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Editorial

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Introduction

This special issue marks the twentieth anniversary of the Civil Partnership Act 2004 ('the CPA') and the Gender Recognition Act 2004 ('the GRA'). Passed by the Westminster Parliament within four months of each other, the CPA and the GRA represented a landmark moment for the rights of lesbian, gay, bisexual and trans ('LGBT') people in the United Kingdom. The laws permitted same-sex couples, for the first time in this jurisdiction, to access formal rights and recognition of their relationships [CPA], while also enabling trans individuals to amend their legal sex by way of a Gender Recognition Certificate ('GRC') [GRA]. The CPA and the GRA had significant immediate, and long-term impacts, on the social, legal and political status of LGBT people across the UK, and their legacy has remained a source of continuing public debate since 2004.

Drawing upon the conversations from a one-day conference in February 2024, this special issue explores the theme of *The CPA and the GRA at 20* – interrogating the histories, evolutions and potential futures of both pieces of legislation. The special issue brings together the voices of six scholars, at different stages of their careers and working in different parts of the UK, to consider the impact of the CPA and GRA – applying a diversity of methodological and critical modes of analysis. The special issue does not claim, nor was it ever intended, to provide an exhaustive overview of the histories, current status, or changing public attitudes towards the CPA and the GRA. Rather, applying the insights and expertise of a variety of researchers within the field, we hope to shed further light on how and why both laws came into existence, the (sometimes conflicting) ways they have developed over the past 20 years, and what the present and future contours of the statutes tell us about the rights of LGBT people in the UK.

The CPA and the GRA at 20

The legislative background, and subsequent evolution, of the CPA and GRA is explored in detail across numerous contributions to this special issue, particularly the articles by Kenneth Norrie, Andy Hayward, Jess Randall and Sharon Cowan.

The CPA obtained Royal Assent on 18 November 2004, and the first civil partnerships took place the following month. Although, as Norrie observes, while same-sex couples had already begun to obtain piecemeal rights prior to this point – particularly through judicial intervention – the CPA was notable as the first formal recognition of such relationships in any jurisdiction of the UK. The legislation extended a majority of the rights and responsibility afforded to married different-sex spouses – with legal provision for same-sex couples to adopt having already been made through the Adoption and Children Act 2002. As Hayward notes, the passage of the CPA was not without objection in Parliament and, even among advocates for LGBT rights, the statute inspired certain backlash – particularly in relation to the perceived 'second class' or exclusionary nature of the institution (see below). Yet, on a practical level, civil partnerships proved very popular with many same-sex couples – some of whom had waited decades to formalise their status, and whose relationship had weathered significant legal impediments, including the criminalisation of same-sex sexual intercourse and the consequences of Section 28. When, almost a decade later, Parliament enacted the Marriage (Same-Sex Couples) Act 2013 ('the MSSC Act 2013') for England and Wales,ⁱ it chose to retain the possibility for same-sex couples to register a civil partnership. Although that option was initially closed to different-sex couples, following intervention by the UK Supreme Court, the Civil Partnership (Opposite-Sex Couples) Regulations 2019 now ensure parity of access irrespective of legal sex or sexual orientation.

The GRA obtained Royal Assent on 1 July 2004, and came into effect in April 2005. The catalyst for the statute was a decision of the European Court of Human Rights ('the ECtHR'), *Goodwin v United Kingdom*, which found that an absolute refusal to provide legal gender recognition ('LGR') to some trans people ('post-operative transsexuals') was incompatible with the UK's obligations under Article 8 and Article 12 of the European Convention on Human Rights ('the ECHR'). The resulting legislation, which went beyond the existing requirements of ECHR law, permitted adult trans individuals to apply to a Gender Recognition Panel for a new, binary (i.e. male or female) 'acquired gender' so long as applicants have, or have had, a diagnosis of gender dysphoria, have lived in their acquired gender for the previous two years, and intend to live in that gender until death. Under the initial terms of the GRA, a married applicant was also obliged to divorce or obtain an annulment before seeking a GRC – so as to avoid the existence of marriages between two people of the same legal sex. However, following the introduction of the MSSC Act 2013, it is now possible to maintain an existing marriage while applying for a GRC, so long as the other spouse consents (a slightly amended process exists in Scotland).

