

Mixed-Sex Civil Partnerships and Relationality: A Perspective from Law

This year saw significant changes to the structure and regulation of adult formalised relationships in England and Wales. On New Year's Eve 2019 mixed-sex couples became eligible to register civil partnerships and join same-sex couples who had been able to enter such status since the scheme's introduction in December 2005. Operating in parallel with the long-established status of marriage, mixed-sex civil partnerships were the product of concerted activism, the introduction of multiple Private Members Bills into Parliament, and a Supreme Court decision in *Steinfeld and Keidan v Secretary of State for International Development* [2018] UKSC 32. That landmark case involved a challenge by a mixed-sex couple who were ideologically opposed to marriage and believed registering a mixed-sex civil partnership would give effect to a more egalitarian expression of their relationship. They were, however, refused that ability on the basis that in accordance with the statutory framework they were not 'of the same sex'. After a lengthy process of litigation, a unanimous Supreme Court declared the provisions in the Civil Partnership Act 2004 prohibiting mixed-sex civil partnerships discriminatory and incompatible with human rights law (see Hayward, 2019). This ruling prompted action by Parliament in the form of the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019. Now that access to this regime is available for all couples, and thus in effect this jurisdiction operates a system of so-called 'equal' civil partnerships, questions now arise as to the future directions of this new status and its transformative potential for English family law.

This article seeks to discover the lived experiences of those mixed-sex couples considering, registering, and enjoying civil partnerships. From the perspective of a legal academic specialising in domestic and comparative family law, this article will explore how mixed-sex civil partnerships are constituted by law and reflect upon how that might influence their experience by couples. Relationality, the core theme of this special edition, will also be considered, particularly when it is remembered that the very essence of a civil partnership is relational and, as with virtually all other civil union regimes operating elsewhere, dyadic. This focus will offer an opportunity to reflect upon a key dispute in this area; namely, whether a system of mixed-sex civil partnerships can help couples create an egalitarian vision of an interpersonal relationship or, instead, may result in the emulation of what many consider the problematic gender-based dynamics of marriage.

Discerning an Ideology of Mixed-Sex Civil Partnerships

The campaign for mixed-sex civil partnerships, spearheaded by the *Steinfeld* litigation, had at its heart several key motivations. These elements underpin the desire for couples to choose a civil partnership over marriage (or cohabitation) and, as with the decision to marry, are clearly specific to the couple concerned. First, and at a generalised level, campaigners support mixed-sex civil partnerships because they believe that marriage remains a patriarchal institution that exemplifies the structural subordination of women. Such couples do not wish to buttress an institution that in the past diminished the legal personality of the wife and entrenched control by the husband. Mixed-sex civil partnerships offer instead a better way of reflecting an interpersonal relationship that disrupts pre-ordained gender roles and rejects sexist ceremonial rites associated with marriage. Second, campaigners believe the terminology of civil partnership accords more with how they view their own relationship dynamics. Rather than the problematic labelling of ‘wife’, couples would see themselves as equal ‘partners’. That decision has a symbolism and signalling function to society indicating that the couple wishes to participate in a more egalitarian union based on mutual respect. Third, couples desire a simpler, more modern method of formalisation that rejects some of pageantry of traditional marriage. Indeed, for Rebecca Steinfeld, mixed-sex civil partnerships are attractive precisely because they possess ‘no social script...and you can do whatever feels right for you’ (Equal Civil Partnerships, 2020). Fourth, another motivation is the desire to obtain legal recognition of a committed relationship, particularly for those couples that have children. That recognition would not only involve an important public acknowledgement of commitment but also would confer much needed legal entitlements, particularly when it is noted that currently cohabitants in England and Wales receive limited legal protections.

The following section will evaluate how far the law itself can adequately accommodate such concerns, but it should be noted that none of them featured prominently in the reasoning of the Supreme Court in the *Steinfeld* case. That case merely centred on human rights issues; namely compatibility of the Civil Partnership Act 2004 with the rights to respect for private and family life and the prohibition on discrimination, enshrined in Articles 8 and 14, respectively, of the European Convention on Human Rights. The Court reasoned succinctly that the discrimination as to access simply had to be removed but that could be achieved through either extension of the regime to mixed-sex couples (levelling up) or phasing out of civil partnerships for all couples (levelling down). By merely declaring the legal framework incompatible with human

rights law, the Supreme Court did not mandate any change but certainly did, in no uncertain terms, put pressure on the Government to address the issue, promptly. Those motivations featured much more prominently in the Parliamentary debates. Supported through Parliament by Tim Loughton MP, the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 mandated the Secretary of State to amend the Civil Partnership Act 2004, by way of regulations, so as to permit different-sex civil partnerships. The Civil Partnership (Opposite Sex Couple) Regulations 2019 came into force at the end of December 2019 and enabled mixed-sex couples to access civil partnerships in the same manner as same-sex couples.

