FOCUS ONE

LGBTI RIGHTS AND LEGAL REFORM: A COMPARATIVE APPROACH

EQUALITY, DIGNITY, AND SOCIAL HARMONY: EXPLORING THE RATIONALES AND MODELS FOR RECOGNIZING SAME-SEX RELATIONSHIPS IN LAW

David Bilchitz*

Abstract One of the major changes that has taken place over the past twenty to thirty years has been the extension of the legal recognition and protections for same-sex relationships in a wide range of countries. A number of jurisdictions, including China, are considering the approach that they will adopt. This article seeks firstly to consider the justifications for the legal recognition of same-sex relationships by the state. Three main, compelling rationales are identified which are rooted in notions of the equality of all persons, the dignity and liberty of individuals to form close personal relationships, and the social benefits of recognizing close, personal relationships of same-sex couples. The second part of this article then turns to consider the manner in which same-sex relationships should be recognized. Four models are identified: a “Partial Rights” model; a “Civil Partnerships” model; a “Marriage Equality” model, and a “Diversity of Relationships” model. Reasons for and against these particular models will be examined. In the conclusion, it shall be argued that the choice of model that has been adopted can be seen to depend on a number of factors: the manner in which equality is conceived in that society; the understanding of same-sex relationships therein, and the religious and cultural opposition to same-sex relationships in that society. The models are also not states of affairs that are fixed for all time and many countries have progressed from less

* David Bilchitz, Ph.D, University of Cambridge; Professor of Human Rights and Constitutional Law, University of Johannesburg, South Africa; Director, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a center of the University of Johannesburg; Secretary-General, International Association of Constitutional Law. Contact: davidb@saifac.org.za

The author would like to thank the Human Rights Center of the Renmin University of China for partnering with SAIFAC to run a very successful first conference in China on “LGBTI Rights and Legal Reform: A Comparative Approach.” The author hopes further collaborations on this topic will be possible. This article was presented as part of this seminar and the author is grateful for participants for their comments and to JIANG Dong for the encouragement to publish it. The author is also grateful to the Dean of Renmin Law School, Prof. HAN Dayuan; Prof. LU Haina, and Dr. LI Ruiyi for their support of this important project and collaboration as well as their generous hospitality to all the international presenters who came. The author would also like to thank Meghan Finn and Raisa Cachalia for research assistance in the preparation of this article.
extensive forms of recognition to wider recognition over time. Ultimately, it shall be argued that the rationales underlying the recognition of close personal relationships in the law support the “Marriage Equality” model or the “Diversity of Relationships” model. This article thus seeks to provide an understanding of the rationales and models for recognizing same-sex relationships that have been adopted around the world: Its focus is thus comparative but may, in this way, be useful to lawmakers and advocates for legal reform in this area in China and other jurisdictions around the world.

**Keywords** same-sex relationships, marriage, human rights, equality, rationales, models, China

**INTRODUCTION**

“The institutions of marriage and the family are important social institutions that provide for the security, support, and companionship of members of our society and bear an important role in the rearing of children… The importance of the family unit for society is recognized in the international human rights instruments referred to above when they state that the family is the ‘natural’ and ‘fundamental’ unit of our society. However, families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of
In this statement, Justice O’Regan, of the South African Constitutional Court, recognizes both the importance of marriage and family in society and the fact that these are institutions that must embrace the full diversity of human beings. If they are to continue to be institutions which are foundational to society, they need to be constructed in such a way that they are relevant and meet the needs of the people who utilize them.

One of the major changes that has taken place over the past twenty to thirty years is the manner in which same-sex relationships are conceived. In most countries, prior to the 1960’s, any form of sexual activity between members of the same-sex was prohibited. Increasingly, states have decriminalized same-sex activity; yet, the question that is facing many jurisdictions concerns whether they should take further steps to positively recognize these relationships. Indeed, this is a question of particular relevance to China where decriminalization took place in 1997, yet there is currently no positive protection for such relationships in law. Individuals are forming same-sex relationships and legal responses are going to be required as concrete problems arise. In deciding the role the state should play in this regard and the legal approach to be adopted, it is necessary to understand the rationales that lie behind the state providing recognition and protection for same-sex relationships. These justifications are important as they also have significant implications for the concrete form which such a positive recognition by the state should take.

In the first part of this article, the “why” question will be considered: namely, the reasons why same-sex relationships should be recognized in law by the state. It will be argued that, in the main, there are three compelling rationales: (1) One is based in the notion of equality, namely, that the state must treat all its people equally and without subjecting them to arbitrary discrimination; (2) the second is based on the notion that every individual must be treated with respect and dignity; this implies that they must be allowed to make their own choices concerning with whom they wish to form a close personal relationship and any such choices afforded respect by the state; and (3) the last rationale is based upon the state having reasons to encourage a range of social benefits that flow from legally-recognized, close personal relationships between persons; these, for instance, relate to social and familial stability, the environment in which children are raised, and the promotion of social harmony.

Once the key reasons for providing protections to same-sex relationships have been determined, the “how” question will be considered: in what ways should same-sex relationships be recognized?

---

1. Dawood and Another vs Minister of Home Affairs and Others; Shalabi and Another vs Minister of Home Affairs and Others; Thomas and Another vs Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at para. 31.
2. Forty-nine countries have decriminalized same-sex sexual activity since 1981.
relationships be recognized? Case law and legislative developments around the world will be examined and four models identified for the recognition of same-sex relationships: a “Partial Rights” model; a “Civil Partnerships” model; a “Marriage Equality” model, and a “Diversity of Relationships” model. The reasons for and against these particular models will be examined. In the conclusion, it shall be argued that the choice of model that has been adopted can be seen to depend on a number of factors: the manner in which equality is conceived in that society; the understanding of same-sex relationships therein, and the religious and cultural opposition to same-sex relationships in that society. The models are also not states of affairs that are fixed for all time and many countries have progressed from less extensive forms of recognition to wider recognition over time. Ultimately, it shall be argued that the rationales underlying the recognition of close personal relationships in the law support the “Marriage Equality” model or the “Diversity of Relationships” model. A few remarks will be offered in conclusion about the extension of the recognition of same-sex relationships across the world and the possibilities of law reform in China in this regard. This article thus seeks to provide an understanding of the rationales and models for recognizing same-sex relationships that have been adopted around the world: Its focus is thus comparative but may, in this way, be useful to lawmakers and advocates for legal reform in this area in China and other jurisdictions around the world.

