CONSTITUTIONAL CHALLENGES TO SEXUAL ORIENTATION DISCRIMINATION

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INTRODUCTION

1999 may well go down in history as a watershed in the legal struggle for gay and lesbian equality. While in the late 1990s many legislatures across the world extended various statutory benefits to same-sex relationships,[1] most legal systems continue to make a clear statutory distinction between same-sex and opposite-sex couples (usually by ignoring the former completely), as well as the more obvious (and deliberate) distinction between married and unmarried couples. Both distinctions have come under increasing challenge and in 1999 decisions from each of the highest courts in Canada, South Africa and Vermont, U.S.A. held legislation to be unconstitutional which treated same-sex couples differently from opposite-sex couples. In that year too, the British House of Lords held that a same-sex couple could be a "family" for certain statutory purposes,[2] and the European Court of Human Rights for the first time accepted that the prohibition of discrimination contained in Article 14 of the European Convention on Human Rights covered sexual orientation discrimination.[3]

Constitutional challenge by judicial review of legislation itself is an unfamiliar process in the United Kingdom (though not entirely unknown[4]) and as British courts begin to grapple with their new powers under the Human Rights Act 1998 they will inevitably be drawn to the jurisprudence of legal systems well-used to such challenges. In the United States, Canada, South Africa, and Europe there is an extensive and well-established equality jurisprudence which has not yet developed in the United Kingdom. The bringing into force of the Human Rights Act

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1. See for example the Property (Relationships) Legislation Amendment Act 1999 (New South Wales), the Definition of Spouse Amendment Act 1999 (British Columbia) and the French Civil Solidarity Pact Law (PACs), 15 Nov. 1999.

2. *Fitzpatrick* v. *Sterling Housing Association* [1999] 4 All E.R. 705, [1999] 2 F.L.R. 1027.

3. *Salgueiro da Silva Mouta* v. *Portugal*, case 33290/96, 21 Dec. 1999.

4. There has long been scope for judicial review of subsidiary legislation and, more recently, of primary legislation inconsistent with EC law (see *R* v. *Secretary of State for Transport, ex. P. Factortame (No. 2)* [1991] 1 A.C. 603).

1998 will, however, require British courts to deal with equality issues in ways similar to those adopted abroad, and it is likely that guidance will be sought, through explicit comparative study, from the principles which continue to evolve in the constitutional courts throughout the world. It is the purpose of this article to explore the constitutional challenges that have been made in three particular jurisdictions to statutes which gave benefits to opposite-sex couples while withholding them from same-sex couples, and to construct an argument, based on the approaches adopted abroad, under which similarly differential treatment in the United Kingdom might be challenged before the courts here.

THREE CASES

(a) Spousal Support in Canada

In May 1999 the Supreme Court of Canada handed down its judgment in *M* v. *H*.[5] This involved a challenge to the constitutionality of legislation in Ontario which provided a continuing obligation of financial support on the breakdown of both marriages and unmarried relationships.[6] The problem was that the definition of unmarried relationships covered by the statute limited its application to opposite-sex couples,[7] with the result that on the breakdown of a same-sex relationship the financially weaker party was unable to seek support from his or her ex-partner in circumstances in which support could have been sought had the parties been of the opposite sex. By an eight to one majority the Supreme Court held that the Ontario statute violated the right to equality guaranteed by s.15 of the Canadian Charter of Rights and Freedoms and was not saved by being justified under s.1 thereof.

The Supreme Court had previously held that sexual orientation was an unlawful ground for discrimination, being analogous to those grounds expressly listed in s.15 of the Charter.[8] In the present case they found that same-sex relationships were capable of being both conjugal and lengthy and that to deny the members of such relationships access to the system of support open to conjugal (though unmarried) opposite-sex relationships amounted to differential treatment on the basis of a personal characteristic, namely sexual orientation. The discrimination was not justified under s.1 because there was no rational connection between the objectives of the spousal support provisions (being to provide for the equitable resolution of economic disputes when intimate relationships

5. (1999) 171 D.L.R. (4th) 577.
6. Family Law Act 1990 (Ont.)
7. *Ibid.*, s.29(1).
8. *Egan* v. *Canada* (1995) 124 D.L.R. (4th) 609; *Vriend v. Alberta* (1998) 156 D.L.R. (4th) 385; *Law* v. *Canada* (1999) 170 D.L.R. (4th) 1.

between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent ex-spouses) and the means chosen to further these objectives. The remedy was to strike down the statutory provision limiting access to spousal support to opposite-sex couples, though the declaration to that effect was suspended for six months in order to give the Ontario legislature itself time to address the issues raised by the appeal. Five and a half months later the Ontario Parliament passed legislation amending 67 provisions which recognised unmarried opposite-sex couples and extended these provisions to same-sex couples also.[9]

(b) Immigration Rights in South Africa

Seven months after *M* v. *H* the Constitutional Court of South Africa gave its decision in the case of *National Coalition for Gay and Lesbian Equality* v. *Minister for Home Affairs*.[10] The Act being challenged in this case was the Aliens Control Act 96 of 1991, which authorised immigration officials to issue immigration permits to the spouses of persons lawfully and permanently resident in South Africa. "Spouse" for the purposes of that provision meant persons validly married or joined in certain customary unions. A number of same-sex couples challenged the constitutional validity of this provision on the ground that limiting the benefit of immigration to married partners amounted to discrimination against partners in same-sex relationships, who were legally unable to marry. Though the South African courts are obliged to interpret all statutory provisions in a way that would "promote the spirit, purport and objects" of the South African Bill of Rights,[11] the Constitutional Court held that it was impossible to give the word "spouse" in the impugned legislation a meaning that would include same-sex relationships.[12] This meant that the benefits conferred by the statute were limited to opposite-sex couples, and a unanimous decision by an 11 judge-court held that this amounted to

9. Amendments Because of the Supreme Court of Canada Decision in *M* v. *H* Act 1999 (Ont.). In Feb. 2000 the Federal Government of Canada introduced Bill C-23 to achieve the same effect at the federal level. The Bill passed the Canadian House of Commons on 18 April 2000.

10. Case CCT 10/99, 2 Dec. 1999.

11. Constitution of South Africa, s.39(2).

12. "Spouse" was held by the House of Lords also to be limited to an opposite-sex couple (*Fitzpatrick* v. *Sterling Housing Association* [1999] 4 All E.R. 705, [1999] 2 F.L.R. 1027), as was the concept of "marriage" in New Zealand (*Quilter* v. *Attorney General* [1998] 1 N.Z.L.R. 523). On the other hand, in *Re B.L.V.B.* 628 A2d 1271 (1993) the Supreme Court of Vermont held that, within the context of adoption legislation, "spouse" could be interpreted to include same-sex partner, so permitting adoption by that partner of the other's child without the other giving up his or her parental rights. The legislation permitted "spouses" to adopt in these circumstances and it was held consistent with the aims of the legislation, being to further the interests of the child, to interpret the word to include life partners of either sexual orientation.

discrimination on the grounds of sexual orientation. This finding was based on s.9 of the South African Constitution, which expressly prohibits discrimination on the grounds of *inter alia* sexual orientation. Since gay and lesbian people are capable of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses, the exclusion of them from the immigration benefits granted to married couples creates a message, the Court held, "that gays [*sic*] and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays [*sic*] and lesbians."[13] It followed that, the narrow meaning being unconstitutional, the Court could either strike the provision down or read words into the statute to save its validity. The latter approach was deemed appropriate in the present case and after the word "spouse", as a recipient of the statutory benefit, the Court added "or partner, in a permanent same-sex life partnership".