Assessing the Claims for Mixed-Sex Civil Partnerships and their Potential to be Realised by Law

The changes ushered in at the end of last year undoubtedly have opened up civil partnerships to a broader class of individuals and granted many couples with objections to marriage the ability to access a different status. However, as will be demonstrated, viewing this reform from a purely legal perspective may reveal that many of the hopes of prospective mixed-sex civil partners might not be realised. As was the case with the original 2004 Act, there is very little guidance given by the statute as to inherent content and nature of civil partnerships. If we are to isolate the decision-making processes of civil partners and how they structure their joint lives, we have to go beyond the law and look more closely to the relational.

An argument can be made that mixed-sex civil partnerships will allow couples to avoid the patriarchal trappings of marriage. Of key significance here is the fact that when civil partnerships were created a new lexicon was developed so as to differentiate them from marriage, exemplified by the rejection of the labels of ‘husband’ and ‘wife’. For example, civil partners dissolve their unions, unlike spouses that divorce. Similarly, conjugal aspects of the law relating to obtaining decrees of nullity or divorce were not transferred onto civil partners and to a lesser extent, same-sex spouses. But it can be questioned how far this differentiation was largely semantic and it remains a point of contention as to whether marriage remains patriarchal *today*. In many ways the change in terminology was nothing to do with civil partnerships being viewed as an alternative secular choice for couples but was motivated by a desire to placate opponents believing that when introduced in 2005 civil partnerships were effectively ‘gay marriage’. Equally the absence of conjugality provisions directly related to the exclusively same-sex nature of civil partnerships and thus were practically of little relevance.

Such provisions are rarely used by mixed-sex spouses anyway and are rightfully viewed as anachronistic. Thankfully the ability to petition for divorce on the basis of adultery will be removed next year once full no-fault divorce is implemented following the recently enacted Divorce, Dissolution and Separation Act 2020. Thus, there are certainly minor legal differences between marriage and civil partnership that may suggest mixed-sex civil partnerships are less likely to be patriarchal, but a textual reading of the law only goes so far when evaluating that claim.

The belief that civil partnerships may be more egalitarian than marriage, again, can only really be assessed through the lived experiences of couples and the gathering of empirical data on that point. At present, there have been no comprehensive studies. The fact that civil partnerships can be considered a ‘construct of statute’ will invariably assist this argument through allowing couples to imprint their own values on the relationship and reject culturally and socially constructed expectations of marriage. But here again we see a further need for data on how the lives of civil partners are played out, particularly when it is recalled that the civil partnership framework shares striking similarities to that relating to civil marriage. Opening the regime to mixed-sex couples naturally entails gender dynamics entering the arena (and arguably a different, more well-researched dynamic than that exhibited between same-sex couples). Questions now arise as to how discussions between civil partners as to childcare or the apportionment of labour in the home will manifest and influence decision-making. It can be assumed that a conscious and more informed choice to select a civil partnership over marriage may lead couples to create more egalitarian arrangements. But in light of the fact that civil partnerships are relational entities it is highly likely that contradictory and problematic patterns may emerge that resonate, or even replicate, those seen in marriage. An area that will acquire key significance in the future is the making of financial orders between mixed-sex civil partners following relationship breakdown. As noted above there has been very few division of assets cases reported between same-sex couples. However, as financial remedy proceedings between spouses constitute a significant area of work for family lawyers, it will be fascinating to discern whether new patterns emerge as to how civil partners share and divide assets in court or out of court through private settlements. Of particular interest will be the making of pre-registration agreements, the equivalent of a pre-nuptial agreement, that has been extensively researched and identified as an area where gender inequality can be created and entrenched through law.

Issues arise in relation to the belief that civil partnerships offer a simpler or stripped back form of union. From the perspective of law that may not be the case or discernible from the legislation. Civil partnerships are not cheaper than marriages and it remains the choice of the parties concerned as to whether they want a lavish or minimalist ceremony (much in the same way for couples contemplating marriage). The procedure for entering a civil partnership is very similar to that used in civil marriages. Interviews with couples who have entered into mixed-sex civil partnerships do, however, provide evidence that the ceremonial rites practised appear to be more informal and relaxed in relation to the nature of the ceremonies and the clothing worn. Here, as noted below, we see potential for new practices to emerge that may differentiate civil partnership from marriage. For example, empirical data revealed that some same-sex civil partners referred to each other as husband or wife prior to the enactment of same-sex marriage in 2014. Now, that a choice has been created for both types of couple as to the type of union celebrated, new ceremonial rites may emerge through the conscious and free choice of couples to select a particular status. This idea was explored by the Equal Civil Partnership's campaign that used social media to gather ideas from the public as to a possible symbol or motif, such as a ring, brooch or badge, that could be used by mixed-sex civil partners. Whilst use of a ring might appear strange in light of its long-established symbolism in wedding ceremonies, such exploration hints at the potential to craft different practices (such as those relating to proposals, the ceremony/reception and even the honeymoon) or equally reject them in their entirety.