I. THE WHY QUESTION: RATIONALES FOR THE PROTECTION OF SAME-SEX RELATIONSHIPS

Early Judeo-Christian religious world-views constructed same-sex sexuality as a form of behavior to be prohibited. Ultimately, according to this perspective, there were no “gay” or “lesbian” people: There were only “heterosexual” or “straight” people who twisted “normal” heterosexual relationships by engaging in sex with members of the same sex.3 There were also no relationships to be had between members of the same-sex: just a form of deviant sexuality. Placing strict legal and social penalties on those engaging in such behavior was designed to reduce its incidence.

The scientific investigation of human sexuality which began in the late 1800’s brought about an important realization which contradicted this world-view. There were a small but significant number of human beings (around five–ten percent of the population) who were orientated naturally to form emotional, romantic, and sexual relationships with members of the same-sex.4 The large majority of the population was orientated towards

---

3 An example of this kind of thinking can be seen in the article by Dennis Prager, Homosexuality, the Bible and Us — A Jewish Perspective, in Andrew Sullivan eds. Same-Sex Marriage Pro and Con: A Reader, Vintage books (New York), at 61–66 (2004).

forming relationships with members of the opposite sex. The direction of one’s predisposition in this regard has been termed “sexual orientation.” Scientific investigation suggests that sexual orientation may arise from genetic, psychological, or early environmental sources.\(^5\) Whatever the origin, however, what has created a major change in legal and social policy is the recognition that a significant group of people in society is naturally predisposed to form relationships with members of the same sex. To try and force such people to form relationships with members of the opposite sex is cruel and doomed to failure: It is like trying to force a left-handed individual to write with their right-hand. We know that this kind of policy is damaging to individuals: It forces them to lie and hide a natural part of themselves. It also often damages the family unit and society as a whole.\(^6\)

Recognizing the existence of a group of people who are naturally orientated to form relationships with members of the same sex has played an important role in challenging the idea that the law should prohibit such relationships. Moreover, it follows too that it would be futile to attempt to penalize such behavior in the hope that heterosexual behavior will ensue instead. It also provides the basis for recognizing that the law should prohibit discrimination on the basis of sexual orientation: Any such discrimination seems just as arbitrary as discriminating against someone because they are left-handed or have blue eyes. The question, however, remains what the implications of this understanding are for whether positive legal recognition should be afforded to such relationships. Increasingly, and over time, it is clear that, where societies have been prepared to be influenced by the scientific shift in the understanding of sexual orientation, gradually more far-reaching changes in state recognition of same-sex relationships has followed. At the same time, not all societies have adopted exactly the same legal and social approaches. In the rest of this part, three of the main rationales will be examined for why the state should positively recognize same-sex relationships in law, through exploring some of the case law of jurisdictions grappling with this question around the world.

\textit{A. The Equality Argument}

Whether the state should be involved in regulating private relationships at all and whether it should in fact provide support for particular types of relationships like


\(^6\) The author will elaborate upon these harms and evidence for them when discussing the particular rationales below.
marriage can be debated. Once it is accepted, however, that the state may and should recognize and confer legal benefits upon certain relationship forms, then it must treat individuals in its jurisdiction equally. Most countries have constitutional provisions similar to Article 33 of the Constitution of the People’s Republic of China, which recognizes that every citizen is equal before the law. The South African constitution includes a rather lengthy equality clause, which protects equality before the law but also specifically outlaws unfair discrimination on many grounds including race, sex, religion, and sexual orientation. These provisions provide the grounds for the following argument to be made: If the state recognizes and provides legal benefits to opposite-sex couples, it must also provide recognition and legal benefits to same-sex couples unless there are very good reasons not to do so. Since courts in many jurisdictions have found a lack of any adequate reasons for such a differentiation, they have required the state to afford legal protection and recognition to same-sex couples. The author will now look at two cases, which illustrate this argument.

Consider the case of X and Y vs Austria. The case dealt with a lesbian couple in which one of the women (“X”) was the biological parent of a child who was born prior to the commencement of their relationship. Her female partner (“Y”) had effectively taken the role of a second parent and applied to the Austrian courts to officially adopt the child that they were both bringing up in what is known as “second-parent adoption.” The Austrian law provided that second-parents could adopt the child of their partners of the opposite sex but made no provision for same-sex, second-parents to adopt in a similar manner. The case went through the Austrian courts without success and eventually reached the European Court of Human Rights. It found a violation of Article 14 (which prohibits discrimination in the enjoyment of rights and freedoms) together with Article 8 (which protects the right to a private and family life) of the European Convention on Human Rights. In doing so, “[t]he Court reiterates that the relationship of a cohabiting same-sex couple living in a stable de facto relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.” It also found that the state was prohibited from discriminating on grounds of sexual

---


11 Id. at para. 95.
orientation unless an objective and reasonable justification existed (which had a legitimate aim and was proportionate). The court found that the Austrian state treated second-parents differently in opposite sex relationships from those in same-sex relationships. The state itself provided no good reasons to doubt that individuals in a same-sex relationship could provide an equally good home for children to those in an opposite-sex relationship. Consequently, the discrimination was in contravention of the European Convention on Human Rights and the state was required to pay damages to the two women.  

In National Coalition of Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others, the Constitutional Court of South Africa had to decide a case in which a South African male citizen wanted to acquire an immigration permit for his foreign, male partner to come and reside with him in South Africa. In terms of the existing law, as a matter of priority, foreign partners who were spouses of South African citizens or permanent residents could acquire such permits. The word “spouse” was understood to refer to an opposite-sex partner. The Constitutional Court of South Africa found that the provision as it stood discriminated unfairly against same-sex foreign partners of South African citizens. Since gays and lesbians could not simply change their sexual orientation, they were unable to benefit from the immigration provisions in a relationship that was consonant with their sexual orientation. The court thus found that there was a serious invasion of the equality of lesbians and gays through such a law and that there was no adequate justification for such discrimination. It forced a change in the law, thus requiring authorities to grant immigration permits to foreign same-sex partners of South African citizens.

