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Incrementalism Revisited – The Contrasting Approaches of Italy, England and Wales and Northern Ireland Towards Legalization of Same-Sex Marriage

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ABSTRACT

We contrast the approach taken by Italy and two constituent parts of the UK (England, Wales, and Northern Ireland) toward legalization of same-sex marriage. The incrementalist theory or "step-by-step approach" first advocated by Waaldijk in 2000 predicts that states will take prescribed steps en route to same-sex marriage. The core of incrementalism is that each step (decriminalization of same-sex sexual relations, equality of treatment for gays and lesbians, civil partnership, and finally same-sex marriage) is the logical premise for and in fact necessarily leads to the next step. Reflecting on 22 years of experience, we analyze whether this has been followed in practice in the jurisdictions under study. We demonstrate that although helpful in the early stages, incrementalism does not always reflect how legal changes have occurred and in Italy's case gives no answers as to when or if same-sex marriage will be legalized.

KEYWORDS

Same-sex marriage; incrementalism; Citizenship; public opinion

Introduction

Legalization of same-sex marriage is an area linked to fundamental constitutional rights in many jurisdictions. Italy construes constitutional protection upon marriage. Under Article 29 of the Italian Constitution, the "Republic recognizes the rights of the family as a natural society founded on marriage." Since 2015, Italy has legalized civil partnership, but not same-sex marriage. England and Wales introduced same-sex marriage following legislation by means of the Marriage (Same-Sex) Couples Act 2013 (MSSCA, 2013) (with same-sex marriage being introduced in Scotland in 2014 and Northern Ireland in 2020). Prior to then, case law placed emphasis on marriage between persons of the opposite sex. The 1866 case *Hyde v Hyde* defined marriage as "[t]he voluntary union for life of one man and one woman, to the exclusion of all others." Lord Nicholls of Birkenhead in *Bellinger v Bellinger (Lord Chancellor Intervening)* opined in 2003 that "[m]arriage is an institution, or a relationship, deeply

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embedded in the religious and social culture of this country … between two persons of the opposite sex." Marriage is protected in international conventions (Article 12 European Convention of Human Rights ("European Convention") and Article 23(2) UN Covenant on Civil and Political Rights).

Proponents of same-sex marriage value this as "understood internationally [as] representing the highest form of recognition for a committed relationship" (*Wilkinson v Kritzinger* paragraph 6) and "exclusion from it, whether on grounds of race or ethnicity, gender, religion, nationality or sexual orientation, means being deprived of full citizenship" (*Wilkinson v Kritzinger* paragraph 8; Bamforth, 2012; Bradley, 2003). Where marriage is not available to same-sex couples, citizens cannot obtain the full legal incidents of marriage, including legal rights such as inheritance, maintenance, and tax concessions. Some feminist and queer writers continue to reject marriage. Zylan writes that "[feminist] critics find much to dislike in marriage" (Zylan, 2011, p. 204) with others seeing marriage as undermining their unique lifestyles (Josephson, 2005, p. 273). Yet in contrast, for proponents of same-sex marriage, this has not only constitutional importance but also symbolic importance. This can be demonstrated by the fact that even though the UK Civil Partnership legalization in 2004 gave almost equivalent rights to same-sex couples, same-sex marriage advocates continued to campaign for marriage (Hamilton, 2017). Although the UK's leading lesbian and gay rights group Stonewall initially rejected same-sex marriage in favor of civil partnership, they supported same-sex marriage from 2010.

Compared to the United States, the legalization of same-sex unions and marriage has occurred rapidly in Northern and Western Europe, where there is a relatively long history of recognition of rights for lesbians and gays. Same-sex civil partnerships with equivalent rights and duties of marriage were introduced in Denmark as early as in 1989 followed by Norway in 1993, Sweden in 1995, Iceland in 1996, and Finland in 2002 (Sperti, 2020). In continental Europe, same-sex marriage has been mainly the result of legislative reforms, as demonstrated by the Netherlands in 2001. Spain amended the Spanish Civil code in 2005 (art 44, s 2) despite the Spanish Constitution of 1978 explicitly conferring the right to marry to a "man" and a "woman" (art 32, Spanish Constitution s 1). In 2010, the Portuguese Parliament adopted a five-article statute (law no 9/2010) altering the traditional definition of marriage in the Civil Code. France first introduced civil partnership (*pacte civil de solidarieté* (PaCS, "civil solidarity pact") (*Loi* no 99–944 du 15 novembre 1999)) and then following a heated debate at political level and the largest demonstrations in decades, same-sex marriage in 2013 (*loi* no 2013–404). In Germany, despite marriage and the family enjoying special constitutional protection (German Basic Law 1949 (*Grundgesetz)*, art 6(1)), the German Bundestag first legalized same-sex civil unions in 2001 (*eingetragene*

Lebenspartnerschaft, literally "life partnership") and then in 2017 the Bundestag opened marriage to same-sex couples ((*"Ehe für alle") Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* (20 July 2017)).

In contrast to the most legislative approaches taken in Europe, in North America, same-sex marriage was instead achieved mostly through the intervention of courts. In 2015, in *Obergefell v Hodges*, the Supreme Court held that denial of marriage to same-sex couples amounted to an unconstitutional violation of their human dignity and autonomy, arguing that the right to marry is a fundamental right and that it should be guaranteed to all individuals, regardless of their sexual orientation. As a consequence, the Supreme Court required all States to issue marriage licenses to same-sex couples, introducing same-sex marriage throughout the whole nation. Canada has also relied on leading judgments from their Supreme Court. In 1999, in M v H, the Supreme Court held that the failure to provide stable lesbian and gay couples undergoing relationship breakdown with the same legal rights and duties accorded to unmarried cohabiting opposite-sex couples amounted to illegitimate discrimination under the Canadian Charter of Rights and Freedoms. In 2005, these judicial developments led to the adoption of a federal regulation extending right to marriage to same-sex couples (Civil Marriage Act 2005, ch 33 (Can); Wintemute, 2004).

Other countries have demonstrated much slower progress, with no protections for same-sex couples. Italy, Greece, and Cyprus are the Western European nations "least developed" with regard to same-sex marriage as they only recognize heterosexual marriage. In 2008, Greece enacted a "Free Unions Pact" that only applied to heterosexual partners. In the *Vallianatos* case, the European Court of Human Rights ("ECtHR") subsequently found this to violate Article 14 (equality) in conjunction with Article 8 (right to private life) of the European Convention. In 2015, following the *Oliari* case and then following Parliamentary Resolution 2239 (2018) from the Council of Europe, all constituent countries are required to "provide a legal framework for the recognition and protection of their unions." However, in 2023, only 19 European states have legalized same-sex marriage.[1] Certain Central and Eastern European States constitutionally define marriage as between a man and a woman only.[2] Globally, there have been far-reaching judgments in favor of same-sex marriage in recent years (for example, *Obergefell v Hodges* and the Inter-American Court Judgement of 9 January 2018). However, over 70 countries worldwide continue to criminalize same-sex sexual relations (ILGA, 2022).

