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National Report: United Kingdom

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NATIONAL REPORT FOR THE UNITED KINGDOM

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Caveat

There is a belief that is held overwhelmingly by LGBT activists and supporters of LGBT rights in North America: an institution called "marriage" is, by dint of its name, better than an institution called "civil union" (or "civil partnership" or "*eingetragene lebenspartnerschaft*" or whatever). I do not subscribe to this belief. Nor do I subscribe to the belief that respect and equality for gay and lesbian people, and same-sex couples, is achieved by having only one institution for the regulation of domestic relationships with one set of rules, to be applied identically to same-sex and opposite-sex couples. Though this project does envisage examining civil union regimes, the focus seems clearly to be on marriage, as shown by the very title of the project. A more neutral title, one that would have a broader world-view, would be "Formalised Same-Sex Relationships." Otherwise assumptions are made throughout that marriage is more worthy of study than civil union and, worse, that it is the ultimate aim and that therefore, the achievement of, for example, the United Kingdom in creating "civil partnership" is a lesser achievement than that of, say, Canada or Sweden or Iowa in opening "marriage" to same-sex couples. These assumptions should not go unquestioned: they might well be the conclusion to be drawn on the completion of the project but are not, in my view, an appropriate starting point. Likewise, I should have preferred the first "Major Aim" to have been expressed more neutrally: "To gather statistics about each country's regulations on formalised same-sex relationships." There are, at this moment in time, many more countries with civil union regimes than with marriage regimes (for same-sex couples), and a comprehensive examination of the position across the world needs to be neutral as to whether one type of regime is better or worse than another (or, indeed, whether such ranking is appropriate).

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1. Legal Framework

The United Kingdom has no formal written constitution (called as such), though various instances of written law have constitutional import. The United Kingdom is a parliamentary democracy, whose legal system is based on the principle of parliamentary sovereignty. There is no higher law than an Act of Parliament. But there are a number of constraints on this in practice. The major legal constraints on the UK Parliament (both imposed, be it noted, by Act of that very Parliament) are (i) the European Communities Act 1973, which accepts the supremacy of European Union law, and (ii) the Human Rights Act 1998. The 1998 Act obliges courts to interpret Acts of Parliament, whenever possible, in a way that is consistent with the European Convention on Human Rights ("the ECHR"); it obliges public authorities to act consistently with the ECHR; it allows the courts to grant declarations that Acts of Parliament are incompatible with the ECHR; and it empowers Parliament to adopt an accelerated legislative process to amend any Act declared by the courts to be incompatible.

The devolved legislatures within the United Kingdom (that is to say the Scottish Parliament, the Welsh Assembly and the Northern Irish Assembly) are not sovereign parliaments. England has no devolved national legislature and is directly governed by the UK Parliament which retains full sovereignty over that constituent part of the United Kingdom. The devolved legislatures are constrained by the UK legislation that established them (the Scotland Act 1998, the Government of Wales Act 1998, and the Northern Ireland Act 1998), and, as public authorities, are further constrained by the Human Rights Act 1998 never to act in a way that is incompatible with the ECHR. This means that the devolved legislatures may not pass legislation or make regulations that are not ECHR-compliant. Courts may strike down any legislation from these legislatures that they find to be non-compliant, as being ultra vires the powers of the Parliament or Assembly that passed it. Further, section 75 of the Northern Ireland Act 1998, specifically requires public authorities to have due regard to the need to promote equality of opportunity between persons of different sexual orientation (amongst other things). An equivalent provision for England and Wales, and for Scotland, is now contained in section 149 of the Equality Act 2010; but, not being contained in constituent legislation as it is in Northern Ireland, this provision could be repealed by normal legislative process.

