

Relationships with Status: Civil Partnership in an Era of Same-Sex Marriage

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Civil partnerships were introduced in 2005 as an equality measure at a time when opening up marriage to same-sex couples was viewed as politically controversial. Following the later introduction of same-sex marriage in 2014 and the retention of civil partnerships exclusively for same-sex couples, a debate has occurred in England and Wales as to the need for a second mechanism for formalisation. Noting the Government's commitment to now extend civil partnerships to different-sex couples and thereby create two statuses for all, this chapter interrogates the relationship between these formalised statuses alongside the relationship that an individual has with a particular status. More specifically, it challenges dominant narratives present in both the academic scholarship and public discourse that conceptualise civil partnerships as 'inferior' or 'marriage-lite'. It argues that the engagement of same-sex couples with civil partnerships through initial registration or the refusal to convert to marriage despite the ability to do so has had the effect of turning civil partnership into a much-valued institution. The chapter suggests that a nascent ideology of civil partnership is now emerging that not only acknowledges some of the objections held by members of the LGBT+ community as to the institution of marriage but also gives for some couples better outward expression of their interpersonal relationship.

Introduction

Marriage has long been considered the cornerstone of the law relating to adult interpersonal relationships and a status central to our understanding of what constitutes a family.¹ Such a position in society means that, when asked to define marriage, individuals can readily, albeit perhaps imprecisely, call upon some of its key features such as its historical role, its ceremonial rites and its symbolism. Owing to the glamorisation of marriage in literature and art, often reinforced through its religious origins, a social narrative has developed that for many couples connects marriage with romanticism, almost mysticism.² Whilst the popularity of marriage has decreased³ and its centrality in our modern definition of family questioned,⁴ it is patently clear, as Martha Fineman tells us, that society has made marriage much more than just a piece of paper.⁵

¹ See Sebastian Poulter, 'The Definition of Marriage in English Law' (1979) 42 *Modern Law Review* 409 and Rebecca Probert, 'Hyde v Hyde: Defining or Defending Marriage?' [2007] *Child and Family Law Quarterly* 322.

² See *S.-T. (Formerly J.) v J.* [1998] Fam 103, 141 where Ward LJ referred to the 'hallowed notion of marriage'.

³ See Office for National Statistics ("ONS"), 'Marriages in England and Wales: 2016' (Statistical Bulletin, 28 March 2019).

⁴ See, for example, Eric Clive, 'Marriage: an unnecessary legal concept?' in John Eekelaar and Sanford Katz, *Marriage and Cohabitation in Contemporary Societies* (Butterworths 1980), Sheila Jeffreys, 'The Need to Abolish Marriage' (2004) 14 *Feminism & Psychology* 327 and Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford University Press 2017).

⁵ Martha A Fineman, 'Why Marriage?' (2001) 9 *Virginia Journal of Social Policy and the Law* 239, 239.

But if we accept that marriage is more than just a marriage certificate, can the same be said about civil partnerships? Despite the fact that civil partnerships have been in existence in the United Kingdom for just over a decade following their introduction in 2005 and therefore are a relative newcomer to the structure of formalised interpersonal relationships, is there a comparable social narrative or emerging ideology for such a relationship status? It is true that the text of the Civil Partnership Act 2004 will reveal its formalities and legal consequences but if, as with marriage, legal structures form only one part of the societal perception of a relationship form, can it be said that civil partnerships are developing a distinct role, independent of marriage? This questioning of the value of civil partnership forms the central focus of this chapter and is of timely significance in light of the recognition by the European Court of Human Rights that such a status possesses an ‘intrinsic value’ for couples.⁶ Furthermore, the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, which now imposes an obligation on the Secretary of State to introduce regulations enabling the registration of different-sex civil partnerships, will undoubtedly generate further debate as to the relationship between civil partnership and marriage.⁷

This chapter critically analyses the relationship between formal statuses alongside the relationships that individuals enjoy with a particular status. Part One sketches the ideology of marriage and reveals that, despite sustained critique of the institution, a marriage-centric approach still dominates modern English family law. More importantly, this trend of eulogising marriage has recently been invigorated by the opening up of marriage to same-sex couples in March 2014. This move, it will be argued, may represent to some a modern redefining of marriage but ultimately precipitates a retrospective undermining of registration regimes that came before such as civil partnerships or civil unions.⁸ After isolating traditionally advanced arguments as to the now superfluous role of civil partnerships, Part Two argues that, like marriage, the institution of civil partnership has evolved and that the interaction of civil partners with their status, and the value many ascribe to such relationship form, has had the effect of developing a nascent ideology of civil partnership. Such narrative, shifting same-sex civil partnerships from a mere act of relationship registration to instead a ‘status’ or an ‘institution’, requires much greater acknowledgement when debating their future in England and Wales for both same-sex and different-sex couples.

Part I – An Ideology of Marriage

Marriage has long played a pivotal role in society’s understanding of what constitutes a family. The inter-changeability of the terms ‘marriage’ and ‘family’ meant that marriage, as an

⁶ See *Vallianatos v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013), para 81 and *Oliari and others v Italy*, App Nos 18766/11 and 36030/11, (ECtHR, 21 July 2015), para 174. See also Andy Hayward, ‘Same-sex Registered Partnerships - A Right to be Recognised?’ (2016) 75 *Cambridge Law Journal* 27.

⁷ Maya Oppenheim, ‘Straight couples to be allowed civil partnerships after law changed by government, Theresa May says’ *The Independent* (London, 2 October 2018).