This piece interrogates the theory of incrementalism to see how accurately this has worked in practice with regard to the jurisdictions under study. In the next section (two), we reevaluate Waaldijk's incrementalist theory (Waaldijk, 2000, 2001). In sections 3-6, we test out incrementalism in the contexts of Italy,

England, Wales, and Northern Ireland, respectively. While incrementalism is a useful starting point, other crucial factors must be borne in mind. Our case studies stress the importance of whether marriage is specifically protected by a written constitution and the importance of public opinion, informed by cultural, religious, and historical traditions.

Incrementalist theory

The fact that more countries globally have recognized same-sex marriage has led some commentators to describe same-sex marriage as a "necessary" (Merin, 2002, pp. 2–4) and an "inevitable" (Tribe, 2012) constitutional development. Some scholars argued that the process could be analyzed according to a "step-by-step approach," in which each step (decriminalization of same-sex relationships; equal recognition of family and social rights; same-sex civil partnerships; legalization of same-sex marriage; reproductive and parental rights for same-sex couples) is critical to enabling the next. The step-by-step approach (also named "small-change theory" or "incrementalism") (Merin, 2002, pp. 328–329; Waaldijk, 2000, p. 66; Waaldijk, 2001, p. 437; Zanetti, 2015) suggests that not only each step is the logical premise for the next one (for example, legal systems cannot prohibit discrimination toward same-sex couples without first decriminalizing same-sex relationships), but also that each stage stimulates social change by making further developments more acceptable at social and political level.

Furthermore, as Eskridge observes, "each step toward same-sex marriage is typically sedimentary: rather than displacing earlier reforms, the new reform simply adds another legal rule or institution on top of the earlier one. In this way, the same-sex marriage movement contributes to a transformation in the options the state offers to different-sex as well as same-sex couples" (W. Eskridge, 2000, 659. Further updates on his theory can be seen from Eskridge, 2002, 2013a, 2013b, 2015 and Esridge & Spedale, 2006). Therefore, the "step-by-step approach" is not merely descriptive: it provides a normative explanation about social perception of the advancement of lesbian and gay rights, arguing that an incremental progress will make social acceptance of same-sex marriage easier once the preceding steps have been achieved (Harvard Law Review, 2004).

Looking at the model of legalization of same-sex marriage in the Netherlands, Waaldijk uses data to suggest political strategies and provide guidance to political and lesbian and gay movements of other countries for achieving same-sex marriage (Waaldijk, 2000, p. 437). He argues that each step becomes possible only when the previous one has been achieved; furthermore, it creates a virtuous cycle because each step facilitates the next one. For instance, the introduction of registered partnership put pressure on the Dutch legislature to legalize same-sex marriage because it "highlight(ed) the

remaining discrimination caused by the exclusion of same-sex couples from marriage" (Waaldijk, 2000, p. 437).

Eskridge proposes a sophisticated theory that considers the social component of public attitudes: he argues that "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law" (W. Eskridge, 2000). In his opinion, the legislative stalemate on lesbian and gay rights can be broken through a step-by-step approach because it "permits gradual adjustment of anti-gay mind-sets, slowly empowers gay rights advocates, and can discredit anti-gay arguments" (W. Eskridge, 2000, p. 649). Furthermore, according to Eskridge, incrementalism can also help break arguments that same-sex marriage is the first step on a slippery slope not only because those who "argue pro-gay measures will have catastrophic consequences-rampant promiscuity and public lewdness, predation against children, and erosion of families" will see that these ills do not in fact occur, but also because a step-by-step approach "undermines the apocalyptic rhetoric of anti-gay groups" (W. Eskridge, 2000, p. 649). "The homophobes who cried wolf against sodomy repeal lose some credibility when they cry wolf again during debates about anti-discrimination laws and measures recognizing same-sex unions" (W. Eskridge, 2000, p. 649). Utilizing a similar perspective, Badgett emphasizes the importance of not ignoring important cultural or social differences between countries and suggests a "conditions for change" approach (Badgett, 2005, p. 85). In order to accurately predict further developments, she suggests supplementing the theory of small change and taking into account also rates of heterosexual cohabitation, levels of religiosity and tolerance in each jurisdiction (Badgett, 2005).

The theory provided useful guidance to social movements, especially in the early years of their fight for lesbian and gay civil rights, and many jurisdictions have followed this model. As previously published, one of the coauthors (Hamilton) found his theory attractive as it considers that legal developments must be considered in a political and social context and allows for consideration of next steps in a strategic manner (Hamilton, 2016). Hamilton also argued that civil partnership could be seen as a "building block" on route to same-sex marriage and to advocate the legislative (as opposed to judicial) approach to legalization of same-sex marriage (Hamilton, 2016). However, multiple scholars have criticized incrementalism. For example, Aloni objects to incrementalism's connection to public opinion on an ideological basis, arguing that its "dependence" on public opinion, or at least "connect[ness] to public readiness for change . . . thus trivializes the harm of those who are harmed by the ban" arguing that "justice delayed is justice denied" (Aloni, 2020b). He explains that people who suffer unlawful discrimination should not be asked to wait in order to "vindicate their rights" (Aloni, 2020b). Incrementalists do not support stasis, or justice denied, but consider that each small change will lead to the next step and argue that public opinion

and the enforcement of laws are "interwoven. because the law has little meaning if it is not enforced" (Gonzalez, 2010, p. 285).

There is also a statistical correlation between favorable public opinion and legal change in order to achieve success in the long term (Hamilton, 2016; Pew, 2019). Prior to the enactment of same-sex marriage in England and Wales 53% of those consulted supported this (HM Government, Equal Marriage, 2012). Public opinion polls in France and Denmark also demonstrated consistent support for same-sex marriage prior to legislation.[3] The observance of the factual correlation between public approval and same-sex marriage legalization should be separated from arguments about the role of courts in recognizing minority rights. A change in the law alone will not result in public acceptance of same-sex couples. The South African Constitutional court was lauded as a world leader in its *Fourie* judgment leading to legalization of same-sex marriage (Barker, 2011, p. 448). Yet in reality, on the ground, many lesbians and gays in South Africa face discrimination, with authors discussing the "limits of the law" (Awondo et al., 2012, p. 157).