In both these cases, the arguments have been centered on the notion of equality: If the state confers benefits on opposite sex couples, it must similarly act towards same-sex couples unless there is a good justification not to do so. Those who try and resist such an argument attempt to provide reasons why it is legitimate to differentiate between same-sex and opposite-sex couples. For instance, it has been argued that opposite-sex relationships are more closely linked to the possibilities of procreation and parenting than same-sex relationships and therefore it is legitimate to confer greater legal benefits and recognition on the former. These arguments, as the one just mentioned, are generally
unconvincing. In brief, while recognizing opposite-sex relationships, the law has never required spouses to become parents; moreover, today many same-sex couples are having children.\textsuperscript{16} There is thus no good reason, in this regard, upon which to justify treating same-sex couples differently from opposite-sex couples.\textsuperscript{17}

Yet, the general problem with the form of equality arguments is that they assert that once a benefit is conferred, it must be equally distributed; they do not tell us what the benefit is that should be enjoyed in the first place and what the significant interests of individuals are that should be met equally.\textsuperscript{18} It is thus necessary to understand what fundamental interests are at stake for individuals in the benefits that the law confers on couples. Once we understand that, a more complete argument can be made for why the law should provide certain protections or not.

\textbf{B. Dignity, Family Life, and Freedom}

The two judgments already discussed provide a useful starting point for this analysis. As we saw in \textit{X and Y vs Austria}, the court found that there had been a violation of the prohibition on discrimination together with a violation of the right to a private and family life of the couple. That judgment, importantly, recognized that all human beings have an interest in having protections afforded for the family lives they lead. The court found that “the relationship of a cohabiting same-sex couple living in a stable de facto relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.”\textsuperscript{19}

In most countries around the world, the state has seen fit to become involved in regulating the legal consequences that flow from close personal relationships, including, shared rights to benefits such as medical care and pension, visitation rights, the legal implications if the couple separates, and the legal effects of the death of one of the partners. The fact that someone is in a same-sex relationship does not alter the fact that they have formed such a close personal relationship and that similar legal issues arise which involve regulating the family life of a couple.

The \textit{National Coalition} case from South Africa took the matter further. In considering

\begin{itemize}
\item \textsuperscript{16} See William Eskridge Jr. & Darren Spedale, \textit{Gay, Marriage: For Better or For Worse?: What We’ve Learned from the Evidence}, Oxford University Press (Oxford), at 169–202 (2006) who outline a range of responses to such arguments that seek to differentiate between same-sex and opposite-sex couples. The majority of the US Supreme Court in \textit{Obergefell vs Hodges} 576 US (2015) also rejects there being any good reason for such a differentiation and recognizes “many same-sex couples provide loving, nurturing homes to their children, whether biological or adopted,” at 15.
\item \textsuperscript{17} See further discussion on whether it is legitimate to differentiate between same-sex and opposite-sex couples below under the “marriage equality” model.
\item \textsuperscript{18} This is a basic problem with the logic of equality: see, for instance, Amarya Sen, \textit{Inequality Reexamined}, Harvard University Press (Cambridge), (1992).
\item \textsuperscript{19} See \textit{X and Y vs Austria}, fn. 10 at para. 95.
\end{itemize}
legislative measures that only protected heterosexual couples, the court had the following to say about the impact of such discrimination on same-sex couples:

The sting of past and continuing discrimination against both gays 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. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.20

The court points out that the damage of unequal treatment lies in the effect it has on the dignity of the individuals concerned. By holding that some are worthy of recognition in law and others are not, society passes a judgment that stigmatizes and dehumanizes lesbian and gay people and those in same-sex relationships.

That in turn not only harms the way in which lesbian and gay people are viewed by others but also the way they see themselves. Poor self-worth is, unfortunately, implicated in self-harming behaviors. Indeed, it is shocking that in studies conducted in the US, it has been shown that lesbian and gay youth are four times more likely to attempt suicide than heterosexual teenagers.21 Moreover, each episode of victimization behavior involving physical or verbal abuse is likely to increase self-harming behavior by 2.5 times on average.22 Unfortunately, statistics such as these do not exist for many other places in the world though it appears likely that similar or worse findings would be reached, particularly in societies in which being lesbian or gay is subject to strong social disapprobation.

If we recognize that sexuality is simply a part of who a person is over which they have little or no choice, it is deeply disturbing that such a difference can be allowed to translate into such a societal devaluation of a group of people. The contribution that lesbian and gay persons make to society can also so easily be lost through social structures that entrench discrimination and have the effect of encouraging self-harming behavior. Affirming same-sex relationships in law sends out the message that lesbian and gay people are valued and that there is no reason for people to have low self-esteem

20 See National Coalition, fn. 13 at para. 42.
22 Id.
simply because of their sexuality. As was recognized recently by the US Supreme Court, this applies also to the children of same-sex couples:

\[\text{Without the recognition, stability and predictability marriage offers, their children suffer the stigma of knowing that their families are somehow lesser...} \text{The marriage laws at issue here thus harm and humiliate the children of same-sex couples.}^{23}\]

The value of liberty and freedom is a further argument about what is at stake concerning state recognition of same-sex relationships. As Justice Kennedy writes, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”^{24} This idea is not simply to be understood in the sense of not persecuting individuals for their choices: That would be achieved simply by decriminalization and non-discrimination measures. The argument would be that the state should enable and support individuals through law in the choices they make as to who they wish to form close personal relationships with.^{25} Most people are hard-wired to have relationships with either members of the opposite sex or same-sex. They have no choice in that regard: The real choices they have concern the difficult matter of finding a suitable partner, and whether they wish to have any stable, committed relationships at all. Once we recognize that the sexual orientation of an individual tends to be relatively stable, it becomes hard to see why the law should intervene to protect the choices made by heterosexual people but not those made by lesbian and gay people.

\[\text{C. Social Benefits}\]

We have thus far considered arguments for the recognition of same-sex relationships in terms of the law in relation to the interests of individuals and the need to treat them equally. These are often referred to as the “liberal” arguments for legal intervention given the focus on individuals. Importantly, though, there are also strong reasons why such a recognition of same-sex relationships should be advanced to realize a number of important social benefits which provide a series of further justifications for laws to be passed which regulate and provide benefits for those in close personal relationships.^{26}

These are sometimes referred to as “conservative” arguments as they focus on the societal benefits of such relationships. What then are some of these reasons?