2. Constitutional Regulations Applicable to Same-Sex Partnerships

The human rights guarantees contained in the European Convention on Human Rights ("the Convention") (insofar as they can be described as "constitutional regulations") are directly enforceable in the United

Kingdom in the manner described above. These guarantees provide support for the legal systems within the UK (and particularly those with devolved legislatures) developing rules that avoid discrimination between same-sex and opposite-sex couples. The articles of the Convention most relevant here are articles 8, 12, and 14. Article 8 guarantees the right to respect for private and family life; article 12 guarantees the right to marry and found a family; and, article 14 provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Since 1999 it has been accepted that article 14 includes sexual orientation as one of the prohibited grounds of discrimination (see part 12). The reference in article 8 to "private life" has been used, in conjunction with article 12, to ensure that personal relationships are regulated without distinction based on sexual orientation; so far, however, the European Court has hesitated to base any of its sexual orientation decisions on the reference in article 8 to "family life," focusing instead on "private life." Only in *X, Y and Z v. United Kingdom* (1997) 24 EHRR 143 is it implicit that a relationship between two persons of the same gender, jointly bringing up their children, engages "family life" for the purposes of article 8 (though this is obscured by the fact that the couple was presented to the world as an opposite-sex couple, one of the parties being transgender). In *Schalk and Kopf v. Austria* (application No 30141/04) and *Chapin and Charpentier v. France* (application no 40183/07), the European Court has been directly asked to include same-sex couples within "family life" for the purposes of article 8 and its decision in these cases is awaited.

Article 12 protects the right to marry and found a family. This has not yet been defined in a way that is inclusive of same-sex couples marrying, and indeed, the European Court's jurisprudence is presently hostile to same-sex marriage. The article is perhaps the least rigorously analysed in the whole of the Convention, and insofar as the European Court of Human Rights has attempted to give guidance as to its meaning, the assumption has been made that "the right to marry and found a family" refers to "traditional marriage," that is to say marriage involving an opposite-sex couple. This has been affirmed, rather than challenged, in a series of cases involving transgender persons who have sought (ultimately successfully) to be recognised in their new gender for the purposes of contracting, what would then, be an opposite-sex marriage. As stated in *Rees v. United Kingdom* (1986) 9 EHRR 56 para. 49:

> In the Court's opinion, the right to marry guaranteed by Article 12, refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear

> that Article 12 is mainly concerned to protect marriage as the basis of the family.

Though the reference to "biological sex" can no longer stand in light of the Court's subsequent decision in *Goodwin v. United Kingdom* (2002) 35 EHRR 447, it remains unlikely that the Court will extend its understanding of article 12 beyond "traditional marriage between persons of the opposite sex". In *Parry v. United Kingdom* (application 42971/05, 28 November 2006), the European Court, declaring inadmissible an application by a couple whose marriage had to be converted into a civil partnership, contrary to their wishes, due to the change of sex of one of the spouses, said this:

> Article 12 . . . enshrines the traditional concept of marriage as between a man and a woman . . . . While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental right [contained in article 12].

The European Court is currently considering two claims by same-sex couples that the failure of domestic law to allow them to marry is a breach of articles 8, 12, and 14 (*Schalk and Kopf v. Austria* (hearing on 25/02/2010); *Chapin and Charpetier v. France*). The Court would have to reverse its existing jurisprudence before allowing the claim on the basis of article 12. Nevertheless, the extension of article 14 to sexual orientation will make it difficult to deny that article 12 encompasses same-sex couples in those European countries, like Belgium, the Netherlands, Norway, Spain, Portugal, and Sweden, where marriage is open to such couples, with the result that opposite-sex and same-sex married couples will be required to be treated the same. Likewise, the interplay between articles 8, 12, and 14 suggests strongly that countries (like the United Kingdom) which have a civil union regime for same-sex couples will have difficulty justifying substantial differences in legal treatment between that institution and opposite-sex marriage. But it may well be that minor differences—such as those that exist in the UK (see part 5)—could be justified by the aim of protecting religious sensitivities, as manifested by the traditional parameters of marriage. That institution has no special constitutional protection in the UK (as it does in, for example, Ireland, Germany, and Hungary); but, the political decision to treat marriage as a socially special institution is likely to be considered by the European Court to be a legitimate governmental aim within a state's margin of appreciation. Beyond that, it is unlikely that the European Court will hold that article 12 requires other countries to open their marriage regimes to same-sex couples. Much more likely is that the Court in *Schalk* and *Chapin* will hold countries in breach of articles 8 and 14 if they provide to same-sex couples

no means of accessing the rights and obligations that are open to opposite-sex couples via marriage. In other words, the approach in *Baker v. State*, 744 A.2d 864 (Vt. 1999) is likely to be followed by the European Court in preference to the reasoning in *Goodridge v. Dept. Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinion of the Justices*, 802 N.E.2d 605 (2004).

