?**

In the beginning, this might have been true. Sometimes fear of change on the part of the majority causes it to grant partial equality to a minority or subordinated group. In 1918, the United Kingdom granted the vote only to women aged 30 or more, whereas men could vote at 21. It took another 10 years to equalise the voting age at 21. Thus, the Netherlands might not have become the first country to allow same-sex couples to marry in 2001, without the "Scandinavian experiments" (the registered partnership laws passed by Denmark in 1989, Norway in 1993, and Sweden in 1994), and its own registered partnership law passed in 1997.

However, I would argue that this intermediate step (a registered partnership law prior to a marriage law) is no longer required. We know now that the sky does not fall once same-sex couples are allowed to marry. Of the 6 territories where same-sex couples are allowed to marry (or will be allowed to do so by the 1st of December), 5 had not created any "separate but equal" institution at the national level, before opening up marriage to same-sex couples. This is true of Belgium (where the "statutory cohabitation" law did not grant equal rights), Spain, Canada, South Africa and Massachusetts. In the Netherlands, a "separate but equal" institution of registered partnership was created before same-sex couples were allowed to marry, but it was made available to all couples. To date, none of the countries that have created a

"separate but equal" institution for same-sex couples only has allowed them to marry. Once they are allowed to marry, the question arises: "What should we do with the 'separate but equal' institution: abolish it or extend it to all couples?" Sweden will probably be the first country to face this question.

Examining the sequence of changes in different countries brings into focus a key feature of all registered partnership laws, both laws for same-sex couples only (as in Sweden) and laws for all couples (as in the Netherlands). To date, all of these laws have been passed for a very negative reason: avoiding the opening up of marriage to same-sex couples. (Québec's civil unions law, passed in 2002, is an exception, because Québec did not have the constitutional power to allow same-sex couples to marry.) To date, no registered partnership law has been passed by a country that already allowed same-sex couples to marry. There may be a strong, positive case for an alternative registration system (called "registered partnership" or "civil union") that is open to all couples who object to the word "marriage". But this is an entirely separate question, and does not answer the equality claim of same-sex couples who seek access to marriage.

## **Conclusion**

To conclude, we know now that full equality for LGBT individuals and same-sex couples can be achieved in countries with Roman Catholic majorities. I would express the same hope for Austria that I expressed for Ireland when I spoke there in May: that Austria will have the courage to recognise the inadequacy of the "separate but equal" compromise of registered partnership, will grant all couples the same choices, and will therefore allow same-sex couples to marry, as in Belgium and Spain.



Vielen Dank.