---

23 See Obergefell, fn. 16.
24 Id. at 12.
26 See also Jonathan Rauch, \textit{For Better or Worse?}, in Andrew Sullivan eds. \textit{Same-Sex Marriage Pro and Con: A Reader}, Vintage Books (New York), at 170 (2004); Eskridge & Spedale, fn. 16.
In the famous Goodridge decision by the Massachusetts Supreme Court on same-sex marriage, Justice Margaret Marshall outlined some of the social benefits of civil marriage as follows:

Without question, civil marriage enhances the “welfare of the community.” It is a “social institution of the highest importance.”...Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data. Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family... Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.27

Justice Marshall covers a number of important social benefits. Some of these—and other related social benefits—will now be elaborated upon briefly in the context of same-sex relationships.

1. Social Stability. — The first argument is based on the value of social stability. By providing benefits to close personal relationships and individuals who commit to one another over a lengthy period of time, the state encourages solid family units which are not continually shifting.28 Such social stability provides individuals with a sense of security and settled expectations which applies both to heterosexual and same-sex relationships.

2. Children. — Socially stable forms of relationship provide a secure environment in which to raise children. If all individuals who had children continually changed their relationship forms, children would be left without a safe, stable, and secure environment in which to grow up.29 There is no reason why same-sex couples cannot bring up children and, indeed, studies do not show any detrimental effects on children growing up

28 See, for instance, Rauch, fn. 26 at 178 who argues that marriage has the power to “settle men, to keep them at home and out of trouble.” See also, Chai Feldblum, Gay Is Good: The Moral Case for Marriage Equality and More, 17 Yale Journal of Law and Feminism 139, 167 (2005).
29 Of course, we should not overstate this point and encourage individuals to stay together in relationships where they are not well-suited and which often becomes more damaging to children. Often, traditional families also are not ideal and provide environments that are not conducive to raise children. Nevertheless, the point in the text is that the encouragement of stable relationships is a good that a state may legitimately aim to encourage given that such environments are, in general, preferable for raising children in.
in same-sex households. It is the stigmatization of same-sex relationships that causes harm to the children who grow up with parents of the same sex; equal recognition of same-sex relationships in law will thus contribute towards improving the environment in which these children grow up.31

3. Duties of Support. — The law usually places duties of support on partners in legally-recognized, close personal relationships. Apart from creating legal bonds between them which contribute to the stability of their relationship, the duty of support helps ensure individuals are cared for when they fall on hard times either financially or health-wise. It also relieves the state of taking on the burden of caring for all individuals who land up in difficult situations. This consideration applies equally to opposite-sex and same-sex couples.32

4. Efficiency of Social Organization. — If every individual in a society is to need certain goods individually, this would often place a greater burden on social resources than if they cluster together. For instance, consider the fact that if every individual required their own separate housing unit, there would be a need for many more separate housing units than if people clustered together in close personal relationships and thus jointly occupied a house or an apartment. That in turn places greater stress on resources and the capacity of the state to provide. The provision of social goods could thus potentially be improved and rendered more efficient by the clustering together of individuals into family units.

5. Social Harmony. — The law usually makes provision for the distribution of property between partners upon the breakdown of a relationship which also contributes to stability and a sense of fairness. No individual should be left completely desperate financially after emerging from a relationship. There has, until recently, been a situation in heterosexual relationships where one of the partners focuses more on the household (usually, the woman due to the patriarchal arrangement of society) and the other on their career (usually the man as above) with a resulting inequality in financial power. It would be unfair upon the breakdown of such a relationship to allow the partner who focused on the home and child-rearing to become desperate due to a lack of finances. Divorce law seeks to regulate these matters and ensure some fairness in the distribution of goods when a relationship ends. The same considerations may well apply in the case of same-sex


31 See Obergefell, fn. 16.

32 See Rauch, fn. 26 at 178–180; and Eskridge & Spedale, fn. 16 at 159–160.
couples. Given the acrimony that often results in such circumstances, there is also the potential that partners would take matters into their own hands. Regulating the breakdown of relationships thus also contributes to ensuring that both the rule of law is adhered to and social harmony is maintained. A similar point can be made about regulating the distribution of property upon death: This contributes to ensuring the affairs of the deceased are addressed in an orderly manner at a time of deep personal sadness and crisis.

6. Reducing Discord amongst Families. — The fact that same-sex relationships have been discouraged in many cultures and communities in the past has led to a number of unfortunate negative social consequences for social harmony. Trying to address these provides even more reason for the state to recognize same-sex relationships.

Consider the following example. The lack of clear partnership rights for same-sex couples and the stigma and discrimination that exists in many places often leads parents and other family members to attempt to disrupt the same-sex relationships of their relatives. If one of the same-sex partners becomes sick, there have been cases where the healthy partner has been refused rights of visitation by the family members who have legal rights to make such decisions in relation to their relative. Similar cases have occurred when family members attempt to disinherit the surviving same-sex partner upon the death of their relative. Apart from the heartbreak for the same-sex couples involved, such behavior can cause severe discord and lead to a breakdown of relations in families and across communities. Partnership rights help provide clarity as to how partners view one another and what their wishes are. In this way, they also help contribute towards greater social harmony.

7. Reducing Coercion into Heterosexual Marriages and Its Consequences. — The lack of recognition and social disapproval of same-sex relationships in some communities leads lesbian and gay individuals to hide their sexuality and to try and form relationships with members of the opposite sex. This is relatively common in China with the one-child policy having created particular social pressures on gay and lesbian children to marry

33 See David Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Michigan Law Review 447, 476–484 (1996) for an analysis of the legal consequences of marriage upon divorce or death in the US (which is similar in many jurisdictions today).


members of the opposite sex in order to have offspring. The opposite-sex marriage that is formed as a result is often unhappy and breaks down several years after it has been formed. Gay and lesbian people are encouraged to hide their sexuality and often lead a secret homosexual life which contributes to the breakdown of their opposite-sex relationship. The children from such unions often suffer from a distant relationship between their parents and the eventual breakdown of the marriage. That is why, increasingly, even in religious conservative communities in Western countries, it is common for religious leaders not to encourage gay and lesbian individuals to marry members of the opposite sex, given the severe social effects that this has.

It is clear that there are strong social benefits that flow from state recognition of close personal relationships and which apply in the case of both same-sex and opposite-sex couples. By encouraging not only opposite-sex couples but also same-sex couples to form such relationships, the state through the law helps to bolster stable and secure relationships across society. We have also seen that there are particular reasons why recognizing same-sex couples in law would help contribute to social stability and social harmony. Having outlined strong reasons for the state to intervene in regulating such relationships, the question then becomes “how” it should do so. The next part of this article addresses that important question.