3. Legal Statutes on Same-Sex Marriage

Marriage in all the legal systems in the United Kingdom is explicitly limited by Act of Parliament to opposite-sex couples: Matrimonial Causes Act 1973, § 11(c) (England and Wales); Marriage (Scotland) Act 1977, § 5(1)(d)); Marriage (Northern Ireland) Order 2003 (SI 2003 No 413 (NI 3)), art. 6(6)(e)). Indeed, foreign marriages involving same-sex couples will be treated in the United Kingdom as if they were civil partnerships rather than as marriages: Civil Partnership Act 2004, § 212(1) and Schedule 20. It has been held at High Court level that this rule does not infringe articles 8, 12, and 14 (*Wilkinson v. Kitzinger*, discussed at part 12).

4. Differences Between Same-Sex Marriage and Opposite-Sex Marriage

Not applicable.

5. Civil Union Regulation (Especially Entry into and Exit from Union)

The Civil Partnership Act 2004 came into force in December 2005 and creates a statutory institution for the legal recognition and regulation of same-sex relationships, which is distinct from, but equivalent to, the existing institution of marriage, a common law institution that has for many centuries recognised and regulated opposite-sex relationships. Though it is an Act of the United Kingdom Parliament, the Civil Partnership Act 2004 creates, in three separate parts, three distinct civil partnership regimes, each of which is designed to replicate the marriage regimes in the three separate legal systems that make up the United Kingdom. Civil partnership regimes are created in part II of the Act for England and Wales, in part III for Scotland, and in part IV for Northern Ireland. These regimes differ from each other insofar as the existing marriage regimes in these different jurisdictions differ from each other.

The conditions for entering a civil partnership within each of the three constituent legal systems of the United Kingdom replicate the conditions for entering a marriage, other than the gender mix. Termination of a civil partnership before death is by judicial dissolution, following the same process as divorce (for the termination of marriage) and granted on the same grounds —other than that adultery is not a ground for dissolving a civil partnership.

The conditions for entering a civil partnership are that the parties:

i. Are both of the same sex
ii. Are neither married nor in a civil partnership already
iii. Are both over the age of 16
iv. Are not within the forbidden degrees of relationship with each other
v. Are capable of understanding the nature of civil partnership
vi. Are capable of validly consenting to the creation of a civil partnership

The law in England and Wales requires the satisfaction of conditions (i) – (iv) (2004 Act, § 3 and sched. 1); the law in Northern Ireland requires the satisfaction of conditions (i) – (v) (2004 Act, § 138 and sched. 12); the law in Scotland requires the satisfaction of conditions (i) – (vi) (2004 Act, § 86 and sched. 10). Parental or guardianship consent is required if one or both parties is under the age of 18 in England and Wales (2004 Act, § 4) or in Northern Ireland (2004 Act, § 145). Parental consent to marry or enter into a civil partnership is not required in Scotland.

5A: Differences Between Civil Union and Marriage

[There should at this point be a question in relation to civil union, equivalent to Question 4 for marriage: is there any formal difference (other than gender mix) between marriage and civil union? The answer to such a question for the United Kingdom would be as follows:]

None of the three civil partnership regimes created by the United Kingdom's Civil Partnership Act 2004 is in all respects identical to the three marriage regimes upon which they were based. The differences are primarily sexual and religious. Marriage remains to some extent both a sexual relationship and a religious institution. Civil partnership, on the other hand, is wholly "desexed" and (originally) completely secularised.

Civil partnership as a "desexed" relationship

Though it is true that civil partnership is assumed to involve parties who are (or at least were) in a sexual relationship with each other (so for example two sisters who live together in a mutually supportive and life-long relationship are ineligible to register for a civil partnership, *Burden v. United Kingdom* (2008) 47 EHRR 38) there is no legal requirement that the relationship is or was sexual, and no legal consequence for the relationship to any sexual act, or absence thereof. This distinguishes civil partnership from marriage since the marriage rules concerning sexual behaviour are not replicated for civil partnership. Adultery, which remains a ground for divorce in all three jurisdictions (Matrimonial Causes Act 1973, § 1(2)(a) (England and Wales); Divorce (Scotland) Act 1976, § 1(2)(a); Matrimonial Causes (Northern Ireland) Order 1978, § 3(2)(a)), is not a ground for the