(c) Marriage Licences in Vermont

Baker v. *Vermont*[14] was decided by the Supreme Court of Vermont three weeks after *National Coalition*. The plaintiffs were three same-sex couples who had lived together in committed relationships for some years, and two of which had raised children together; each couple applied for a marriage licence and each was refused. Being excluded from civil marriage, the couples were thereby prevented by the law of Vermont from accessing a number of statutory benefits and protections, such as spousal insurance, hospital visitation rights, decision-making on illness and death, property protection and intestate succession. The plaintiffs sought a declaratory judgment that the refusal to issue them with a marriage licence was contrary to the Common Benefits Clause of the Vermont Constitution, which is similar to but rather broader in scope than the Equal Protection Clause of the U.S. Constitution. The Supreme Court held that the legal benefits and protections flowing from a marriage licence are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency and authority that the justice of the deprivation cannot seriously be questioned. The justifications for exclusion put forward by the State government (which are discussed later) were regarded as falling substan-

13. Per Ackermann J, at para.54.
14. 20 Dec. 1999, Supreme Court of Vermont.

tially short of the necessary standard, with the result that the exclusion of same-sex couples from the benefits and protections afforded to married couples by Vermont statutes was unconstitutional. It followed that the State of Vermont had a constitutional obligation to extend to the plaintiffs the common benefit, protection and security that Vermont law provides to opposite-sex married couples. All five judges concurred in this result, but there was disagreement as to the appropriate remedy. The majority held that it was not for the Court to determine how to remedy the situation, given that there was a variety of potential options, including opening the institution of marriage to same-sex couples, creating a new and analogous institution for same-sex couples, or extending all the individual statutory benefits of marriage to all unmarried couples. For this reason the Court suspended its decision in order to allow the legislature to decide how to extend the benefits of marriage to the plaintiffs[15] and the legislature was given a "reasonable time" in which to act. One judge would, however, have been willing to grant the plaintiffs that which they sought immediately, and order the issuing of marriage licences.[16] On 26 April 2000, the Governor of Vermont signed into law Bill H.847 which creates from 1 July 2000 the institution of "civil unions" for same-sex couples in Vermont, an institution similar to the "registered partnerships" available in some European countries and which gives to the parties to the union most of the (state) rights and liabilities of marriage.

THE BASES OF THE CHALLENGES

Though these three decisions move the law in their respective jurisdictions in the same direction, each case goes substantially further than the one before. The Canadian Court found unconstitutional a statute which gave benefits to (and imposed liabilities on) unmarried opposite-sex couples but withheld them from (necessarily unmarried) same-sex couples, and the remedy was to put same-sex couples in the same position as opposite-sex (unmarried) cohabitants. In the South African case, however, the Court found unconstitutional a statute which gave a particular benefit to married couples but not same-sex couples, and the remedy was to put same-sex couples in the same position as opposite-sex *but married* couples for that particular statutory purpose. The Supreme Court of Vermont obliged the Vermont legislature to open *all* the statutory benefits and liabilities of marriage to same-sex couples.

15. In a similar, and earlier, case in Hawaii the legislature pre-empted the final decision of the Supreme Court by changing its constitution to ensure that marriage, as such, could not be extended to same-sex couples: see *Baehr* v. *Anderson*, 9 Dec. 1999 (Sup. Ct. Hawaii).

16. The New Zealand Court of Appeal had earlier dealt with a similar challenge but, being limited in its role to statutory interpretation, it was unable to find the New Zealand Marriage Act 1955 to be unconstitutional: *Quilter* v. *Attorney General* [1998] 1 N.Z.L.R. 523.

Though the precise way any particular case will be argued and decided depends essentially on the constitutional framework of the State involved, and notwithstanding the different results in these three cases, the reasoning in the cases shows remarkable similarity. This common approach might well be taken to indicate not only an emerging international consensus that gay men and lesbians have a right not to be discriminated against in the allocation of state benefits and protections, but also an emerging consensus on how to test the legitimacy of legal provisions which distinguish on the basis of sexual orientation. Both the European Court of Human Rights and the domestic British courts are likely to be invited to join or to reject this emerging consensus early in the new century, and the arguments, reasoning and results in the Canadian, South African and Vermont cases will provide these courts with valuable lessons. In each of the three jurisdictions under consideration, the challenged provisions had first to be shown to be discriminatory, and then the State had to be given an opportunity to justify the discrimination. This, essentially, is how British courts are likely to approach the issue under a human rights analysis. Whether they will adopt the same result will depend upon how valid they assess the various arguments to be.

(a) Differential Treatment as Discrimination

Each of the statutory provisions at issue treated same-sex couples differently from opposite-sex couples and each of the applicants had to show that this amounted to discrimination. This is not self-evident, for it has long been recognised that different treatment is not in itself necessarily discriminatory treatment.[17] Some anti-discrimination provisions provide a list of grounds of distinction which are *prima facie* discriminatory, most usually different treatment based on race or sex. South Africa is one of the few jurisdictions in the world (and was certainly the first) where the Constitution itself (as opposed to, for example, employment statutes or other provisions with limited purposes[18]) explicitly lists sexual orientation as a distinction that is *prima facie* unlawful discrimination.[19] In Canada s.15 of the Charter of Rights and Freedoms does not expressly mention sexual orientation, but the Supreme Court of Canada has held that this is an "analogous ground" to

17. This was accepted early by the European Court of Human Rights in the *Belgian Linguistic Case* (Series A 6 (1968)). See also *Andrews* v. *Law Society of British Columbia* (1989) 56 D.L.R. (4th) 1 at p.13, per McIntyre J.

18. See for example the New Zealand Human Rights Act 1993, s.21(1)(m) which prohibits sexual orientation discrimination in specified circumstances such as employment, provision of services, and access to land and education.