II. THE HOW QUESTION: DIFFERENT MODELS OF RECOGNITION

Across the world, different models have emerged through which the state has recognized same-sex relationships and provided legal protections. In this part, four different models are identified and examined in light of the reasons that have been provided for and against each of them. As shall be seen, these models often represent stages in a process that culminates in the full recognition of same-sex relationships. In the conclusion, the author will argue that only the “Marriage Equality” model and the related

---

36 A recently made documentary film titled Inside the Chinese Closet highlights the social phenomenon of marriages of convenience in China between gay men and lesbians who are open about their sexuality to one another. An interview with the Director and some more information can be found at https://www.vice.com/read/gay-men-and-lesbians-in-china-are-getting-married-inside-the-chinese-closet (last visited May 10, 2016).

37 See, for example, the Statement of Principles issued by over 100 Orthodox Rabbis, (Jul. 28, 2010), available at http://statementofprinciplesnyu.blogspot.com/ (last visited Jan. 25, 2016).

38 There have been different ways to express these models: The author adopts his own taxonomy but see, for instance, also MacDougall, fn. 25 at 235 who argues that the positions adopted by jurisdictions can be mapped along a spectrum, ranging from condemnation, compassion, condonation and celebration. A condemning approach outlaws and criminalizes homosexual activity, while a compassionate approach decriminalizes gay and lesbian sex and may even outlaw discrimination against LGBTI people, but does not actively recognize their relationships. A jurisdiction which condones such relationships adopts a model which partially recognizes the legal consequences that can flow from them. Finally, a celebratory approach is one that symbolically recognizes and actively celebrates same-sex relationships, usually through a marriage model.
“Diversity of Relationships” model can fully realize the purposes discussed and identified in Part I above.

A. The “Partial Rights” Model

The “Partial Rights” model involves the state providing some recognition for same-sex relationships in the law through conferring some of the benefits and protections enjoyed by heterosexual couples. At the same time, as the name of the model suggests, the state does not confer the full range of equal rights on persons in same-sex relationships. In Germany, for example, a form of registered partnership for same-sex couples was allowed from 2001. While same-sex couples could form such a partnership, and it granted many of the rights that opposite-sex couples receive, such couples could not jointly adopt children and did not enjoy equivalent tax benefits. A similar state of affairs occurred in France, which allowed same-sex couples to form PACs (pacts civils), a form of domestic partnership also open to unmarried heterosexuals. The PACs also excluded the rights of joint adoption, artificial insemination and, initially, the right to lodge a joint tax return. In South Africa, the early court challenges addressed discrimination against same-sex couples in relation to specific benefits: Thus, in a period from 1999–2005, the Constitutional Court extended particular rights to same-sex couples relating to immigration for foreign partners, joint pension benefits, joint adoption rights, artificial insemination, and intestate succession. Since the South African legislature did not intervene to pass legislation in these areas, the position of same-sex couples improved gradually with the recognition of an increasing number of rights over several years.

This model has, in general, not been adopted for long in any of these countries given that it fails to accord with some of the basic justifications outlined in Part I of this article for the recognition of same-sex relationships in law. Clearly, affording only partial rights fails to meet the demands of full equality for same-sex couples, and retains a sense in which same-sex relationships are less worthy of protection, thus perpetuating the dignity harms discussed above. The “Partial Rights” model also only partially succeeds in providing some of the social benefits that legal recognition provides and leaves out, for instance, important protections for children where often joint adoption is excluded. The model is perhaps best understood as a first step adopted by countries concerned to

39 Recent court judgments have shifted this position somewhat: see Melanie Amann, Dieter Hipp & Peter Muller, Vater and Vater: Gay Adoption Debate Fluster Conservatives, Der Spiegel, (Jun. 11, 2013), available at http://www.spiegel.de/international/germany/gay-adoption-debate-flusters-german-conservatives-a-904875.html (last visited May 10, 2016). However, same-sex couples still do not benefit from extensive and full adoption rights in Germany.
41 See National Coalition, fn. 13; Satchwell vs President of the Republic of South Africa and Another 2003 (4) SA 266 (CC); Du Toit and Another vs Minister of Welfare and Population Development and Others 2003 (2) SA 198 (CC); J. and Another vs Director General, Department of Home Affairs and Others 2003 (5) SA 621 (CC); and Gory vs Kolver NO and Others 2007 (4) SA 97 (CC).
provide some protection for same-sex couples yet unsure how far they wish to go. It may also arise in a society where there remains both support for and significant opposition to extending the rights of same-sex couples. Its inherent instability leads in most cases at least to the second model.

B. The “Civil Partnerships” Model

The second model or “Civil Partnerships” model involves the law conferring on same-sex couples all the equal rights and responsibilities that heterosexual couples have in marriage. This model is distinguishable from the “Marriage Equality” model in that marriage is preserved as the sole exclusive legal status for opposite-sex couples; and a new legal form — a “civil partnership” or “civil union” — is created for same-sex couples. It is often referred to as a “separate but equal” model. The UK, for example, initially adopted this approach: It passed new legislation recognizing civil partnerships for same-sex couples while preserving the ability to marry only for opposite-sex couples. The rights and responsibilities enjoyed by both were virtually identical. A number of states in the US have also adopted this model, which has been approved by some of the state courts. In Vermont and New Jersey, for instance, state courts have allowed the legislature to choose between extending marriage or civil unions to same-sex couples. In the decision of Lewis and Winslow vs Harris, for example, the New Jersey Supreme Court found that it was unconstitutional for the state to discriminate between same-sex couples and opposite-sex couples in terms of the benefits that the law conferred. At the same time, it was up to the legislature to decide between whether to offer such couples the status of being in a “marriage” or “civil unions”:

 Raised here is the perplexing question — “what’s in a name?” — and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage, the word marriage itself — independent of the rights and benefits of marriage — has an evocative and important meaning to both parties.