In terms of legal protections, mixed-sex civil partnerships are equivalent to marriage and couples will obtain much stronger legal protections for themselves and their children than if they remained cohabiting. Moreover, unlike other registered partnership regimes existing on the continent, the rights and entitlements of civil partners are not capable of extensive modification through agreement by the parties. This means that couples are unable to create a lighter, personalised form of legal commitment. The confident assumption as to demand for mixed-sex civil partnerships is also a key point of contention with some proponents erroneously believing that registration can represent a solution to the 3.5 million cohabitants in the UK who enjoy fewer legal protections than those that formalise their relationships (Office for National Statistics, 2019).

It must be stressed that the above critique does not seek to diminish the value of mixed-sex civil partnerships as a valuable and modernising development in English family law. The author has supported the extension of the regime from the outset and reform efforts to bring

about this change. Instead what it seeks to do is reveal that a law-centric analysis provides only a piece of the broader jigsaw puzzle and that an empirically grounded dimension is needed to complement a theoretical legal understanding. Barker illustrates this observation particularly well in their exploration of the ‘structures’, ‘consequences’, and ‘ideology’ of marriage (Barker, 2012). Noting that the first two concepts regulating the eligibility rules and legal consequences of marriage are often easy to discern through consulting the legislation itself or its interpretation in the courts, ideology is more challenging in that it is open-textured, malleable and difficult to define. But, despite these challenges, ideology remains highly influential and has a powerful symbolism when it is remembered that individuals can readily call upon ‘obvious, even universal (social) understandings of marriage’ (Barker, 2012: 22). At present it is easy to determine the structures and consequences of mixed-sex civil partnerships, but it may be too soon to say that a distinctive ideology is emerging. But, as a subject of further academic study, it is this ideology as developed through the day-to-day relationship practices of couples that will arguably have the transformative potential for this status and determine its future.

Future Directions

The recent introduction of mixed-sex civil partnerships has prompted an important conversation as to the value of relationship formalisation and what shape that can take. However, it is still too early to predict how that scheme will be received by the public and much of the existing scholarship in this field explores patterns exhibited by spouses and same-sex couples. As a result, there is now a need for socio-legal and empirical research that unpacks the decision-making processes of mixed-sex civil partners that differentiates between the experiences of same-sex and mixed-sex couples.

Going forward full statistics as to uptake in the first year will be particularly interesting to see and will be available at the end of 2021. As mixed-sex civil partnerships could first be formalised on 31st December 2019, and thus with one day capable of falling within the statistics for 2019, recent data has revealed 167 registrations took place on that day. But, in isolation, that figure does not reveal much. A longer-term evaluation is needed to discern trends, particularly as the Government Equalities Office’s Impact Assessment predicted that between 2020 and 2029 there could be as many as 84,000 registrations or as few as 2,600 (Government Equalities Office, 2019).

Exploring demographics will also be important. At present, the data on same-sex civil partnerships reveals that the small number of individuals registering are generally older couples with an average age of 51.6 for women and 50.5 for men. Indeed, one in five civil partnerships registered in 2019 was between individuals aged 65 or over. It will be interesting to see whether older mixed-sex couples find civil partnerships attractive and, if so, for what reason. Here, comparative law insights may be particularly helpful. For example, will the couple demographic in England and Wales mirror that of France where research has shown that the partnership regime operating there is attractive to generally more affluent, middle-class and university educated individuals (see Scherpe and Hayward, 2017: 5).

The introduction of mixed-sex civil partnerships, and in turn a system of equal civil partnerships, was clearly facilitated by law and there is further work for the law to do. At present there are no legal provisions in relation to converting pre-existing mixed-sex civil partnerships to marriage or vice versa, which will need to be addressed by new regulations or primary legislation. But, as this article has demonstrated, the law can only go so far in encouraging or facilitating the behaviour of individuals in an interpersonal relationship. What now needs to occur is a more holistic analysis of the lived experiences and decision-making processes of mixed-sex civil partners.

Conflict of Interest Statement

The Author declares that there is no conflict of interest

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