19. South African Constitution, s.9(3). Section 9(5) of the Constitution provides that "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

those grounds of distinction that are listed.[20] All that needs to be shown thereafter to turn *prima facie* discrimination into actual discrimination is that the different treatment on this basis is discriminatory in a substantive sense, that is to say that "the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being, equally deserving of concern, respect and consideration".[21] Neither the Supreme Court of Canada nor the Constitutional Court of South Africa had difficulty in finding substantive discrimination in this sense in the reality of the lives of gay men and lesbians, and in particular in the prejudices which they continue to face today in nearly every modern society. In *M* v. *H* the Supreme Court found that individuals in same-sex relationships face significant pre-existing disadvantage and vulnerability which was exacerbated by the challenged provision.[22] Thus the exclusion of such relationships from the statutory provisions at issue perpetuated disadvantages suffered by individuals in same-sex relationships and their human dignity as individuals was thereby violated. In *National Coalition* the Constitutional Court found that the impugned legislation added to the already prejudiced position of individuals in same-sex relationships. "The sting of past and continuing discrimination against both gays [*sic*] and lesbians is the clear message that it conveys, namely that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships."[23]

It is noticeable that in both these decisions the Courts relied very heavily on the notion of the denial of human dignity in finding that the statute perpetuated actual discrimination. The South African court, indeed, held that as well as the equality provision in s.9 of the South African Constitution, which drew upon the notion of human dignity, s.10 also, which provides that every person is entitled to human dignity as a right in itself, was breached. By treating one person less advantageously than another, that person's inherent dignity was compromised. For the Supreme Court of Canada, whether legislation has the effect of violating human dignity is "the central question" in a discrimination claim.[24] That Court has held that "the purpose of [the equality guarantee in s.15 of the

20. *Egan* v. *Canada* (1995) 124 D.L.R. (4th) 609; *Vriend* v. *Alberta* (1998) 156 D.L.R. (4th) 385; *Law* v. *Canada* (1999) 170 D.L.R. (4th) 1.

21. *Law* v. *Canada* at para.88; *M* v. *H* at para.65.

22. Per Cory & Iacobucci JJ, (1999) 171 D.L.R. (4th) at para.3.

23. Per Ackermann J at para.42.

24. *Law* v. *Canada* at para.70, *M* v. *H* per Cory J at para.70 and per Gonthier J at paras.222 and 261.

Charter] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".[25]

(b) Justifying Discrimination

Once it has been established that a statutory provision is discriminatory in a substantive sense, Canada, South Africa and Vermont each give to the State the opportunity to justify the different and disadvantageous treatment. In each jurisdiction at this stage the onus is on the state, and the Supreme Court of Vermont made the point that the more important the statutory benefits, the heavier this onus will be. In all three cases the justifications offered by the state for discriminating against same-sex couples were found to be entirely unconvincing. Predictably, the arguments in all the cases were similar.

In each case the respective state argued that non-recognition of same-sex relationships was necessary to enhance the concepts of "marriage" and "family" in the traditional sense, and in each this argument failed.[26] The Constitutional Court in *National Coalition* pointed out that the government interest in protecting the traditional and conventional institution of marriage was valid only in so far as it did not infringe the

25. *Law* v. *Canada* at para.88, per Iacobucci J. The illegitimacy of stereotyping, that is presuming characteristics in an individual divorced from that individual's own characteristics, is brought out well in *T, Petitioner* 1997 S.L.T. 724 where the Court of Session in Scotland castigated the judge at first instance for refusing an adoption petition made by a gay man in the absence of any evidence that the petitioner had himself any characteristics which would justify the refusal of the petition. It is this stereotyping that constitutes an attack on human dignity, by denying individuality and treating a person as he or she is presumed to be rather than as he or she actually is. The Nazis did that.

26. The argument did, however, persuade the European Commission for Human Rights which, in 1986, had held that "protection of the family" provided an objective and reasonable justification for treating same-sex couples less well than opposite-sex couples: *S* v. *UK* (1986) 47 D.R. 274. This was, however, in the context of succession to a tenancy (the application having been made as a result of the failure of the plaintiff in *Simpson* v. *Harrogate Borough Council* (1984) 17 H.L.R. 205 to persuade the English court that a lesbian couple were "spouses" of each other). That issue must now, of course, be read in the light of the House of Lords decision in *Fitzpatrick* v. *Sterling Housing Association* [1999] 4 All E.R. 705. *Simpson* was followed by the House of Lords as a matter of statutory interpretation, but the Commission decision in *S* v. *UK* was dealt a body-blow by Lord Nichols' statement that once it is accepted that an unmarried opposite-sex couple are capable of being a "family", "there can be no rational or other basis on which the like conclusion can be withheld from" a same-sex couple: [1999] 4 All E.R. at 720D. In *Sutherland* v. *UK* (1998) E.H.R.L.R. 117 at para.65 the European Commission expressed willingness to overrule its previous approach and hold that a state's entitlement to indicate disapproval of homosexual lifestyles could not justify inequality of treatment under the criminal law.

constitution,[27] and in any case the legitimate protection of heterosexual spouses was not affected by the extention of benefits to same-sex couples. "It is true", said Ackermann J[28] "... that the protection of family and family life in conventional spousal relationships is an important governmental objective, but the extent to which this could be done would in no way be limited or affected if same-sex life-partners were appropriately included under the protection of section 25(5)." As L'Heureux-Dubé J put it in *Canada (A-G)* v. *Mossop*:[29] "It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values."[30] A related argument had been put forward in *M* v. *H*, namely that the impugned legislation enhanced the position of women, by tackling the systemic inequality in earning power suffered by women in opposite-sex relationships. Again it was held that that enhancement was not detracted from at all by enhancing the position of others also.[31] Underlying the States' arguments here, in truth, is the desire to give more benefits to heterosexuals and their relationships in order to reflect the moral judgment that they are more deserving of respect and protection than homosexuals. This moral judgment is illegitimate, for it relies too heavily on stereotyping, as does the claim that heterosexual relationships are an "ideal" to be encouraged or to be benefited.[32] An institution becomes an ideal only by clothing it with moral approbation. While there are many people who are willing to advocate this moral judgment, this is simply an argument in favour of discrimination, in favour that is of the proposition that a heterosexual lifestyle is more worthy than

27. Per Ackermann J at para.55.

28. *Ibid.*, at para.59.

29. (1993) 100 D.L.R. (4th) 658 at 712.

30. Cf. *Marckx* v. *Belgium* (1979) 2 E.H.R.R. 330 where the European Court of Human Rights held that states could not encourage "the traditional family" by prejudicing the "illegitimate" family: "The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family; the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family" (at para.40). This would apply to same-sex relationships if, but only if, such relationships were capable of being a "family". The House of Lords in *Fitzpatrick* v. *Sterling Housing Association* [1999] 4 All E.R. 705 held that they were.

31. Per Iacobucci J at para.109. This argument was never persuasive in any case since either party in an opposite-sex relationship could under the impugned legislation access the benefits, through suffering *actual* inequality, and not just the female partners who suffered systemic inequality. There was therefore no reason to exclude same-sex partners who could, like heterosexual males, show actual but not systemic economic disadvantage.