As both Randall and Cowan recall, at the time of enactment, the GRA was considered a model of international best practice, primarily because it allowed trans people to obtain LGR without submitting to unwanted surgeries or sterilisation. However, since 2004, particularly as other European jurisdictions have liberalised their rules, an increasing number of observers, including the House of Commons Women and Equalities Committee, have called upon Parliament to update the statute – reducing the criteria that individuals must satisfy to apply for a GRC. Such calls for reform have, in turn, inspired considerable backlash – with some commentators suggesting that an easier process for LGR would increase the risk of abuse, and might unintentionally weaken the protections that women enjoy through the protected characteristic of 'sex' under the Equality Act 2010 ('the EA 2010'). The Employment Appeals Tribunal has also recently confirmed that 'gender critical beliefs' – an understanding of sex as both biological and immutable, as well as determinative of whether a person is a man or a woman – are a protected philosophical belief within the scope of Section 10(2) EA 2010. In response to a public consultation, which largely favoured reform, the UK Government decided not to make substantive changes to the GRA. However, in 2022, the Scottish Parliament did attempt to update the legislation as it applies in that jurisdiction through the Gender Recognition Reform (Scotland) Bill. Although passed by a majority of the Members of the Scottish Parliament, the law was blocked from receiving Royal Assent by the Secretary of State for Scotland, using Section 35(1) of the Scotland Act 1998 – a decision which was ultimately upheld by the Outer House of the Court of Session. The new Labour government did include reforming the GRA as part of its election manifesto promises, but it is unclear what actions, if any, will be taken to pursue that goal during the lifetime of the current Parliament.

Special Issue

On 22 February 2024, with generous support from the Society of Legal Scholars Subject Sections Fund, we organised a one-day conference to mark 20 years of the CPA and GRA at City Law School, University of London. The event, which began with a keynote address from Baroness Ruth Hunt, sought, over two panels and a final roundtable, to engage attendees in reflective conversations about the past, present and potential futures of both laws – individually and as part of a conversation about the broader rights of LGBT people in the UK. Contributors to the discussion(s) included: Kenneth Norrie, Nicola Barker, Andy Hayward, Sharon Cowan, Flora Renz, Lena Holzer, Stephen Whittle, Rob Clucas, Davina Cooper, Loveday Hodson, Charlotte Bendall and Daniel Monk. As part of their interventions, contributors drew upon personal experiences, current and former research projects, policy analyses, and socio-legal insights – both interrogating existing debates and identifying new avenues for inquiry.

Following the conference, and in order to capture some of the different perspectives shared across the day, we have now brought together this special issue of the Journal of Social Welfare and Family Law. Highlighting the research of six contributors to the event, the special issue explores diverse aspects of the CPA and the GRA – charting their histories, seeking to unpack their evolutions, and questioning how both statutes might develop in an increasingly uncertain future for LGBT people in the UK and Europe.

The special issue opens with an intervention from Kenneth Norrie, *The Before Time: LGBT Families Prior to 2004*, in which he explores the legal rights and status of LGBT people, particularly those in relationships or who had children, prior to the CPA and GRA. Canvassing a broad range of topics – including child arrangements, adoption, access to reproductive assistance and relationship recognition – Norrie conveys the comparative vulnerability, and legal powerlessness, of many LGBT people in this ‘before time’. His chapter serves as reminder that, irrespective of their (highly contested) substantive merits, for some individuals, the CPA and the GRA offered an important opportunity to finally emerge from the shadows of the law.