Other criticisms of incrementalism have been raised. One point is incrementalism's tendency to generalize and its lack of consideration of the social, cultural, and legal contexts. Waaldijk and Eskridge based their theories primarily on the United States, Nordic countries, and the Netherlands, but—as Aloni argues—those countries are unique in terms of their social model and their example cannot be said to represent the whole European context (Aloni, 2010, p. 117). In particular, "gender equality . . . emerged earlier in the Nordic countries than elsewhere in Europe and thus suggests that Nordic countries demonstrate . . . a unique progressive and equal attitude toward marriage and divorce" (Aloni, 2010, p. 117) that cannot be easily extended elsewhere. Furthermore, marriage is deeply entrenched in religious and cultural traditions, which can affect the process of recognition of lesbian and gay rights (Ho, 2014, p. 10). Acceptance of economic rights does not imply social and political consensus to infringe on established religious and social traditions of marriage and family. The United States is also different from many European countries due to their system of federalism where marriage is regulated by the states. Critics have therefore considered that incrementalism may not always work the same way in all jurisdictions and that different alternative paths may be opened up outside the Euro-American model. Yet with the increase in the number of countries globally passing same-sex marriage legislation in recent years, and following the incrementalist strategy, the concerns about drawing comparisons from small countries with homogenous populations, although still relevant, are now less concerning (Hamilton, 2016).

Other commentators have instead focused on the lack of an incremental progress or stasis (Harvard Law Review, 2004, p. 24) with countries needing longer to adjust, raising the possibility that change may never occur (W. Eskridge, 2000, p. 119). A major criticism is that incrementalism proceeds

too slowly. Badgett further explains that "each step might require significant political mobilization and could generate increasing practical and symbolic opposition" (2005, the great majority of countries do not give any "formal recognition to same-sex couples" (Saez, 2001, p. 31). It is not possible to predict how long is needed in between stages (Aloni, 2020b). European experience provides evidence that the advancement of lesbian and gay rights may stall, perpetuating a second-class status for same-sex couples. Worldwide, some countries may need longer to adjust and some countries may never legalize same-sex marriage (W. Eskridge, 2002, p. 119). This may lead to a criticism that the incremental steps toward same-sex marriage do not provide the "normative explanation" suggested by the Harvard Law Review (2004), that incremental progress does not necessarily make social acceptance of same-sex marriage easier, and that in fact there can be a diversity of norms. Yet, where countries are stalling in legalizing same-sex statuses, this does not mean that no change is occurring. Rather, there may be smaller changes, such as anti-discrimination laws, at an appropriately slower pace (Hamilton, 2016, p. 133). Hamilton argued in 2016 that comparative constitutionalism means that "even if a country does not give same-sex couples legal protection, the enactment of same-sex marriage laws in other countries has had an influence on the public consciousness of that jurisdiction" (Hamilton, 2016, p. 133–134). International bodies such as the EU and Council of Europe exert powerful influence. Globalization also means that there are going to be increased instances of same-sex couples married in one jurisdiction, asking for their union to be recognized in another jurisdiction.

There are also advantages to proceeding at a slower pace. Authors discuss examples of Nordic countries and US states, such as Vermont, which followed the incrementalist criteria and "managed to introduce same-sex marriage resulting in a substantive and lasting change and avoiding a backlash in public opinion" (Hamilton, 2016, p. 132; Richards, 2004, p. 727). Slower change allows time to "permit … gradual adjustment of antigay mind-sets, slowly empower … gay right advocates and … discredit antigay arguments" (W. Eskridge, 2002, p. 119).

In contrast, various writers and judges have argued that acting in advance of public opinion can "mobilize opponents, undercut moderates and retard the cause they purport to advance" (Marshall, 2010, p. 199 referring to Klarman, 2005). An often cited example of backlash is the US experience. The Massachusetts Supreme Court became the first state in the US to recognize same-sex marriage (Goodridge, 2003) and were not deterred from this judgment despite the lack of a "broad social consensus" supporting this (voters were opposed by two to one, Klarman, 2014, pp. 148–149). Yet within six months, "voters responded with a crushing blow, approving, in eleven states, constitutional amendments outlawing same-sex marriage" (Verchick, 2005, p. 191).

Subsequently, federal legislation was enacted in the shape of DOMA, allowing US states the right to "deny recognition to same-sex marriages should they be allowed in other states" (DOMA, 1996). It was not until the *Obergefell* decision in 2015 that same-sex marriage was legalized across the USA. Yet, even after reaching the so-called "end point" of legalization of same-sex marriage, it is still possible that regressive steps may occur. The recent US Supreme Court case of *Dobbs v Jackson Women's Health Organization* overturning the decision of *Roe v Wade* regarding women's rights to abortion, has led to concerns about other similar decisions being made, one being around *Obergefell* and the right to same-sex marriage.

Writing in 2010, Aloni cast doubt upon whether certain nations would move from civil partnership to same-sex marriage. He noticed that "outside the Netherlands and Belgium, European recognition of same-sex unions has thus far ended with registered partnerships—and only in the Netherlands does same-sex marriage include full rights of adoption" (Aloni, 2010). He stated that one argument for failure to move to the next stage is that having obtained many rights through civil partnership, the "attractiveness of formalized marriage had waned." However, this critique has proved wrong in France, Germany, England, and Wales, and in Switzerland, same-sex marriage was legalized in 2021. At the moment Aloni's objections can be considered true in some respects in Italy where, after the introduction of same-sex civil unions in 2016, recent debate on lesbian and gay rights has mostly focused on parental rights and protection against hate-speech, whereas marriage equality still appears a distant goal.

Italy

Proponents of same-sex unions in Italy have attempted to introduce this by legislative and court-based means but have been thwarted on many occasions. While civil partnerships are now legal in Italy, there is no indication that same-sex marriage will be introduced. If the end-goal of incrementalism is same-sex marriage, this has therefore had little success in Italy. Bills for the regulation of (same-sex and opposite-sex) civil partnerships were introduced before the Italian Parliament as early as in 1988 (Bill n. 2340, *"Disciplina della famiglia di fatto"*, February 12, 1988; Buffone et al., 2016, p. 34). Yet these early attempts had no success in progressing through Parliament due to opposition from conservative and Catholic political forces. Following the Parliamentary stalemate, supporters of same-sex unions turned to the courts. In 2009, ordinary courts began to raise questions before the Italian Constitutional court about the constitutional legitimacy of the Italian civil code on marriage. As the civil code "did not allow individuals to contract marriage with persons of the same sex" it was argued that this violated important provisions of the Italian Constitution

1942 including Articles 2 (fundamental rights), 3 (equal protection), 29 (marriage and family) and 117, sect. 6 (on fulfillment of international obligations). In a similar manner to other international cases, the Italian Constitutional Court had to consider the constitutional legitimacy of the use of references to "man" and "woman" in key legal texts. Yet the Italian constitutional court rejected the arguments brought forward on behalf of same-sex couples. Ultimately, the introduction of civil partnership in Italy only ensued following intervention from the ECtHR (*Oliari*).