32. In *C* v. *C (A Minor) (Custody: Appeal)* [1991] 1 F.L.R. 223 the Court of Appeal in England held that an opposite-sex relationship was closer to the "ideal" of a nuclear family centred on marriage than a same-sex relationship, and that this entitled them to prefer the one to the other in a custody dispute.

a homosexual lifestyle. The fact that such statements—or even a position of claimed neutrality[33]—are not met with the almost universal disgust that a similar statement in relation to, say, Judaism or blackness would be met illustrates vividly that homophobia is one of the few remaining respectable bigotries.[34]

Another argument put forward to justify the discrimination was that excluding same-sex couples from the benefits afforded to opposite-sex couples encourages the upbringing of children in opposite-sex relationships which it is assumed is best for children. This argument is illogical in jurisdictions like Vermont (though it was that state's primary stated justification in *Baker*) where adoption law is based on the child's welfare and yet permits same-sex couples to adopt jointly, and it was summarily dismissed as such there: "the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the state argues the marriage laws are designed to secure against";[35] "the state's arguments that Vermont policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance".[36] But nor does the argument have validity in jurisdictions which do not (yet) permit same-sex couple adoptions. For one thing, the argument is based on precisely the form of stereotyping that non-discrimination provisions are designed to prevent: it makes an assumption about risk to children which is divorced from the reality of any particular adult-child relationship. In addition, the legal consequences attaching to conjugal relationships are seldom in themselves justified by the existence of children, and they are usually granted even when the couple have no children. In *M* v. *H* the Supreme Court of Canada pointed out that spousal support is justified by the needs of a dependent ex-cohabitant rather than by the fact that the cohabitants might have had children together.[37] Hospital visitation rights, pension

33. There are some issues, such as racism, in which it is impossible to be neutral, to claim, that is, that one cannot or will not either condemn or support it, for that in itself is a highly judgmental position to take. It is submitted that, similarly, it is no longer possible to be neutral about the issue of gay and lesbian equality. A claim to neutrality in that struggle is a vote against.

34. "A Christian lifestyle is worth more respect than a Jewish lifestyle"; "black people are less worthy of respect than white people". These statements are no different in effect from those that say "a homosexual lifestyle has less moral validity than a heterosexual lifestyle". Yet some politicians and religious leaders feel able to express such views openly. To attempt to ameliorate it with such ostensibly benign comments as "love the sinner while hating the sin" is entirely meaningless to those who suffer homophobic abuse: "don't take it personally—it's not you as an individual we are beating up, only your sin". And respect for the individual is as harmed by psychological abuse ("your relationship does not have the same moral validity as mine") as by physical abuse.

35. Per Amestoy J at p.31 (of transcript).

36. *Ibid.*, at p.36.

37. (1999) 171 D.L.R. (4th) 577 at para.92.

rights, succession rights, protection from domestic violence, all flow from needs other than the need to provide a secure environment for children. In *Baker* v. *Vermont* the majority stated that "the laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts".[38] The other stated goal, being the state interest in promoting child-rearing within a setting that provides both male and female role models, was held to be fundamentally flawed since it was diametrically at odds with a 1996 statutory provision removing all barriers in Vermont to same-sex couples adopting children. And in *National Coalition* the Constitutional Court gave a rather different, but equally decisive, response: "From a legal and constitutional point of view procreational potential is not a defining characteristic of conjugal relationships."[39]

A subsidiary argument in the Vermont case, easily dismissed, was that the history of official intolerance to homosexuals and their relationships justified the continuance of such intolerance. The Supreme Court of Vermont countered the argument by reminding itself of other well-known examples of constitutionally intolerable official tolerance (such as race segregation) and pointed out in addition that the Vermont legislature itself had taken a number of steps, deliberately designed to move away from that history, including permitting same-sex adoptions, and extending both the anti-discrimination and the anti-hate-crime legislation to cover sexual orientation.

Even less persuasive was the argument put forward in *National Coalition* that if a gay or lesbian person wishes to access the benefits of marriage he or she can do so by entering into the (heterosexual) institution of marriage. The South African Constitutional Court was contemptuous in its dismissal of this argument: "What the submission implies is that same-sex life partners should ignore their sexual orientation and, contrary thereto, enter into marriage with someone of the opposite sex ... Section 25(5) affords protection only to conjugal relationships between heterosexuals and excludes any protection to a life partnership which entails a conjugal same-sex relationship, which is the only form of conjugal relationship open to gays [*sic*] and lesbians in harmony with their sexual orientation... The respondents' submission that gays [*sic*] and lesbians are free to marry in the sense that nothing

38. Per Amestoy CJ, p.35 (of transcript).
39. Per Ackermann J at para.51.

prohibits them from marrying persons of the opposite sex is true only as a meaningless abstraction."[40]

COUNTERPOINT: AN ENGLISH CASE

In October 1999, some months after the decision of the Supreme Court of Canada and some weeks before the decisions of the Constitutional Court of South Africa and the Supreme Court of Vermont, the British House of Lords handed down its judgment in the case of *Fitzpatrick* v. *Sterling Housing Association*.[41] The issue here was not a constitutional challenge to the validity of a statutory provision but was rather a more mundane problem of statutory interpretation. The Rent Act 1977 provided that on the death of a tenant either his or her "spouse" (which was defined to include his or her unmarried cohabitant) or a member of his or her family would be entitled to succeed to the tenancy. The plaintiff had lived for almost 20 years in a conjugal, same-sex, relationship with a tenant, who had died; he now sought to succeed to his deceased partner's tenancy. The House of Lords unanimously held that the word "spouse", and in particular its definition as a person "with whom the tenant was living as husband and wife", could not be interpreted to include members of a same-sex relationship, because the normal meaning of the phrase, and the one Parliament intended it to have, was limited to an opposite-sex relationship.[42] However, by a three to two majority the House of Lords held that the plaintiff was a member of the deceased's family, because the necessary characteristics of a family, being a mutual degree of inter-dependence, the sharing of lives, caring and love, commitment and support, could be shown in a same-sex relationship as it could be in an opposite-sex relationship. While this case was a famous victory for the individual plaintiff within the law of landlord and tenant, its effect in other areas of the law was minimal, because very few U.K. statutes confer benefits and impose liabilities on "families" while a large number do confer benefits and impose liabilities on couples "living together as husband and wife". However, the decision that "living together as husband and wife" cannot be interpreted to include same-sex relationships was made within the context of a very different human rights regime from that which applies in the United Kingdom today. This makes the decision vulnerable and if the argument presented below is accepted it will prove to be short-lived as a binding precedent.

40. *Ibid.*, at paras.36 and 38. Even the dissenter in *M* v. *H* accepted this: (1999) 171 D.L.R. (4th) 577, per Gonthier J at para.215.

41. [1999] 4 All E.R. 705, [1999] 2 F.L.R. 1027.

42. This was following an earlier decision of the Court of Appeal to this effect: *Harrogate Borough Council* v. *Simpson* (1984) 17 H.L.R. 205.