This historical overview is followed by the contribution from Andy Hayward: *Civil Partnerships and the Repurposing of Relationship Formalisation: From Creating a Space to Developing a Script*. In his piece, Hayward charts the changing social, political and legal narratives around civil partnerships – showing a movement from protection to protest, and with civil partnerships more recently be heralded as a means of personalisation. Hayward’s contribution problematises this evolution in understanding – warning against revisionism in the origins and initial purposes of the CPA, while also questioning the extent to which civil partnerships can/should be perceived as disrupting marital norms.

The special issue then shifts to consider relationship recognition in a broader jurisdictional context, focusing specifically on the requirements of the ECHR.

Nicola Barker initiates this European turn with the article: *Civil Partnerships Twenty Years Later: From an Incremental Step Towards (Marriage) Equality to a Giant Leap Away from it? A Cautionary Tale from a UK Overseas Territory*. In 2018, the UK Overseas Territory of Bermuda introduced the Domestic Partnership Act 2018 (‘the DPA’) – as a means of regressing rather than extending relationship rights. Same-sex couples in the territory had been able to marry since 2017, following a judgment of the Supreme Court of Bermuda. The DPA was enacted to maintain legal recognition for couples while removing the right to marry. Barker explores the compatibility of the DPA with the ECHR – considering the issue through the lens of a pending case before the European Court of Human Rights. Although that ECtHR has not yet recognised a positive obligation to permit same-sex marriages, Barker argues that the unprecedented step of creating domestic partnerships, solely to remove existing marital entitlements, falls outside the margin of appreciation afforded to State Parties under the Convention.

Marital rights are also the primary focus for Loveday Hodson, who more squarely addresses and critiques the continuing refusal of the ECtHR to acknowledge a positive right for same-sex couples to marry. In *The European Court of Human Rights and Same-Sex Marriage: Incompatible Bedfellows?* Hodson charts the incremental extension of relationship rights for same-sex couples in the Strasbourg jurisprudence. Moving from initial invisibility to explicit inclusion within the concept of ‘family life’, the ECtHR now recognises an obligation for State Parties to create minimum structures for relationship recognition and protection. Yet, as Hodson observes, the Court remains firm in resisting calls for broader marital rights for same-sex couples. The article critiques the normative and intellectual justifications for such refusal, placing significant emphasis on the contested notion of European consensus. Reflecting on

the evolving case law, Hodson suggests that recent progress belies a pervasive heteronormativity which remains at the core of ECHR conceptions of acceptable families.

In the final two articles, the special issue moves to explore different aspects of the GRA – with contributions from Jess Randall and Sharon Cowan.

Randall's piece is entitled *The GRA at 20: The Development of a Binary and Permanent Legal Gender*. Concentrating on key ideas, including permanence, autonomy and enforced binaries, Randall interrogates processes of constructing and reforming the GRA – drawing from Parliamentary debates in 2003/2004, as well as submissions to a government-led public consultation on changes to the law in 2018. Randall's analysis considers the different policy goals, and social anxieties, which have animated, and continue to animate, public, legal and political understandings of legal gender recognition in the UK. With an especial emphasis on the binary and 'until death' requirements within the law, the article suggests that, at present, the GRA is insufficiently sensitive to the diverse ways in which many trans and non-binary people experience their gender. As such, without reform, the law remains unworkable for, and therefore excludes, many individuals in this jurisdiction.

In the final article, Sharon Cowan considers the theme: *Trans Rights, Queer Times: In search of a new hope*. Cowan provides a reading of recent cases, specifically on trans rights, in the areas of gender recognition, and equality-based rights under the Equality Act 2010. Cowan argues that the Scottish government's legal and policy interventions have leaned into rights-based identity politics through their attempts at progressive reforms. Such attempts have been legally challenged, and have been adjudicated by courts taking a 'balancing approach' to apparently competing rights. While to some degree useful for advancing trans recognition and equality, the article shows that the competing rights framework has resulted in trans justice claims being narrowed, defeated and/or dismissed. For Cowan, this reliance on rights, with variable results, suggests that the possibility of feminist queer hope for the progressive potential of law seems limited by the scope for its hostile appropriation and transformation.