The majority of the court proceeded to hold that, once equal rights were guaranteed, the choice between marriage and civil unions should be left to the legislature. A minority dissented and held that “what we ‘name’ things matters, language matters.” The

---

42 Macarena Saez, Same-Sex Marriage, Same-Sex Cohabitation and Same-Sex Families around the World: Why “Same” Is So Different, 5 European Review of Private Law 631, 640 (2011).
43 Ingo Bachmann, Civil Partnership — “Gay Marriage in All But Name”: A Corpus-Driven Analysis of Discourses of Same-Sex Relationships in the UK Parliament, 6 Corpora, 77–105 (2011). However, the UK has now recognized the right of same-sex couples to marry, see Marriage (Same Sex Couples Act) 2013, available at http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted/data.htm (last visited May 10, 2016).
44 908 A.2d 196 (N) 2006.
45 Id. at 221.
46 Id. Dissenting Judgment by Chief Justice Poritz, at 226.
minority went on to find that:

We must not underestimate the power of language. Labels set people apart as surely as physical separation on a bus or in school facilities. Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately, the message is that what same-sex couples have is not as important or as significant as “real” marriage, that such lesser relationships cannot have the name of marriage.⁴⁷

These two judgments indicate much of what is at stake in this model. Its proponents argue that what really matters is that people have equal rights and what we name a relationship in law is less important and may be influenced by different considerations. Some proponents of the “Civil Partnerships” model argue that there is a difference between same-sex relationships and opposite-sex relationships and that this difference is best captured by labeling these relationships differently. Moreover, in contexts where there is significant opposition to extending the notion of marriage to same-sex couples, this model may help ensure equal benefits are provided to same-sex couples while placating the religious and cultural opposition.

Opponents, however, argue that while this model on its face appears to create equality, it does not in fact do so. The separate names in fact contain an implicit judgment on same-sex relationships, which institutionalizes the social prejudice that such relationships are “inferior” and thus perpetuates harms to the dignity of lesbian and gay people.⁴⁸ The lack of equal status for same-sex relationships also contributes to undermining the social benefits of the institution, which becomes a less desirable prospect for same-sex couples.⁴⁹ The famous philosopher Ronald Dworkin expresses this view eloquently in the following passage in which he explain why it is not possible simply to invent an institution out of thin air and claim it has an equal status to marriage:

The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social and personal meaning. It means something slightly different to each couple, no doubt. For some it is primarily a union that sanctifies sex, for others a social status, for still others a confirmation of the most profound possible commitment. But each of these meanings depends on associations that have been attached to the institution by centuries of experience. We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we

⁴⁸ Cheshire Calhoun, Feminism, the Family and the Politics of the Closet, Oxford University Press (Oxford), (2000) for the view that excluding lesbian and gays from marriage sustains their inequality by preventing their participation in this foundational social institution.
⁴⁹ See, for instance, Alison Rolfe & Elizabeth Peel, “It’s a Double-Edged Thing”: The Paradox of Civil Partnership and Why Some Couples Are Choosing Not to Have One, 21 Feminism and Psychology 317, (2011).
can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered: it enables two people together to create value in their lives that they could not create if that institution had never existed...If we allow a heterosexual couple access to that wonderful resource but deny it to a homosexual couple, we make it possible for one pair but not the other to realize what they both believe to be an important value in their lives.50

C. The “Marriage Equality” Model

The third model, the “Marriage Equality” model, effectively extends the legal status, rights, and responsibilities of marriage to same-sex couples. This model has been gaining adherents very rapidly in the last decade with 21 countries now recognizing the possibility for same-sex couples to marry legally within their jurisdictions.51 The reasoning for the “Marriage Equality” model can be seen to flow from many of the rationales identified in Part II above for recognizing same-sex relationships. The focus of this section will be on the famous Goodridge vs Department of Public Health judgment in the US which remains an exemplar of clarity in providing reasons for this model and challenging the arguments provided against it.52

The case concerned fourteen individuals in Massachusetts who had applied to the city clerk’s office for a marriage license, which had been refused on the grounds that the state did not recognize same-sex marriage. The individuals concerned included individuals such as Maureen Brodoff and Ellen Wade who had been together for twenty years and had a twelve-year-old daughter; Hillary Goodridge and Julie Goodridge who had been together for thirteen years and lived with their five-year-old daughter; and Gary Chalmers and Richard Linell who had been together for thirteen years and lived with their eight-year-old daughter. These couples applied to court to have the city clerk’s decision overturned on the grounds that preventing same-sex couples from marrying was inconsistent with the equal protection and due process guarantees in the state constitution.

The court found in favor of the applicants and wrote eloquently about the social benefits and status of marriage in a passage that has already been quoted above. However, conservative religious groups argued that the extension of marriage to same-sex couples


52 This judgment still remains a classic of judicial reasoning and its argumentative force and logic is perhaps responsible for the gradual extension of marriage to same-sex couples in various states across the US. The culmination of this process was the extension of marriage to same-sex couples by the US Supreme Court in Obergefell, fn. 16.
would undermine the institution. The court, however, recognized that lesbian and gay people were not seeking to undermine or harm the institution of marriage or to abolish it; they were seeking to get married. Therefore, they were not challenging the institution but actively endorsing it. The court wrote:

*They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.*

The reasoning of the court importantly turned on questions of equality and whether there was a rational basis for the differentiation between same-sex and opposite-sex couples. The court rejected the three main arguments put forward by the state that are often also expressed by opponents of same-sex marriage. First, the claim was made that marriage was essentially about procreation and thus could not be extended to same-sex couples that were not able to have children biologically. The court pointed out, however, that procreation has never been a condition of marriage: Opposite-sex couples may marry and remain married even if they do not intend to have children; moreover, couples who are unable to have children for reasons of age or infertility are not excluded from the possibility of marrying. The court thus found that it was the “the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage”

The second argument was that the retention of marriage for opposite-sex couples alone would encourage the raising of children in the “optimal,” heterosexual nuclear family. The court responded on two fronts: First, there was no evidence that excluding same-sex couples from marriage would encourage more opposite-sex marriages. In fact, given the fact that sexual orientation is relatively fixed, this idea seems highly unlikely to have much purchase. Second, the government itself conceded that same-sex couples may be excellent parents: As such, the exclusion of same-sex couples from marriage was itself harmful to the children of such unions, excluding them from “the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.”