⁸ The introduction of same-sex marriage has often precipitated the phasing out of same-sex only registered partnership regimes as evidenced in the Nordic countries. For analysis see Jens M Scherpe and Andy Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia 2017).

institution, became synonymous with stability, commitment and propriety.⁹ Its long period of development and celebration also prompted a societal consciousness or ideology of marriage. As Barker notes, an ideology of marriage is something different from what she terms its ‘structures’ and ‘consequences’.¹⁰ Whereas the latter concepts regulating the entry and exit requirements for marriage and its legal consequences are often easy to discern through consulting the legislation itself or its interpretation in the courts, ideology is open-textured, malleable and much more difficult to define. Despite these challenges, ideology remains highly influential and, as such, its pervasive nature means that individuals can readily call upon ‘obvious, even universal (social) understandings of marriage’.¹¹ These imprecise understandings evolve over time, are refined in response to changing societal attitudes and imbue the status of marriage with qualities, some of which are far removed from what marriage is in a legal sense.

When attempting to trace the source of these ideologies, it is clear that they were undoubtedly fuelled by Lord Penzance’s ‘definition’ of marriage stated in *Hyde v Hyde and Woodmansee* that it was ‘the voluntary union for life of one man and one woman to the exclusion of all others’.¹² This starting point, somewhat over-used in academic commentary,¹³ proffered a conception of marriage with elements that continue to be emphasised today: indeed, Lord Penzance’s definition is regularly cited in marriage ceremonies showing a connection between social and legal perceptions of this relationship form. Much more recent case law references *Hyde*¹⁴ and the dicta of Lord Nicholls in *Bellinger v Bellinger* echoes the case in his discussion of the meaning of marriage:

‘Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex.’¹⁵

In addition, it is arguable that an ideology of marriage also develops through discussion of the functions performed, or qualities exhibited in marriage, and their role in understanding what constitutes a family. Despite family being a concept that eludes definition, courts have nevertheless deployed techniques, such as the ‘reasonable person’ definition or functionality analysis, to conceptualise its meaning and articulate its key features. Crucially for this chapter, the methodology deployed by courts and policy-makers in the past, and even today, invariably leads back to marriage. For example, it is likely that under the ‘reasonable person’ approach such individual will use the established relationship form of marriage as a reference-point when

⁹ See Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press 2009).

¹⁰ See Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2012).

¹¹ *Ibid* 22.

¹² *Hyde v Hyde* (1866) LR 1 P&D 130, 130. See Poulter (n 1).

¹³ Probert (n 9)

¹⁴ *A v A (Attorney General Intervening)* [2012] EWHC 2219 (Fam) [93] where Moylan J noted this ‘well-known statement’. See *Sheffield City Council v E and another* [2004] EWHC 2808 (Fam) [112] where Munby J acknowledged the ‘famous definition’.

¹⁵ *Bellinger v Bellinger* [2003] UKHL 21 [46].

assessing whether a particular unit should be regarded as a family.¹⁶ Similarly, analysis of the functions of a particular unit has often seen family status awarded to groupings that emulate those routinely exhibited within a marriage.¹⁷ Whereas the formal definition of family would readily recognise parties in a civil partnership as capable of constituting a family, marriage has also long been associated as the primary determinant of a family under this particular approach. The aforementioned underlines the overt and implicit influence marriage exerts on the construction of relationship statuses and what it means to be a family. It should, however, be noted that the impact on society of judicial utterances as to the meaning of marriage may be limited. Far more persuasive when delineating the ideologies of marriage has been the participation in marriage of individuals and its support from politicians when promoting policies aimed at supporting the family.¹⁸

It is argued that at a political level marriage still remains an attractive tool for societal goals and social engineering. In 1998 the Green Paper, *Supporting Families*, stated that '[m]arriage is the surest foundation for raising children and remains the choice of the majority of people in Britain'.¹⁹ Whilst the strength of that view may have diminished, it is apparent that marriage is viewed by many as capable of fostering stability and commitment between the parties and their children. Underlying this sentiment is the view that marriage creates its own 'social security' system and as such helps the state minimize and avoid the consequential financial liabilities following relationship breakdown. Research by van Acker suggests that, even taking into account negative critiques of marriage, the 'government perceives that marriage lies at the heart of stable families and communities'.²⁰ However, introducing policies aimed at promoting marriage and strengthening its role in society, is inherently difficult when government aspiration is confronted by the social reality of modern family forms and living patterns. As such, promoting, or even preaching, the virtues of marriage through what she terms the 'conception of the desirable' is a risky strategy that can both strengthen the political base whilst simultaneously alienating voters who view marriage as a private institution.²¹ Drawing upon pro-marriage policies such as the marriage tax allowance, couple relationship education and same-sex marriage, van Acker reveals that recent governments have indeed promoted marriage as an ideal but may ultimately fail in their long-term ambition of strengthening marriage as an institution.²²

¹⁶ Exemplified in cases such as *Brock v Wollams* [1949] 2 KB 388. cf *Fitzpatrick v Sterling Housing Association Ltd* [1998] 1 FLR 6.

¹⁷ See *Fitzpatrick v Sterling Housing Association Ltd* [1999] UKHL 42 and *Ghaidan v Goden-Mendoza* [2004] UKHL 30. See also 'Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family' (1990-1991) 104 *Harvard Law Review* 1640.

¹⁸ See Nicola Barker, 'After the Wedding, What Next? Conservatism and Conjugalinity' in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015).