Article 29 of the Italian Constitution states that "the Republic recognizes the rights of the family as a natural society founded on marriage." There is no specific reference to the sex of the spouses or any definition of the institution of marriage, unlike for example art. 32 of the Spanish Constitution. In case no. 138 of 2010 the Constitutional Court recognized that "the concepts of family and marriage cannot be considered 'frozen' at the time when the Constitution came into force because they are endowed with the flexibility of constitutional principles" and "should be interpreted in light of the evolution of society and customs" (Schillaci, 2014; Sperti, 2013). Despite this promising start for same-sex marriage supporters, ultimately, the Constitutional Court adopted an historical or "originalist" interpretation of the constitution. The Constitutional Court refused to modify Article 29 "in such a way as to include phenomena and problems not considered in any way when it was issued." In so doing, the Court admitted that while theoretically a progressive interpretation of marriage would have been possible, ultimately with specific regard to marriage, the court safeguarded the heterosexual "traditional meaning" of marriage. This follows the approach of the ECtHR in *Schalk and Kopf v Austria*. The ECtHR had similarly attributed an "originalist interpretation" to the meaning of Article 12 (right to marry), when asserting that the use of the words "men and women" must be deliberate, in contrast to the other articles that refer to everyone (*Schalk and Kopf*).

Case n. 138 of 2010 has been much criticized. The result placed the Italian Constitutional Court in a minority position when compared to other constitutional supreme courts, which had rejected "heterosexual paradigms" when asked to rule on the constitutional legitimacy of provisions on marriage. Italian scholars criticized the Court's judgment, arguing that not only was the conclusion unnecessary but was setting a "dangerous" precedent for the future recognition of socially controversial fundamental rights (Schillaci, 2014, p. 45). Furthermore, case n. 138 of 2010 made clear to proponents of same-sex unions that a change to Article 29 Constitution (even though it does not mention marriage) could not be achieved through ordinary legislation. This type of reform could only occur by a Constitutional amendment to Article 29, requiring two-thirds majority of both chambers, or alternatively an absolute majority with the possibility of a constitutional referendum (Art 138 Italian Constitution).

The decision has also been much criticized due to its questionable reasoning. Adoption of originalist arguments places a lack of evolution on key legal points. Furthermore, the Constitutional Court sought to justify its approach by reference to the "procreational argument" against same-sex marriage. The Constitutional court emphasized that "it is not coincidental that [Art 30 of] the Constitutional Charter, after dealing with marriage, has deemed it necessary take care of the protection of children." The Court referred to the "constitutional importance of the legitimate family and the (potential) procreative purpose of marriage" stating that this is what "differentiates it from [a] homosexual union." It is possible to infer that the Court intended to stress a "procreative purposive" as a distinctive trait of marriage, in order to underline a difference with heterosexual couples and perhaps to justify a lack of adoption rights for same-sex couples. Yet in doing so they did not follow the approach of other constitutional courts who rejected such arguments, as they would also discredit the marriages of other couples unable to procreate, such as the sick or the elderly (for example, see the South African Constitutional Court in *Fourie*).

However, the Court did address the lack of same-sex civil unions at the time. The Court considered that same-sex couples formed "stable union(s) between two people of the same-sex" protected under Article 2 of the Constitution (which protects fundamental rights of individuals and groups). As a social group protected by Article 2, the Court argued that same-sex couples enjoy "the fundamental right to live freely as a couple and to achieve —within the times, methods and limitation established by law—legal recognition with the pertaining rights and duties." Case n. 138 of 2010 therefore sent a clear message to the Italian Parliament. While same-sex marriage was precluded by the constitutional interpretation of "marriage," the Court requested Parliament "in the exercise of its full discretion to adopt a regulation that guarantees and regulates same-sex unions." The Court also suggested to ordinary judges "to make timely interventions ... aimed at remedying individual differences in treatment between heterosexual and homosexual couples" through an evolutionary interpretation of existing legislation. Furthermore, the Court reserved to itself the right to assess the reasonableness of legislative choice as they considered that married couples and homosexual couples should have "homogeneous treatment." At this point, the Constitutional Court seemed to follow other European courts that had similarly left freedom to national legislators (for example, see the French Conseil Constitutionnel in 2011). Yet, even were civil unions to be introduced, marriage remained possible for heterosexuals only, resulting in a clear different treatment between heterosexual and same-sex couples.

It is now worth analyzing how other Italian courts interpreted the Constitutional court's judgment, given the two competing strands of the judgment. While one part of the judgment focused on the Constitutional

Court's instructions to have an "evolutionary" interpretation where possible, in contradiction and result the case n138 of 2010 stressed that marriage was open to heterosexuals only. The Supreme Court of Cassation (the court with the highest jurisdiction for civil and criminal cases in Italy) was asked, following the Constitutional Court decision, to recognize by means of registration of a marriage certificate, a same-sex marriage celebrated abroad (Case n. 4184/2012). The same-sex couples who submitted their case had already had this request refused as contrary to the "public order." The Supreme Court stressed that the rationale of case 138 of 2010 of the Constitutional Court, was to have "gender diversity of spouses" based on "very ancient and shared cultural traditions" (Case n. 4184/2012). The Supreme Court concluded that within the Italian legal system, same-sex couples have neither the right to marry nor the right to a registration of their marriage concluded abroad. They justified this conclusion by reference to the civil code and by references to the diversity of sex in international treaties.

However, a glimmer of hope remained for proponents of same-sex marriage. The Court, relying on a comparative survey of other European countries, referred to a "widespread legal recognition of the right to marry for same-sex couples" together with civil unions. The Court referred to the leading judgment of the ECtHR in *Schalk and Kopf v. Austria*. Although this case left a wide margin of appreciation ("MoA) or area of discretion, to contracting states, the Court adopted a generous meaning of this case holding that the right to marriage pursuant to Article 12 of the European Convention, could "also include the right to marriage between persons of the same sex." This meant that the Court rejected as an indispensable requirement of the foundation of marriage that there should be gender diversity of spouses. Against this background the Court argued that in light of ECtHR cases, same-sex marriage can no longer be considered void for the Italian legal system, but simply 'unable to produce any legal effect.' Accordingly, whilst the result of the case was that the Court rejected the applicants" request, same-sex marriage was "saved from prohibition or irrelevance" leaving open the possibility for the legislator to attribute full validity and effectiveness to same-sex marriages contracted abroad.