---

53 See Goodridge, fn. 27 at 337.
54 Id. at 332.
55 Id. at 335.
The last argument related to the contention that limiting protections to opposite-sex couples helped to conserve scarce state resources given that same-sex partners are often financially more independent than opposite-sex partners. The court held that this argument lacked an adequate empirical basis: It was quite clear that many same-sex partners were dependent in the same way heterosexual partners were; and, moreover, that, in the heterosexual case, there was no requirement for partners to be financially dependent prior to recognizing that they can marry.56

Thus, the court found that there was no adequate basis for the state to prevent same-sex couples from marrying and that, to do so violated their most basic liberty and equality guarantees. After this decision was handed down, the same court was asked by the legislature to rule on whether affording same-sex couples the right to form a civil union rather than a marriage that provided equal state benefits for them would be constitutional or not. The court found that the prohibition

\[
\text{of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.}
\]

57

The court thus found that anything short of affording same-sex couples the right to marry would constitute discrimination and be unjustifiable on the basis of the equal protection provisions of the U.S. Constitution.

The South African Constitutional Court in its decision on whether it was discriminatory for the state to refuse to provide for the marriage of same-sex couples58 also recognized that there were both tangible and intangible benefits to marriage. Clearly, the discrimination against same-sex couples in terms of their lack of concrete legal entitlements was important; yet, the court also emphasized the intangible harm caused to the dignity of lesbian and gay couples through refusing to afford them the status of being married in law. Justice Sachs wrote the following for the court:

\[
\text{The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our}
\]

56 Id. at 336–337.
58 Minister of Home Affairs and Another vs Fourie and Another 2006 (1) SA 524 (CC).
Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples. It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognized by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture.  

The court found that no adequate rationale existed for this severe intrusion into the dignity and equality of lesbian and gay individuals and, significantly, found that it was not simply the rights and responsibilities of same-sex couples that mattered but also the legal status that was accorded to them.

Opponents of the “Marriage Equality” model have come from both the left and the right. From the left, a number of writers question why lesbian and gay people should campaign for being able to marry at all. They claim that marriage is a conservative institution which has in the past sought to entrench male and heterosexual privilege. Marriage is also tied to notions of possession and the very cultural status it has helps to subordinate alternative relationship forms. Marriage also places strong pressure on individuals to conform and live their lives according to a set, prescribed model: It thus puts pressure on lesbian and gay people to “normalize” or “assimilate” into the mainstream.

These arguments from the left have not, however, deterred lesbian and gay people from campaigning for marriage. The response most often offered to these arguments is that lesbian and gay people can challenge mainstream social norms if that is what they want; yet what matters is that they have the choice to be married or not. As Justice Sachs writes in the Fourie case:

what is in issue is not the decision to be taken, but the choice that is available. If

59 Id. at paras. 71–72.
heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples.\textsuperscript{63}

It is also contended in response to the critiques from the left that the extension of marriage to same-sex couples may well in fact have salutary effects on society as a whole. Indeed, it has been argued that same-sex marriage may well have wider effects on advancing gender equality in society, by, for example, undermining the traditional gender hierarchies in marriage and extending the understanding that there are a diversity of family relationships.\textsuperscript{64}

Criticism from the right generally involves the notion that admitting same-sex couples to marriage will fundamentally change that institution for the worse. Marriage, it is argued, is for good reasons meant to privilege heterosexual relationships and provide them with a special status.\textsuperscript{65} Sometimes the reasons underlying this perspective are religious in nature and differing streams of the various religions have adopted different attitudes towards same-sex relationships, some of which are embracing and others condemnationary. Religious reasons alone, however, are clearly unacceptable as a ground for legislating for a whole society in which many individuals do not subscribe to the point of view of that religion.

Those opposed to same-sex marriage from the right have struggled to articulate convincing reasons against the state recognition thereof that are not rooted in particular religious convictions or prejudice. When more general reasons are provided, they have been subject to powerful critiques (as is evidenced in the reasoning of the \textit{Goodridge} judgment) which seek to show that the admission of same-sex couples to marriage does not in any way affect the rights of opposite-sex couples; and, that, in fact, such an admission bolsters the institution of marriage by bringing within its fold a minority which was previously excluded and now subscribes to some of its core social values.\textsuperscript{66}

\textbf{D. The “Diversity of Relationships” Model}

As we saw, the South African Constitutional Court found the exclusion of same-sex couples from the status, rights, and responsibilities of marriage to be unconstitutional. Its

\textsuperscript{63} See \textit{Fourie}, fn. 58 at para. 72.

\textsuperscript{64} See, for instance, Miriam Smith, \textit{Gender Politics and the Same-sex Marriage Debate in the United States}, 17 Social Politics 1, 2 & 23 (2010) who writes that “[s]ame-sex marriage is a challenge to a neoconservative politics of morality in which “morals laws” are needed to keep women in line through imprisoning them in heterosexual marriage and creating incentives for opposite-sex couples to discharge their biological capacity to procreate in a responsible manner…same-sex marriage in the United States has become and arena for debating contrasting concepts of gender and family, one that centrally concerns women’s interests and place in society.”


order though was interesting: It did not automatically change the law relating to marriage (as lies within its power) but sent the issue back to the legislature to address the constitutional defect within one year of the judgment. In doing so, it placed two constraints on the legal regime that could emerge from the legislature: First, the state could not choose to do away with marriage altogether as a means of including same-sex couples; and second, it could not create a “separate” model for same-sex couples that would on its face provide equal protection but in fact “reproduce new forms of marginalization.”

A separate legal structure would be unacceptable if it “implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status.”

The legislature responded to the judgment by initially adopting a “Civil Partnership” model: The draft bill provided all the rights of marriage to same-sex couples but confined the legal status of marriage itself to heterosexuals. Many civil society organizations opposed the law on the basis that it created a separate regime that was in fact unequal in that it refused to provide the status of “marriage” to same-sex couples. The lesbian and gay community organizations asked for two things: (1) that there be no separate law for same-sex and opposite-sex couples and that the relationships of both be addressed under the same law; (2) that same-sex couples be able to have the status of “marriage” conferred on their relationships legally. After intensive discussions across the society, the legislature eventually passed a law confusingly titled the Civil Union Act, which allowed both opposite-sex and same-sex couples to choose to designate their relationships as a marriage or civil partnership. The author terms this the “Diversity of Relationships” model. While it extends marriage to same-sex couples, it also allows both opposite-sex and same-sex couples to decide how they wish their relationship to be designated legally and socially. Some people prefer not to have all the associations of marriage linked to their relationship and thus may opt for a civil partnership; others wish to connect with the institution of marriage. Both statuses provide the same legal consequences and this legal regime simply extends the choice of designation to the couples concerned. This model has been identified as a distinct one in that it provides a novel example of how both the “Marriage Equality” and “Civil Partnership” models may be combined.

