

The Curious Case of Civil Partnership: The Extension of Marriage to Same-Sex Couples and the Status-Altering Consequences of a Wait-and-See Approach

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In this article, I argue that, if civil partnership is to persist and marriage remain unchanged, civil partnership must be extended to include opposite-sex couples. I develop my case through an analysis of Andrews J's decision in the High Court in Steinfeld and Keidan v Secretary of State for Education. Firstly, I demonstrate why it matters whether any specific discrimination claim is equality-based or liberty-based. Secondly, I consider immutability or flexibility in meaning of particular status relationships – both civil partnership and marriage. Thirdly, to determine the correctness of the decision in Steinfeld, I examine the ongoing relevance and value of the High Court's earlier decision in Wilkinson v Kitzinger and another (No 2), particularly in light of the ECHR's developing jurisprudence. Fourthly, given its notable absence from Andrews J's judgment, I consider the significance of the nature and justifiability of the public interest in status relationships. I conclude that, whilst an equality-based discrimination claim demands that entitlement to enter into civil partnership be extended to opposite-sex couples, a liberty-based perspective reveals that revisiting the meaning of civil marriage may yet justify denying demands for extending entitlement to entry into civil partnership. Preferring the equality-based approach depends on seeing it as justifiable for the courts, not Parliament, to pursue reform here. Favouring the liberty-based view turns on believing in the transformation of the meaning of marriage by the modernising role for civil marriage.

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1 Introduction

Since the extension of marriage via the Marriage (Same Sex Couples) Act 2013, same-sex couples can choose whether to secure formal legal recognition of their relationship via marriage or civil partnership. Sections 1 and 3(1)(a) of the Civil Partnership Act 2004 restrict eligibility to enter into civil partnership to same-sex couples. The opposite-sex claimant couple in *Steinfeld and Keidan v Secretary of State for Education*,¹ who wished to be able to enter a civil partnership, argued that these provisions were incompatible with Article 14 of the European Convention on Human Rights taken together with Article 8, and sought a declaration of incompatibility under section 4 of the Human Rights Act 1998.

In Andrews J's dismissal of the opposite-sex claimant couple's application for judicial review, the decision in *Steinfeld* makes clear that no such choice is open to opposite-sex couples. In its 2014 review, and despite discussing the Equal Love campaign,² the Government had suggested there was 'no evidence to validate' the suggestion that there were opposite-sex couples in long-term committed relationships, who wanted to secure formal legal recognition for their relationship but had ideological objections to marriage.³ The *Steinfeld* couple are such a couple and their challenge highlights that this issue is in urgent need of resolution.

In this article, I argue that, if civil partnership is to persist and marriage remain unchanged, civil partnership must be extended to include opposite-sex couples. I develop my case through an analysis of Andrews J's decision. Firstly, I demonstrate why it matters whether any specific discrimination claim is equality-based or liberty-based. Secondly, I consider immutability or flexibility in meaning of particular status relationships – both civil partnership and marriage. Thirdly, to determine the correctness of the decision in *Steinfeld*, I examine the ongoing relevance and value of the High Court's earlier decision in *Wilkinson v Kitzinger and another (No 2)*,⁴ particularly in light of the ECHR's developing jurisprudence. Fourthly, given its notable absence from Andrews J's judgment, I consider the significance of the nature and justifiability of the public interest in status relationships.

¹ [2016] EWHC 128 (Admin) [*Steinfeld*].

² Department for Culture, Media, and Sport, *Civil Partnership Review (England and Wales) – A Consultation* (London: HMSO, 2014) [2.10].

³ Department for Culture, Media, and Sport, *Consultation*, *ibid* [3.14].

⁴ [2006] EWHC 2022 (Fam) [*Wilkinson*].

I conclude that, whilst an equality-based discrimination claim demands that entitlement to enter into civil partnership be extended to opposite-sex couples, a liberty-based perspective reveals that revisiting the meaning of civil marriage may yet justify denying demands for extending entitlement to entry into civil partnership. Preferring the equality-based approach depends on seeing it as justifiable for the courts, not Parliament, to pursue reform here. Favouring the liberty-based view turns on believing in the transformation of the meaning of marriage by the modernising role for civil marriage.