dissolution of a civil partnership (all the other grounds of divorce are equally grounds for dissolving a civil partnership). Sexual potency remains relevant to marriage. Inability or refusal to consummate a marriage is a ground upon which it might be nullified in England and Wales (Matrimonial Causes Act 1973 § 12(a) and (b)) and in Northern Ireland (Matrimonial Causes (Northern Ireland) Order 1978, § 14(a) and (b)), the marriage remaining valid but voidable until it is nullified. But these rules are not replicated in the Civil Partnership Act. In Scotland incurable impotency is, at common law, the only ground upon which a marriage is voidable but that ground is not extended by legislation to civil partnership.

Civil partnership as a secular institution

Civil partnership was deliberately designed to be a completely secular (non-religious) institution (see Hansard, HL 22 April 2004, col. 388; Hansard, HC 12 October 2004, col. 177). Marriage, to different extents in each of the three UK legal systems, is both secular and religious. In particular, marriages in the United Kingdom can be solemnised by either a church officer or a secular state official (a registrar). Civil partnership may be registered only by a registrar—and indeed the language of "solemnization," with its sacramental overtones, is avoided completely. Place of registration was originally deliberately secular in all parts of the United Kingdom (Civil Partnership Act 2004, §§ 6, 93) and registrations were prohibited at any "religious premises," which are defined to mean premises used solely or mainly for religious purposes or which have in the past been so used and have not subsequently been used solely or mainly for other purposes. The rule has now changed for England and Wales and, under section 202 of the Equality Act 2010 (not yet in force), regulations (not yet made) may provide for the approval of religious premises for the registration of civil partnership; even here, however, registration is at the hands of the secular registrar and not the religious official in whose premises the registration takes place.

6. Opposite-sex Civil Unions

Civil partnership in all three constituent parts of the United Kingdom is limited to same-sex couples: Civil Partnership Act 2004, §§ 3 (England and Wales), 86 (Scotland), and 138 (Northern Ireland).

7. Differential treatment for opposite-sex civil unions

Not applicable.

8. Specific Purpose Recognition

Not applicable.

9. Future Developments with Marriage

The United Kingdom Government, which became Conservative-dominated in May 2010, is unlikely to change the position in relation to marriage and civil partnership, with the former being limited to opposite-sex couples and the latter to same-sex couples. The major LGBT campaigning groups in the United Kingdom have not in the past seen either the opening of marriage to same-sex couples or the opening of civil partnership to opposite-sex couples as major campaign priorities, but they do tend to support calls for such openings. In March 2009, the Scottish Parliament accepted a Public Petition (PE 1239) urging the Scottish Government to open marriage and civil partnership to both types of couples. Some of the minority parties, represented in the Scottish Parliament, but none of the major parties, support this call, and the Scottish Government is presently resisting the pressure.

10. Future Regulation of Civil Union

Not applicable.

11. Non-Legislative Regulations

Not applicable.

12. Judicial Construction of the Law

The European Convention on Human Rights continues to be a major influence in discrimination law in the United Kingdom. The UK was forced to change the criminal law in Northern Ireland in relation to male-male sexual activity by the European Court of Human Right's decision in *Dudgeon v. United Kingdom* (1981) 3 EHRR 40 (decriminalisation had occurred earlier in England and Wales (1967) and in Scotland (1980)). In *Dudgeon*, the Court held that a complete ban on same-sex sexual activity was a breach of the right to private life as protected by article 8 of the ECHR, though it did not address the issue of discrimination under article 14. It was not until 1999 that sexual-orientation discrimination was held to be within the terms of article 14 (*Salgueiro da Silva Mouta v. Portugal* (2001) 31 EHRR 47). Following that decision, differential age requirements to sexual activity based on the gender mix of the participants was held to be contrary both to article 8 and article 14 (*SL v. Austria* (2003) 37 EHRR 30), and differential treatment regarding other civil rights for same-sex couples as opposed to opposite-sex couples was held contrary to article 8 in *Karner v. Austria* (2003) 2 FLR 623. Though the European Court has not yet directly held that same-sex couples are entitled to the protection of family life guaranteed by article 8, the Court now very clearly takes the view that, just like legal differences based on sex, legal

differences based on sexual orientation may be justified only by particularly serious and persuasive reasons (*SL v. Austria* at para. 37, *Karner v. Austria* at para. 37, and *Burden v. United Kingdom* at para. 47).