After the Supreme Court's ruling, the Constitutional court examined same-sex marriage for the second time in 2014 in relation to the issue of the so-called "forced divorce." The case arose from a married heterosexual couple, when the husband, with the support of his wife, decided to undergo male-to-female gender reassignment surgery ("GRS"). However, Italian law (Article 4 of Law 164 of 1982) implies that on registration of a change of sex, any existing marriage is nullified. The couple who wished to remain married argued that the law was unconstitutional. This resulted in the Constitutional Court being asked to reconcile the right to marriage and the right to personal identity of the spouses. Given the GRS, this question was closely intertwined with the validity

of same-sex marriage within the Italian legal system. In judgment n.170 of 2014 the Constitutional Court refused the claims of the same-sex couple to remain married. The Court began by rejecting many arguments made by the applicants. First, they referred to case n.138 of 2010 as authority for the fact that marriage must be between persons of the opposite sex. This case was also seen as grounds for rejecting any argument under Article 29 Constitution. They also rejected any arguments under Article 3 equality grounds, arguing that as this case involved GRS it was different from other cases brought by same-sex couples. Finally, relying on authorities from the ECtHR the Court held irrelevant arguments made in relation to Articles 8 (on the right to respect for family life) and 12 (on the right to marry and raise a family) of the European Convention. In the analogous case *H. v. Finland*, all claims to remain married following GRS had been rejected by the ECtHR "because of the lack of a consensus among the member States on the issue of same-sex unions and the margin of appreciation consequently recognized to them."

According to the Court, the only relevant argument addressing constitutionality was following the dictum in case 138 of 2010 around the recognition of same-sex couples as social groups under Article 2 of the Constitution. The Court declared that Article 4 of Law 164 of 1982 requiring forced divorce on GRS, entirely sacrificed the interests of the couple, in favor of the "exclusive protection" of the "fundamental characteristics" of marriage as heterosexual only. This excluded any chance "to balance [that interest] with the interests of the couple" and their right to preserve their marriage. Yet any possibility of an evolutionary interpretation of Article 4 Law 164 of 1982 to allow an automatic continuation of the marriage was excluded as otherwise this would make same-sex marriage legal. Instead, the Constitutional Court declared art. 4 Law 164 of 1982 unconstitutional as the lack of a registered civil partnership to replace their marriage bond and to safeguard the couples' rights, did not exist. Once again the Court clarified that it was the legislative's prerogative to introduce civil partnership.

The conclusion of this case has resulted in widespread debate. One issue was that the Constitutional Court had actually declared unconstitutional a legislative omission, namely the lack of a civil partnership statute (Romboli). However, there was no practical guidance on the future principles to be applied by the judges, until the gap was filled by the intervention of the legislator. Particularly in this specific case, given the absence of same-sex marriage, it was unclear whether judges should consider the marriage of the applicants following GRS to be valid or dissolved. In a Court of Cassation case the following year, the court interpreted the Constitutional court's ruling to mean that following GRS surgery, two women could remain married until the intervention of the legislator and the "automatic transformation" of their marriage into a same-sex civil partnership (Corte di Cassazione, no 8097/2015, 21 April 2015).

The decisive step toward the introduction of same-sex civil partnerships in Italy was the ECtHR case *Oliari*. Several same-sex couples had tried to celebrate same-sex marriage, only then for their application for marriage to be rejected by their city registrars. They subsequently lodged appeals before local courts, arguing that "Italian law did not explicitly prohibit marriage between persons of the same sex, and that, even if that were the case, such a position would be unconstitutional." Following the precedent set by the Constitutional Court in case 138 of 2010, lower-level courts rejected their claims, and refused requests to issue marriage banns between same-sex couples. Having failed to be successful in their right to marry case being recognized domestically, the applicants referred their cases to the ECtHR. They alleged violations of Articles 8 (protection of private and family life) 12 (right to marry), in combination with Article 14 (prohibition of discrimination) European Convention. The ECtHR focused on the violation of Article 8. They stated that same-sex couples are in need of legal recognition and protection of their relationship as they "are just as capable as different-sex couples of entering into stable, committed relationships and that they are in a relevantly similar situation to a different-sex couple" (paragraph 165). The Court noticed that "the applicants' status in the domestic legal context could only be considered a 'de facto' union." While Italy allowed private cohabitation agreements between same-sex partners, these failed to provide "basic needs which are fundamental to the regulation of the relationship, such as, inter alia, the mutual rights and obligations they have toward each other, including moral and material support, maintenance obligations and inheritance rights" (paragraph 169).

The ECtHR referred to the numerous times that Italian courts had advised the Italian Parliament to introduce same-sex relationships and considered the fact that the majority of Italian citizens supported same-sex civil partnership. The ECtHR concluded that the lack of action by the Italian Parliament was undermining the credibility of the judiciary, leaving "the parties in a situation of legal uncertainty" (paragraph 184). Ultimately, the ECtHR found that Italy has violated Article 8 of the European Convention (protection of private and family life) as it had not introduced any type of civil partnership to provide same-sex couples with requisite rights. However, following its judgment in *Schalk and Kopf*, the ECtHR found no violation of Article 12 (right to marry), continuing to rely on a large of MoA due to a lack of consensus across Council of Europe states.

The ECtHR's ruling meant that Italy was in violation of the European Convention. In response to the many pressures of the courts and public opinion, the Italian Parliament finally legalized same-sex civil unions in 2016 (Legge no 76, 20 May 2016). Yet the Italian civil partnership has not resulted in equal status for same-sex couples. Instead, Italy followed the example of a dual track model, based on the German' Austrian and Swiss

regulations of same-sex partnerships (*eingetragene Lebenspartnerschaft*, literally "life partnership"). While, according to Article 1, marriage and same-sex partnership produce mostly the same legal effects, differences remain. However, there is a denial of parental rights including reproductive rights (such as IVF) for lesbian couples. There is also an exclusion of the duty of faithfulness for same-sex partners. Even for married couples, the duty has lost legal relevance as there is no consequence for its violation. Yet this symbolic difference in treatment, some would argue, has resulted in a stigma for same-sex couples (Falletti, 2016).

Stepchild adoption and joint adoption were also denied to same-sex couples. In recent years, Law 76 of 2016 authorized the judiciary to apply, as long as possible, the provisions of Law 184 of 1983 on adoption. This clause makes it possible for lower courts and the Corte di Cassazione to recognize the rights of gays and lesbians to adopt the child of their partner (step-child adoption), considering that this legal solution satisfies the best interests of children in the instant cases (Court of Cassation, n 12962, 2016; Gattuso, 2017, p. 219). Courts have also allowed the registration of birth certificates for children born abroad through IVF (Corte di Cassazione, n 19599, 2016; Corte di Cassazione n 14878, 2017); the registration of foreign certificates of joint adoption (Corte di Cassazione, n 9006, 2021) and ordered the registration of children of lesbian couples born in Italy (Tribunale di Pistoia, 5 July 2018). Finally, in two recent cases (Corte costituzionale, case n 32 and 33, 2021), the Constitutional Court pressed the Parliament to intervene in order to regulate the legal condition of children of gay couples born abroad through surrogacy and to provide an adequate legal protection for the children of lesbian couples (when stepchild adoption is not possible due to divorce between the biological and the social mother).

The recent concentration on lesbian and gay adoption rights means that this has become one of the focuses for lesbian and gay groups in Italy, with consequently less concentration on same-sex marriage. Italy's Constitution (art 29) – as interpreted by the Constitutional Court in 2010 – safeguards traditional marriage and for Italian proponents of same-sex marriage this remains a distant dream. Despite a recent public opinion poll demonstrating 59% for equal marriage (Euripses Survey, 2020), the originalist interpretation of Article 29 of the Italian Constitution by the Constitutional Court implies that same-sex marriage in Italy could be introduced only through a constitutional amendment, which in the present political landscape would be difficult to achieve. The courts have recently focused on lesbian and gay adoption rights. At a political level, recent debate has considered hate speech. However, the most recent attempt at reform (Known as "Disegno di legge Zan") has been rejected by one House of the Italian Parliament (Camera dei Deputati) raising protests by lesbian and gay movements and progressive political parties. Aware of the need to

make political progress and to counter the parliamentary stalemate, a recent bill for the introduction of equal marriage has been proposed in the Italian Senate with the support of the main lesbian and gay associations. If, as quite probable, this proposal is not given Parliamentary debating time, some lesbian and gay movements propose that a referendum is the only way out of the stalemate. Even then, given the judgments of the Italian Constitutional court, it is likely that they would declare a referendum inadmissible.

England and Wales

By means of the Civil Partnership Act 2004, the UK introduced civil partnership across all constituent countries. In contrast to other jurisdictions, such as France or Italy, which gave limited or uneven rights, the UK opted to give very similar rights to same-sex couples as compared to those given to married heterosexual couples (but with some differences). However, soon after the legalization of civil partnership, this began to be criticized as a "second-class status" (Aloni, 2010, p. 156) compared to the US treatment of blacks in the Jim Crow South (Duggan, 2002, p. 175) and derided as a "weapon" being utilized against lesbians and gays to prevent same-sex marriage (Triger, 2012). Despite an endorsement by the ECtHR of civil partnerships having an "intrinsic value ... irrespective of the legal effects, however narrow or extensive" (*Oliari*), for others marriage continued to be seen as the "gold standard" (*Wilkinson v Kitzinger* paragraph 6). Following public opinion moving in its favor, same-sex marriage was introduced onto the statute books of England and Wales in 2013. It can be argued that on this occasion Waaldijk's incrementalist approach was followed, yet several criticisms can be made. The incrementalist theory assumes that civil partnership is a "building-block" (Hamilton, 2016), with the final step being legalization of same-sex marriage. This argument might suggest that following the introduction of same-sex marriage, civil partnerships would no longer be seen as important and only a step along the way. It also ignores the fact that civil partnership also has a value of its own. Palazzo contends that "these partnerships retain value for non-traditional families" (Palazzo, 2022, p. 186) and the ECtHR has also referred to civil partnership as having an "intrinsic value" (*Oliari*). Therefore, portraying civil partnership only as a step on the path to same-sex marriage harms the possibility of appreciating this as a meaningful institution in itself. Civil partnership as a status was abolished in many jurisdictions after legalization of same-sex marriage (for example, the Republic of Ireland and Germany). Yet, in other jurisdictions, even after legalization of same-sex marriage, in a move unexpected by incrementalists, civil partnership has been retained as an alternative status. This is not necessarily contradictory to incrementalism (as after all same-sex marriage has been introduced), but yet

the idea that some would prefer civil partnership as a status was not envisioned by theorists who originally set out same-sex marriage as the ultimate goal. Despite an initial lack of clarity as to whether it would be retained, civil partnership remains on the statute books in England and Wales (as is also the case with the French PACS and statutory cohabitation in Belgium).

In fact, in England and Wales, civil partnership has been opened to heterosexuals. This was the result of a public consultation (Government Equalities Office, 2014) and a high-profile case, *Steinfeld*, brought by a heterosexual couple arguing for inclusion within a civil partnership. The heterosexual couple in question, Rebecca Steinfeld and Charles Kaiden, rejected marriage because of its patriarchal associations (*Steinfeld*, paragraph 6). Ultimately, the UK Supreme Court judgment ruled that barring heterosexual couples from civil partnership was discriminatory under Article 14 European Convention. For some, this has resulted in civil partnership being seen as a positive new status (Hayward, 2020) and statistics demonstrate that many did enter into civil partnership and same-sex marriage (Office of National Statistics 'ONS,' 2018). Civil partnership is also an important alternative to co-habitation where legal rights for unmarried couples in England and Wales are very limited. As Herring explains, in most cases "the law treats unmarried couples as two separate individuals, without regard to their relationship. If there is no particular statutory provision, the law treats an unmarried couple in the same way it would two strangers" (Herring, 2020, p. 120). This is different from other countries in Europe, who have legislated to treat married and unmarried couples the same way (Herring, 2020, p. 129).

However, if the goal of incrementalism was full equality, this has not been achieved by MSSCA (2013). Differences in religious and sexual treatment for same-sex and opposite-sex couples remain. Religious organizations cannot be compelled to solemnize same-sex marriage (section 2 MSSCA, 2013), and religious groups have a choice to opt-in (section 4), but even then this is not available for the Church of England (section 4(5)). These provisions clearly do result in a lack of equality for same-sex couples, but for many are justified on grounds of protecting religious freedoms (article 9 European Convention). Perhaps, it could be an argument for separating religious and civil marriages (Herring, 2020, p. 109).

MSSCA2013 also contains sexual differences in the treatment of same-sex and opposite-sex couples. Unlike the case for opposite-sex couples, same-sex couples are not able to rely on grounds of non-consummation for having a marriage annulled (Schedule 4 para 4). Seconds, adultery is not a ground for dissolution of a civil partnership or same-sex marriage, whereas it is a ground for divorce of an opposite sex-marriage (Schedule 4, paragraph 3).