The statute at issue in *Fitzpatrick* is by no means the only legislative provision in the United Kingdom that gives benefits to opposite-sex couples while withholding them from same-sex couples. It needs to be emphasised right away that this is not a consequence of deliberate attempts to treat same-sex couples less well than opposite-sex couples.[43] Rather, the statutory law in the United Kingdom simply ignores the very existence of same-sex couples. This normally results in disadvantage[44] but occasionally, and perhaps ironically, it works to the advantage of same-sex couples.[45] When the House of Lords decided *Fitzpatrick* no court in the United Kingdom had the power to strike down an Act of the British Parliament on the ground that it was unconstitutionally discriminatory. Even with the coming into force of the Human Rights Act 1998 that power is not available. Nevertheless, while direct constitutional challenges of the nature discussed above are not possible to Acts of the British Parliament, the 1998 Act does change entirely the basis of statutory intepretation with the result that judicial precedents on the meaning of particular words and phrases are themselves open to review. Instead of looking, as before, for the intention of Parliament in the words which appear in a statute, the British courts will now be obliged to find a meaning to the words which is consistent with the protections guaranteed by the European Convention on Human Rights. Not only are the courts themselves public bodies which must act consistently with the ECHR, but s.3 of the 1998 Act obliges them in the strongest terms to interpret Acts of Parliament in accordance with Convention rights. Section 3 provides that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." This means that the courts must give to statutory words and phrases a meaning that is consistent with the ECHR in preference to a meaning that is not, even when the latter is more obvious or natural and even when the latter has the imprimatur of a previous court

43. Though such intent does exist in the criminal law, at least in relation to male couples.

44. See for example the Rent Act 1977, Damages (Scotland) Act 1976, Fatal Accidents Act 1976; para.35 of the Criminal Injuries Compensation Scheme. The English Law Commission in their *Report on Claims for Wrongful Death* (Law Com. No. 263) have recommended that same-sex couples be recognised for these purposes. See Draft Bill, cl. 2, substituting a new s.1A in the 1976 Act.

45. So for example same-sex couples do not suffer the aggregation of their income when one or other of them claims income-related benefits such as income support under the Social Security Contributions and Benefits Act 1992. It would be a nice irony if the argument about to be propounded here were first used by an opposite-sex couple claiming that they were subjected to a more onerous, and therefore discriminatory, tax regime than a similarly situated same-sex couple.

decision.[46] The rule is the same in South Africa, where s.39(2) of that country's Constitution requires courts to give a meaning to words which will "promote the spirit, purport and objects" of the Constitution in preference to one that does not.[47] In neither the U.K. nor South Africa does this permit the court to give to words or phrases meanings which they simply cannot bear, but while in South Africa if the statutory word cannot be interpreted consistently with the Constitution then it might be declared unconstitutional and struck down, in the U.K. the court is limited to making a "declaration of incompatibility" under s.4 of the 1998 Act.[48]

Notwithstanding that limitation to the power of the British courts, it is clear that the interpretation requirements of s.3 of the 1998 Act will have profound effects on how courts operate, and existing decisions, such as that in *Fitzpatrick* v. *Sterling Housing Association*, will be open to reconsideration. In that case the House of Lords unanimously held that the phrase "living together as husband and wife" could not be interpreted to include a same-sex couple, with the result that the numerous statutes which confer benefits and impose liabilities on cohabiting couples are limited in their effects to opposite-sex couples. This, however, was predicated on the search for parliamentary intention in using the phrase. Lord Slynn recognised that the result might be different when the rules for statutory interpretation are changed by the Human Rights Act 1998.[49] And it is possible to construct an argument, in the steps set out in the following paragraphs, to the effect that, in order to be consistent with the European Convention on Human Rights, the phrase "living together as husband and wife" must now be interpreted to include rather than to exclude same-sex couples.

(a) Stage One: Is the Phrase Ambiguous?

The first stage is to establish that the phrase is open to reinterpretation. The question is not one, as it has been hitherto, of utilising an international convention to resolve an ambiguity, in the sense of an uncertainty as to which of two equally plausible interpretations ought to

46. Grosz, Beatson and Duffy, *Human Rights: the 1998 Act and the European Convention* put the effect of s.3 thus: "Statutes must be read in accordance with the Convention unless it is *clearly impossible* to do so" (para.3.13, emphasis added). See also Bennion, "What Interpretation is 'Possible' under Section 3(1) of the Human Rights Act 1998?" (2000) Pub. L. 77.

47. See also s.6 of the New Zealand Bill of Rights Act 1990, which provides (in possibly less emphatic terms than under the Human Rights Act 1998) that "whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

48. The effect of such a declaration is that the executive can act speedily to remedy the deficiency: Human Rights Act 1998, s.10.

49. [1999] 4 All E.R. at 710J.

be given to a statutory work or phrases.[50] Rather, the question is one of whether the statutory provision concerns a Convention right and whether, if it does, it is at all possible to interpret it consistently with the ECHR. In relation to any phrase, such as "living together as husband and wife", ambiguity in this new sense exists unless it can be shown that it is unambiguously and unequivocally limited to the meaning given it in *Fitzpatrick* (as was the word "spouse" in *National Coalition*). Lord Slynn, by contemplating reinterpretation after the 1998 Act is in force, is at the very least implying that the phrase has more than one possible interpretation, but more instructive is the dissenting judgment of Ward LJ when *Fitzpatrick* was in the Court of Appeal. He concluded that the phrase at issue was habile to cover same-sex couples, because the word "as" in "living together as husband and wife" might rationally be interpreted to mean "in the manner of".[51] Ward LJ held that a same-sex couple could live together in the manner of a husband and wife just as easily as an opposite-sex couple can live together in the manner of a husband and wife: each can show commitment and permanency, interdependence and support and the only difference is in the form of the sexual activity between the parties, which is not relevant to the manner of their living together. From this it would appear that the phrase *is* ambiguous, and that it can indeed rationally be interpreted to include same-sex couples even while accepting that Parliament did not intend it to have that inclusive meaning but intended, rather, a meaning that excluded same-sex couples. At the very least, an inclusive interpretation is *not impossible*.

(b) Stage Two: Is a Convention Right at Issue?

If the inclusive interpretation is rational, then it is that interpretation which must be given to the phrase if it can be shown that the exclusionary interpretation is inconsistent with Convention rights. So the second stage of the argument is to examine whether a "Convention right" is at issue. Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for his or her private and family life, home and correspondence. The European Court of Human Rights has not yet explicitly extended the notion of "family life" protected by Article 8 to a same-sex couple. Indeed, in 1986, the European Commission held the reverse.[52] However, it has frequently been held since then that "family life" under Article 8 is not limited to a traditional family based around

50. See, as exemplars of this traditional approach, *R* v. *Home Secretary, ex. p. Brind* [1991] 1 A.C. 696, per Lord Bridge at 747H–748A; *Derbyshire County Council* v. *Times Newspapers Ltd.* [1993] A.C. 534, per Lord Keith of Kinkel at 550D–551G; *T, Petitioner*, 1997 S.L.T. 724, per Lord President Hope at 733L–734C.

51. [1998] 1 F.L.R. 6 at pp.39–40.