Within the context of the European Union too, discrimination on the basis of sexual orientation has been prohibited in the fields of employment (Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), giving effect to Council Directive 2000/78/EC) and the provision of goods and services (Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), also giving effect to Council Directive 2000/78/EC). These provisions have now all been consolidated into the Equality Act 2010.

Domestic case law is also supportive of equality between same-sex and opposite-sex couples. The breakthrough case was that of *Fitzpatrick v. Sterling Housing Association* (1999) 4 All ER 705, in which the House of Lords held that a same-sex couple could be a "family" for the purposes of legislation governing the succession to tenancies (reaching the same decision as the Supreme Court of New York had done ten years previously in *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989)). The Court held at the same time, however, that a same-sex couple could not be said to be "living together as husband and wife." But once the Human Rights Act 1998 came into force that latter holding was reversed in *Ghaidan v. Mendoza* (2004) 3 All ER 411, where the House of Lords held that the Human Rights Act 1998 required UK courts to depart from the unambiguous meaning of legislation, and even from the intention of Parliament, if this was necessary to achieve consistency with the ECHR. The phrase "living together as husband and wife" had now to be read to mean "living together *as if they were* husband and wife" in order to include same-sex cohabiting couples within the terms of the legislation, for non-discrimination between these two types of couple was required, the House of Lords accepted, by articles 8 and 14 of the ECHR.

The UK's rule that all formalised (i.e. registered) relationships from overseas involving same-sex couples, even those structured as, and named, marriage in the country of their creation, will be treated as civil partnership was challenged in *Wilkinson v. Kitzinger* (2006) EWHC 2022, (2007) 1 FLR 296 as a breach of articles 8, 12, and 14. The challenge failed. The judge accepted that there was different treatment based on sexual orientation, but held that this was justified. He said (at para. 122):

> With a view (1) to according formal recognition to relationships between same sex couples which have all the features and characteristics of marriage save for the ability to procreate children, and (2) preserving and supporting the concept and institution of marriage as a union between persons of opposite sex or gender, Parliament has taken steps by enacting the Civil Partnership Act to accord to same-sex relationships effectively

> all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homosexuals who wish to join stable long-term relationships. To the extent that by reason of that distinction it discriminates against same-sex partners, such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States.

Another case of relevance here is *Ladele v. London Borough Council of Islington* (2009) EWCA Civ 1357, (2010) 1 WLR 955. A marriage registrar was disciplined and threatened with dismissal when she refused to participate in the registration of civil partnerships on the grounds that to do so would conflict with her "orthodox Christian" beliefs in the sanctity of marriage. She claimed that this amounted to direct and indirect discrimination contrary to the Employment and Equality (Religion or Belief) Regulations 2003, as read with article 9 of the ECHR (the right to freedom of thought, conscience, and religion). The Court of Appeal for England and Wales held that there was no direct discrimination against Ladele because the Council's actions were a response to her refusal to carry out civil partnership duties and not a response to her religious beliefs. There was no indirect discrimination because the Council's legitimate aim was not only to ensure that all couples who wished to register a civil partnership had access to a registrar who would do so, but also, to ensure that the Council acted consistently with its stated policy of fighting discrimination against gay and lesbian citizens and employees. The Court endorsed the finding of the Employment Appeal Tribunal that "once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate—and in truth it was bound to do so—then . . . it must follow that [the Council] were entitled to require all registrars to perform the full range of services" (per Lord Neuberger MR at para. 49). Importantly, the Court held that the council's policy of requiring all its registrars to perform civil partnership duties was a proportionate means of achieving its aim of providing a non-discriminatory public service, notwithstanding that some other councils might not impose this requirement on its registrars. Indeed, the Court was willing to contemplate that councils could not lawfully exempt their registrars from civil partnership duties, on the ground that the Equality Act (Sexual Orientation) Regulations 2007 (now the Equality Act 2010), which prohibits discrimination in the provision of goods and services on the basis of sexual orientation, takes precedence over any rights which a person might otherwise have by virtue of his or her religious belief or faith, to practice discrimination on the ground of sexual orientation (paras. 71 and 74).