When considering adultery as a ground for divorce, this is restricted to voluntary sexual intercourse. It must involve penile penetration of the vagina: *Dennis v Dennis*. "This is hard to justify but matters little in practice, because

other sexual unfaithfulness can fall under the unreasonable behavior fact" (Herring, 2020, p. 151). However, the existence of these differences has caused much criticism, with some arguing that they "reinforce an historical sexual hierarchy . . . reflecting a heteronormative bias within the law" (Maine, 2021). Only a very small number of opposite sex couples ever annul their marriage for lack of consummation (345 in 2012. The ONS no longer collects information). In addition, the introduction of no-fault divorce following the Divorce, Dissolution and Separation Act 2020 means that no couple will in the future ever be able to allege adultery as a ground for divorce, thereby negating the second difference. Yet the very existence of these differences would seem ground for complaint. It is unclear why these differences were introduced. Some may speculate that perhaps this was because of difficulties in defining physical consummation or adultery between lesbian couples. Yet this has not been an issue in other areas of criminal law (Herring, 2020). Perhaps, it is an example of the law choosing to turn a blind eye, being perhaps too lazy or prudish to consider, resulting in the law being heteronormative in result if not by design.

However, other authors argue that differences in adultery provisions might be more appropriate for same-sex couples. Aloni argues that treating same-sex couples equally in terms of adultery provisions "might be particularly harmful for same-sex couples [as] across the globe, same-sex couples adopt flexible relationship models, often not based on traditional notions of fidelity" (Aloni, 2020a, 69, and Wen-Yi et al., 2017). Aloni refers to research demonstrating that gay male couples adopt more open relationships (Parsons et al., 2018, and Shieh, 2015), although he does explain that non-monogamy is more important to lesbian couples (Hsiu-Yun). Aloni is careful to clarify that research demonstrates "that the more flexible approach toward extramarital affairs does not affect the quality of the relationships among same-sex couples, who still form strong, fulfilling partnerships" (2020, 70 citing Parson, 2012, 669). Arguing that all relationships should therefore be treated more similarly is precisely the kind of uniformity that the shadow of incrementalism makes. While some consider the law should be reformed to allow for greater acknowledgment of sexual expression within marriage for same-sex couples (Maine, 2021), perhaps the advent of no-fault divorce and the subsequent removal of adultery as a ground is to be welcomed. It is hoped that the difference of consummation should also be made obsolete as an historical anachronism due to nonuse.

Northern Ireland

Despite civil partnership having been introduced in 2004 and same-sex marriage in England and Wales in 2013, it took until 2020 for legalization of same-sex marriage in Northern Ireland. Perhaps, this is an example of Aloni's criticism that civil partnerships may be a "stumbling block that can

significantly delay acceptance of same-sex marriages" (2010). However, of much more relevance were the cultural, religious, economic, and political specificities of Northern Ireland as a region. This highlights incrementalism's connection to public readiness to change. It also demonstrates a problem with incrementalism, which does not anticipate that developments can stall for large periods of time and that change can occur at an unpredictable rate. Further, incrementalists' preference for change by means of legislative domestic methods, allowing engagement with the public (Hamilton, 2016), did not occur. In Northern Ireland, change was actually introduced from Westminster, by means of the Northern Ireland Executive Formation Act 2019. This reversed a long tradition of Westminster not becoming involved in this issue because of different cultural, historical, and religious traditions in Northern Ireland. Only as recently as 2018 did the Secretary of State for Northern Ireland, express the opinion in the House of Commons that equal marriage was a "devolved issue" (Karen Bradley, 138 Hansard, HC Deb, vol 635, col 1479 (7 February 2018). The 2019 legislation was only passed, as the Northern Ireland assembly, already suspended for 3 years as the constituent members could not re-establish power-sharing, failed to meet a deadline that same-sex marriage would be extended to Northern Ireland by 21 October 2019 if devolution were not reestablished. Despite the best efforts of the Democratic Unionists (the party most opposed to same-sex marriage), the Northern Ireland assembly remained suspended and same-sex marriage was introduced in Northern Ireland from Westminster in October 2019. The first same-sex marriage took place in Northern Ireland in February 2020.

Northern Ireland has long been classed as a "place apart" (Side, 2006). Northern Ireland is a deeply religious jurisdiction, with 93% identifying as religious, compared to 59.4% in England and a history of sectarian tensions and violence known as the Troubles. Some authors argue that the reason for Northern Ireland's conservative attitude toward nonrecognition of same-sex marriage in the period prior to reform can be traced to the inherent moral conservatism of the jurisdiction. Kitchin and Lysaght state that at the time of the Troubles, lesbians and gays were more likely to remain in the closet and were less likely to be seen as "legitimate, full citizens of the State" (2004, 92; Hayes and Nagle, 2019). Religious groups also remained strongly opposed to same-sex marriage (Kitchin & Lysaght, 2004). For example, following the approval of same-sex marriage in the Republic of Ireland's 2015 referendum, several different church leaders condemned the result (Evans & Tonge, 2018). US writers also comment that most opponents of same-sex marriage "base their views on religious beliefs" (Nelkin, 2005). This in turn can lead to prejudice or "religious animosity" (Smyth, 2006, p. 663) against gays.

Some authors argued that the reason why conservative policies in relation to rejecting same-sex marriage remained popular in Northern Ireland for such a long time was because they were a rare unifying factor across the sectarian

divide (Smyth, 2006; Thomson, 2016). On this view, social conservatism itself, alongside national and religious identity was seen as a key part of Northern Irish citizenship (Smyth, 2006). This in turn "consistently" acted as a justification for refusal to legislate for same-sex marriage (Fegan & Rebouche, 2003). Perhaps, however, the continual trumpeting of "inter-denominational" unity was used as a tactic (Smyth, 2006, p. 663). Such statements could be made to induce a "climate of intimidation" in order to suppress debate (Fegan & Rebouche, 2003, p. 244).

Further analysis also reveals that it is inaccurate to portray Northern Ireland as having a universal morally conservative approach to same-sex relationships. Changes include increased discussion of lesbian and gay rights, new policing practices in Belfast, reform of laws in the Republic of Ireland, and greater visibility of lesbian and gay groups in Belfast (Kitchin & Lysaght, 2004). Over time, public opinion polls demonstrate that a majority of the public in Northern Ireland favor same-sex marriage (IPSOS MORI, 2016). Political parties, although still attached to their religious influences, were less overt in their connections than previously (Evans & Tonge, 2018). Votes in the Northern Ireland Assembly were largely split across traditional nationalist-unionist lines. In more recent times, Sinn Fein and the Green Party have favored reform. The Democratic Unionist Party only defeated votes in the Northern Ireland assembly by narrow margins and by use of Petitions of Concern (for example, November 2015 vote where a narrow majority voted in favor of reform but were only defeated by a Petition of Concern). The use of the latter device has been criticized as a tactic designed to "stymie debate" (Evans & Tonge, 2018). The Petition of Concern is special to the Northern Ireland Assembly and was intended to be used only where sectarian issues were at stake. Once raised, it requires "cross-community support" (Evans & Tonge, 2018, p. 5) in order for a motion to be passed. This includes 40% support from each of the nationalist and unionist blocs and 60% of the assembly in total. Yet although it was intended to protect issues sensitive to the delicate peace agreement in Northern Ireland, critics have argued that it has been used to restrict movement on social issues in this case in relation to same-sex marriage (McCormick & Stewart, 2020, p. 24). Perhaps, a more accurate depiction is that all of the additional factors of sectarian tensions, religious allegiances, and political connections to religious standpoints meant that public readiness to change in relation to same-sex marriage occurred at a much slower rate than on mainland UK.