¹⁹ Home Office, *Supporting Families: A Consultation Document* (1998).

²⁰ Elizabeth van Acker, 'Disconnected Relationship Values and Marriage Policies in England' [2016] 38 *Journal of Social Welfare and Family Law* 36, 37.

²¹ *Ibid* 36.

²² *Ibid* 46-47.

Whilst the success of these policies may be limited, it is argued that the prioritization of marriage has nevertheless continued to the present day. Moreover, as the following section will demonstrate a key element in the transmission of the message that marriage is the ideal has been the introduction of same-sex marriage. It is the effect of opening up marriage to same-sex couples and its relationship with civil partnership to which this chapter now turns.

Eulogising Marriage

The introduction of same-sex marriage following the Marriage (Same Sex Couples) Act 2013 was for many a source of celebration and a significant moment in the historical development of family law.²³ Lauded by politicians and a move unsurprisingly praised by LGBTQ+ organisations, the opening up of marriage to same-sex couples had several consequences. First, after years of being treated (at best) as strangers in the eyes of the law, same-sex couples were allowed access to what is perceived by many as the premier status for the expression and legal recognition of a relationship. As Barker notes, same-sex marriage is widely viewed as the ‘final stop for “full equality” for lesbian and gay men’.²⁴ Indeed, looking at patterns overseas, access to marriage is often regarded as to ultimate prize that follows on from the earlier stages in a process of acceptance of same-sex relationships such as the decriminalisation of sexual activity, creation of civil law protections and the introduction of domestic partnerships.²⁵ Whilst it still remains questionable how ‘equal’ marriage currently is in light of current prohibitions applicable to the Church of England and Church in Wales when officiating ceremonies, it is indisputable that from a formalisation perspective access to marriage went some way in expressing state validation of same-sex relationships. Its introduction not only symbolised society’s tolerance but also had an important signalling function by creating kinship links and integrating couples within the wider community. The focus on these particular values in the parliamentary debates in England and Wales was not that dissimilar to the emphasis placed on citizenship and dignity of the individual that was used to challenge same-sex marriage bans in other jurisdictions such as South Africa²⁶ and United States of America.²⁷

Second, and more important for discerning whether an ideology of civil partnership now exists, the introduction of same-sex marriage evidenced, and was indeed motivated by, functionality analysis of the dynamics of same-sex couples. These sentiments were already present in the earlier law, most notably in the House of Lords decision in *Ghaidan Godin v Mendoza*, but were equally present when the Marriage (Same Sex Couples) Bill was going through Parliament.²⁸ Maria Miller MP remarked that marriage ‘is something that should be embraced by more couples’ and that the ‘depth of feeling, love and commitment between same-sex

²³ On the value of marriage over civil partnerships see the Witness Statements referenced in *Wilkinson v Kitzinger (No 2)* [2006] EWHC 2022 (Fam) [5] (Sir Mark Potter P).

²⁴ Barker (n 10) 2.

²⁵ See Kees Waaldijk, ‘Others May Follow: The Introduction of Marriage Quasi- Marriage, and Semi-Marriage for Same-Sex Couples in European Countries’ (2003) 38 *New England Law Review* 569, 583.

²⁶ See *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19.

²⁷ *Obergefell v Hodges* 576 US, 135 S Ct 2584 (2015).

²⁸ *Ghaidan* (n 17)

couples is no different from that depth between opposite-sex couples'.²⁹ Here, the indicia of what exemplifies a relationship was being transferred onto same-sex couples in the same breath as encouraging couples to embrace marriage. Thus, it was not purely a formalistic equality-based argument that justified extension of marriage to same-sex couples, but one that explored the inherent dynamics or functions of a relationship.³⁰ Like the description of marriage proffered in *Hyde*, there appeared to be a transferral of the values associated with traditional marriage to same-sex couples wishing to solemnise their relationships.

Third, perhaps the most significant trend, both at a domestic level and in other countries that have recently introduced same-sex marriage, was the eulogising of marriage as the gold standard.³¹ Marriage, of course, is an institution of continuity and change with an individual's perspective invariably placed somewhere on a spectrum between these two points. But for some, same-sex marriage was a game-changing moment as it triggered a revitalisation of a dwindling institution by enabling it to become more egalitarian, modern and inclusive. The fact that marriage had changed over time evidenced both its positive protean nature and a welcome elasticity with its elements subject to re-evaluation and reformulation. Thus, the inclusion of same-sex couples was viewed by some as an opportunity for a beneficial reappraisal of the role of marriage in society. The dicta of Justice Roberts in *Obergefell v Hodges* neatly encapsulated this sentiment in a passage of the judgment now frequently used in same-sex marriage ceremonies:

'No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death... Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.'³²

As will be further analysed below not only do expressions such as this marginalise the value of civil partnerships and de facto unions, they also help to entrench a monolithic understanding of marriage premised on the listed attributes, some of which same-sex couples may not wish to emulate themselves. These particular concerns have already been explored from feminist and queer perspectives with scholars often adopting a somewhat ambivalent approach to the campaign towards, and ultimate introduction of, same-sex marriage.³³ Kitzinger and

²⁹ HC Deb 5 February 2013, vol 558, col 125.

³⁰ See Helen Fenwick and Andy Hayward, 'From Same-Sex Marriage to Equal Civil Partnerships: on a path towards 'perfecting' equality?' (2018) 30 *Child and Family Law Quarterly* 97.

³¹ See *Wilkinson* (n 23) [6] (Sir Mark Potter P).