52. *S* v. *UK* (1986) 47 D.R. 274. The lesbian relationship in that case was, however, held by the Commission to come within the ambit of protection afforded by the right to private life.

marriage; it certainly includes opposite-sex couples who are living together as husband and wife.[53] Indeed in *X, Y and Z* v. *UK*[54] the ECHR held, contrary to the arguments of the British Government, that there were *de facto* family links such as made Article 8 applicable between an ostensibly heterosexual unmarried couple and the woman's children, even although the man, being a female to male transsexual, was in terms of English law also a woman. This cannot be interpreted other than as the recognition of family life based around a same-sex relationship. The Court said that "when deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children *or* by any other means".[55] Heterosexuality is not stated as a requirement and it would be difficult to argue that such a requirement is implicit given that the Court in this and other transsexual cases has consistently left it within the margin of appreciation for states to determine how they define to which sex a person belongs. The result of this is that when English law regards X as a woman there is no infringement of the ECHR in doing so. But the ECHR's recognition that X's relationship with Y, another woman, amounts to "family life" is a recognition that Article 8 applies to same-sex relationships, even though, in that case, that article was not infringed.[56] This case, together with the House of Lords' acceptance that a same-sex couple may be a "family"[57] and the creation in many European countries and provinces, including Denmark, Sweden, Norway, the Netherlands, France, Catalunya and Aragon, of a civil institution for same-sex couples analogous to marriage, makes it increasingly difficult to deny that same-sex relationships are covered by the right to respect for family life in Article 8.

However, even if "family life" cannot be founded on by a couple who satisfy all the requirements mentioned by the ECtHR in *X, Y and Z* v. *UK*, because a court purports to see an implicit requirement for

53. *Johnston* v. *Ireland* (1987) 9 E.H.R.R. 203; *Kroon* v. *Netherlands* (1995) 19 E.H.R.R. 263; *X, Y & Z* v. *UK* (1997) 24 E.H.R.R. 143. In *Marckx* v. *Belgium* (1979) 2 E.H.R.R. 330 the European Court said, at para.40, "the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family". See note 30 above.

54. (1997) 24 E.H.R.R. 143.

55. *Ibid.*, para.36 (emphasis added).

56. The applicant, X, had claimed an infringement was constituted by English law's refusal to permit him to be registered as Z's father.

57. It is worth remembering at this point that the ECHR lays down minimum standards and that domestic legal systems are free to extend the guarantees contained therein wider than the ECHR has done or even would do. The UK is entitled to recognise as a "family" worthy of article 8 protections a relationship which the ECtHR would not so recognise. It would be odd if UK law recognised a same-sex relationship as a "family" for domestic purposes but refused to do so for human rights purposes.

heterosexuality, Article 8 may still be applicable, because gay men and lesbians as individuals are also protected under Article 8 in respect of their private lives.[58] It is interesting to note at this point that in *National Coalition for Gay and Lesbian Equality* v. *Minister for Home Affairs*[59] the Constitutional Court of South Africa held that the failure to extend a benefit flowing from a relationship to persons in same-sex relationships was an infringment of each *individual's* right to human dignity.[60] If this approach were followed in relation to Article 8 of the ECHR it would not matter whether or not same-sex couples were "families"—a legal rule that gave effect or denied effect to the existence of a personal relationship between two individuals would easily be seen to come within the private life of each individual member of the relationship. It has already been accepted by the ECtHR, in *Niemitz* v. *Germany*[61], that "respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human persons", and the European Commission, while holding that a lesbian relationship was not a family, nevertheless held that the relationship was within the ambit of private life as protected by Article 8.[62] It would be entirely illogical to hold that while sexual relationships between persons of the same sex are covered by Article 8 and at the same time conjugal relationships between unmarried persons of the opposite sex are also covered by Article 8, nevertheless conjugal relationships between persons of the same sex are not covered by Article 8.[63] It follows that the consequences of a same-sex relationship are (somewhere) within the ambit of Article 8 and (probably) within the ambit of both "family life" and "private life".

(c) Stage Three: Is There an Interference with a Convention Right, or a Discriminatory Application Thereof?

Having established that the legal consequences of same-sex relationships are within the parameters of a Convention right, the next stage is to establish that an interpretation of the phrase "living together as husband and wife" which excludes same-sex couples amounts *either* to an interference with the right protected by Article 8 *or* to a discriminatory application of the right.

58. *Dudgeon* v. *UK* (1981) 3 E.H.R.R. 40, (1982) 3 E.H.R.R. 149; *Norris* v. *Ireland* (1991) 13 E.H.R.R. 186; *Modinos* v. *Cyprus* (1993) 16 E.H.R.R. 485.

59. 2 Dec. 1999.

60. Human dignity is a right protected by s.10 of the South African Constitution.

61. (1993) 16 E.H.R.R. 97, at para.29.

62. *S* v. *UK* (1986) 47 D.R. 274.

63. It is open to argument that a failure by the state to recognise same-sex relationships is also an infringement of the right of freedom of association protected under article 11. If heterosexual associations have legal consequences, article 14 requires that homosexual associations have the same legal consequences.

In relation to interference, it is relevant to note that the "Convention right" in Article 8 is a right to "respect" for private and family life, rather than a right to private and family life. "'Respect' for family life ... implies an obligation for the state to act in a manner calculated to allow these ties to develop normally."[64] It is difficult to see how any respect at all is shown to a relationship that is entirely ignored by the law. This suggests strongly that the state's positive obligations under Article 8 are breached by its failure to provide for the recognition of the family or the private relationships of same-sex couples.

Even if the right to respect has not been infringed then, so long as same-sex relationships come within the ambit of Article 8, a claim for discriminatory treatment remains open. Article 14 provides that the rights and freedoms set forth in the ECHR are to 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, birth or other status. Unlike the human rights instruments in Canada, South Africa and Vermont, the ECHR does not (yet) provide a substantive right to equality, or to freedom from discrimination, but only a freedom from discrimination in the securing of Convention rights.[65] Nevertheless, once it is accepted that same-sex relationships come within the ambit of Article 8 then the state must guarantee the rights protected by that Article "without discrimination on any ground". Though Article 14 does give a list of impermissible grounds of discrimination (which does not contain a ground based on sexual orientation), this list is illustrative and not exhaustive,[66] and there is little scope for arguing that other grounds of discrimination are not covered by Article 14.[67] In *Salgueiro da Silva Mouta* v. *Portugal*[68] the ECtHR held that sexual orientation is "without doubt" included in Article 14: "The Court cannot conclude other than that there was a difference in treatment between the applicant and the mother of M, which reposed in the sexual orientation of the applicant, a notion which is covered, without doubt, by Article 14 of the Convention".[69] The importance of this decision is that it recognises the very concept of sexual orientation discrimination, and so

64. *Marckx* v. *Belgium* (1979) 2 E.H.R.R. 330 at para.45.

65. Protocol 12, when it comes into effect, will change this and the right to be free from discrimination will become a self-standing rather than a derivative right. Draft Protocol 12 did not expressly add sexual orientation to the list presently contained in article 14, though after *Salgueiro da Silva Mouta* that, technically, would make no difference. Nevertheless, on 26 Jan. 2000 the Parliamentary Assembly of the Council of Europe voted to recommend that sexual orientation be expressly mentioned. The significance of express mention would be symbolic, but no less important for that.

66. *Engel & Ors* v. *the Netherlands* (1976) 1 E.H.R.R. 647 at para.72.

67. Grosz, Beatson & Duffy, *Human Rights: the 1998 Act and the European Convention* (Sweet & Maxwell, 2000) at para.C14.04.

68. European Court of Human Rights, 21 Dec. 1999.

69. *Ibid.*, para.28 (author's translation).

frees a victim of such discrimination from the need to argue the case as one of sex discrimination. This allows the victim to avoid the "inappropriate comparator" defence successfully pleaded before the European Court of Justice in *Grant* v. *South West Trains*.[70] To claim discrimination one must establish that one is being treated less favourably than persons in analogous situations,[71] and in *Grant* in response to a claim for sex discrimination the defendants successfully argued that the analogous situation to a lesbian claiming travel passes for her female lover was not that of a heterosexual man claiming passes for his female lover but that of a hypothetical gay man claiming passes for his male lover. The recognition of the concept of sexual orientation discrimination requires that a gay person be compared with a non-gay person in an analogous situation, to see whether there has been differential treatment. The applicant in *Salgueiro da Silva Mouta* argued, drawing on the equality jurisprudence from Canada and South Africa, that the central flaw in such differential treatment was the illegitimate stereotyping upon which it was founded: the judgment of the Portuguese court "resorts to ancestral fantasies [*des fantasmes ancestraux*] divorced from the realities of life and common sense. In doing so, the disputed judgment has, for the applicant, set in motion a form of discrimination prohibited by Article 14 of the Convention".[72] The ECtHR held that making such a distinction "cannot possibly be tolerated under the Convention".[73] It follows that legislation which gives benefits to opposite-sex couples but withholds these benefits from same-sex couples is discriminatory within the meaning of Article 14.

(d) Stage Four: Is the Interference or Discrimination Justified?

The final stage is to establish that there is no justification either for the interference of the Article 8 right or for the discriminatory application thereof. Article 8 provides only very tightly drawn justifications: a failure to respect private or family life is permitted if it is both in accordance with the law and "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others". The ECtHR has allowed states a fairly liberal "margin of appreciation" in determining when a limitation of a Convention right is "necessary in a democratic society", and while that doctrine is unlikely to be available in the domestic situation[74] nevertheless the U.K. courts are likely to develop a notion

70. [1998] 1 F.L.R. 839.
71. *Hoffmann* v. *Austria* (1994) 17 E.H.R.R. 293.
72. *Ibid.*, para.24.
73. *Ibid.*, para.36: "*distinction qu'on ne saurait tolérer d'après la Convention*".
74. Per Lord Hope of Craighead in *R* v. *DPP, ex p. Kebilene* [1999] 3 W.L.R. 972 at 993G–994E.

similar to that in other jurisdictions, like Canada and South Africa, where the demands of democracy require that a certain deference be shown by the courts to legislative choices. Courts must, however, be careful not to allow this to emasculate the Convention rights they are charged to protect. The ECtHR has held that the more important the issue at stake the less of a margin of appreciation will be granted to states[75] and this may be translated in the domestic sphere to a proposition that less deference will be shown to legislative choice the more that choice interferes with a fundamental right protected under the ECHR. This has been the approach of the Supreme Court of Canada.[76]

The onus lies with the state to show for what the interference with the Article 8 right is necessary, though "necessity" is not to be taken to mean "indispensible".[77] The state is likely to have a difficult task in establishing any of these justifications, especially in the light of the treatment of the proferred justifications in the decisions from Canada, South Africa and Vermont discussed above. In Canada s.1 of the Charter of Rights and Freedoms contains a very similar concept to that of "necessity in a democratic society", for there derogations from Charter rights may be held to be constitutional if they can be "demonstrably justified in a free and democratic society".[78] This was explained by Dickson CJ in *R* v. *Oakes*[79] as embodying, amongst other things, the following values and principles: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity". These are the values against which any limitation of Charter rights is to be judged and they provide a persuasive model against which, in Europe, limitations on Convention rights might be judged. The ECtHR has already held, in relation to the criminalisation of gay male sex, that a breach of Article 8 is not justified merely because it has popular support.[80] In the same context it has said that since a democratic state is characterised by tolerance, the fact that some people disapprove of same-sex relationships does not make the infringement of the private or family life of their members

75. *Johansen* v. *Norway* (1997) 23 E.H.R.R. 33 at para.64. In *Schmidt* v. *Germany* (1994) 18 E.H.R.R. 513 the Court said, at para.24, "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention".

76. See *M* v. *H* (1999) 171 D.L.R. (4th) 577 where the deliberate choice of the Ontario legislature to reject the reforms sought in the case did not prevent the Supreme Court from requiring these reforms to be made.

77. *Handyside* v. *UK* (1976) 1 E.H.R.R. 737; *Sunday Times* v. *UK* (1979) 2 E.H.R.R. 245 at para.59.

78. See also the South African Constitution, s.36(1), under which limitations to the rights contained in the Constitution are permitted if they are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

79. (1986) 26 D.L.R. (4th) 200.

80. *Dudgeon* v. *UK* (1981) 3 E.H.R.R. 40 at paras.57–59.

justifiable.[81] The European Commission for Human Rights affirmed that while a recent parliamentary vote for discriminatory treatment carries weight it is not decisive and the validity of the reasons advanced to justify the difference of treatment was more important.[82] An important aspect of necessity is whether the interference under Article 8 is proportionate to the aims sought to be achieved; this also appears as an aspect of Article 14. The ECtHR has frequently said this: "For the purposes of Article 14, a difference in treatment is discriminatory if it 'has no objective or reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is 'not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'."[83] The ideas contained in this statement, which involve evaluating the validity of both the aims of the challenged legislation and the means the legislation adopts to further these aims, are central also to the equality jurisprudence in Canada and South Africa. In *M* v. *H* the Supreme Court of Canada found no relationship between the aims of the legislation—either the actual or the claimed aims—and the discrimination the state sought to justify: "it defies logic to suggest that a gender-neutral support system is rationally connected to the goal of improving the economic circumstances of heterosexual women upon relationship breakdown. In addition I can find no evidence to demonstrate that the exclusion of same-sex couples from the spousal support regime of the Family Law Act in any way furthers the objective of assisting heterosexual women."[84] In *National Coalition*, it was held that the exclusion of same-sex couples from the statutory benefit there at issue was entirely disproportionate to the aims claimed by the state (the protection of "traditional" marriage) since the exclusion did not advance these aims at all. And in *Salgueiro da Silva Mouta* v. *Portugal* the ECtHR held that while the aim of protecting the rights and health of the child was a legitimate objective, the means adopted, that is making a distinction dictated by considerations of sexual orientation, "a distinction which cannot possibly be tolerated under the Convention", meant that there was no reasonable relationship of proportionality between these aims and the means.[85]

81. See *Norris* v. *Ireland* (1991) 13 E.H.R.R. 186 at paras.43–46.

82. *Sutherland* v. *UK* (1998) E.H.R.L.R. 117 at para.62. The Commission held in that case that while the setting of a minimum age for sexual acts was justifiable under article 8(2) the setting of different ages for homosexual and heterosexual acts was unjustified discrimination.

83. *Abdulaziz, Cabales and Balkandali* v. *UK* (1985) 7 E.H.R.R. 471, para.72; *Lithgow* v. *UK* (1986) 8 E.H.R.R. 329, para.117; *Inze* v. *Austria* (1987) 10 E.H.R.R. 394, para.41; *Schmidt* v. *Germany* (1994) 18 E.H.R.R. 513, para.24; *B* v. *UK* [2000] 1 F.L.R. 1 at p.4C.

84. Per Iacobucci J at para.109.

85. Para.36. The approach followed the earlier decision in *Hoffmann* v. *Austria* (1994) 17 E.H.R.R. 293, where the unjustified distinction drawn by the domestic court in a child custody dispute was based on religion.

(e) Summary

If (i) the phrase "living together as husband and wife" can be interpreted to include same-sex couples or alternatively to exclude them, (ii) the rule of law accessed through the phrase concerns a Convention right, and (iii) the exclusionary interpretation results in a difference of treatment based on sexual orientation, then that exclusionary interpretation is both an infringment of Article 8 and discriminatory contrary to Article 14, while an inclusionary interpretation is not. Neither the interference with the Convention right nor its discriminatory application can be justified. If this is so then, whenever they are faced with the statutory phrase "living together as husband and wife", the U.K. courts in the future will be obliged by s.3 of the Human Rights Act 1998 (as well as by their own obligations as public authorities) to adopt an interpretation that includes rather than excludes same-sex couples in order to be consistent with the ECHR.

However, this will only work with those statutes that use the phrase in a non-gender-specific manner. So for example the Rent Act 1977 refers to "a person who was living with the original tenant as his or her wife or husband".[86] On the other hand, there are many statutes where the language is gender-specific. So for example in Sched 13B to the Taxes Act 1988,[87] and in s.128 of the Social Security Contributions and Benefits Act 1992, benefits in relation to children's tax credit and family credit respectively are afforded to "a man and a woman who are not married to each other but are living together as husband and wife". In statutes like this no amount of reinterpretation of this unambiguous phrase will permit same-sex couples to access these benefits. They fall, in other words, at the first of the stages set out above and all that can be done is for the court to issue a declaration of incompatibility under s.4 of the 1998 Act.[88]

The Position in Scotland and Northern Ireland

The courts in Scotland and Northern Ireland are in a very different position from the courts in England and Wales. In all jurisdictions Acts of the U.K. Parliament are subject to identical limitations: they may be

86. Sched. 1 para.2(2). See also Fatal Accidents Act 1976, s.1(3)(b), Damages (Scotland) Act 1976, sched. 1(1)(aa), Rent (Scotland) Act 1984, sched. 1A, para.2(2).

87. As inserted by Sched. 3 to the Finance Act 1999.

88. Whether statutes giving benefit to married couples will be held to be incompatible with Conventions rights, as they were held to be incompatible with the South African and the Vermont Constitutions, will depend upon (i) whether the statute in question deals with a Convention right, (ii) what its purpose is, and (iii) whether the limitation of benefit to married couples is proportionate to its aims. The ECtHR has held that there is a rational justification for distinguishing between married and unmarried fathers in connection with their relationship with their children: *McMichael* v. *UK* (1995) 20 E.H.R.R. 205; *B* v. *UK* [2000] 1 F.L.R. 1.

reinterpreted in the light of the provisions of the ECHR, as described above, or declared incompatible therewith, but they may not be struck down. However, Acts of the Scottish Parliament and of the Northern Ireland Assembly are subject to direct constitutional challenge. The Scotland Act 1998 prohibits the Scottish Parliament from passing legislation which is inconsistent with the ECHR as enacted in the Human Rights Act 1998: any legislation which does so "is not law" and may not be given effect to in any court.[89] This is also the case under the Northern Ireland Act 1998.[90] So if, for example, the Scottish Parliament passed legislation giving rights or imposing liabilities on opposite-sex unmarried couples but did not expressly extend that legislation to same-sex couples, such legislation will be subject to both compatibility interpretation[91] and to judicial review of its constitutional validity. If the matter concerns private and family life the Scottish Parliament may only discriminate against gay men and lesbians if this could be shown to serve a legitimate aim and to have a reasonable relationship between that aim and the differential treatment. It is worth again remembering that the justifications offered by the state in Canada, South Africa and Vermont for such discrimination were all found wanting by 24 of the 25 supreme court judges who heard the cases discussed above. One can only hope that the Scottish judges will be as robust in their defence of fundamental rights and freedoms and of the human dignity of gay men and lesbians in Scotland.

Conclusion

The issue of the legal recognition of same-sex relationships may well be the single most important family law issue to emerge in recent years. As well as the importance for gay and lesbian advancement and for the wider equality agenda, it is an issue in which constitutional principles have been developed. So for example in *National Coalition for Gay and Lesbian Equality* v. *Minister for Home Affairs* the South African Constitutional Court took to itself for the first time the power to read into legislation

89. Scotland Act 1998, s.29(2). The validity of legislation can sometimes be saved only by reading on words to a statute. This is what happened in *National Coalition for Gay and Lesbian Equality* v. *Minister for Home Affairs*, 2 Dec. 1999, Constitutional Court of South Africa. The UK Courts already accept that they too have this power (see, in relation to an Act of the UK Parliament inconsistent on its face with EC law, *Litster* v. *Forth Dry Dock & Engineering Co* 1989 S.L.T. 540 (HL)). To what extent this power can be developed remains to be seen, for the principle in *Litster* was limited to reading in words which the court held were a "necessary implication" of the actual words of the statute. The Constitutional Court of South Africa went much further, for the words they read into the statute in *National Coalition* were in no sense a necessary implication of the words that were already there, though they were necessary to save the provision's constitutional validity.

90. Northern Ireland Act 1998, s.6(2).

91. Scotland Act 1998, s.101, to similar effect as the Human Rights Act 1998, s.3. For Northern Ireland, see Northern Ireland Act 1998, s.83, also to similar effect.

words which are necessary to preserve the Act's constitutional validity. It is an issue which will invariably give rise to recognition problems in international private law[92] as more and more countries give formal recognition to the status of same-sex relationships and the parties to such relationships move across international borders. It is a testbed for the continued validity or acceptability of many religious and political as well as legal principles which have rested unchallenged for centuries. It is a litmus test for the exposure of prejudice and bigotry. The important cases discussed above, all from 1999, indicate a judicial turning point which is far ahead of most legislatures. Yet all the legislatures mentioned here are to a greater or lesser extent limited by constitutional and human rights constraints and it is these constraints which have allowed the judges to develop the concept of non-discrimination in this highly practical manner. These developments are to be welcomed by everyone who believes that human dignity is an attribute to be protected in every person and not just those who belong to a cultural, religious, racial, linguistic or sexual majority. That, after all, is what human rights are all about.

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92. See Norrie, "Reproductive Technology, Transsexualism and Homosexuality: New Problems for International Private Law" (1994) 43 I.C.L.Q. 757 and Note, "Conflict of Laws and Recognition of Same-Sex Marriages" (1996) 109 Harv. L. R. 2038. The solution is to separate the so-called "status" of marriage from the individual legal consequences of marriage: see Reese, "Marriage in American Conflict of Laws" (1977) 26 I.C.L.Q. 952.

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