Although the 2019 legislation can be criticized as having introduced reform from London, it only narrowly anticipated a judgment from the Belfast Court of Appeal in April 2020, which would have found a breach of Article 14 (freedom from discrimination) European Convention, had the position not already been changed by Westminster (*Re X* and *Re Close*). This reversed a 2017 judgment from the Northern Ireland High Court, which ruled that

a same-sex marriage conducted in England and Wales could only be treated as a civil partnership in Northern Ireland (*Re X*). The Belfast Court of Appeal April 2020 judgment, proceeded on an analysis of social change, heavily influenced by "temporal developments" (McCormick & Stewart, 2020). Their judgment contained an interesting analysis of the evolution of morally conservative values. The Court of Appeal stated that in the period 2004 to 2014 "exclusion of same sex couples from marriage . acknowledge[d] the historical nature of marriage as a commitment between a man and a woman which had an embedded cultural significance for those who had entered into it" (*Re Close*, paragraph 50).

2015 was considered by the Belfast Court of Appeal to be a turning point. This was due to the Same-Sex Marriage Act being passed in Scotland, the Republic of Ireland referendum favoring same-sex marriage, public opinion polls favoring same-sex marriage (IPSOS MORI, 2016) and a majority voting in favor in the Northern Ireland Assembly but only failing due to a petition of concern (*Re Close*, para 53). The Court of Appeal stated that "[i]n our view the events of 2015 and their consequences increasingly called into question the balance between the interests of those favoring tradition and the interests of those denied the opportunity to be seen as equal and no longer separate" (*Re Close*). The Court of Appeal was satisfied that by the time of the delivery of the first instance judgment (August 2017), the absence of same-sex marriage discriminated against same-sex couples; that a fair balance between tradition and personal rights had not been struck; and that therefore the discrimination was not. Ultimately, the Court of Appeal did not need to reach a conclusive judgment as no purpose was served by this, due to the recent reforms coming from Westminster. Action from Westminster certainly accelerated this matter as it avoided having to pass legislation through the Northern Ireland assembly, which had previously rejected same-sex marriage legalization on five different occasions. Arguably, contrary to incrementalist preference, it also failed to engage with local Northern Irish legislative preferences. Intervention by Westminster also means that although the reforms have been widely accepted in Northern Ireland, their legitimacy continues to be questioned by the Democratic Unionist Party, who most oppose reform (BBC, 2019).

Conclusions

This paper analyzes whether in reality the incrementalist theory has been a useful tool in predicting steps toward legalization of same-sex marriage. We have analyzed the different approaches of Italy and constituent parts of the UK (England, Wales, and Northern Ireland) with that of Italy. It can be argued that England and Wales largely followed the incrementalist approach. Following the introduction of civil partnership in 2004, some high-profile case laws (for example, *Wilkinson v Kritzinger)*, and development of favorable

public opinion, same-sex marriage was introduced by means of the MSSCA2013. Yet still criticisms remain, connected with the fact that incrementalists did not conceive of civil partnership remaining on the statute books following introduction of same-sex marriage (Hamilton, 2016, p. 138) and lingering lack of equality in the way in which civil partnership and same-sex marriage have actually been enacted, including differences in religious and sexual treatment for same-sex couples.

The deviation from the incrementalist paradigm is even more obvious in connection with Northern Ireland. While incrementalists prefer legislative methods, because of the engagement with public opinion this involves (Hamilton, 2016), in Northern Ireland same-sex marriage was legalized by Westminster, by means of the Northern Ireland (Executive Formation, etc.) Act 2019 at a time when the Northern Ireland Assembly was suspended after failing to re-establish a power-sharing agreement within a period stipulated. Further Aloni's (2010) argument that at times incrementalism can stall in its progress has also been demonstrated. While incrementalists suggest that following the legalization of civil partnership, public opinion would shift in favor of same-sex marriage (Harvard Law Review, 2004), this took time to materialize. Of much more relevance here was incrementalist connections with public readiness to move. Complex and inter-connected reasons concerning Northern Ireland's religious population, the sectarian divide and political struggles, meant that it took until 2020 for Northern Ireland to legalize same-sex marriage.

In relation to Italy there are even more difficulties for the incrementalist theory. Article 29 of Italy's Constitution—as interpreted by the Constitutional Court in 2010 – safeguards traditional marriage. For years following numerous cases before the Italian courts, pressure was placed on the Italian legislature to introduce reform. Yet a political stalemate resulted, and it was only following the intervention of the ECtHR in the *Oliari* case that civil partnership was introduced. For Italian proponents of same-sex marriage, this remains a distant dream. Perhaps, a referendum resulting in a change of the Italian constitution is the only way that this can be achieved. Public opinion in Italy now favors same-sex marriage. From an incrementalist point of view, this could now be considered a favorable moment for the introduction of same-sex marriage in Italy. Yet in reality diverse social, religious, and political factors, together with the specificities of the Italian constitution as interpreted by the Italian court, mean that no one predicts legalization of same-sex marriage in the short term.

Experience of 22 years tells us that in an overview of incrementalism while this theory does provide a useful starting point, placing too much faith in the next step being predictable and inevitable is misguided. In reality, experience shows that proponents of same-sex marriage have utilized all methods available (including case law-based, referendums, legislation based, interventions

through international courts, or central as opposed to regional parliaments). Even when legalized, same-sex marriage does not result in full equality and so this should not be seen as the end of the story for lesbian and gay groups. However, we should not be too critical of incrementalists. Statistics observe that over time many states have progressed toward same-sex marriage but to view this as inevitable is mistaken and regressive as well as progressive steps can occur.

Notes

1. Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.
2. For example see Armenia, Bulgaria, Croatia, Latvia, Lithuania, Moldova, Montenegro, Poland, Serbia, Slovakia, and Ukraine.
3. France Ifop poll (June 2008) 62% BVA poll (November 2009) 64%, Credoc Poll (July 2010) 61%. Denmark a YouGov Poll (Dec 2012) 79% of Danes support same-sex marriage.

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