Themes and Questions

A striking feature of the six contributions to this special issue is the number and diversity of themes considered by the authors. Extending from employment law to administrative law, and from human rights to compliance with the European Union's *acquis*, the articles in this issue make clear the extent to which the CPA and GRA – enacted ostensibly to enhance rights in the family and child law spheres – have profoundly impacted the broader legal status of LGBT people in England and Wales, Scotland and Northern Ireland. A comprehensive overview of all the topics and questions identified by contributors would not be possible in a (necessarily short) editorial of this nature. Yet, before inviting readers to explore the different pieces in this special issue, we briefly address four important themes below.

European Law

The contributions to this special issue consistently illustrate the vital role which the Council of Europe and the European Union, particularly through their courts, have played in advancing the rights of LGBT people in the UK. As Norrie observes, prior to the CPA and the GRA, it was EU secondary legislation, which required the introduction of minimum domestic protections against discrimination on the basis of sexual orientation and gender reassignment. The ECtHR also issued landmark rulings on consensual same-sex sexual intercourse and the exclusion of gay, lesbian and bisexual persons from the armed forces. When, in 2004, Parliament finally created a pathway to legal gender recognition, it did so in direct response to condemnation from the Strasbourg judges in *Goodwin v United Kingdom*. As such, European actors have

been at the forefront of reforming the rights of LGBT people in this jurisdiction – often in ways which, as those reforms have become increasingly accepted in national legal culture, are overlooked or forgotten.

Conversely, as Hayward, Randall and Cowan note, the UK has sometimes adopted a more proactive approach in advancing equality for LGBT people, going beyond the strict requirements of either ECHR or EU law. For example, when Parliament introduced the CPA in 2004, it did so six years before the ECtHR had even acknowledged that same-sex couples can enjoy ‘family life’ and almost two decades before that Court placed an obligation on State Parties to provide minimum relationship recognition. Hodson’s discussion of same-sex marriage also shows that, despite consistent references to the rhetoric of human rights during the legislative debates, adopting the MSSC Act 2013 was not required by ECHR law – although the UK Supreme Court did set aside unequal survivor pension benefits for same-sex spouses in order to comply with EU law. Similarly, that Court also had recourse to Article 14 ECHR, read with Article 8 ECHR, when issuing a Declaration of Incompatibility where it held that it was unlawful discrimination to exclude different-sex couples from civil partnerships.

Moving forward, and post-Brexit, it remains to be seen if or how European institutions can influence the future trajectory of the rights of LGBT people in this jurisdiction. The pending litigation in *Ferguson*, addressed by Barker, will offer an immediate test as to the relevance of ECHR law for LGBT people in UK Overseas Territories. On other questions – including the rights of non-binary people, legal gender recognition through self-determination, and the status of gender diverse parents – the Strasbourg judges have already indicated a more cautious approach, increasingly relying on consensus analysis to afford greater discretion to State Parties. As such, on many of the most complex LGBT questions currently facing UK policy-makers, it may be that, unlike in previous times, those advocating more progressive reform will have fewer opportunity to draw from European sources to advance their arguments.

Symbolism and the Law

The various contributions to this special issue also emphasise the symbolic value of law – both in general, and in the specific contexts of the CPA and the GRA. Although, as Norrie explains, legal systems across the UK had, by 2004, already begun to incrementally acknowledge LGBT people, there remained significant symbolism in the refusal to extend legal status to either the relationships formed by same-sex couples or the lived gender of trans individuals. While queer scholars have convincingly challenged the desirability of investing the power of legitimisation in legal rules and institutions, for many LGBT people, they did experience their exclusion from the law as a form of deep practical and symbolic injury.