13. Other Relevant Issues

(i) Recognition of Overseas Relationships

The United Kingdom's Civil Partnership Act 2004 makes explicit (and complex) provision for the recognition within the UK of same-sex relationships that have been formalised abroad. The rules are contained in Part V, Chapter 2 of the 2004 Act. The Act defines those "overseas relationships" that are eligible for recognition, and then sets out the recognition rule.

To be eligible for recognition under the Act the relationship must *either* be of a type that is specified in schedule 20 to the Act *or* be of a type that meets certain "general conditions." Schedule 20 specifies relationships from a number of jurisdictions including California, Maine, Massachusetts, Denmark, Finland, Norway, Sweden, the Netherlands, Germany, France, Spain, and Canada, and this list has subsequently been added to by the Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005 No 3135) so that it also includes Andorra, Luxembourg, New Zealand, Connecticut, and New Jersey. The "general conditions" are that the type of relationship (i) may not be entered into if either party is already married or in a relationship of that kind, (ii) is of indeterminate duration and (iii) has the effect of treating the parties as a couple either generally or for specified purposes (2004 Act, § 212(1)(a) – 214). Any individual relationship that is either of a type listed in schedule 20 or of a type that meets the general conditions will be eligible for recognition if (i) it has been registered with a responsible authority, (ii) it is between two persons of the same sex, and (iii) it is between two persons neither of whom is presently married or in a civil partnership (§ 212(1)(b)). Being limited to same-sex couples, opposite-sex civil unions from, say, South Africa, the Netherlands, or New Zealand are not eligible to be recognised as civil partnerships under the 2004 Act. However, foreign marriages involving same-sex couples (many of which are explicitly listed in schedule 20) are eligible for recognition, but as civil partnerships. So marriages involving same-sex couples from, say, Canada, Sweden, or Iowa will be treated in the United Kingdom as civil partnerships even if they are treated as marriage in the country of their creation. Additionally, domestic partnerships (see subsection iii) such as the French Pacs and the Victorian registered domestic relationship, will be treated as civil partnership in the UK when they involve same-sex couples; the crucial defining characteristic is registration of a same-sex relationship and not its legal consequences.

The recognition rule itself, once it is established that the individual relationship is eligible for recognition, is that under the relevant law both parties had capacity to enter into the relationship and they met all that law's requirements necessary to ensure the formal validity of the relationship. The "relevant law" is the law of the country or territory where the

relationship is registered, including its rules of private international law (2004 Act, § 212(2)). In other words, the *lex loci registrationis* governs both formalities and capacity. A registered same-sex union (whatever its technical form) valid by the *lex loci registrationis* will be treated as a civil partnership in the United Kingdom. This is a noticeably generous and inclusive approach and relationships from most foreign countries with formalised same-sex relationship regimes will be eligible for recognition in the UK.

(ii) Informal Relationships (cohabitants/de facto relationships)

The Civil Partnership Act 2004 does not provide a comprehensive set of rules for the recognition or regulation of informal relationships, that is to say relationships that are not registered with an appropriate authority (usually referred to in the United Kingdom as "cohabiting couples," or cohabitants —in many other countries, such as Australia and New Zealand, they are referred to as "de facto couples" and de facto partners). But the House of Lords has made plain that, wherever possible, statutes referring to cohabiting couples should be read to include same-sex cohabiting couples because the ECHR requires that opposite-sex and same-sex couples be treated the same (*Ghaidan v. Mendoza*, part 12 above). Where this is not possible on the words of the statute (for example because they are explicitly gender-specific) it is likely that a declaration of incompatibility will be made by the court.