³² *Obergefell* (n 27) 28.

³³ See Rosemary Auchmuty, 'What's So Special about Marriage? The Impact of *Wilkinson v Kitzinger*' [2008] *Child and Family Law Quarterly* 475, Rosie Harding, 'Sir Mark Potter and the Protection of the Traditional Family: Why Same Sex Marriage is (Still) a Feminist Issue' (2007) 15 *Feminist Legal Studies* 223 and Kenneth McK Norrie, 'Marriage is for heterosexuals – may the rest of us be saved from it' [2000] *Child and Family Law Quarterly* 363.

Wilkinson, for example, recognise the progress that same-sex marriage offers as part of an equality-project that integrates same-sex couples into established relationship forms. Indeed, such change offered the ability for marriage to eschew its obsession with procreation and heterosexual mores.³⁴ Conversely, others are far more critical believing that the differences of same-sex couples are marginalised in this process and as Norrie noted, '[e]quality is granted, but only on heterosexual terms'.³⁵ Assimilation and emulation represent the key concerns that overlook different visions of interpersonal relationships that are not premised on conjugality, monogamy or even the two-person dyad. Irrespective of these positions, it is clear that marriage between different-sex couples has been subject to much more rigorous criticism than same-sex marriage owing to its long history and the negative effects of coverture especially for women.³⁶ Of course, same-sex marriage is a much more modern phenomenon and impacts upon a smaller minority of individuals, but the dominance of the equality rationale had the effect of creating a societal fixation on marriage with advocates and activists viewing it as a prize, previously withheld from same-sex couples.

Part II – Downgrading Civil Partnerships

It has been established that even today, and despite negative critiques, marriage remains a highly popular status for both different and same-sex couples. However, more pertinent for this chapter in relation to civil partnerships, is the presence of three trends in the academic scholarship and public discourse that, it will be argued, prioritise marriage as the idealised status, which in turn, generates questions as to the value of maintaining civil partnership regimes.

The Progression Argument

Under this argument, marriage is viewed as the ultimate destination for all couples. Whilst different-sex couples have long had access to all forms of marriage, access to marriage has been a key battle ground for LGBTQ+ activism. The process of reform has been a gradual one aligning closely with the levels of public acceptance of same-sex relationships at the time in question and exhibiting in the legislative journey political concessions and compromise. Comparative family law analysis clearly evidences this with registered partnership regimes, comparable in legal protection terms to marriage, often initially omitting overly contentious provisions such as same-sex adoption only for them then to be included within the scheme some years later.³⁷ Even jurisdictions such as Belgium and France, where the registered partnership regime grants fewer rights than those conferred on married couples, have undergone a gradual process of closer alignment with marriage in terms of the rights accrued.³⁸

³⁴ Celia Kitzinger and Sue Wilkinson, 'The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership' (2004) 14 *Feminism & Psychology* 127.

³⁵ McK Norrie, (n 33) 365.

³⁶ See Andy Hayward, 'The Married Women's Property Act 1882' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Hart 2018).

³⁷ See Ingrid Lund-Andersen, 'Registered Partnerships in Denmark' in Scherpe and Hayward (n 8).

³⁸ See Laurence Francoz Terminal, 'Registered Partnerships in France' in Scherpe and Hayward (n 8).

Noting this movement Kees Waaldijk evidences the influence of the marital model through classifying these types of regimes as marriage, 'quasi marriage' and 'semi-marriage'.³⁹

Thus, irrespective of the route taken, the opening up of marriage to same-sex couples appears to be the end point. Views to this effect can also be discerned at a domestic level as acknowledged by Baroness Hale in *M v Secretary of State for Work and Pensions* noting 'the UK following the lead of Council of Europe states'.⁴⁰ Evidencing this trend of progression towards marriage Baroness Hale, writing extra-judicially, stated that eventually:

'The final steps are taken by family law, extending laws applicable to unmarried heterosexual couples to homosexual couples, recognising the parental relationship between homosexual parents and their own, their partners' and even other people's children, providing for registered civil partnerships, and finally providing for civil marriage.'⁴¹

After just under a decade of civil partnership registrations, the parliamentary debates for the Marriage (Same Sex Couples) Bill reveal that previous developments regarding the legal recognition of same-sex couples helped pave the way but further progress was needed. Indeed, in the debates for the Marriage (Same Sex Couples) Bill, Yvette Cooper called same-sex marriage 'the next step for equality' and several Members of Parliament expressed the view that England and Wales should go one step further.⁴²

More important for this chapter is the impact that this progression narrative has on existing civil/registered partnership regimes. Drawing upon trends in other countries that introduced same-sex only registered partnerships the progression argument would militate towards England and Wales phasing out the regime of civil partnerships following the introduction of same-sex marriage. This so-called Nordic Model is premised on the idea that the availability of marriage for all couples renders pre-existing regimes redundant.⁴³ Reform in the Nordic countries was not merely motivated by equality arguments but also premised on a need to avoid the segregation and practical limitations of operating one status for same-sex couples and another identical status for different-sex couples. This belief was canvassed in *Steinfeld and Keidan v Secretary of State for Education* where Briggs LJ noted that for some civil partnerships had 'an essentially transitional purpose, designed to alleviate the disadvantages which then affected same-sex couples, but do not now'.⁴⁴ As the extent of legal protections under the Civil Partnership Act 2004 reflects those of the now repealed Nordic regimes, at face value England and Wales falls within this Model and a case for abolition can, and has, been made. Ultimately, the progression argument conceptualises civil partnerships as part of a journey, sometimes meandering, towards marriage equality.