As such, the mere passage of the CPA and the GRA had important symbolic value for the rights and self-perception of some LGBT people. Yet, the terms and structures of those statutes have also proven to be important – with evolving understandings, over the past 20 years, about the social norms and broader statements that each law conveys.

In the context of the GRA, both Randall and Cowan observe that, upon enactment, the legislation was praised as an example of international best practice. By omitting a requirement for surgery or sterilisation, the GRA was perceived as a symbolic shift from the medicalisation of trans identities, and towards a more holistic, rights-centred notion of gender identity. However, in the two decades since the statute was passed, and as an increasing number of peer jurisdictions have adopted more liberal models for LGR, so too the perceived symbolism of the GRA has begun to shift.

For some observers, by maintaining a requirement for diagnosis, ‘real life experience’ and the oversight of the GRP, the GRA now stands as a symbol of the historic pathologizing of trans people – a reminder of ongoing institutional mistrust and the continued belief that diverse

genders must be controlled. Furthermore, as the statute currently does not cover non-binary people and trans children, for some advocates, the GRA is increasingly symbolic for its implicit messages of exclusion rather than the ways that it has brought trans people within the ambit of the law. On the other hand, with the emergence of a prominent 'gender critical' movement, and growing backlash to trans-focused legal reforms, some commentators now question whether the GRA should ever have been understood as a symbol of progressive change. As Cowan notes in her article – citing concerns about potential unintended consequences and claimed impacts on non-discrimination law – these commentators increasingly present the GRA as symbolic of a wider retreat from the rights of women. These differing conceptions of the symbolism of the GRA now regularly play out in policy debates, national media and in the UK's domestic courts.

There has also been an evolution in the perceived symbolism of the CPA since 2004. Although, when initially introduced, that legislation was celebrated for providing formal recognition to same-sex couples, the CPA was also subject to robust critiques. In particular, many observers highlighted the symbolic nature of creating an alternative relationship structure, merely to ensure that same-sex couples would not be included within marriage. To the extent that civil partnerships were intended to provide a 'separate but equal' relationship status for same-sex couples, they could, so the argument goes, only ever be a symbol that lesbian, gay and bisexual people are second class citizens. The potentially exclusionary nature of civil partnerships is perhaps most vividly illustrated in Barker's discussion of the DPA in Bermuda – where domestic partnerships became an instrument to remove existing marriage rights from same-sex couples.

Yet, with the passage of the MSSC Act 2013, and the decision to retain civil partnerships for same-sex couples, Hayward describes how popular perceptions of the CPA quickly began to shift. In particular, for different-sex couples – unburdened by the problematic origins of the statute – the institution of the civil partnership came to symbolise possibility rather than prohibition. Without the supposed historical barrage of marriage, civil partnerships are now seen by many as a means of obtaining legal rights, and embracing public status, in new and transformative ways – personalised to the situation of each individual couple. Hayward convincingly warns against uncritically accepting such revisionist or idealised understandings of civil partnerships, which neglect the history, processes and rights attached to the CPA. Yet, the fact remains that it is precisely because, at least for some different-sex couples, they perceive civil partnerships to lack the symbolic attributes of marriage that those couples have fought for access to the institution.

CPA and GRA: Insiders and Outsiders

Perhaps the primary, and most obvious, impact of the CPA and the GRA was to bring certain LGBT people, who had long been strangers to the law, inside the ambit of legal protection. In so doing, beyond symbolism, both statutes provided substantive legal rights and protections. Yet, as a final point in this Editorial, it is important to acknowledge that, despite the broad scope of these laws, and the subsequent legal reforms that the CPA and GRA have inspired, many LGBT people in the UK remains 'outsiders' from the legal system.

In his contribution, Hayward observes that, despite important developments to the shape and terms of the CPA, there has been notably little movement on the legal rights of cohabitants in England and Wales. Despite the growing proportion of couples, irrespective of sexual orientation, who live in situations of cohabitation, as well as frequent calls for reform and new models being adopted in Scotland, the Westminster Parliament has consistently failed to address the rights of cohabitants in law. When extending civil partnerships to different-sex couples in 2019, the government appeared to suggest that broadening the access conditions for the CPA would ameliorate the position of individuals who were otherwise reluctant to marry. Yet, such approach materially fails to account for the numerous couples in England and Wales

who, for a variety of reasons, do not, cannot or will not enter formalised legal relationships but who nevertheless should benefit from (or be subject to) minimum rights and responsibilities. Although the absence of cohabitation applies equally to different and same-sex couples, to the extent that the latter have historically been required to organise their joint-lives outside of formal legal relationships, there is reason to assume that failing to recognise cohabitation might disproportionately impact LGBT people.

When the GRA was enacted in 2004, public, legal and scholarly discussions of non-binary identities was comparatively rare in the UK. Yet, in the two decades since that point, the visibility of non-binary people has dramatically increased – with surveys both in this jurisdiction and beyond suggesting that a growing number of individuals (both in and outside of the ‘trans’ umbrella) now identify as neither statically male nor female. Although a small (but increasing) cohort of European countries currently provide for legal sex options outside of the binary, UK law continues to permit only two options. Furthermore, it is not possible for individuals to apply for a GRC with anything other than a male or female acquired gender, and the Court of Appeal has recently confirmed that the Government need not issue a GRC where a non-binary legal sex was obtained elsewhere. In the *Elan-Cane* litigation, the UK Supreme Court rejected the argument that Article 8 ECHR currently requires access to a non-gendered passport, and this position has largely been affirmed by the ECtHR in *Y v France*. In Scotland, as part of their Non-Binary Action Plan 2023-2028, the Government has committed to commissioning research on how non-binary LGR, if introduced, would work in that jurisdiction. While the relationship between non-binary people and the GRA remains an open question, the failure to provide any recognition for this population means that a substantial body of individuals continue to live outside the structures of the law.

Finally, a key demographic that is largely absent from consideration in this special issue is children. Unlike in other jurisdictions, where children became central objects of political contestation in debates around same-sex civil partnership and marriage, the UK government largely avoided this phenomenon by creating adoption rights for same-sex parents prior to the CPA. Although questions relating to same-sex parenting have given rise to periodic political tensions in the subsequent two decades, most notably during passage of the Human Fertilisation and Embryology Act 2008, the position of children within same-sex families is not (and has not been) a particularly notable source of conflict since 2004.

By contrast, in recent years, the rights and status of LGBT children have been considerably more fraught. Despite consistent promises from successive governments, conversion practices – efforts to change the sexual orientation and/or gender identity of children – are still not the subject of legislative prohibition, although they are likely to violate other key criminal and civil law protections. Access to LGBT-inclusive relationship and sexuality education also remains a question of deep contention, despite legislative intervention – with on-going discussions about what materials children should be taught, from what age, and the appropriate ways to accommodate (or not) schools with a religious ethos. Finally, over the past five years, the English courts have increasingly been asked to demarcate the rights of children, and their parents, who wish to undertake a process of transition – medical, social or otherwise. In an area of intense complexity, as exemplified by the recent Cass Report, judges are being placed in the unenviable position of being asked to determine not just the lawfulness of treatment protocols, but also the appropriateness of desired transition pathways for individual young people. There remains a real question as to what extent legal instruments (Acts of Parliament or secondary legislation), or the courts, are the best fora to provide nuanced, child-focused and welfare-centred answers to these often layered and deeply personal questions.

While the status of young people has not been comprehensively addressed in this special issue, the question of whether and how LGBT children should be brought ‘inside’ the legal

system is likely to be a predominant question for family law scholars, as well as those within wider fields of law, for many years to come.