Scottish law has gone rather further than the law in England and Wales, and Northern Ireland, in granting rights and responsibilities to cohabiting couples, and whenever it has done so since 1999 (when the Scottish Parliament was re-established) it has included within its terms same-sex couples. Additionally, the Family Law (Scotland) Act 2006 contains various provisions extending to same-sex cohabitants those rights and responsibilities already existing for opposite-sex couples. So Scottish law can now claim to make no distinction between same-sex and opposite-sex couples who live together in unregistered relationships. The major rights are family home protection (Matrimonial Homes (Family Protection) (Scotland) Act 1981, as amended to include civil partners in the Civil Partnership Act 2004 and as amended to include same-sex cohabitants in the Family Law (Scotland) Act 2006); the right to claim financial readjustment on separation (Family Law (Scotland) Act 2006, § 28); and the right to claim a portion of a deceased cohabitant's intestate estate on death (Family Law (Scotland) Act 2006, § 29). In each of these cases the claim available to a cohabitant is of lesser worth than the claim available to a married or civilly empartnered person.

(iii) Domestic Partnership Schemes

The full picture of same-sex relationship recognition cannot emerge clearly without drawing a distinction between marriage and civil union schemes on the one hand and what are usually called "domestic partnership" schemes on the other hand. Domestic partnerships differ from informal relationships in that they involve the registration of the relationship, but they also crucially differ from marriage and civil union schemes in that no divorce or analogous process is needed to bring the relationship to an end, and the registration of the relationship does not create a status that has effect on the capacity of the individual party to the relationship to contract another relationship. In other words, parties to a domestic partnership scheme, such as is available in Hawaii, Maine, and Washington (USA); Victoria (Australia); France; and, Uruguay, remain free to marry or enter a civil union even before their existing domestic partnership has been ended (and usually doing so is one of the means of bringing the domestic partnership to an end). In the United Kingdom, foreign domestic partnership schemes will be treated as civil partnerships, so long as the relationship has been registered and it otherwise satisfies the recognition rules specified above. The anomaly that the relationship is converted thereby into one that cannot now be escaped from by means other than judicial process is more apparent than real and is no different from a marriage created in a legal system that permits easy and non-judicial escape (for example by talaq) but which, if the parties subsequently acquire a domicile in the United Kingdom, can only be terminated by a court of law.

(iv)The Parent-Child Relationship

(a) Adoption:

In each of the jurisdictions of the United Kingdom, same-sex couples, whether registered as civil partners with each other or not, are permitted to adopt children jointly: Adoption and Children Act 2002, §§ 50 and 144(4), for England and Wales; Adoption and Children (Scotland) Act 2007, § 29, for Scotland. These provisions permit "couples" to adopt jointly, and "couple" is defined to mean partners who are either married to each other, civil partners of each other, or living with each other in an enduring family relationship. In Northern Ireland article 14 of the Adoption (Northern Ireland) Order 1987 restricted joint adoption to married couples but in *Re P (A Child) (Adoption: Unmarried Couple)* (2008) UKHL 38, (2009) 1 AC 173, the House of Lords held that an unmarried (opposite-sex) couple could adopt since the limitation was contrary to articles 8 and 14 of the ECHR. There is no indication that this decision is limited to opposite-sex couples

and so it may be said with some confidence that in all parts of the United Kingdom, stable couples, whatever their gender mix and whether or not their relationship is registered with the state through marriage or civil partnership, are entitled to apply for an adoption order over a child.

(b) Artificial Reproduction:

Applying in all the jurisdictions of the United Kingdom, the Human Fertilisation and Embryology Act 2008 provides that where a woman has become pregnant as a result of the placing in her of an embryo or of sperm and eggs or of her artificial insemination, and at that time she was a party to either a marriage or a civil partnership, her husband will be treated as the father or her (female) civil partner will be treated as a parent of the child unless it can be shown that the husband or the civil partner, as the case may be, did not consent to the placing in the woman of the embryo or the sperm and eggs or to her artificial insemination (2008 Act, §§ 35 and 42). If the woman who becomes pregnant by these artificial means is unmarried and not in a civil partnership but nevertheless has a partner (male or female), then the partner becomes the father or a parent, as the case may be, so long as that partner consents to being treated as the father or a parent (2008 Act, §§ 36 and 43).

(c) Surrogacy:

If a child is born as a result of his or her gestational mother having entered into a surrogacy arrangement, the commissioning couple can obtain a "parenting order" (which has the same effect as an adoption order) so long as one or both of the couple is genetically a parent of the child, and the couple is either married to each other, civil partners of each other, or living as partners in an enduring family relationship (2008 Act, § 54). This applies throughout the United Kingdom and is available whatever the gender mix of the couple and whether or not the relationship is registered.