³⁹ Waaldijk (n 25).

⁴⁰ [2006] UKHL 11 [93].

⁴¹ Brenda Hale, 'Homosexual Rights' [2004] 16 *Child and Family Law Quarterly* 125, 125.

⁴² HC Deb 5 February 2013, vol 558, col 136.

⁴³ See the chapters from the Nordic countries in Scherpe and Hayward (n 8).

⁴⁴ [2017] EWCA Civ 81 [172].

However, it is argued that a closer examination of the progression argument reveals that the phasing out of civil partnerships following marriage equality is no longer the predictable outcome or indeed one that is, in fact, desired by many couples. Developments across western Europe indicate that the simple alternatives of abolition or retention are no longer the only options for reform and new patterns can be discerned following the introduction of same-sex marriage.⁴⁵ Several jurisdictions in Europe have approached civil partnership reform creatively. Austria, for example, introduced marriage equality on the 1st January 2019 and simultaneously opened up to different-sex couples their originally same-sex only civil partnership regime first introduced in 2010.⁴⁶ Another example indicating the continued desire for civil partnerships alongside the availability of same-sex marriage is the approach taken to this issue in the Isle of Man.⁴⁷ Same-sex civil partnerships were introduced through the Civil Partnerships Act 2011 and during the passage of a Bill introducing same-sex marriage a clause extending the coverage of civil partnerships was discussed in the House of Keys (Lower House of Tynwald, the Parliament of the Isle of Man) in March 2016. The motivation of the clause was, according to Leonard Singer, a Member of the House of Keys, to ‘make things equal’ and to remove inequalities faced by different-sex couples.⁴⁸ The Marriage and Civil Partnerships (Amendment) Act 2016 passed with a significant majority resulting in the Isle of Man now permitting both marriage and civil partnership for all couples.

More recently, support for the continued relevance of civil partnerships in an era of same-sex marriage can be found in England and Wales. In *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* the Supreme Court determined that the ban on different sex-civil partnerships constituted a breach of Articles 8 (right to respect for private and family life) and 14 (prohibition on discrimination) of the European Convention on Human Rights. As a result of that ruling and developments in Parliament, former Prime Minister Theresa May pledged to extend the Civil Partnership Act 2004 to different-sex couples as opposed to phasing out the regime which would have been a move consistent with the progression narrative.⁴⁹ This development has also been supported by LGBTQ+ groups such as Stonewall and the Peter Tatchell Foundation that both believed that the prospect of

⁴⁵ See Helen Fenwick and Andy Hayward, ‘Rejecting asymmetry of access to formal relationship statuses for same- and different-sex couples at Strasbourg and domestically’ [2017] 6 *European Human Rights Law Review* 544.

⁴⁶ Austrian Constitutional Court Judgment: G 258/2017, 4 December 2017. Note this was following an earlier unsuccessful challenge in both the Austrian Constitutional Court and before the European Court of Human Rights in *Ratzenböck and Seydl v Austria* [2017] ECHR 947.

⁴⁷ See Gibraltar that has permitted same and different-sex civil partnerships from March 2014 and same-sex marriage from December 2016. Note also the Falkland Islands that in April 2017 introduced same-sex marriage and civil partnerships for both same and different-sex couples.

⁴⁸ House of Keys Deb 1 March 2016, Vol 133, Line 1550.

⁴⁹ [2018] UKSC 32. See Andy Hayward, ‘Taking the Time to Discriminate - *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*’ [2019] 41 *Journal of Social Welfare and Family Law* 92 and Andy Hayward, ‘Equal Civil Partnerships, Discrimination and the Indulgence of Time: *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*’ [2019] 82(5) *Modern Law Review* 922.

abolishing same-sex civil partnerships would have been met with considerable resistance.⁵⁰ Indeed, activist Peter Tatchell noted it would ‘provoke an almighty backlash’ and ‘do catastrophic damage to relations between the Conservative party and LGBT people’.⁵¹ Moreover, the fact that same-sex couples are continuing to enter civil partnerships despite an availability of marriage and not converting their status to marriage, discussed further below, indicates the need for a modern reappraisal of formalised relationship statuses.

Whilst it is clear that the drive towards marriage equality has been a major impetus for reform across Europe, it is argued that the phasing out of civil partnerships as the *inevitable* outcome has been undermined by examples of countries valuing civil partnerships in an era of same-sex marriage. When combined with the drive in some jurisdictions to offer an alternative to marriage for all couples it is apparent that a trend recognising the intrinsic value of civil partnerships can be identified.

The Status Argument

Another related argument diminishing the validity of civil partnerships focusses on the societal perception of such a relationship, and like the progression argument, shows hierarchies at play. As noted above, marriage possesses a lengthy, venerated history and has been, over the centuries, supported both politically and through state incentives.⁵² Overlaid on top is a social narrative created through people’s engagement with the institution and its depiction in art and literature. As such, marriage influences society’s perspective of other non-marital statuses such as civil partnerships. Such relationships, the earliest regimes created in the late 1980s, cannot tap into such a legacy and, as noted by Davies LJ in *R v Bala and others*, civil partnerships were simply a ‘construct of statute’.⁵³ It is true that for some jurisdictions this aspect was the precise point behind their inception as they were originally conceived to offer a more administrative, secular alternative to marriage and often bestowed upon the parties fewer rights than those available through marriage. However, in relation to registered partnership regimes exclusively available to same-sex couples, many regimes have been viewed by some academics as second-rate concessions: a ‘painful compromise between genuine equality and no rights at all’⁵⁴ or as ‘marriage-lite: same great taste, half the respect of regular marriage’.⁵⁵

The status criticism affects not just the outward expression of a relationship but also relates to its internal dynamics. Although the extent of legal rights and protections stemming from marriage is frequently misunderstood by society, the relationship is often conceptualised as a

⁵⁰ Stonewall, ‘Abolishing Civil Partnerships is not an Option’ (27 June 2018) <www.stonewall.org.uk/our-work/blog/abolishing-civil-partnerships-not-option> accessed 15 March 2019.

⁵¹ Equal Civil Partnerships Campaign, ‘Campaign responds to reports of Government u-turn on civil partnerships for opposite-sex couples’ (1 February 2018) <<http://equalcivilpartnerships.org.uk/2018/02/campaign-responds-reports-government-u-turn-civil-partnerships-opposite-sex-couples/>> accessed 15 March 2019.

⁵² Discussed in van Acker (n 20) 37.

⁵³ *R v Bala and others* [2016] EWCA Crim 560 [38].

⁵⁴ Sue Wilkinson and Celia Kitzinger, ‘In support of equal marriage: Why civil partnership is not enough’ (2006) 8 *Psychology of Women Review* 54, 54.

⁵⁵ Rosie Harding, “‘Dogs are ‘Registered’, People Shouldn’t Be’”: Legal Consciousness and Lesbian and Gay Rights’ (2006) 15 *Social and Legal Studies* 511, 524.

sexual union and underpinned by duties of fidelity and mutual support.⁵⁶ In contrast, the Civil Partnership Act 2004 is silent on the inherent nature of the relationship and, unlike marriage, the sexual dimension finds no legal expression owing to the inability to dissolve a partnership on the basis of adultery or obtain a decree of nullity relating to non-consummation. Moreover, civil partnerships are concluded through the act of registration and thus possess, for some, a more clinical, administrative dimension.⁵⁷ This was clearly encapsulated by Maria Miller MP in the Second Reading of the Marriage (Same Sex Couples) Bill when she noted that ‘a legal partnership is not perceived in the same way and does not have the same promises of responsibility and commitment as marriage’.⁵⁸

Despite these criticisms and just like the progression argument, articulated above, it is arguable that even in an era of same-sex marriage the value of civil partnership as a status is, in fact, now being recognised. One source of evidence is the changing interpretation of civil partnerships by the courts revealing a shift in attitudes, similar to how Lord Penzance’s definition of marriage in *Hyde* has been reimagined, albeit over a much shorter time period. To provide examples, prior to the commencement of the Civil Partnership Act 2004, the judiciary generally acknowledged the change that the forthcoming Act would introduce, without necessarily engaging with the significance for the couples concerned. Referring to the Bill before Parliament at the time, Lord Millet in *Ghaidan v Godin Mendoza* called civil partnership a ‘new legal relationship’ premised on the parties ‘registering themselves’.⁵⁹ After the Act came into force, judicial discussion of the regime continued to largely focus on this somewhat administrative registration aspect and that the scheme was very much aligned to marriage in terms of legal consequences. In particular, it was apparent, and not entirely unsurprising, that judges were in a process of acquainting themselves with the scheme. Indeed, as noted by Hedley J, in a case concerning an application for parental responsibility by a father that had assisted a lesbian couple to have a child: ‘the speed with which the law responds to social change is not uniform...it cannot be assumed, therefore, that the majority of the population necessarily supports the provisions of the Civil Partnerships Act’.⁶⁰ This comment was motivated by concerns that the law was advancing at a pace quicker than the pace of change of the views of society and is echoed in the observation by Black J, as she then was, that language at that time had ‘not yet evolved to accommodate them’.⁶¹

The first wide-ranging discussion of the Act was in *M v SSWP*, the hearing of which began on the date the Act came into force.⁶² Here, there is useful judicial insight into the motivations behind its introduction which offer much greater detail as to the judicial perception of the scheme at that time. Whilst also focussing on the technical implementation of the Act, Baroness

⁵⁶ This understanding of marriage is sculpted out of the common law duties of consortium, maintenance and unity.

⁵⁷ See the Civil Partnership Act 2004, s 1(1)(a) noting that such relationship is created through the act of registration.

⁵⁸ HC Deb 5 February 2013, Vol 558, col 127.

⁵⁹ *Ghaidan v Godin Mendoza* [2004] UKHL 30 [96].

⁶⁰ *TJ v CV & S & BA* [2007] EWHC 1952 (Fam) [32].

⁶¹ *B v A and others* [2006] EWHC 2 (Fam) [34].

⁶² *M v SSWP* [2006] UKHL 11.

Hale reflected on how the Act was passed to give ‘equal dignity’⁶³ to individuals and to change the traditional position of the law that treated same-sex couples as two separate individuals.⁶⁴ Importantly, for the development of perceptions relating to civil partnerships, there was a noticeable shift away from focussing on registration to instead discussion of civil partnership as ‘a formal status with virtually identical legal consequences to those of marriage’.⁶⁵ Indeed, later in *Bull v Hall*, a civil partnership was viewed by Lady Hale as:

‘...more than a contract. Like marriage, it is a status, in which some of the terms are prescribed by law, and which has consequences for people other than the couple themselves and for the state’.⁶⁶

However, caution should be exercised as the context of the dispute undoubtedly affected the judicial perception of civil partnerships. This is apparent in the earlier case of *Wilkinson v Kitzinger* where Sir Mark Potter P had to determine whether an overseas same-sex marriage could be treated in this jurisdiction as a marriage as opposed to a civil partnership.⁶⁷ Through rejecting the couple’s application for recognition of their overseas marriage Potter P, perhaps unsurprisingly, defended the civil partnership regime calling it an ‘institution’ that was in no way inferior to marriage or reflected the view that ‘same-sex commitment’ was any lesser than that exhibited within an different-sex marriage.⁶⁸ In particular, he remarked that it was unclear whether the rejection of the civil partnership regime by the petitioners as second class were feelings ‘shared by a substantial number of same-sex couples content with the status of same-sex partnership’.⁶⁹ Other cases involved a confrontation between marriage and civil partnership where courts were forced to compare entitlements under the regime. What is noticeable in these cases is an emphasis on the fact that the regimes were equivalent, albeit possessing different labels.⁷⁰

More recently, the *Steinfeld* litigation has seen the courts grapple with the value of civil partnership in an era of same-sex marriage. Justifying their decision to seek a civil partnership, the litigants emphasise the more egalitarian, secular and neutral nature of civil partnerships in comparison with what they view as the patriarchal, heteronormative and value-laden concept of marriage.⁷¹ What these observations and their treatment in the numerous government consultations and reports on the future of civil partnerships reveal is that courts and policy-makers are now at a later stage of the process seeking to discern the inherent nature of civil

⁶³ Ibid [101].

⁶⁴ See Department of Trade and Industry, *Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (2003) 17, remarking that same-sex couples were ‘treated as two strangers under current law’.

⁶⁵ *M v SSWP* [2006] UKHL 11 [99] (Baroness Hale).

⁶⁶ *Bull v Hall* [2013] UKSC 73 [26]. See also *Radmacher v Granatino* [2010] UKSC 42 and *Taiwo v Olaigbe and another; Onu v Akwivu and another* [2016] UKSC 31.

⁶⁷ *Wilkinson* (n 23)

⁶⁸ Ibid [121].

⁶⁹ Ibid [116].

⁷⁰ See *Lawrence v Gallagher* [2012] EWCA Civ 394.

⁷¹ See The Equal Civil Partnerships Campaign, ‘Why Does it Matter?’ <<http://equalcivilpartnerships.org.uk/why-does-it-matter/>> accessed 28 May 2019.

partnerships. This scheme has now been established for over thirteen years and drawing upon Barker's typology, discussed above, it is apparent that we are now beginning to unpack an ideology of civil partnership, which is an exercise distinct from the earlier evaluation of its structure and legal consequences.⁷²

The Stasis Argument

One final argument used to evidence the superfluous nature of civil partnerships following the introduction of same-sex marriage relates to uptake now that same-sex couples have a choice between two formalised statuses. In many jurisdictions, this issue does not arise as the introduction of same-sex marriage often simultaneously involves the phasing out of civil partnerships. However, in England and Wales, since the introduction of same-sex marriage in March 2014 there has been a notable decrease in civil partnership registrations revealing that when faced with a choice there may exist a preference among couples for marriage. In 2013 there were 5,646 civil partnership registrations but, after the introduction of same-sex marriage, this number decreased to only 1,683.⁷³ Furthermore, whereas December 2013 saw only 314 civil partnership registrations, one year later, only 58 were formed constituting a drop of 82 per cent.⁷⁴ Similarly, the number of civil partnerships dissolutions has continued to rise since they first became available in 2007. In 2016, there were 1,313 civil partnership dissolutions granted in England and Wales, compared with 1,211 in 2015, representing an increase of 8.4 per cent. Higher numbers of dissolutions have occurred between female couples despite the fact that historically more men enter civil partnerships than women.⁷⁵ For those critical as to the future of civil partnerships, this data is used to demonstrate that they have become a 'legacy relationship' applicable to a dwindling number of couples.⁷⁶ Furthermore, the fact that many registered partnership schemes are very similar in structure to civil marriage means that, once the latter is available, transferring to the latter relationship form presents few difficulties. Thus, whilst it is undoubtable that civil partnerships played an important role in changing societal attitudes, these arguments paint civil partnerships merely as an important milestone on a journey to the greater prize of same-sex marriage. After all, as Scherpe notes, where a partnership scheme is more or less the identical copy of marriage, once the original is made available, it could be argued that there is 'no need to keep the copy'.⁷⁷

It is clear that the appeal of a scheme would naturally feed into its longevity. However, like the progression and status arguments, this argument equally requires careful consideration. It cannot be disputed that same-sex marriage has had a marked impact upon civil partnership registrations in England and Wales but it should be acknowledged that 2016 saw the first annual increase in registrations; in that year 890 civil partnerships were formed in England and Wales,

⁷² See Barker (n 10) 22.

⁷³ ONS, *Civil Partnerships in England and Wales: 2014* (20 October 2015).

⁷⁴ *Ibid.*

⁷⁵ ONS, *Civil Partnerships in England and Wales: 2017*, (16 August 2018).

⁷⁶ Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation*, (2014), para. 3.10.

⁷⁷ Jens M Scherpe, 'The Past, Present and Future of Civil Partnerships' in Scherpe and Hayward (n 8) 577.

which represents an increase of 3.4 per cent compared with 2015.⁷⁸ There was a further two per cent increase in civil partnership registrations the following year.⁷⁹ Similarly, the initial uptake of same-sex marriage was not as pronounced as that when civil partnerships were first introduced. Thus, in contrast to the relatively large number of civil partnership registrations entered into during the first three days in which registrations could take place in December 2005 (1,227), only 93 same-sex marriages took place during the equivalent period of time. Whilst these statistics are likely to be attributable to a clear demand among couples in 2005 to obtain some form of legal recognition not being replicated in 2014, it does tentatively suggest a more critical engagement with same-sex marriage by couples within the unique context created in England and Wales.

More revealing when rejecting the status arguments are the conversion statistics. Conversion from civil partnership to marriage, but not vice versa, is permitted by section 9 of the Marriage (Same Sex Couples) Act 2013 and has the effect of back-dating the marriage to the point in which the parties first entered the original civil partnership. At present only 1 in 8 civil partnerships have been converted to marriages.⁸⁰ Tim Loughton MP, who has campaigned for the introduction of different-sex civil partnerships, developed this point noting that ‘more than 80% of same-sex couples who have committed to a civil partnership do not think that they need to or want to convert that into a marriage’.⁸¹ The reasons why people are not converting are multi-faceted. Without detailed empirical data on this trend, it could be attributable to lack of awareness on the part of couples as to the need to convert or financial reasons with couples waiting so that their marriage can be celebrated. In addition, particularly owing to the high proportion of couples not wishing to convert, it could be attributable to symbolic rather than legal reasons and a desire to retain a particular relationship status. Importantly for this chapter though, these statistics reveal that civil partnerships resonate with some couples and, despite the availability of an alternative status, individuals are actively choosing to express their relationship through this particular relationship form.

Conclusions - A Future for Civil Partnerships in England and Wales

As a jurisdiction England and Wales is clearly at a transitional point in the regulation of adult interpersonal relationships. Unlike other countries where civil partnerships are of largely historical significance, in England and Wales they have a future owing to the Government’s recent decision to both retain and extend the regime to different-sex couples. This chapter has challenged some of the assumptions necessitating the phasing of same-sex civil partnerships and sought to argue that their retention was not solely attributable to the Supreme Court’s ruling *Steinfeld* noting the exclusion of different-sex couples from the regime constituted a breach of Articles 8 and 14 of the European Convention on Human Rights. After all, the Supreme Court merely required the removal of the discriminatory treatment and that could have been achieved

⁷⁸ ONS, *Civil Partnerships in England and Wales: 2016* (26 September 2017).

⁷⁹ ONS (n 75).

⁸⁰ See John Haskey, ‘Civil Partnerships and same-sex marriages in England and Wales: A Social and Demographic Perspective’ (2016) *Family Law* 44.

⁸¹ HC Deb 2 February 2018, vol 635, col 1142

through either extension to different-sex couples or phasing out the same-sex only regime in its entirety.⁸² Instead, this chapter has interrogated the more abstract arguments in favour of retention of the scheme and questioned whether, despite a relatively short existence, civil partnerships are now imbued with a nascent ideology necessitating their future.

As civil partnerships clearly represent a valued status for many same-sex couples, it is important for their viewpoints to feed into the future legislative that extends the regime to different-sex couples through regulations.⁸³ This is particularly imperative as the public discourse relating to this move has been confused. There has arguably been a palpable silence by the LGBTQ+ community on the introduction of different-sex civil partnerships. Conversely, for different-sex couples, access to civil partnerships has dominated media coverage with, in particular, an emphasis on the discriminatory nature of the current ban and its human rights implications. What is apparent here is that both communities are approaching the rationales behind the introduction and purpose of civil partnerships differently. Whereas groups calling for different-sex civil partnerships such as the Equal Civil Partnership campaign are viewing them as alternatives to marriage, there is evidence in the academic scholarship of resistance by same-sex couples to such a move because historically requiring a civil registration regime is fundamentally different to *desiring* one as an alternative.⁸⁴ Without a doubt, these tensions reveal that future reform requires the perspectives and lived experiences of same-sex couples in civil partnerships to underpin the process.

It is true that civil partnerships are a statutory construct created by the state to protect a vulnerable group of citizens at a time when marriage was not available. Owing to their administrative nature and focus on registration, it is perhaps unsurprising that Lord Lester remarked that he doubted Shakespeare would write about civil partnerships in the same way he wrote about marriage.⁸⁵ Thus the occurrence of the progression, status and stasis narratives, delineated above, are neither surprising nor without foundation when you compare other jurisdictions and their journey towards same-sex marriage. However, this chapter has argued that even a newly created registration regime can serve an important expressive function for couples, which is a fact that needs full acknowledgment when contemplating its future. Indeed, Eekelaar has cautioned against underestimating the symbolism of both marriage and civil partnership noting that the by permitting relationship formalisation, the state is demonstrating its approval or at least acceptance ‘of processes that have symbolic importance for the couple for the growth of love within the relationship.’⁸⁶ This observation reveals that just as marriage has changed over time through society’s engagement with that institution, so too has civil partnership and long may it continue to do so.

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⁸² Brenda Hale, ‘Private Family Law Reform’ [2018] *Family Law* 810.

⁸³ As required by the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s 2.

⁸⁴ See Adam Jowett and Elizabeth Peel, “‘A Question of Equality and Choice’: Same-Sex Couples’ Attitudes towards Civil Partnership after the Introduction of Same-Sex Marriage’ (2017) 8 *Psychology and Sexuality* 69.

⁸⁵ HL Deb 25 January 2002, vol 630, col 1746.

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