The chief merit of this model is that the law enables individuals, both those in same-sex and opposite-sex relationships, to choose how they wish their relationships to be designated and described in law. It thus also empowers them to determine, to an extent,
the concomitant social and cultural meanings that will be attached to their relationships. It also encourages a strong sense that there is a diversity of forms that relationships can take and they are all valid options which are sanctioned by the law.\textsuperscript{71} The model’s detractors might argue that there is no real difference between the two relationship forms and that the choice itself could lead to the dilution of the cultural meaning of marriage in South Africa. The response to this could well be that the model empowers individuals to choose the social meanings they wish their relationships to have. Given the enduring strength of marriage, it is unlikely to harm the institution but rather place pressure on it to respond to the modern social needs of individuals and thus to transform, for instance, in the direction of greater equality.

\textbf{CONCLUSION}

This article began by outlining the rationales for why same-sex relationships should be recognized in law by the state. Some of the recent judgments by courts across the world were utilized to highlight three main strands of argumentation: one relating to the state being required to treat all its citizens equally; the second relating to the importance of protecting the liberty, dignity, and family life of individuals; and the last relating to the social benefits of marriage which included considerations of social and familial stability, and the environment in which children are raised, and social harmony. Four different models were then considered through which jurisdictions around the world have, in some form or the other, recognized, same-sex relationships. These models can be understood to identify a continuum from partial to full recognition as well as an indication of the process which has been followed in many countries gradually to advance the rights that the law affords to same-sex couples.

The models also embody different ideological commitments: a “Civil Partnerships” model, for instance, is committed to the notion that there is a difference between same-sex and opposite-sex relationships that is worth marking in law; whereas the “Marriage Equality” model regards same-sex and opposite-sex relationships as essentially similar in nature. The opposition in society to the extension of relationship rights to same-sex couples may also condition the model that is chosen. The chief form of opposition in Western societies has generally emanated from religion and, in particular the church. There has also, at times, been opposition from those who claim to be defending a particular culture: In South Africa, for instance, African traditionalists sought to limit the legal protections for same-sex couples on the grounds that this was inconsistent with African culture. Defenders of the rights of same-sex couples, however, were able to show that the contentions of the traditionalists were not true and that same-sex relationships had existed and been recognized by African societies for centuries.\textsuperscript{72}


It is important to recognize that the rationales for the state recognition of same-sex relationships identified in Part I above strongly support the “Marriage Equality” model (and the related “Diversity of Relationships” model adopted in South Africa). As we have seen, for a state to treat its citizens equally it needs to consider both the tangible and intangible elements of legal recognition. In most cultures around the world, marriage has a particular status and history that cannot be replicated by any other institution. Failure to allow same-sex couples to marry implicitly judges and stigmatizes their relationships and excludes them from social and cultural meanings that may be important to them. In turn, the law in such cases fails to respect the liberty of same-sex couples to choose to enter into the particular relationship forms with one another and violates their dignity by relegating their relationships to a second-class status. Marriage equality will also help to encourage a sense of self-worth among lesbian and gay people that can help curb the high rates of self-harming behavior in that community. Finally, only marriage equality can fully achieve the social benefits attaching to the state recognition of close personal relationships. Only by affirming same-relationships as being equally valuable as heterosexual relationships can the bonds of stability between individuals be cemented and the children of same-sex partners feel fully embraced. With the recognition that same-sex relationships are socially sanctioned through the law, there will be less pressure on gay and lesbian individuals to form unhappy opposite-sex marriages that regularly fall apart. The rule of law will itself be strengthened with less resort being needed to self-help and the clarity of expectations will also help prevent serious strife amongst families around a range of matters such as visitation rights and property distribution upon the death of a partner. Providing for the possibility of marriage for same-sex couples in law with its particular social meanings will also encourage the recognition of these relationships by families and cultural communities.

The recognition of same-sex relationships in law is happening across the world and is not just the preserve of Western democratic societies. As has been discussed in this article, South Africa has extended full and equal recognition to same-sex couples, as have Argentina, Colombia, Uruguay, and Brazil in Latin America. Cuba, which is ruled by a central communist party and subscribes to a Marxist-Leninist philosophy, has also recently been debating the recognition of same-sex relationships in law. Mariela Castro, daughter of Raul Castro (President of Cuba), has been a strong advocate for the recognition of same-sex relationships and recently stated that “I’m going to insist on same-sex marriage; on giving the same rights that heterosexual couples have to same-sex couples.”

The time is ripe too for legal developments in relation to same-sex couples in the

---

People’s Republic of China. In 2006, LI Yinhe submitted a proposal to the National Committee of the Chinese People’s Political Consultative Conference (CPPCC) to recognize same-sex marriage. Unfortunately, the proposal did not succeed to garner the necessary votes to be taken forward. The law currently does not regulate or confer benefits directly on same-sex relationships though there is some historical and cultural precedent in China for such recognition. The focus of activism amongst civil society in China has, however, generally not been on same-sex marriage but rather on curbing discrimination, addressing social pressures, and stopping the spread of HIV/AIDS in the lesbian and gay community.

This article has provided a range of justifications for providing legal recognition to same-sex couples as well as models, which might be considered by lawmakers in China to address this gap in the law. Engaging in a law reform process is necessary in this regard if all people in China, including lesbian and gay people, are to be adequately catered to and treated equally in accordance with its Constitution. The extension of rights to same-sex couples, as we have seen, would further the equal treatment of people in China, develop respect for every person no matter their sexual orientation, and contribute to the social stability, rule of law, and social harmony of Chinese families. Legal reform though is not enough: It would be desirable for such a step to be accompanied by a process of discussion and engagement in the society around issues of sexuality so as to increase the understanding and acceptance of lesbian and gay people. In this way, legal and social processes could work hand-in-hand to improve the lives of millions of Chinese citizens and to ensure that same-sex couples are able to take advantage of law reforms that recognize their relationships. By extending legal recognition and protection to same-sex couples, the leadership of China will help improve the lives of millions of its citizens and gain respect from around the world for its fairness in relation to all its people.

---


77 The author does not agree with Hildebrandt, id 1329–1332 that recognition of same-sex marriage will somehow harm the development of a LGBT movement or that, if it would, that would provide any reason against the government taking the progressive step towards recognition. At the same time, it is important to ensure that legal change and social change go hand-in-hand in order to render legal rights capable of being given effect to.