2 The Decision of the High Court

Andrews J reached her conclusion on alternative grounds. Firstly, the claim did not fall within Article 14 read together with Article 8. At the heart of her characterisation of the couple's 'novel' claim⁵ was that

having chosen to create the status of civil partners, and then having subsequently chosen to allow same-sex couples to marry, it became incumbent on the UK to treat opposite-sex couples equally by allowing them access to become civil partners.⁶

In response, she characterised the state's ECHR obligations as requiring the provision of 'a means of formal recognition' of the relationship, so that

the denial of a further means of formal recognition which is open to same-sex couples, does not amount to unlawful state interference with the Claimants' right to family life or private life, any more than the denial of marriage to same-sex couples did prior to the enactment of the 2013 Act.⁷

Andrews J placed significant weight on Sir Mark Potter P's reasoning in *Wilkinson*, by which she considered herself bound by judicial comity unless the decision was "clearly wrong".⁸ As a result, she concluded that the denial of access to civil partnership on the grounds of the claimants' sexual orientation did 'not impinge upon the core values of either limb' of Article 8 ECHR to the extent necessary to support the Article 14 claim: 'The link between the measures complained of, and their right to enjoy their family and private life, is a tenuous one'.⁹

⁵ *Steinfeld* (n 1) [7].

⁶ *Steinfeld*, *ibid* [9].

⁷ *ibid* [39].

⁸ *ibid* [41], [85].

⁹ *ibid* [39].

Secondly, and in the alternative, if the couples' claim were seen to fall within the ambit of Article 14 read together with Article 8, Andrews J concluded that differential treatment of same-sex and opposite-sex couples in terms of their access to civil partnership was objectively justified:¹⁰ the absence of finality on the future of civil partnership was a short-term measure¹¹ whilst the Government gathered sufficient evidence from practice to determine which option for reform to civil partnership to adopt;¹² there was no social consensus in the UK or across Europe regarding the best path to take,¹³ which is to be contrasted with the policy convergence that has emerged across Europe on same-sex couples' access to formal legal recognition;¹⁴ mistaken reform would be costly to correct;¹⁵ and, whilst a clear timescale for review would have been preferable,¹⁶ opposite-sex couples were not disadvantaged in practice in the intervening period.¹⁷

3 The Nature of the Discrimination Claim

The correct characterisation of the nature of the claimant couple's discrimination claim is critical to understanding both the force of their argument as well as the justifiability of Andrews J's dismissal of their claim. There are two interrelated issues that determine the character of the discrimination claim: firstly, whether it is procedural or substantive; secondly, whether it is underpinned by equality or liberty.

Whilst they have brought their claim within the context of the Government's delay in bringing forward legislative proposals in response to its civil partnership review under section 15 of the 2013 Act, is it the delay itself or the substantive position that results from the delay that better characterises their case? Andrews J's judgment is inconsistent on this point. She explicitly rejected framing the couple's claim as procedural, reasoning that it was 'highly

¹⁰ *ibid* [86].

¹¹ *ibid* [71].

¹² *ibid* [72], [81]-[82].

¹³ *ibid* [69]-[71], [86].

¹⁴ David Paternotte and Kelly Kollman, 'Regulating intimate relationships in the European polity: same-sex unions and policy convergence' (2013) 20: 4 *Social Politics* 510-533, 511.

¹⁵ *Steinfeld* (n 1) [86].

¹⁶ *Steinfeld*, *ibid* [83].

¹⁷ *ibid* [72], [86].

unlikely' that they would have got permission to bring the claim had it been so.¹⁸ Yet, when considering the claim on the alternative basis that made the issue one of justification, she saw the analogous case as one that related to process¹⁹ – *Schalk and Kopf v Austria*,²⁰ which was concerned with the timing of reform – rather than the substantive issue of whether to afford any legal recognition at all, as in *Vallianatos v Greece*.²¹ Given Andrews J's earlier comments about the inadequacy of a claim grounded in process, we might question this approach to the justification alternative.

More critically, it is not clear that the process can indeed be distinguished from substance, as Andrews J implies. Such a distinction overlooks the necessary substantive implications of process. The delay in reforming civil partnership – whether through abolition, extension to opposite-sex couples, or otherwise – has created a situation in which there is a substantive difference in the opportunities for formal legal recognition of same-sex and opposite-sex couples' relationships. A reply that this is only short-term²² is better understood not as a reply that there is no substantive differential treatment, but rather that the evident substantive differential treatment should not be seen as significant. But we can reach this conclusion only if we have taken a specific view on the debate over whether equality or liberty underpins the particular claim here.

Equality and liberty underpin two central competing perspectives, though there are other possible approaches. If the claim is equality-based, as explained by Hellman, '[a] law discriminates in an impermissible way when it fails to treat people as equals'.²³ By contrast, if the claim is liberty-based, '[a] law discriminates in an impermissible way when it deprives some, but not all, of a liberty to which all are entitled'.²⁴ For the purpose of the following analysis, we do not need to settle the status of other alleged alternative accounts, such as

¹⁸ *Steinfeld* (n 1) [21].

¹⁹ *Steinfeld*, *ibid* [71].

²⁰ (2011) 53 EHRR 20.

²¹ (2014) 59 EHRR 12.

²² *Steinfeld* (n 1) [71].

²³ Deborah Hellman, 'Equality and Unconstitutional Discrimination' in D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 51-70, 51.

²⁴ Hellman, *ibid*.

whether dignity is a competing perspective²⁵ or the better understanding of the value upon which the equality-based approach is grounded.²⁶

Moreau makes a sound case for the distinction between equality and liberty ‘not [being] as deep as it appears’²⁷ since one can imagine that affording individuals a set of liberties can be seen as a way of treating them with equal concern and respect. Conversely, ‘if [equality arguments] are to be of real use as justificatory arguments, they beg the prior question of why the things being compared are morally valuable’.²⁸ The nature of any particular claim is nevertheless important even if it is a matter of emphasis in constructing the view of the same phenomenon, rather than distinguishing between two different phenomena. Here, it determines whether we emphasise one of two particular issues: an equality-based claim is usually seen as needing the analysis to be framed in comparative terms, whereas a liberty-based claim ‘require[s] courts to make controversial moral judgments’²⁹ about the nature of particular institutions such as marriage.³⁰ Is the claimant couple’s objection to their treatment better seen as equality-based or liberty-based?

The defence of the view that the substantive consequences of the procedural delay are not discriminatory relies on having reached two conclusions: firstly, that the discrimination claim is liberty-based rather than equality-based; secondly, that, in its liberty-based form, it is not morally unjustifiable to make available to opposite-sex couples fewer institutions for formal legal recognition. But what if the discrimination claim is better seen as equality-based? Even if the process is itself justifiable, a thinner, equality-based claim is not defeated by the lack of domestic³¹ or European³² consensus, since that relates to establishing a clear moral position for a liberty-based claim. The immediate equality-based substantive implications of the delay in reform mean that the justifiability of the process is rendered irrelevant by the unjustifiable substantive position. Social impact, let alone uncertainty over

²⁵ As posited by Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) 6.

²⁶ As contended by Denise Réaume, ‘Dignity, Equality, and Comparison’ in D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press) 7-27.

²⁷ Sophia Moreau, ‘In Defense of a Liberty-based Account of Discrimination’ in D Hellman and S Moreau (eds) *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2013) 71-86, 72.

²⁸ Nicholas Bamforth, ‘Same-sex partnerships: some comparative constitutional issues’ [2007] *European Human Rights Law Review* 47-65, 55.

²⁹ Moreau (n 27) 72.

³⁰ Hellman (n 23) 52.

³¹ Equalities Office, *Equal civil marriage: a consultation* (London: HMSO, 2012); Department for Culture, Media, and Sport, *Civil Partnership Review (England and Wales) – Report and Conclusions* (London: HMSO, 2014).

³² *Steinfeld* (n 1) [69], [86].

social impact, relates to the broader moral debate, which would be critical only to a liberty-based claim not an equality-based claim. Thus we cannot rely on the justifiability of the process to defeat the claim under Article 14 read together with Article 8 ECHR.

This equality-based understanding of the couple's claim is further supported by Andrews J's comment that it is not the claimants' case that '... if a new form of legal status is created, it must be open to all couples regardless of their sexual orientation, unless there is a justification for a difference in treatment'.³³ Were that their claim, it would be liberty-based. Their claim, however, centres on the *extension* of access to *marriage* for same-sex couples, and how that renders discriminatory the *denial* of access to *civil partnership* for opposite-sex couples. So constructed, this appears a straightforward equality-based claim, and one that, after taking account of the inseparability of the substantive and procedural elements, would be difficult to defeat. The Government has proposed otherwise:

... it is the Government's view that it is within a State's margin of appreciation to recognise different forms of relationship for same sex and opposite sex couples. In the past, prior to the introduction of the CPA, it was not unlawful for opposite sex couples to enjoy greater legal recognition of their relationship than same sex couples. That was a choice States were permitted to make. We consider that, equally, it is not unlawful for same sex couples now to have more options available to them in terms of the legal recognition of their relationship than opposite sex couples.³⁴

Revisiting the contrast between liberty-based and equality-based discrimination claims demonstrates why the Government's perspective must be seen as unpersuasive. The pre-CPA position was not discriminatory because it could not be seen as such in liberty-based terms. A moral judgment was required to determine whether same-sex couples were entitled to formal legal recognition of their relationship in status terms. This no longer holds. Having extended status recognition to same-sex couples via the Civil Partnership Act 2004 and the particular status of marriage via the Marriage (Same Sex Couples) Act 2013, the Government has thereby ostensibly *equalised* treatment of same- and opposite-sex couples. The *Steinfeld* couple's claim for access to civil partnership is thus not simply one for the same treatment, denial of which is not necessarily discriminatory, but one for equal concern and respect.³⁵ Having demonstrated via the extension of marriage to same-sex couples that same- and opposite-sex couples are seen as deserving of the same formal legal status, minor differences in content aside, the denial of the status of civil partnership to opposite-sex couples fails to

³³ *Steinfeld* (n 1) [54].

³⁴ Department for Culture, Media, and Sport, *Consultation* (n 2) [2.11].

³⁵ cf. Hellman (n 23) 54.

treat them as equals. There is no need or even space for the moral judgment required by a liberty-based discrimination claim.

This equalisation in treatment also reflects the European consensus on equalising treatment of same-sex and opposite-sex couples,³⁶ which renders more problematic any Government argument that the denial of access to civil partnership for opposite-sex couples is a proportionate means of protecting the institution of marriage.³⁷ As a result, the Government has not satisfactorily addressed the current discrimination claim since it has not considered the matter in equality-based terms. As I explain in the following section, this means that it misses the point to consider whether civil partnership pre-‘extended marriage’ was discriminatory.

4 The Immutability or Flexibility in Meaning of Particular Status Relationships

The claimants’ argument that the state was not entitled to delay legal reform to civil partnership once it had extended access to marriage to same-sex couples³⁸ is in effect an argument that the Government retrospectively changed the purpose of civil partnership from being, as expressed in terms of the Government’s argument, a means to ‘allow [same sex couples] equivalent access to the rights, responsibilities, and protections ... as those afforded by marriage’ to an ‘alternative to marriage’.³⁹ An institution with a fundamentally different purpose to the original purpose of civil partnership is the only basis upon which immediate access might be justifiably demanded. If extending marriage to same-sex couples fundamentally transformed the nature of civil partnership, the justifiability of civil partnership pre-‘extended marriage’ is irrelevant to the justifiability of civil partnership post-‘extended marriage’. The *Steinfeld* couple’s argument is not simply that they should ‘have a choice of type of legal recognition of their relationship’,⁴⁰ but that they should be able to choose the *particular* relationship form, which is posited on the basis of being equalised to marriage. Whether civil partnership as an institution now has a different nature turns on

³⁶ Paternotte and Kollman (n 14).

³⁷ On proportionality and European consensus, see Nicholas Bamforth, ‘Families but not (yet) marriages? Same-sex partners and the developing European Convention “margin of appreciation”’ (2011) 23: 1 *Child and Family Law Quarterly* 128-143, 139.

³⁸ *Steinfeld* (n 1) [21]-[22].

³⁹ *Steinfeld*, *ibid* [15].

⁴⁰ Department for Culture, Media, and Sport, *Consultation* (n 2) [3.15] (emphasis added).

whether we see the institutions that regulate intimate adult relationships as immutable or flexible. This point applies equally to the Court's view of civil partnership as to the claimant couple's view of marriage.

Andrews J implicitly relied on the immutability of the meaning of civil partnership when arguing that, just as the Civil Partnership Act 2004 was not within the ambit of Article 8 ECHR prior to the enactment of the Marriage (Same Sex Couples) Act 2013, so it was not afterwards.⁴¹ The introduction of civil partnership for same-sex couples was arguably grounded in a liberty-based perspective on discrimination, concerned with the purpose of formal legal recognition of adult intimate relationships. If civil partnership is seen as immutable in purpose, this forestalls the equality-based discrimination argument, which can ground opposite-sex couples' claim for immediate access to civil partnership without the need for careful moral deliberation about the purpose of marriage and civil partnership.

But institutions can and do change their meaning. Marriage itself makes that plain. In his oft-cited decision in *Hyde v Hyde*,⁴² Lord Penzance defined marriage as ...the voluntary union for life of one man and one woman to the exclusion of all others...'.⁴³ Similarly, in *Sheffield City Council v E*,⁴⁴ Munby J reasoned:

Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.⁴⁵

Whilst generally accepted that that meaning was transformed by the Marriage (Same Sex Couples) Act 2013, did the 2013 Act also *indirectly* and *immediately* transform the meaning of civil partnership? As explained above in terms of the relationship between process and substance, I would argue both that it did and that it was inevitable that it did. This is because of the implications of any response to the extension of marriage to same-sex couples. Thus,

⁴¹ *Steinfeld* (n 1) [55].

⁴² (1866) LR 1 P&D 130.

⁴³ *Hyde v Hyde*, *ibid* 133.

⁴⁴ [2004] EWHC 2080.

⁴⁵ *Sheffield City Council v E*, *ibid* [132].

Andrews J's emphasis on the original purpose of civil partnership⁴⁶ is of itself no answer to the claim so construed. Similarly, if pre- and post-'extended marriage' civil partnership are best understood as distinct forms of status relationship, how much weight can or should be placed on the government's reference to the 'inten[tion] or design[]' of civil partnership when introduced in 2004.⁴⁷ If the Government were to make the positive decision to maintain civil partnership in the long-term whilst restricting access to same-sex couples, this would inevitably be subject to challenge and unable to benefit from any claims about the persistence of the original purpose of the institution.

In declining to make any change at all to civil partnership, the Government reasoned that it ... did not make changes to civil partnership in the Marriage (Same Sex Couples) Act 2013 because of the important role it plays in the lives of many couples. The Government saw little benefit at that stage in changing a well-understood legal institution without evidence of a clear need to do so and of the impact such a step would have.⁴⁸

Neither of these reasons is normative. Public understanding may be important to how individuals order their lives, but provides no justification for permitting and requiring individuals to order their lives within a discriminatory framework. Whilst a particular impact on marriage, civil partnership, or adult intimate relationships generally, may provide a basis for justifiable differential treatment, lack of understanding of impact of itself can ground only a delay in reaching a decision. Yet, as explained above, in an equality-based discrimination claim, justifiable process is rendered irrelevant by the unjustifiable substantive differential treatment.

Other than extending access to civil partnership to opposite-sex couples, the Government is left with two options: mandatory conversion of extant civil partnerships to marriage accompanied by the abolition of civil partnership; or, alternatively, closure of civil partnership to new entrants without forced conversion. Both options are unjustifiable, yet represent the default European approach.⁴⁹ This in fact makes the UK's current position –

⁴⁶ See, for example: *Steinfeld* (n 1) [74].

⁴⁷ *Steinfeld*, *ibid* [15].

⁴⁸ Department for Culture, Media and Sport, *Report* (n 31) [1.2].

⁴⁹ See, for example: Department for Culture, Media and Sport, *Consultation* (n 2), note 14 to [3.2], citing Denmark, Norway, and Sweden; Ruth Gaffney-Rhys, 'Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?' (2014) 26: 2 *Child and Family Law Quarterly* 173-195, 184, also discussing Belgium and Iceland.

retaining civil partnership for same-sex couples only alongside equal access to marriage – an isolated one within the European context.

Conversion is both possible and popular: the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 were introduced under powers conferred by sections 9 and 18 of the 2013 Act. Haskey found that, in the second half of 2015, the total number of ‘conversions’ was double the number of ‘non-conversion’ marriages between same-sex couples.⁵⁰ But mandatory conversion would undermine individuals’ autonomy. Those who objected to marriage would be in a particularly unjustifiable situation in which the only alternative would be ending their formal legal relationship.

Closing civil partnership to new entrants was rejected by the Government on the basis that ‘civil partnerships are understood and it allows [the Government] to maintain the ability for same-sex couples to register their union in a religious premises’.⁵¹ Given that same-sex couples can marry through a religious ceremony, the Government’s aim here must be seen to relate to the blend of the civil and religious in more precise terms: it intends to preserve a situation whereby the couple can, in religious premises, possibly in the context of a religious ceremony, formalise their relationship in civil terms. Such nuance does not apply to entry into marriage. Whilst this approach enables same-sex couples to form civil partnerships in Anglican churches, might it not risk engendering public misunderstanding of the strictly demarcated role for religion? This is particularly pertinent when viewed alongside the Government’s appeal to public understanding which, I suggest, is no more valid an argument here as it was when raised by the Government to justify not making any changes to civil partnership.

In introducing the second reading of the Civil Partnership Bill in the House of Commons, for example, Jacqui Smith MP asserted that ‘the Bill represents a historic step on ... a long journey to respect and dignity for lesbians and gay men in Britain’,⁵² and in discussing proposed amendments to the Bill, she reasoned that the Government

... seek[s] to create a parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses

⁵⁰ John Haskey, ‘Civil partnerships and same-sex marriages in England and Wales: a social and demographic perspective’ (2016) 46 *Family Law* 44-59, 46.

⁵¹ Equalities Office, *Equal civil marriage: Impact Assessment (IA)* (London: HMSO, 2012) 1; see also 5.

⁵² HC Deb 12 Oct 2004: Vol. 425 Col. 174.

civil marriage as a template for the processes, rights and responsibilities that go with civil partnership. We are doing this for reasons of equality and social justice.⁵³

Writing extra-judicially, Baroness Hale described civil partnership as ‘marriage in almost all but name’.⁵⁴ Closing civil partnership to new entrants would be highly problematic because, I suggest, it would send the clear signal that civil partnership was never in its essence equal to marriage, as the Government positioned it at the time of its introduction. The Government expresses this concern in milder form, noting that closing civil partnership to new entrants ‘[r]isks diminishing [its] perceived status’.⁵⁵ Indeed, the public might not interpret the closure of civil partnership as signalling a devalued reinterpretation of extant civil partnerships. In the absence of research evidence on the impact of abolition and mandatory conversion or closure to new entrants, the Government is arguably correct not to take either step.⁵⁶

Viewed in the context of the *Steinfeld* couple’s claim for access to civil partnership, there is an irony to the second argument that civil partnership was never truly equivalent to marriage. This argument was grounded in both the different label and some substantive differences.⁵⁷ In terms of the latter, most emphasis was placed on the ‘ambiguity ... about the essential attributes of the relationship,’⁵⁸ expressed in particular via the absence of adultery as a fact upon which dissolution can be grounded and the lack of non-consummation as a basis for voidability. Other differences are also important in practice, particularly varying entitlement to benefits under occupational pension schemes.⁵⁹

These differences persist in the context of marriage between same-sex couples. Recent academic commentary of extended marriage continues to highlight the significance of these distinctions. Beresford, for example, contends they evidence the lack of formal equality between opposite-sex and same-sex couples who marry. She argues that extended marriage has in fact ‘created further inequality on the basis of marital status’.⁶⁰ I would go further and

⁵³ HC Deb 9 Nov 2004: Vol. 426 Col. 776.

⁵⁴ Brenda Hale, ‘Homosexual rights’ (2004) 16 *Child and Family Law Quarterly* 125-134, 132.

⁵⁵ Department for Culture, Media, and Sport, *Consultation* (n 2) [3.10].

⁵⁶ Department for Culture, Media, and Sport, *Consultation*, *ibid* [3.2].

⁵⁷ Summarised by Department for Culture, Media, and Sport, *Consultation*, *ibid* Appendix A.

⁵⁸ Stephen Cretney, *Same Sex Relationships: From ‘Odious Crime’ to ‘Gay Marriage’* (Oxford: Oxford University Press, 2006) 37.

⁵⁹ Department for Culture, Media, and Sport, *Consultation* (n 2) Appendix A.

⁶⁰ Sarah Beresford, ‘We’re All Same (Sex) Now?: Lesbian (Same) Sex; Consummation; Adultery and Marriage’ (2016) *Journal of GLBT Family Studies* 1-23 (advance publication) 21.

suggest that, to the extent that these distinctions are in fact substantive not formal, they indicate a more fundamental absence of equality. This may be further reinforced by the common description of the extension of marriage to same-sex couples as ‘same-sex marriage’. By contrast, my analysis adopts the language of ‘extended marriage’ in order to signal that the extension *should* be seen as a means of both promoting equal treatment and respect for same-sex couples within marriage and affecting the core meaning of marriage, rather than as a separate form of marriage, which leaves unaffected a core opposite-sex form.

The *Steinfeld* couple’s argument overlooks the substantive differences and, as their case is characterised by Andrews J, they ‘do not suggest that there is any substantive difference between civil marriage and civil partnerships in terms of the legal rights and responsibilities they accord...’.⁶¹ The claimants’ argument is premised on same-sex couples having open to them the full choice of the form of formal legal recognition of their relationship, whereas in fact same-sex couples are denied that choice. In focusing on the demand for equal access to civil partnership, we risk obfuscating the ongoing pernicious status hierarchy between opposite-sex and same-sex couples. In any event, it is clear that there is no option open to the Government that enables them to avoid transforming the nature of civil partnership, whether directly or indirectly.

Whereas the Court unjustifiably sees *civil partnership* as immutable, the claimant couple’s argument itself appears to turn on the need to see the meaning of *marriage* as immutable. As Andrews J characterises it, the claimants contend that they

have deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature. They wish, instead, to enter into a civil partnership, a status which they consider reflects their values and gives due recognition to the equality of their relationship.⁶²

But, in extending access to marriage to same-sex couples, might the Government have not either thereby modernised or at least triggered the social modernisation of marriage? Do the *Steinfeld* couple not need to take account of that flexibility in the meaning of marriage in making their argument for access to a modern equivalent to traditional marriage? In time, could that not just be a demand for access to marriage itself? Further, and as discussed above, given the critical differences between the content of marriage and civil partnership as

⁶¹ *Steinfeld* (n 1) [4].

⁶² *Steinfeld*, *ibid* [2].

enacted, and as subsequently repeated in the content of marriage as extended to same-sex couples, their benevolent view of the nature of civil partnership may not reflect its true meaning. Even as an alternative to marriage, it may be seen to be an alternative that further embeds the unequal status of same-sex couples. Should couples who have ideological concerns about the patriarchal nature of marriage, not be similarly concerned and reject the heteropatriarchal nature of civil partnership and marriage as extended to same-sex couples?

5 The Reinvigoration of the Importance of the Decision in *Wilkinson*

The previous section demonstrates the centrality to this discussion of the true meaning of civil partnership. This is further heightened by Andrews J's reliance on the High Court's earlier decision in *Wilkinson*, in which Sir Mark Potter P held that it was justifiable to recognise a foreign marriage between a same-sex couple as a civil partnership only and not a marriage in domestic law. In dismissing the *Steinfeld* couple's claim, Andrews J commented that the *Wilkinson* reasoning and outcome 'would apply with equal force' here,⁶³ and that she was 'fortified' by the fact that Sir Mark Potter P 'had reached a similar conclusion (on stronger arguments)'.⁶⁴ Setting aside the satisfactoriness of the decision in *Wilkinson* itself, is she correct on either count?

Were the arguments in *Wilkinson* stronger than the arguments in *Steinfeld*? I would suggest not: they raise different issues, not stronger ones. Whilst the couple in question were validly married in Canada in *Wilkinson*, there was no European social consensus on the issue of marriage for same-sex couples at the time. This meant that the issue of same-sex couples' access to marriage was liberty-based and required a moral judgment to be made about the nature of marriage. No such judgment is required here – it is an equality-based claim for treatment with equal concern and respect. For this reason, the *Wilkinson* analysis should not be seen to apply with equal force here.

Moreover, it is not clear that the justification for dismissing the claim under Article 14 read together with Article 8 ECHR was sound even at the time of the original judgment in *Wilkinson*. The Courts in both *Wilkinson* and *Steinfeld* dismissed the critical importance of

⁶³ *ibid* [9].

⁶⁴ *ibid* [40].

the label used to assign formal legal recognition. Whilst the petitioner in *Wilkinson* emphasised the ‘symbolic status’ of marriage,⁶⁵ Potter P’s reasoning rejected that concern. He suggested that, to bring a claim within Article 8, ‘it is necessary to focus on an aspect of a person’s private or family life’⁶⁶ or, in other words, that the impact needs to be directly functional. In *Steinfeld*, Andrews J commented that

‘[t]here has been no suggestion in the evidence or in [counsel for the claimants]’s submissions that the denial of the status of civil partners to the Claimants devalues their relationship either generally, or relative to similar committed relationships of same-sex partners.’⁶⁷

Andrews J followed the *Wilkinson* focus on the functional impact of legal consequences alone.⁶⁸ This focus on substantive legal consequences also explains why Andrews J commented that ‘the impact is light’ and there is a ‘lack of appreciable impact’⁶⁹ attributable to the denial of access to civil partnership for opposite-sex couples. In considering arguments over whether to extend civil partnership to opposite-sex couples, the Government reasoned similarly, emphasising the ‘equivalent rights and responsibilities’ available to opposite-sex couples through marriage.⁷⁰

In terms of legal consequences alone, Andrews J’s analysis may be correct. But she was arguably mistaken to have concluded that the denial of the status ‘has placed no constraints on their social intercourse’.⁷¹ Marriage is a social institution. The direct substantive, functional consequences of formal legal recognition are only a part thereof. But the structural and cultural aspects of marriage relate both to those within particular marriages as well as to individuals regarding marriage within society generally. Collective intentionality is critically important to the social meaning of intimate relationships. Thus the denial of a particular institutional status label arguably does impact on how individuals within that relationship view each other; and on how, dialogically, those individuals by themselves and as a couple understand their identity within broader society.

⁶⁵ *Wilkinson* (n 4) [5], discussed in *Steinfeld*, *ibid* [32].

⁶⁶ *Wilkinson*, *ibid* [80].

⁶⁷ *Steinfeld* (n 1) [37].

⁶⁸ *Steinfeld*, *ibid* [37]-[39].

⁶⁹ *ibid* [72].

⁷⁰ Department for Culture, Media, and Sport, *Consultation* (n 2) [3.15].

⁷¹ *Steinfeld* (n 1) [37].

Andrews J examines ECHR jurisprudence against the background of the availability of a form of legal recognition,⁷² rather than a particular form of recognition. She notes that the ECtHR has never suggested that the ECHR imposes any requirements in the latter situation.⁷³ To fortify her conclusion, Andrews J posits that domestic courts ‘have no business overtaking’ Strasbourg jurisprudence.⁷⁴ The bluntness of this assertion is unfortunate given both misunderstanding and debate surround the relationship between domestic law and the ECtHR’s jurisprudence. In this regard, it is critical to distinguish between domestic government action, principally reflected in legislation, and domestic judicial decisions when determining the correct approach. In respect of government action, the government must ‘abide by’ the final decisions of the ECtHR (Article 46) but may go further in its protection of human rights (Article 53).⁷⁵

The requisite judicial approach turns on the correct interpretation of the requirement under section 2 of the Human Rights Act 1998 to ‘take into account’ the jurisprudence of the ECtHR, and is hotly contested. Fenwick suggests that there are three basic models one can adopt, which differently relate to the ‘mirror principle’, the idea that ‘the scope and content attributed by domestic courts to municipal rights must always match that attributed to Convention rights by the European Court of Human Rights’;⁷⁶ the ‘anti-mirror principle’; the ‘partial or semi-mirror principle’; and the ‘full mirror principle’.⁷⁷ Andrews J’s analysis falls squarely within the third camp:

Whilst national courts are obliged to take relevant Strasbourg cases into account, they are only under an obligation to follow any clear and consistent jurisprudence of the ECtHR. The interpretation of rights accorded by the Convention is essentially a matter for the ECtHR: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [20]. The national courts should keep pace with Strasbourg jurisprudence as it evolves over time, but they have no business overtaking it.⁷⁸

It is far from settled that the ‘full mirror principle’ is the correct approach. Lord Judge, for example, has suggested that ‘it is at the very least arguable that what Lord Bingham said in

⁷² *Steinfeld*, *ibid* [41] ff.

⁷³ *ibid* [52], [54].

⁷⁴ *ibid* [53].

⁷⁵ See, for example: *E.B. v France*, 2008 ECHR 43546/02 (22 Jan 2008) [49]; *P.B. and J.S. v Austria*, 2010 ECHR 18984/02 (22 Jul 2010) [34].

⁷⁶ Jonathan Lewis, ‘The European ceiling on human rights’ [2007] *Public Law*, 720-747, 720.

⁷⁷ Helen Fenwick, ‘What’s Wrong With S.2 of the Human Rights Act?’, UK Const. L. Blog (9 Oct 2012), available online: <<http://ukconstitutionallaw.org>>.

⁷⁸ *Steinfeld* (n 1) [53].

Ullah went too far’.⁷⁹ This perspective is reinforced by the increasingly-explicit recognition of the principle of subsidiarity,⁸⁰ whereby national courts bear primary responsibility for giving effect to Convention rights. The ‘full mirror principle’ embraced by Andrews J effectively treats the ECtHR as a fourth level of appeal, which it is not⁸¹ and suggests a relationship of deference rather than effective dialogue.⁸²

I suggest that we do not need to resolve this larger debate over the relationship between domestic courts and the ECtHR in order to settle the importance of the expressive aspect to the *Steinfeld* couple’s argument grounded in Article 14 read together with Article 8. This is because the UK Government has removed the justifiability of excluding the value of labels from the analysis. I contend that, in extending marriage to same-sex couples but leaving in place the contentious substantive differences, the Government must be treated as having acknowledged the centrality of labels and terminology. This Government action fundamentally undermines the validity of this aspect of the *Wilkinson* reasoning. Further, this point is critical to the outcome in *Steinfeld* even if the couple have not themselves directly raised it. In this regard, I suggest that it is hard to know how to interpret their previously-discussed ideological objections other than as also extending to the connotations of the label, even if they organise their relationship otherwise within that label. That individuals attach weight to the label can also be seen as at least in part explaining the popularity of same-sex couples ‘converting’ their civil partnerships to marriages, discussed above.

6 The Nature and Justifiability of the Public Interest in Status Relationships

Whilst the public interest in marriage is immediately acknowledged by Andrews J,⁸³ she does not explore its relevance to determining whether access to civil partnership should be extended to opposite-sex couples. An analysis of the state interest entails distinguishing status relationships – marriage and civil partnership – from non-status relationships –

⁷⁹ Joint Committee on Human Rights, *HC 873-ii: Human Rights Judgments, uncorrected transcript of oral evidence* (15 November 2011) Q64.

⁸⁰ See, for example: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213), ratified by the UK: 10 Apr 2015; not yet in force.

⁸¹ Rt Hon Lady Justice Arden, ‘Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe’ [2010] *Yearbook of European Law* 3-20, 7.

⁸² Arden, *ibid* 14.

⁸³ *Steinfeld* (n 1) [1].

cohabitation. In respect of the former, formalities automatically give rise to legal consequences; in respect of the latter, legal consequences flow from the functional content of the relationship or from specific legal regulation. The state interest underpins both of these methods for the recognition of interpersonal rights and obligations. The lack of consistent basis for the imposition of legal consequences in respect of the latter highlights the assumed strength of the norm or convergence of norms underpinning status relationships.

The *Steinfeld* couple's own argument that they should be 'entitled' to choose the form of legal recognition by which they acquire legal rights and responsibilities⁸⁴ assumes the state interest either is irrelevant or, to the extent it is relevant, supports or is neutral toward their claim. The couple's claim focuses on legal *recognition* but overlooks the implication of the automatic flow of legal *consequences* from recognition for status relationships, which is of the essence to status relationships. