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Marriage and Civil Partnership in Northern Ireland: A Changing Legal Landscape

Frank Cranmer and Sharon Thompson

Abstract: This article seeks to provide a comprehensive overview of the changing legal landscape of marriage and civil partnership law in Northern Ireland. It looks at three specific areas: first, marriage law pursuant to the Marriage (Northern Ireland) Order 2003; second, the Northern Irish context of the Civil Partnership Act 2004 coupled with the ongoing debate over Northern Ireland's failure to introduce same sex marriage; and third, the absence of any facility for belief/humanist weddings that has only very recently been resolved. It is argued that the influence of Northern Irish religious beliefs and culture has resulted, overall, in a legal landscape that is out of step with the rest of the United Kingdom, most notably in its refusal to introduce same sex marriage. Paradoxically, however, the authors conclude that in other respects the law of England and Wales remains antiquated in comparison with that of Northern Ireland, where marriage law has been radically reformed in the last 15 years.

Keywords: marriage, Northern Ireland, same sex relationships, humanism, devolution

Introduction¹

When the Royal Commission reported in 1868 on the marriage law of pre-Partition Ireland,² marriage by the Church of Ireland (the Established Church at that time) differed little from marriage law in England and Wales.³ However, with respect to marriages other than those by

¹ We should like to thank Professor Rebecca Probert and the anonymous reviewers for their helpful and thought-provoking comments on various drafts of this article.

² *Report of the Royal Commission on the Laws of Marriage: with an appendix* (HMSO, 1868) x.

³ The Church of Ireland was disestablished by the Irish Church Act 1869, a year after the report was published. See further R Probert, M Harding and B Dempsey, 'A Uniform Law Of Marriage? The 1868 Royal Commission Reconsidered' [2018] 30 CFLQ **.

the Church of Ireland there was considerable divergence between the laws of these two parts of the United Kingdom. As the Royal Commission explained, the marriage law of Ireland was sectarian and denominational, ‘varying in the substance of its provisions according to differences of religious belief, to a much greater extent than the law of England’.⁴

This complex history is partly why the development of marriage and civil partnership law in Northern Ireland is so fascinating. Indeed, the jurisdiction’s unique political and historical context and dominant social conservatism have both shaped reform and obstructed it.⁵ Though almost all the core legislation for Northern Ireland has been passed not by the Northern Ireland Assembly⁶ but by the Westminster Parliament, the influence of Northern Irish beliefs and culture have brought it out of step with the rest of the UK, most notably in its refusal to introduce same sex marriage. Yet in some respects, the law in England and Wales lags behind that of Northern Ireland; the former relies on an antiquated system of marriage law while Northern Ireland’s marriage law has been subject to wholesale reform in the last 15 years.

The first part of this article will explore why and how marriage law was reformed under the Marriage (Northern Ireland) Order 2003 (SI 2003/413), referred to subsequently as the 2003 Order. It will be argued that the historical context of marriage in Northern Ireland both before and after Partition culminated in a legislative mess, whereby procedure affecting the registration of marriages differed (sometimes significantly) depending on the religion of the parties. This created a law that was in urgent need of reform and, under the 2003 Order,

⁴ *Report of the Royal Commission* xii.

⁵ It should be noted, however, that the focus of this article is on legal change in Northern Ireland, and so does not comprehensively detail the development of changing approaches to marriage and civil partnership by the political parties in this jurisdiction. A full exploration of the social and political landscape in Northern Ireland is outside the scope of this article. For more information see: P Dixon, *Northern Ireland: The Politics of War and Peace* (Palgrave 2008).

⁶ The Assembly established as a result of the Belfast Agreement, also known as the Good Friday Agreement, which first met on 1 July 1998. It is not to be confused with the earlier Northern Ireland Assembly established under the Sunningdale Agreement in 1973 and which collapsed in 1974. In the course of the negotiations leading up to the Belfast Agreement, Seamus Mallon MP famously – and accurately – predicted that whatever emerged at the end of the talks would be ‘Sunningdale for slow learners’.

Northern Ireland adopted a model like that in Scotland, replacing registration of buildings for the solemnization of marriage with a register of religious officiants.

The second part will examine same sex relationships in Northern Ireland: specifically, the Northern Irish context of the Civil Partnership Act 2004 and the ongoing debate over Northern Ireland's failure to introduce same sex marriage. The 2004 Act divided opinion between the two communities and political discord over same sex marriage has deepened those battle-lines; however, in spite of public pressure north and south of the border and numerous challenges in the Northern Ireland courts, reform has not yet happened.

Finally, the third part of this article will focus on humanist weddings. Northern Ireland's cultural proximity to the Republic of Ireland and the strong institutional and interpersonal links between the two jurisdictions have meant that the absence of any facility for humanist weddings has caused some controversy, culminating in the recent decision by the Northern Ireland Court of Appeal in *Smyth, Re Judicial Review*.⁷

By tracing the history of marriage and civil partnership, we argue that Northern Ireland is currently at a critical juncture. While commentators rightly point out that Northern Ireland's resistance to change is caused by the 'prevailing social conservatism and dominance of religion in social life'⁸ in the jurisdiction, there are signs that the influence of such conservatism is waning. Indeed, by applying a historical lens to marriage and civil partnership in Northern Ireland, and by comparing debates surrounding civil partnership with debates on same sex marriage today, it is clear that social attitudes even in a historically conservative jurisdiction can, and do, change.

⁷ *Smyth, Re Judicial Review* [2017] NIQB 55, [2018] NICA 25.

⁸ Office of Law Reform, Department of Finance and Personnel, 'Civil Partnership: A Legal Status for Committed Same-Sex Couples in Northern Ireland: Analysis of Responses' (Northern Ireland Office, 2004) at [3.2]. See also B Sloan, 'Registered Partnerships in Northern Ireland' in Scherpe and Hayward (eds), *The Future of Registered Partnerships* (Intersentia, 2017).

Before and after the Marriage (Northern Ireland) Order 2003

Marriage and family law in Northern Ireland generally are ‘transferred matters’ within the legislative competence of the Northern Ireland Assembly,⁹ inasmuch as they do not appear in the list of ‘excepted matters’ specified in Schedule 2 to the Northern Ireland Act 1998 or of ‘reserved matters’ specified in Schedule 3. As we shall see, however, almost all the core legislation for Northern Ireland has been passed not by the Assembly but by the Westminster Parliament, either as part of a UK-wide statute or because the Assembly was suspended at the material time.¹⁰ The law relating to marriage in the jurisdiction therefore has a complex history¹¹ which cannot be explained without giving some attention to the state of the law at the Partition of Ireland in 1921.¹²

Marriage law in 1921

At the time of Partition there were three distinct classes of non-Anglican ceremonies: Roman Catholic marriages, Presbyterian marriages and marriages under a registrar’s certificate or licence. The Royal Commission had noted that the House of Lords had held in *R v Millis*¹³ that the presence of an Anglican or Roman Catholic cleric at the time of solemnization was ‘essential to the valid constitution of the contract of marriage: but a marriage solemnized by any such clergyman, whether publicly or privately, at whatever time or place, and in whatever

⁹ The Westminster Parliament will not normally legislate on a ‘transferred matter’ without the consent of the Northern Ireland Assembly.

¹⁰ For example, the Polygamous Marriages (Northern Ireland) Order 1995 (SI 3211/1995), which provides that a potentially polygamous marriage entered into outside Northern Ireland by parties neither of whom was already married should not be void on the ground that either party was domiciled in Northern Ireland, was enacted at Westminster.

¹¹ See Sloan, n 8 above, and S Semple, ‘Researching the Law of Northern Ireland’ (2008) 8 *Legal Information Management* 283.

¹² Northern Ireland was created pursuant to the Government of Ireland Act 1920 and the Partition took effect in 1921. For a comprehensive overview of the law in Northern Ireland, see B Dickson, *Law in Northern Ireland* (Hart Publishing, 3rd edn, 2018).

¹³ *R v Millis* [1843-44] 10 Clark and Fennelly 534, 8 ER 844. Interestingly, at 8 ER 849 their Lordships quoted Lyndwood’s *Provinciale* (published by Wynkyn de Worde in 1496) as authority for the proposition that marriage should only be celebrated in public: ‘*nisi in loco celebri coram publicis et pluribus personis ad hoc convocatis*’.

form or manner, (between parties competent to intermarry), was valid, without any previous publication of banns, licence, notice, residence, or consent’ and that it was still the law of Ireland in relation to Roman Catholic marriages. It remained so after 1921.

As to Presbyterian marriages, the Marriages (Ireland) Act 1844 that had been passed in consequence of the decision in *R v Millis* distinguished between Presbyterians and other Nonconformist denominations and established a procedure for Presbyterian marriages closely resembling that for the Church of Ireland: marriage might be solemnized in a certified Presbyterian meeting house by a Presbyterian minister according to the Presbyterian Church’s forms. Such a marriage either had to be preceded by publication of banns or be conducted under licence ‘granted by certain Presbyterian ministers whose function closely resembles that of surrogates in the Established Church’.¹⁴ If both parties were Presbyterians they could choose between banns or licence; otherwise, a licence was necessary.

As to other religious marriages, clergy of denominations other than the Church of Ireland, the Roman Catholic Church and the Presbyterian Churches could solemnize and register marriages on receipt of an authority from a civil registrar¹⁵ and there were special provisions for marriages of Quakers and Jews. In short, the legal procedure applicable to marriage depended on the faith of the couple getting married. Not only were such legal formalities distinct within Ireland, the law relating to faiths other than the Church of Ireland also differed significantly from marriage law in England and Wales.¹⁶

Moreover, the ‘extensive divergence’ noted by the Royal Commission in 1868 persisted long after Partition in 1921: the Marriage Act 1949 consolidated the law of England and Wales

¹⁴*Report of the Royal Commission xiii*. A surrogate is a cleric of the Church of England or the Church in Wales (or, in the days of *R v Millis*, of the Church of Ireland) deputed by the Chancellor of the diocese to receive applications for the grant of a Bishop’s common licence to authorise a marriage.

¹⁵ Law Reform Advisory Committee, *Marriage Law* - Report No 11 (LRAC No 9, 2000) [1.28(c)].

¹⁶ For a comprehensive overview of marriage law in England and Wales, see R Probert, ‘A Uniform Marriage Law for England and Wales’ [2018] 30 CFLQ ***.

– with very minor amendments¹⁷ – but left marriage law in Northern Ireland untouched, so that by the time wholesale reform was considered, the law had changed relatively little since the nineteenth century. Put simply, Northern Ireland inherited a mesh of divergent marriage law that had been introduced *ad hoc* across a chaotic period of Irish history and depended on the faith of the parties and the church in which the marriage was solemnized. As the Minister of Finance and Personnel later summarised the position:

The current law stems from a series of statutes dating back to the early Victorian era. The system of marriage preliminaries has not developed on a uniform basis and privileges in relation to the celebration, timing and place of actual marriage are granted to certain religious groups and not to others. The current rules relating to religious and civil marriage venues are unnecessarily complex and unsatisfactory, and certain churches are afforded greater autonomy than others that are subject to a larger amount of state control. In addition, the current rules in relation to notice of intended marriage and preliminary notification requirements are too complex and those relating to the registration of marriages are also felt to be in need of wholesale change.¹⁸

The Marriage (Northern Ireland) Order 2003

Unsurprisingly, this was problematic in practice; and in 1998, the then Secretary of State for Northern Ireland, Mo Mowlam, referred the law relating to marriage preliminaries to the Law Reform Advisory Committee for Northern Ireland¹⁹ because she considered that the existing law was ‘outdated, ...possibly discriminatory’ and needed to be simplified.²⁰

¹⁷ The Marriage Act 1949 was ‘An Act to consolidate certain enactments relating to the solemnization and registration of marriages in England with such corrections and improvements as may be authorised under the Consolidation of Enactments (Procedure) Act 1949’.

¹⁸ Department of Finance and Personnel, *Marriage Bill: Explanatory and Financial Memorandum* (2002), at <http://archive.niassembly.gov.uk/legislation/primary/2001/niabill18_01-efm.htm> accessed 2 January 2018, para 5.

¹⁹ The Advisory Committee was the precursor to the Northern Ireland Law Commission, which was established in 2007 following the recommendations of the Criminal Justice Review Group.

²⁰ *Hansard*, HC First Standing Committee on Delegated Legislation, col 3 (16 December 2002).

The Committee reported to the Northern Ireland Assembly in December 2000²¹ and its recommendations formed the basis of a Marriage Bill²² introduced into the Assembly. The Committee's recommendations merit some consideration because, although the Marriage Bill did not become law, its contents provided the basis for the Marriage (Northern Ireland) Order 2003, which is the statutory source of marriage law in Northern Ireland today. As a result, this section will consider how and why marriage law in Northern Ireland was reformed by first outlining the key recommendations of the Law Reform Advisory Committee, tracing the journey of the Marriage Bill and finally outlining the circumstances in which the 2003 Order was introduced.

For the Law Reform Advisory Committee, issues of equality came first when considering legislative reform. In its 'guiding principles for reform' it stated that equal and fair treatment was of particular importance in the Northern Ireland context,²³ given sectarian tensions in that jurisdiction, which had to be considered alongside any reform relevant to religious belief. Accordingly, the Committee emphasised that 'any new legislation must be framed so far as possible to ensure common rights and duties irrespective of religious affiliation'. At the heart of the Committee's recommendations, therefore, was a desire to produce a system of marriage law that could be *universally* applicable and effective.

As a result, it was clear that applying the Committee's approach rendered the existing law unfit for purpose because its differential treatment according to religion (with regard to venues, preliminary procedural requirements, authorisation of celebrants, registration requirements and hours and forms of marriage) could not be objectively justified and was therefore possibly discriminatory. On that basis, the Committee made 32 recommendations for legislative reform. For instance, a new system, according to the Committee should, so far as

²¹ Law Reform Advisory Committee, n 15 above.

²² NIA Bill 18/01.

²³ Law Reform Advisory Committee, n 15 above.

possible, guarantee the continued validity of both religious and civil marriages, should treat all religions equally with minimal interference with the existing freedoms of individual religions, should ensure equal treatment between those wishing to have a civil or a religious marriage, should provide certainty, simplicity, transparency and ease of application and should be cost-effective.²⁴

The Committee considered options for reform by looking elsewhere and favoured the Scottish model as the best template²⁵ in three principal respects. First, it recommended a modified version of the Scottish marriage schedule, which would replace the rules on notice of intended marriage and preliminary notification requirements with a unified and simplified system of preliminary notification and authorisation. Secondly, the Committee proposed that, like the Scottish model, there should be a statutory scheme defining authorised officiants and statutory requirements in respect of religious and civil marriage ceremonies. Thirdly, it concluded that the current rules on registration of marriages were unnecessarily complicated and should be replaced by a simplified system of registration along Scottish lines.²⁶ It also recommended that religious marriage venue requirements should be abolished and that the law relating to civil marriage venues should be relaxed to follow current English, rather than Scots, law.

The vast majority of the Law Reform Advisory Committee's 32 recommendations were incorporated into the Marriage Bill. As a result, the Marriage Bill was closely modelled on Scots law, with some exceptions. For example, the Department of Finance and Personnel²⁷ decided that the Committee's recommendation on religious officiants could create inequality

²⁴ Law Reform Advisory Committee, n 15 above, (iv)-(v). Specifically, the Committee recommended that the law relating to the consequences of procedural irregularity should be clarified and that the current law on criminal offences in the Marriage Acts required major simplification.

²⁵As the explanatory notes of the Marriage Bill stated: 'The Committee consulted closely with relevant parties in Scotland and the framework for reform is based on that jurisdiction, while taking into account local issues and variances': Department of Finance and Personnel, n 18 above.

²⁶ Ibid.

²⁷ Which, at the time, oversaw marriage law in Northern Ireland.

in relation to different religions because it followed the Scottish system that differentiated between larger bodies and smaller organisations. Instead, the Department decided that *all* religious organisations should be treated in the same manner irrespective of size. Furthermore, though the Committee had recommended ‘that the law should not prescribe the locations at which religious marriages may be conducted and that it should be left to religious bodies themselves to determine appropriate venues’²⁸ and relaxing the law relating to civil marriage venues, the Department decided instead to legislate in accordance with recent changes to the Scots law on approved places for marriage, which were broader in scope.²⁹ The Marriage Bill was introduced into the Assembly on 17 June 2002 by the Minister of Finance and Personnel. The explanatory notes stated that ‘at the fulcrum of the Bill is the concept of equality’³⁰ and that the ‘wholesale change’³¹ which it sought to introduce was based on removing legal differences between religions in Northern Ireland.

The Bill passed the second stage on 25 June with broad cross-party and cross-community support and proceeded to committee stage. It was expected that the plenary would pass the Bill without further substantive change; however, the Assembly was suspended on 14 October 2002 and the Bill fell. Instead, its contents provided the basis for the Marriage (Northern Ireland) Order 2003 passed by the Westminster Parliament.

The Explanatory Note to the 2003 Order states – laconically – that ‘This Order makes provision in connection with the formalities for marriage and the solemnization and registration of marriages’. Which it most certainly did: the Order repealed almost all of the previous law on the formation of marriage and instituted an entirely new regime. Its main features were a new system of universal civil preliminaries to be used for all marriages, replacing the previous procedures which applied in different ways to different denominations and religions, and a

²⁸ Law Reform Advisory Committee, n 15 above, para 5.7.

²⁹ Department of Finance and Personnel, n 18 above, [14].

³⁰ *Ibid*, [7].

³¹ *Ibid*, [5].

relaxation of the law on civil marriage venues in order to allow people to marry in a greater variety of locations, subject to the approval of the venue by the local authority. The Order distinguished between civil and religious marriages and, crucially in relation to the latter, it abolished registration of *buildings* for the solemnization of marriage and replaced it with a register of religious *officiants*. It was not possible to include a definition of marriage in the Order, as proposed during the earlier Bill's committee stage in the Assembly,³² because to do so would have been outside its scope; however, as the Parliamentary Under-Secretary of State for Northern Ireland pointed out when introducing the draft Order in the Delegated Legislation Committee, 'the definition of marriage is already well settled in common law'.³³

In short, Northern Ireland adopted something very like the Scottish model³⁴ except that, though the minimum age for marriage is 16, persons under the age of 18 require permission to marry from their parent or guardian or, if appropriate, a court order – as in England and Wales.³⁵

Interestingly, according to the explanatory notes of the Marriage Bill, which formed the basis of the 2003 Order, part of the fundamental rationale for reform was that it would bring 'the system of marriage preliminaries into the 21st century, by removing archaic concepts and by affording a greater freedom of choice in relation to getting married.'³⁶ However, though subsequent reform under the 2003 Order may have given different sex couples more freedom of choice when getting married, same sex couples had no legal option to formalise their relationship at that time, and still do not have the freedom to marry.

³² *Smyth, Re Judicial Review* [2017] NIQB 55, [30].

³³ *Hansard*, HC First Standing Committee on Delegated Legislation, col 4 (16 December 2002).

³⁴ For which, see the Marriage (Scotland) Act 1977: *mutatis mutandis*, the Marriage (Northern Ireland) Order 2003 follows its structure fairly closely. See further M McLean, 'Beyond belief: the law and practice of marriage formation in contemporary Scotland' [2018] 30 CFLQ **.

³⁵ NI Direct Government Services, 'Guidance on marriage procedures in Northern Ireland', at <<https://www.nidirect.gov.uk/articles/guidance-marriage-procedures-northern-ireland>> accessed 4 May 2018.

³⁶ Department of Finance and Personnel, n 18 above, para 7.

Same Sex Relationships in Northern Ireland

Citizens of Northern Ireland are entitled to dual Irish and British citizenship, yet unlike Irish citizens in the Republic of Ireland and British citizens in the rest of the UK, same sex couples cannot legally marry in Northern Ireland. Instead, they must register as civil partners to have their relationships legally recognised in that jurisdiction. This section examines the context in which the civil partnership framework was introduced in Northern Ireland and the current debate over equal marriage. These matters are inextricably linked, as the context of civil partnership in Northern Ireland differs from the rest of the UK, and therefore an assessment of this context facilitates a richer understanding of why there is still resistance to equal marriage in Northern Ireland. Reflecting on the debates surrounding the introduction of a civil partnership framework in Northern Ireland also demonstrates how social attitudes have changed since 2003-2004.

The Civil Partnership Act 2004

Civil partnerships were introduced for the whole of the United Kingdom by the Civil Partnership Act 2004. The Act was passed by the UK Parliament and, at the time, Northern Ireland was under direct rule from Westminster after the collapse of the power-sharing Executive at Stormont.³⁷ The dates for their registration in England, Wales, Scotland and Northern Ireland were identical, with the respective commencement orders bringing the provisions of the Act into effect on 5 December 2005. In practical terms, this meant that civil partnership registrations under the standard procedure as set out in sections 8-17 of the Act became available in all three jurisdictions fifteen days later and the first civil partnership ceremonies in the UK took place in City Hall, Belfast, on 19 December 2005.³⁸

³⁷ Stormont is the location of the Northern Ireland Parliament.

³⁸ BBC News (2005), “‘Gay weddings’ first for Belfast”, 19 December
<http://news.bbc.co.uk/1/hi/northern_ireland/4540226.stm> accessed 24 May 2018.

The introduction of the Act in Northern Ireland was not straightforward for, as Baroness Hale has noted, ‘adherence to traditional family values is more widespread in Northern Ireland than in the rest of the United Kingdom, as is religious belief’;³⁹ but as Brian Sloan observed, had Northern Ireland *not* introduced a legal framework for the recognition of same sex relationships it would have ultimately been in breach of the European Convention on Human Rights,⁴⁰ as seen in cases like *Oliari and others v Italy*.⁴¹

The debate about civil partnership in Northern Ireland began in 2003, when Ministers in the Northern Ireland Office published a consultation paper on whether the Civil Partnership Bill should include provisions introducing civil partnerships in Northern Ireland alongside the rest of the UK. While 86 per cent of all respondents opposed this,⁴² 60 per cent of organisational respondents supported its introduction.⁴³ In Parliament, the legislation divided opinion between the two communities in Northern Ireland: of those Ulster MPs who voted on the Commons second reading of the Civil Partnership Bill – which was first introduced into the Lords – John Hume and Seamus Mallon, both of the Social Democratic and Labour Party, voted in favour while the Unionists voted against.⁴⁴

Considering the range of arguments surrounding the Bill, Sloan notes the conviction of some religious groups that same sex relationships were inherently wrong and undermined marriage and the model of the traditional family.⁴⁵ Other religious groups did not necessarily

³⁹ *Re G* [2008] UKHL, at [121], cited in Sloan, n 8 above.

⁴⁰ Sloan, n 8 above.

⁴¹ *Oliari and others v Italy* [2015] ECHR, (2017) 65 EHRR 26 (App No 18766/11).

⁴² Office of Law Reform, n 8 above, [6].

⁴³ *Ibid* at [7].

⁴⁴ *Hansard*, HC Deb vol 425, col 253 (12 October 2004).

⁴⁵ Sloan, n 8 above, 257.

hold such beliefs but feared that reform would impact on the freedom of religion⁴⁶ of those opposed to civil partnerships.⁴⁷

However, the Government addressed religious objections by asserting that it had ‘no intention or desire to interfere with religious beliefs in any way’;⁴⁸ instead, it highlighted the ‘significant unfairness and inequality’ experienced by same sex couples with no means of having their relationship legally recognised.⁴⁹ In reality, after the introduction of the Civil Partnership Act in Northern Ireland there was an *increase* in the number of marriages when one compares the figures for 2015 with those for 2005 – which, as Sloan suggests, undermines the arguments of those who claimed that civil partnerships would affect marriage rates and weaken the institution of marriage.⁵⁰

The legal consequences of civil partnerships do not differ, at least in any meaningful way, from those in the rest of the UK; and the High Court of Northern Ireland has held⁵¹ that the property consequences of civil partnership dissolution mirror those applicable to marriage in Northern Ireland.⁵² The social consequences of civil partnerships are more difficult to determine, but recent data show a significant shift in public attitudes since the introduction of civil partnerships was debated in 2003 and 2004. Indeed, Sloan has suggested that, while the

⁴⁶ R Sandberg, ‘The Right to Discriminate’ (2011) 13(2) *Ecclesiastical Law Journal* 157. The tension between recognition of same sex relationships and freedom of religion has increased as a result of the high-profile case of *Lee v McArthur & Ors* [2016] NICA 39: the appeal against that judgment was heard by the Supreme Court (sitting in Belfast) on 1-4 May 2018 and, at the time of writing, judgment was still awaited.

⁴⁷ See Sloan, n 8 above, 256 for a complete summary of the range of arguments from respondents opposed to reform. For instance, some respondents used the census data to argue that there was a relatively small number of same sex households; but the data was challenged by the Government, which argued there might be families recorded in the census which did not wish to disclose their sexual orientation for fear of homophobic attacks: see Office of Law Reform, Department of Finance and Personnel, *Civil Partnership: A Legal Status for Committed Same sex Couples in Northern Ireland* (Belfast 2003). This argument is supported by the gulf between the 288 households declared to consist of a same sex couple in the 2001 census and the 1,026 civil partnerships registered in Northern Ireland between 2005 and 2015 (Northern Ireland Statistics and Research Agency, 2016), available at <<https://www.nisra.gov.uk/publications/civil-partnerships-northern-ireland-2005-2015>> accessed 18 June 2018.

⁴⁸ Office of Law Reform, n 8 above, [15].

⁴⁹ *Ibid*, 8.

⁵⁰ Sloan, n 8 above, 259.

⁵¹ *Stevenson v Stevenson* [2008] NI Fam 8.

⁵² For an overview the property consequences of divorce in Northern Ireland, see S Thompson, ‘Ancillary Relief in Northern Ireland: The Jurisprudence of the Noughties’ (2010) *Northern Ireland Legal Quarterly* 61 (4) 431-437.

relationship between the ‘remarkable’ change in Northern Irish attitudes and the Civil Partnership Act cannot be factually proven, the Act still ‘cannot possibly be irrelevant to the greater tolerance now in evidence’. From this perspective, it would be a mistake to assume that the religious and social conservatism that influenced an 86 per cent opposition to civil partnership in 2003 still prevails; indeed, recent studies suggest that a majority of the public in Northern Ireland now favours same sex marriage.⁵³ Nevertheless, though the pressure for change is increasing, the likelihood of the imminent introduction of same sex marriage is unclear.

Same sex marriage

The first and second civil partnerships in the UK were registered in Northern Ireland. However, while other same sex couples around the UK have since been given the right to convert their civil partnership to marriage pursuant to the Marriage (Same Sex Couples) Act 2013, those first couples to register as civil partners still cannot marry in Northern Ireland. Same sex couples who marry in England, Wales or Scotland are not legally recognised as spouses in Northern Ireland but are instead regarded in law as civil partners;⁵⁴ and civil partners travelling abroad will not necessarily fulfil those visa requirements that apply to spousal relationships.⁵⁵ While there are few formal legal differences between marriage and civil partnership, the symbolic gulf between the two is significant. Indeed, as Sue Wilkinson and Celia Kitinger

⁵³ See *Pink News*, ‘Just 1 in 5 people oppose same sex marriage in Northern Ireland’: at <https://www.pinknews.co.uk/2018/04/09/just-1-in-5-oppose-equal-marriage-in-northern-ireland/> accessed 4 May 2018 and *Belfast Telegraph*, ‘Northern Ireland says yes to same sex marriage, latest polling finds’: at <https://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-says-yes-to-samesex-marriage-latest-polling-finds-35281876.html> accessed 4 May 2018. It should be noted that the reliability of these studies is unclear.

⁵⁴ Pursuant to Schedule 2 of the Marriage (Same Sex Couples) Act 2013.

⁵⁵ Furthermore, debates over the practical purpose of civil partnership in the rest of the UK following the introduction of same sex marriage can only be theoretical so long as civil partnership remains the only option for formalised same sex relationships in Northern Ireland.

stated prior to their unsuccessful petition for a declaration that their marriage, contracted in Canada, was valid under English law:⁵⁶

Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction. Its foundational role in defining structures of social institution and citizenship means that definitional authority over what ‘counts’ as marriage, and who is allowed access to it, has always been intensely political. Systematic exclusion of any group of people from the institution of marriage has been (and continues to be) a powerful way of oppressing that group in terms both of concrete rights and responsibilities and – more crucially still – in terms of the symbolic message that the group so discriminated against is unworthy of equality, and is less than ‘human’.⁵⁷

For many couples the formal equivalence of marriage and civil partnership is insufficient.⁵⁸ Therefore, it is argued, excluding gay and lesbian couples from the option of marriage in Northern Ireland is substantively discriminatory and raises issues of equality.

The social landscape in Northern Ireland has arguably changed since the Civil Partnership Act was introduced and there appears to be considerable appetite for reform,⁵⁹ particularly after the introduction of same sex marriage in the Republic of Ireland, following the decision of the Convention on the Constitution on 14 April 2013 – by an overwhelming

⁵⁶ *Wilkinson v Kitzinger & Ors* [2006] EWHC 2022 (Fam).

⁵⁷ C Kitzinger and S Wilkinson, ‘The Re-Branding of Marriage: Why we got married instead of registering a civil partnership’ (2004) 14(1) *Feminism & Psychology* 127.

⁵⁸ As activist group ‘Love Equality’ states: ‘many people want to get married and see civil partnerships as something given less societal respect and understanding than marriage’, Sloan, n 8 above, 273, quoting ‘Love Equality, Frequently Asked Questions’, at <<https://loveequalityni.org/faqs/>> accessed 4 May 2018.

⁵⁹ There has also been a change in attitude from some Northern Irish political parties. SDLP and Sinn Féin have both brought motions forward in the Northern Ireland Assembly for marriage equality. Marriage equality is listed on both parties’ most recent manifestos as key policies (see <http://www.sdlp.ie/site/assets/files/43536/manifesto_2017_low_res.pdf> and <https://www.sinnfein.ie/files/2017/MANIFESTO_ENGLISH.pdf> respectively). Sinn Féin in particular has pursued marriage equality in Northern Ireland since the Republic of Ireland’s referendum resulting in same sex marriage in 2015. One reason for this is that Sinn Féin seeks parity of legislation North and South of the border (although Sinn Féin is arguably more socially progressive than Northern Ireland’s Unionist parties in any case).

majority – to recommend a change in the law.⁶⁰ In June 2013 the Convention reported formally that ‘the Constitution should contain an express acceptance of the right of persons of the same sex to marry each other’⁶¹ and the subsequent referendum in 2015 approved the proposal to amend the Constitution by a margin of almost two to one. And so same sex marriage became legal in the Republic of Ireland, while the North continued to debate the issue.

On 1 October 2012, a motion calling on the Executive to introduce same sex marriage legislation was discussed by the Assembly – and was rejected.⁶² The motion was tabled by the Green Party and Sinn Féin, supported by the Alliance Party⁶³ and the Social Democratic and Labour Party. The Democratic Unionist Party and most MLAs from the Ulster Unionist Party opposed it.⁶⁴ The motion was defeated by 50 votes to 45. But, in accordance with the rules of the Assembly, the DUP had tabled a ‘petition of concern’ under section 42 of the Northern Ireland Act 1998 – a mechanism designed to protect the interests of minorities – which meant that the motion would pass only if separate majorities of Nationalists and Unionists supported it.⁶⁵ So even if it had achieved a majority of votes cast, the motion would *still* not have been carried because there was no way that a majority of Unionists (of whatever party allegiance) was going to vote for it.

The subsequent referendum in the Republic of Ireland did not fail to have an impact on opinion in Northern Ireland; and on 29 April 2013 the Assembly returned to the

⁶⁰ ‘Convention on the Constitution Votes in favour of Same Sex Marriage’ 14 April 2013: <<https://www.constitution.ie/AttachmentDownload.ashx?mid=b4bee9f7-fda4-e211-a5a0-005056a32ee4>> accessed 4 May 2018. See further K O’Sullivan and S Leahy, ‘Marriage in Ireland: Current Law and Practice’ [2018] 30 CFLQ **.

⁶¹ *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same sex marriage*, June 2013: <<https://www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4>>. As a result, the Thirty-fourth Amendment of the Constitution of Ireland was signed into law on 29 August 2015 and same sex marriage was legalised by the Marriage Act 2015.

⁶² Northern Ireland Assembly, *Official Report*, Monday 1 October 2013 vol 77, no 7, 13-28, 40.

⁶³ Which describes itself on its website as ‘Northern Ireland’s cross-community party’: <<https://allianceparty.org/page/join-alliance>> accessed 10 June 2018.

⁶⁴ Ulster Unionist MLA Basil McCrea told the Assembly that he would probably be one of the few on the Unionist benches to speak in favour of the motion: NIA *Official Report*, vol 77 No 7, 19 (1 October 2013).

⁶⁵ Section 42(1) requires that ‘If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support’.

matter, debating the following motion in the name of three Sinn Féin MLAs – Caitríona Ruane, Bronwyn McGahan and Barry McElduff: ‘That this Assembly recognises the importance of the constitutional convention; notes the participation of parties from the Assembly; welcomes the 79 per cent majority vote at the Constitutional Convention in favour of marriage equality; and calls on the Executive to bring forward the necessary legislation to allow for same sex marriage’.⁶⁶ The nub of their argument was that ‘what Churches do is a matter for Churches’ but that the state needed to treat everyone equally and that the ‘traditional’ family based on heterosexual marriage should not have any higher status in law or practice than any other form of family life. Law and social policy, in their view, should recognise the diversity of family life in Northern Ireland and respect the rights of all families, including those in which the partners were unmarried.

David Ford MLA, at the time leader of the Alliance Party and Minister of Justice in the Northern Ireland Executive, proposed an amendment to leave out from ‘Assembly’ to the end of the question and add: ‘states its support for the extension of civil marriage provisions in Northern Ireland to same sex couples, provided that robust legislative measures permit faith groups to define, articulate and practise religious marriage as they determine; and calls for respectful dialogue on this issue between all members of society’.

Unsurprisingly, both the amendment and the original motion were lost – the latter by an overall majority of 53 votes to 42. As on the previous occasion, the Nationalists, broadly speaking, voted in favour and the Unionists against – though there was a thoughtful speech from at least one UUP member in support of the Alliance amendment when Michael Copeland MLA reminded the Assembly of the disgraceful treatment meted out to Alan Turing on account of his homosexuality. Again, had the motion been carried on the raw numerical vote it would still not have passed because the DUP had tabled a petition of concern.

⁶⁶ Northern Ireland Assembly, *Official Report*, vol 84 no 5, 15-28, 42-46 (29 April 2013).

The Assembly returned to the matter again on 27 April 2015, when it debated a motion in the names of Caitríona Ruane and others, as follows:

That this Assembly welcomes the marriage equality referendum in the south of Ireland; notes that a growing number of parliaments across the world have embraced, and legislated for, marriage equality; respects the rights of the religious institutions to define, observe and practise marriage within their beliefs; and calls on the Executive to legislate for marriage equality for same sex couples so that all citizens will have the same legal entitlement to the protections, responsibilities, rights, obligations and benefits afforded by the legal institution of marriage.

The motion was defeated by 49 votes to 47. Sinn Féin, the SDLP and five Alliance MLAs supported the motion, while the DUP opposed it. The UUP allowed its members a free vote on the issue but of 53 Unionist MLAs only four voted in favour: Danny Kinahan, John McCallister, Basil McCrea and Claire Sugden. As on previous occasions, a petition of concern had been tabled in advance of the vote.⁶⁷

Though not formally suspended, the Assembly went into abeyance at the beginning of 2017 following the resignation of the late Martin McGuinness MLA as Deputy First Minister over a row between Sinn Féin and the DUP about a controversial green energy scheme. At the time of writing, there seemed little prospect of a new Executive being established and, in any event, the issue of the absence of same sex marriage in Northern Ireland seemed likely to remain unresolved by the Northern Ireland Executive for the foreseeable future.

However, the matter has not rested there. In *X*,⁶⁸ the applicant, a gay man living in Northern Ireland, married his husband in a religious ceremony in London in 2014 under the provisions of the Marriage (Same Sex Couples) Act 2013. According to media reports, the couple, who are liberal Christians, chose not to have a civil partnership ceremony in Northern

⁶⁷ Northern Ireland Assembly, *Official Report*, vol 104 no 3, 10-22, 40-42 (27 April 2015).

⁶⁸ *X, Re* [2017] NI Fam 12.

Ireland because it had no religious significance.⁶⁹ X sought a declaration that his English marriage was a valid and subsisting marriage under the law of Northern Ireland pursuant to Article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 (SI 1989/677) and that the failure to recognise it as a valid and subsisting marriage when domiciled in Northern Ireland contravened his Convention rights – ‘notwithstanding the provisions of Schedule 2 and the clear intentions of the Westminster Parliament not to legislate for same sex marriage in Northern Ireland’.⁷⁰

O’Hara J accepted that Article 31 of the Order gave him jurisdiction to hear X’s petition;⁷¹ however, he dismissed the petition on the grounds that the Strasbourg case law was ‘entirely against X’, there was no right under Convention law to recognition of same sex marriage and it was an issue on which states parties to the ECHR had a wide margin of appreciation – adding that the House of Lords and the Supreme Court had repeatedly made the point that national courts should not without strong reason dilute or weaken the effect of the Strasbourg case law.⁷² On that basis, he also rejected a challenge under Article 9 ECHR.⁷³

Furthermore, in a brief judgment in *Close & Ors, Re Judicial Review*,⁷⁴ O’Hara J dismissed a challenge to Article 6 of the Marriage (Northern Ireland) Order 2003 by two same sex couples who had entered into civil partnerships in 2005.⁷⁵ This case involved the first two couples (Grainne Close and Shannon Sickles, and Chris and Henry Flanagan-Kane) to register their civil partnerships following the introduction of the 2004 Act. The applicants contended that the effect of the Convention, as incorporated into the law of the United Kingdom by the

⁶⁹ Laura Abernethy, ‘Gay Christian couple in battle to overturn same sex marriage ban’, *Belfast Telegraph* (20 August 2015).

⁷⁰ X [2017] NI Fam 12, [10].

⁷¹ Ibid, [15].

⁷² Ibid, [28].

⁷³ Ibid, [23].

⁷⁴ *Close & Ors, Re Judicial Review* [2017] NIQB 79.

⁷⁵ In its initial form, the judicial review had challenged the use of the petition of concern in the Assembly; however, that issue was not pursued: *Close & Ors, Re Judicial Review* [2017] NIQB 79, [3].

Human Rights Act 1998, was that the denial of same sex marriage in Northern Ireland was unlawful.⁷⁶

O'Hara J noted that the Strasbourg Court had not imposed an obligation on states parties to introduce same sex marriage; though the European Court of Human Rights required some form of legal recognition of same sex relationships, that recognition already existed in Northern Ireland in the form of the civil partnership.⁷⁷ In *Schalk and Kopf v Austria*,⁷⁸ the ECtHR had held that a provision of the Austrian Civil Code under which marriage had to be between persons of the opposite sex was not contrary to Article 12 ECHR (right to marry and found a family) and that changes in attitudes and social policy did not lead to a conclusion that a 'living instrument' interpretation of the Convention was justified in that case or would lead to a conclusion that Article 12 embraced same sex marriage – on which there was no European consensus.⁷⁹ The Grand Chamber had considered the matter again in the context of Article 12 in *Hämäläinen v Finland*⁸⁰ and had again concluded that Article 12 did not oblige states parties to introduce same sex marriage⁸¹ – a judgment confirmed in *Oliari v Italy*.⁸² In both *Schalk and Kopf* and *Hämäläinen* the ECtHR had also rejected the proposition that the absence of same sex marriage violated Article 8 (respect for private and family life).⁸³

If there was a trend, it was undoubtedly towards recognition of same sex marriage in more and more countries but 'there is no sign whatever of the Strasbourg Court moving in that direction. It has had three opportunities to consider the issue during this decade and has turned its face firmly against it'.⁸⁴ Thus O'Hara J concluded that if equality in marriage was to be

⁷⁶ *Close & Ors, Re Judicial Review* [2017] NIQB 79, [7].

⁷⁷ *Ibid*, [8].

⁷⁸ *Schalk and Kopf v Austria* [2010] ECHR 995; (2011) 53 EHRR 20 (App No 30141/04).

⁷⁹ *Close & Ors, Re Judicial Review* [2017] NIQB 79, [9].

⁸⁰ *Hämäläinen v Finland* [2014] ECHR 787 (App No 37359/09).

⁸¹ *Close & Ors, Re Judicial Review* [2017] NIQB 79, [10].

⁸² *Oliari and others v Italy* [2015] ECHR 716, [11].

⁸³ *Close & Ors, Re Judicial Review* [2017] NIQB 79 at [12].

⁸⁴ *Ibid* at [15]. Subsequent to the judgment in *Close*, Strasbourg had a fourth opportunity to consider the issue. In *Orlandi and others v Italy* [2017] ECHR 1153 (App Nos 26431/12, 26742/12, 44057/12 and 60088/12), the majority noted that 'The Court has already held, in respect of various domestic legislations, that civil unions

achieved for same sex couples, ‘it will have to be achieved through the Assembly. I hope that when the Assembly is next asked to consider the issue, those who have the responsibility of voting will read the evidence in this case and in *Re X* in order to understand more completely the issue before them’.⁸⁵

The petitioners in *Close* and in *X* appealed. At the time of writing, the Northern Ireland Court of Appeal had heard both appeals, but judgments were still awaited.⁸⁶

Nevertheless, Executive stalling on same sex marriage in Northern Ireland has not meant that the issue has been shelved. In the spring of 2018, twin bills were introduced in each House of the Westminster Parliament, both entitled the Marriage (Same Sex Couples) (Northern Ireland) Bill; if enacted, they would introduce same sex marriage in Northern Ireland, provide for the legal recognition of same sex marriages of armed forces personnel overseas and other such marriages solemnized outside Northern Ireland and provide for the conversion of civil partnerships to marriages. The Bills would also require the Secretary of State to initiate a review of civil partnerships and would confer rights to pensions and social security contributions on same sex married couples and civil partners. Finally, they would make provision in relation to gender change by spouses and civil partners. In short, as a representative of the activist group ‘Love Equality’ put it, these Bills are ‘a powerful demonstration of cross-party, cross-parliamentary support for equal marriage in Northern Ireland’.⁸⁷

The chances of their becoming law, however, are slight because they do not have Government support. When asked by Ged Killen whether she would support the Bill before

provide an opportunity to obtain a legal status equal or similar to marriage in many respects ... The Court considers that, in principle, such a system would *prima facie* suffice to satisfy Convention standards’ [194].

⁸⁵ *Close & Ors, Re Judicial Review* [2017] NIQB 79, [17].

⁸⁶ A Erwin, ‘Judgment reserved on Northern Ireland couple’s same sex marriage legal challenge’, *Belfast Telegraph* (16 March 2018).

⁸⁷ S McGonagle, ‘Two bills to legalise same sex marriage in Northern Ireland before both houses’, *Irish News* (27 March 2018) at <<https://www.irishnews.com/news/northernirelandnews/2018/03/27/news/parallel-bills-on-same-sex-marriage-in-northern-ireland-to-enter-house-of-commons-and-house-of-lords-1288193/>> accessed 4 May 2018.

the Commons during Prime Minister's Questions, Theresa May said that 'this is a devolved matter that will be dealt with, and we hope that there will be a Northern Ireland Executive in place soon that will be able to address these issues'.⁸⁸ Moreover, it should be remembered that the Conservative Government does not have an overall Commons majority and relies on a 'Confidence and Supply' agreement with the DUP⁸⁹ – which, as we have seen, is bitterly opposed to any such development.

Humanist weddings

Northern Ireland's cultural proximity with the Republic of Ireland has not only highlighted Northern Ireland's absence of same sex marriage: it has also made more apparent the absence of any facility for 'belief' weddings in Northern Ireland, as opposed to purely civil weddings. Couples can have a humanist wedding south but not north of the border. This has caused some controversy and has been challenged in the Northern Ireland courts in the case of *Smyth, Re Judicial Review*.⁹⁰ This section will explore the importance of this case, which has changed marriage law in Northern Ireland (and could possibly influence change in England and Wales).

In *Smyth*, Laura Smyth and her fiancé Eunan O'Kane, both humanists, wished to marry in a legally-recognised humanist wedding ceremony on 22 June 2017.⁹¹ Ms Smyth applied to the General Register Office (GRO) for temporary authorisation for a British Humanist Association⁹² wedding celebrant, Ms Isobel Russo, to perform the marriage under Article 14 of the Marriage (Northern Ireland) Order 2003 but was refused.⁹³ She challenged both the

⁸⁸ *Hansard*, HC Deb vol 638 col 755 (28 March 2018).

⁸⁹ For the text of the agreement, see <<https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament>> accessed 11 June 2018.

⁹⁰ *Smyth, Re Judicial Review* [2017] NIQB 55.

⁹¹ *Ibid* at [1-3].

⁹² Which subsequently changed its name to Humanists UK.

⁹³ *Smyth, Re Judicial Review* [2017] NIQB 55, [5-7].

decision itself and the lawfulness of the legislation which, she argued, were incompatible with her Convention rights.⁹⁴

Ms Smyth and her fiancé wanted ‘an *explicitly* humanist marriage ceremony – not a civil ceremony with attenuated humanist “bits”⁹⁵ – involving a clear public affirmation before their family and friends of their humanist values as individuals and as a couple. Legal validity was also important to them because it signified that the state recognised their values as legitimate and worthy of legal recognition equal to the diverse religious beliefs that were afforded the same legal privilege. ‘We only have this one life and so the decision to share with one other person is all the more significant for a humanist’, said Ms Smyth.⁹⁶

The crux of the issue was that the GRO was not prepared to interpret ‘religious marriage’ as encompassing ‘belief marriage’: humanism is undoubtedly a belief but, equally, it is not a religion. And the 2003 Order only provides for ‘religious marriages’⁹⁷ and civil marriages’: it does not ostensibly provide for ‘belief’ marriages. But Ms Smyth argued that a more expansive interpretation of the 2003 Order was possible. ‘Religious marriage’, she argued, could – and should – be read to include the concept of ‘belief marriage’. This broader approach would encompass a humanist marriage performed by a BHA-accredited celebrant, which, she claimed, should be afforded equal protection.⁹⁸

If the 2003 Order could not be interpreted in this way, Ms Smyth argued that those provisions of the 2003 Order which *only* permitted the authorisation of religious marriage⁹⁹ contravened Article 9 (freedom of thought, conscience and religion) ECHR and/or Article 14

⁹⁴ Ibid, [13].

⁹⁵ Ibid, [56].

⁹⁶ Ibid, [56].

⁹⁷ And under Article 14, the Registrar General may grant a member of a religious body a temporary authorisation to solemnize a religious marriage: *ibid*, [24].

⁹⁸ *Smyth, Re Judicial Review* [2017] NIQB 55, [33].

⁹⁹ On behalf of a religious body by the General Register Office.

(prohibition of discrimination)¹⁰⁰ because they excluded the possibility of granting temporary authorisation (and thereby legal recognition) for a humanist marriage ceremony.¹⁰¹

The respondents argued that the Order did not include a power to grant a temporary authorisation to a humanist celebrant because the British Humanist Association was not a religious body, nor was the state obliged to facilitate every manifestation of religion or belief.¹⁰² Furthermore, there was no interference with Ms Smyth's Article 9 and/or 14 rights – and if there *was* any interference, it was justified in law.¹⁰³ The Attorney General noted that Ms Smyth had not framed her challenge under Article 12 ECHR (right to marry and found a family) and argued that Article 9 was not engaged because Ms Smyth's desire to have her humanist ceremony recognised as legally binding did not come within the ambit of a 'manifestation' of her humanist belief within the meaning of Article 9(1). A requirement to provide legal recognition for humanist marriage would be contrary to 'the natural flow of existing Strasbourg case law'.¹⁰⁴

Colton J disagreed. He concluded that Ms Smyth's beliefs easily met the test of 'a certain level of cogency, seriousness, cohesion and importance' in *Eweida and Others v United Kingdom*¹⁰⁵ and that Article 9 was engaged.¹⁰⁶ He reasoned that courts in England and Wales had looked at the issue of manifestation and had stated that, as a minimum, a belief had to be consistent with basic standards of human dignity or integrity, relate to matters that were more than merely trivial and possess an adequate degree of seriousness and importance. The freedom to hold a belief was an absolute right, whereas the right to manifest a belief was a qualified

¹⁰⁰ *Smyth, Re Judicial Review* [2017] NIQB 55, [34].

¹⁰¹ Further, the Department of Finance had acted unlawfully in failing to introduce regulations to correct that illegality and discharge its statutory obligation under s 75 of the Northern Ireland Act 1998: *Smyth, Re Judicial Review* [2017] NIQB 55, [35].

¹⁰² *Ibid*, [36].

¹⁰³ *Ibid*, [38].

¹⁰⁴ *Ibid*, [39].

¹⁰⁵ *Eweida and others v United Kingdom* [2013] ECHR 37, (2013) 57 EHRR 8 (App Nos 48420/10, 59842/10, 51671/10 and 36516/10) [81].

¹⁰⁶ *Smyth, Re Judicial Review* [2017] NIQB 55, [48].

right. In order to count as a ‘manifestation’ within the meaning of Article 9, the act in question had to be intimately linked to the religion or belief. There had to be a sufficiently close and direct nexus between the act and the underlying belief – which had to be determined on the facts of each case.¹⁰⁷

Colton J noted that the essence of Ms Smyth’s case was based on the different treatment between religious bodies and humanists despite the fact that both groups had shared beliefs. The basis of her claim was that the state had chosen to empower religious bodies to perform legally valid marriages but had refused to extend that privilege to humanists. More importantly, the respondents had missed her fundamental point: she did not want a civil marriage but, rather, a marriage solemnized by a humanist celebrant – which was different and distinct from a civil marriage. Ms Smyth did not understand her marriage as a ‘purely legal’ construct. It was, as she saw it, a manifestation of her beliefs.¹⁰⁸

As a result, the court held that Ms Smyth’s desire for a humanist officiant at her wedding was a manifestation of her humanist beliefs that engaged Article 9¹⁰⁹ and that there had been an interference with her Article 9 rights.¹¹⁰ Her rights under Articles 9 and 14 had been breached because, in Colton J’s view, to protect freedom of religion the law ‘must recognise that all religions and beliefs should be treated equally’.¹¹¹ He had concluded that humanism met the test of a belief body, and the state’s decision to authorise the solemnization of religious marriage ceremonies in recognition of those bodies’ beliefs therefore meant that it also had to ‘provide equal recognition to individuals who hold humanists’ beliefs’.¹¹²

Colton J then considered whether the breach or difference in treatment was capable of objective justification. The respondents had argued that a successful application would create

¹⁰⁷ Ibid, [55].

¹⁰⁸ Ibid, [68].

¹⁰⁹ Ibid, [69].

¹¹⁰ Ibid, [76].

¹¹¹ Ibid, [94].

¹¹² Ibid, [96].

‘huge difficulties for the regulation of marriage’¹¹³ and that there was ‘a significant public interest in closely controlling (and limiting) those who are permitted to officiate’ because permitting any non-religious group to conduct weddings ‘could dilute the dignity and status of marriage in Northern Ireland’.¹¹⁴ In Colton J’s view, however, the second argument fell ‘into the very trap that Articles 9 and 14 are designed to avoid. It does not chime with the State’s obligation to respect all religions and beliefs’.¹¹⁵ Moreover, the ‘flood gate argument’ was not borne out by the evidence¹¹⁶ because Ms Smyth’s was the only application that had been received by a non-religious body.¹¹⁷ Moreover, if granted temporary authorisation the application would still be subject to the series of checks and balances applied by the 2003 Order *all* marriages¹¹⁸ and any applicant would still have to satisfy the test of a ‘belief’ – not all of which would attract the protections of Article 9; moreover, the experience in Scotland between 2005 and 2015 suggested that registration of humanist officiants had not given rise to ‘administrative chaos or difficulty’.¹¹⁹ There was a significant public interest in controlling and regulating marriage, but that could be achieved without discriminating against those who wished to manifest humanist beliefs.¹²⁰ He concluded that there was no objective basis for the justification raised by the respondents¹²¹ and that there had therefore been an unlawful interference with Ms Smyth’s Convention rights with no objective justification in law.¹²²

As to the question of remedy, he decided to echo the approach taken in Scotland by reading the words ‘or belief’ into Articles 14, 15, 16 and 17 of the 2003 Order in each reference to ‘religious marriage’ so that the Order would read ‘religious or belief marriage’.¹²³ That

¹¹³ Ibid, [102].

¹¹⁴ Ibid, [103].

¹¹⁵ Ibid, [104].

¹¹⁶ Ibid, [105].

¹¹⁷ Ibid, [106].

¹¹⁸ Ibid, [107].

¹¹⁹ Ibid, [109].

¹²⁰ Ibid, [111].

¹²¹ Ibid, [112].

¹²² Ibid, [141].

¹²³ Ibid, [157].

interpretation quashed the decision of the GRO and meant that Ms Smyth could have a legally valid and binding humanist wedding. However, the relief granted constituted temporary authorisation *only*, because it authorised Ms Smyth’s wedding specifically; crucially, *it did not change the legal status of humanist weddings in Northern Ireland generally*. Though Ms Smyth might complain that temporary authorisation still constituted discrimination, Colton J considered it appropriate relief in the circumstances for three reasons. First, Ms Smyth had only sought temporary authorisation. Secondly, his decision would provide the GRO with an opportunity to monitor and assess the extent to which belief bodies sought to avail of the opportunity for temporary authorisation. Thirdly, there would be more control over the process, which would enable the Registrar General to guard against the potential difficulties that, it had been suggested, might arise in the event that belief bodies were permitted to avail of the entitlements provided in respect of religious marriages.¹²⁴ The Registrar General could impose any conditions deemed necessary for any temporary authorisations – and all the other protections in the 2003 Order remained in place.¹²⁵ He declined to make a declaration of incompatibility in respect of the 2003 Order and did not hold that the Department of Finance had failed to discharge its statutory obligations pursuant to section 75 of the Northern Ireland Act 1998.¹²⁶ However, he strongly advised reform of the 2003 Order to ensure the breaches that he had identified in this case would be remedied.¹²⁷ It should be emphasised that Colton J granted specific relief related to the specific set of circumstances before him – and so the more general issue of humanist weddings in Northern Ireland remained unresolved. The judgment in *Smyth* was appealed and in June 2017 the Court of Appeal granted interim authority for the wedding to go ahead.

¹²⁴ Ibid, [159].

¹²⁵ Ibid, [160].

¹²⁶ Ibid, [161].

¹²⁷ Ibid, [162].

On 28 June 2018, the Court of Appeal handed down its substantive judgment.¹²⁸ The Attorney General noted that the challenge had been framed in terms of Article 9 and Article 14 ECHR, whereas the *lex specialis* that deals with marriage was Article 12, which expressly provided for regulation of marriage by national law. He argued that nothing in Article 12 or national law required legal recognition of humanist marriage ceremonies and that the Convention had to be read as a whole: Articles 9 and 14 could not be used to establish rights related to marriage that had not been provided for in Article 12.¹²⁹ Moreover, the British Humanist Association did not exercise a marriage ministry; and Colton J had therefore been wrong to rely on its objectives for the purpose of establishing a nexus between the respondent's wish to have a particular form of marriage recognised by law and her underlying beliefs. Colton J ought to have enquired into what was, from the respondent's perspective, missing from a *civil* ceremony and whether what was missing had a sufficiently close nexus with her underlying belief.¹³⁰ Further, a humanist celebrant was not in a relevantly comparable situation to those who could be granted temporary authorisation to solemnise marriages pursuant to Article 14 of the 2003 Order (Temporary authorisation to solemnise religious marriage) because such an authorisation could only be issued to a member of a religious body and, in his contention, humanists did not constitute such a body.¹³¹ Moreover, refusing temporary authorisation had been justified by the need to protect the dignity of marriage by preventing its commercialisation because the licensing of humanist celebrants merely provided a commercial platform for certain individuals to earn money.¹³² Finally, he argued that the finding that Articles 9 and 14 ECHR required the state to provide legal recognition for humanist marriage went against the natural flow of existing Strasbourg case law.¹³³

¹²⁸ *Smyth, Re Judicial Review* [2018] NICA 25.

¹²⁹ *Ibid*, [19].

¹³⁰ *Ibid*, [23].

¹³¹ *Ibid*, [24].

¹³² *Ibid*, [26].

¹³³ *Ibid*, [27].

Perhaps paradoxically, though the Court of Appeal accepted that the statutory prohibition of a humanist celebrant as the person solemnising the respondent's marriage would have constituted discrimination pursuant to Articles 9 and 14 ECHR, it considered that Article 31 of the 2003 Order provided a basis for avoiding such discrimination by enabling the appointment of a humanist celebrant *without* the need for it to be read and given effect in a way that was compatible with the Convention rights pursuant to section 3 of the Human Rights Act 1998. The fact that the person solemnising the marriage would be appointed pursuant to Article 31 of the 2003 Order (Registrars and other staff) rather than pursuant to Article 14 did not, in the Court's view, give rise to any difference of treatment.¹³⁴

Though it had never been contemplated that Article 31(3) might be used in order to avoid discriminatory treatment in respect of the background of a marriage celebrant, where such discriminatory treatment arose it was the responsibility of the Registrar General to act in a way which avoided that discrimination and, if satisfied that a couple wanted a humanist marriage or civil partnership ceremony in order to express their humanist beliefs, 'he should accommodate that request if content that the proposed celebrant will carry out the solemnisation of the marriage according to law'.¹³⁵ Nor did the Court accept that the requirement that a civil ceremony had to be secular in nature would debar readings supporting or promoting humanist beliefs: 'The prohibitions in Article 19 should be narrowly construed and ought not to interfere in any way with non-religious material'.¹³⁶

Accordingly, it allowed the Attorney's appeal, quashed the mandatory Order made by Colton J and set aside his declaration – *but otherwise agreed with 'his carefully reasoned judgment'*.¹³⁷

¹³⁴ Ibid, [59].

¹³⁵ Ibid, [61].

¹³⁶ Ibid, [60].

¹³⁷ Ibid, [61].

One could argue that the Court of Appeal has missed an opportunity to make a declaration of incompatibility and trigger comprehensive reform of the legal status of humanist (or belief) weddings. After all, following *Smyth*, humanist weddings are only deemed legal in Northern Ireland by what might be described as a loophole in the 2003 Order.

From a different perspective, however, Colton J's judgment in *Smyth* has proved to be an important turning-point in Northern Ireland marriage law. It has created a precedent for couples to have legally valid humanist weddings – which the Court of Appeal has upheld. Indeed, it is significant that while the Court of Appeal decided in favour of the Attorney General, it appeared to reject his assertion that temporary authorisation was inappropriate because humanist belief was not comparable to religious belief.¹³⁸ That in itself could support future challenges to the law in England and Wales on the basis of discrimination, where such temporary authorisation is not available to couples. With humanist weddings now legally recognised in Scotland, Ireland and Northern Ireland, England and Wales are the outliers in this regard. As a result, it will be interesting to see whether the outcome of *Smyth* could increase pressure for reform and influence the future of marriage law in England and Wales. .

Conclusion

What this brief discussion of marriage law in Northern Ireland suggests – if nothing else – is that Northern Irish society is still grappling with issues that have been largely settled in

¹³⁸ Ibid, [25 & 26].

Scotland and Ireland – though the issue of humanist wedding ceremonies remains unresolved in England and Wales as well as in Northern Ireland.¹³⁹

The outstanding issue of same sex marriage is arguably the most glaring difference between marriage law in Northern Ireland and in the rest of the UK and the Republic of Ireland, but, unfortunately, it may not be resolved any time soon. When the issue was raised in the House of Commons the Secretary of State for Northern Ireland, Karen Bradley, was firmly of the view that reforming the law was a matter for the Northern Ireland Assembly: ‘Equal marriage is clearly a devolved issue and quite rightly should be legislated for in Stormont. That is the right place for this legislation to be enacted, and I look forward to a devolved Government being in place that can do that’.¹⁴⁰

Whether the Assembly will return to the matter depends on the re-establishment of the Northern Ireland Executive. However, in the event that the Assembly *does* reconvene and same sex marriage is debated, it will no longer be possible for the members of the DUP to table a petition of concern without external support – most likely, from other Unionists. Under section 42 of the 1998 Act and Standing Order No 28, a valid petition requires the signatures of 30 Assembly members. Prior to the election in March 2017 the DUP had 38 seats: it now has 28, one of whom, Robin Newton MLA, is Speaker of the Assembly.¹⁴¹

¹³⁹ As the Law Commission points out in *Getting Married: A Scoping Paper* (2015) para 1.5, under the current law in England and Wales it is not possible for a non-religious belief organisation such as Humanists UK to conduct any form of legally binding ceremony of marriage. S 14 of the Marriage (Same Sex Couples) Act 2013 instructed the Secretary of State to arrange for a review as to whether an order should be made permitting marriages to be solemnized according to the usages of belief organisations on the authority of a superintendent registrar’s certificates and, if so, what provisions should be included in the order. There was a positive response to the consultation, but the Government decided in December 2014 to ask the Law Commission to conduct a general review of the law governing how and where people can marry in England and Wales – hence the scoping paper. At the time of writing the Ministry of Justice had kicked the issue into the long grass: see the decision letter dated 11 September 2017 from the Minister of State for Justice: Ministry of Justice, *Response from Government on Marriage*, at <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2017/10/Response-from-Government-on-Marriage.pdf>> accessed 4 May 2018.

¹⁴⁰ *Hansard*, HC Deb vol 635 col 1479 (7 February 2018).

¹⁴¹ As at Westminster, by convention the Speaker does not ‘become involved in party politics, nor does he or she comment on Northern Ireland political matters or on issues of Government policy’: G McGrath, *The Role of the Speaker of the Northern Ireland Assembly* (London, Global Partners Governance, 2016), 2, available at <<http://www.gpgovernance.net/wp-content/uploads/2016/03/ENG-Role-of-the-Speaker-NI.pdf>> accessed 10 June 2018.

When the Northern Ireland Executive (or whatever may replace it) is eventually in place once again, our suspicion is that it will no longer be able to ignore the strength of public support for same sex marriage. Northern Ireland has traditionally been rather more socially conservative than England and Wales, or even the Republic; for example, homosexual acts between consenting male adults aged 21 or above in private, decriminalised in England and Wales by the Sexual Offences Act 1967, were not decriminalised in Northern Ireland until 1982.¹⁴² But, as we have suggested, there are signs that such social conservatism is waning and that attitudes now are very different from when civil partnership was debated in 2003-2004, for three reasons.

The first is the hard-fought campaign by LGBTQ activists for equal rights. The second is that, though cases such as *Close* and *X* and legislative proposals such as those currently before the Commons and the Lords might not lead *directly* to reform, they serve to emphasise the inequity of the current law and create pressure for change. The third, and perhaps the most important, is that in comparison with the Republic, which introduced same sex marriage on 16 November 2015¹⁴³ and on 25 May 2018 voted by a two to one majority to repeal the constitutional bar on abortion, the law in Northern Ireland relating to issues of sexuality looks increasingly as if it is stuck in a 1950s time-warp.

The recent decision by the Supreme Court on the compatibility of abortion law in Northern Ireland with Articles 3 and 8 ECHR¹⁴⁴ highlights both the dissonance between the law on matters of sexuality in Northern Ireland and Great Britain and the difficulty of change. In that case, a majority held that the current law was incompatible with the right to respect for

¹⁴² By the Homosexual Offences (Northern Ireland) Order 1982 SI 19821536. The Order was made by the Westminster Parliament as a result of the judgment in *Dudgeon v United Kingdom* (1982) 4 EHRR 149 (App No 7525/76), which held by fifteen votes to four that Northern Ireland's criminalisation of homosexual acts between consenting male adults violated Article 8 ECHR (respect for private and family life). Subsequently, as a result of the judgment in *Norris v Ireland* (1991) 13 EHRR 186 (App No 10581/83), male homosexual acts between persons aged 17 or over were decriminalised in Ireland by the Criminal Law (Sexual Offences) Act 1993.

¹⁴³ By the Marriage Act 2015.

¹⁴⁴ *Human Rights Commission for Judicial Review (Northern Ireland: Abortion)* [2018] UKSC 27.

private and family life guaranteed by Article 8 ECHR insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality.¹⁴⁵ However, a majority also held that the Northern Ireland Human Rights Commission did not have standing to bring the proceedings and, accordingly, that the Court did not have jurisdiction to make a declaration of incompatibility to reflect the majority view on the compatibility issues.¹⁴⁶ In such circumstances, it would not be at all surprising if women (and men) in Northern Ireland were to look to recent developments in the Republic – traditionally, a much more socially-conservative society – and start asking ‘If them, why not us?’

So, to conclude, even if the Northern Ireland Court of Appeal does not rule in favour of the applicants in *Close* and *X* and the Marriage (Same Sex Couples) (Northern Ireland) Bills are not enacted, the activists behind them¹⁴⁷ will be an important part of the historic moment when, one day, same sex marriage *is* introduced in Northern Ireland. Rosemary Auchmuty argues that the ‘rhetoric of progress’¹⁴⁸ often ignores the work of activists and pressure groups, and so when exploring marriage and civil partnership law in Northern Ireland, we would want to acknowledge their crucial role in its history.

The issue of same sex marriage apart, however, we would suggest that the current marriage law in Northern Ireland is considerably more fit for purpose than the law in England and Wales, based as the latter is on a statute that is now almost seventy years old and which was merely consolidation and minor amendment rather than new law even when it was passed. It is difficult to see, for example, in what circumstances the mistake that resulted in the proceedings in *MA v JA*¹⁴⁹ could occur in Northern Ireland because, as we have seen, the law

¹⁴⁵ Ibid, [2].

¹⁴⁶ Ibid, [3].

¹⁴⁷ For instance, the petitioners in *X* are supported by an activist group, The Rainbow Project, and the applicants in *Close* have used their own stories to raise consciousness about how the law unfairly affects them.

¹⁴⁸ R Auchmuty, ‘Legal History’ in R Auchmuty (ed.) *Great Debates in Gender and Law* (Palgrave 2018).

¹⁴⁹ *MA v JA* [2012] EWHC 2219 (Fam), in which a couple who had been married in an Islamic ceremony subsequently found that – unknown to them – the mosque had failed fully to comply with the registration requirements of the Marriage Act 1949 and were therefore obliged to seek a declaration that they had, in fact, contracted a valid marriage under English law.

authorises celebrants rather than registering buildings. As the Law Commissioner with responsibility for family law, Nick Hopkins, pointed out in his response to the Minister's decision not to proceed with the Commission's proposed project on marriage law in England and Wales, 'Judging by what we have been told during consultation for our 13th Programme, the pressure for change in relation to marriage law – or at least for a comprehensive review of the area – is unlikely to diminish'.¹⁵⁰

Northern Ireland is uniquely placed to show how that change could take effect. As we hope this article has shown, two of the areas identified for reform by the Law Commission¹⁵¹ – marriage registration and belief/humanist weddings – are matters that have been reformed in Northern Ireland. Given that Northern Irish marriage law is based on licensing celebrants rather than venues, there is no simple read-across to England and Wales; nevertheless, if legislators at Westminster wish to know how to change these matters in a system of family law that is in other respects similar to their own, they should look very carefully at the developing landscape of Northern Irish marriage law.

¹⁵⁰ N Hopkins, 'Letter from Professor Nicholas Hopkins, Law Commissioner for Property, Family and Trust Law to Rt hon Dominic Raab MP, Minister of State at the Ministry of Justice, 26 October 2017', at <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/12/Letter-to-Dominic-Raab-MP-Response-to-protocol-support-rejection-26.10.2017.pdf>> accessed 4 May 2018.

¹⁵¹ Law Commission, *Getting Married: A Scoping Paper* (2015).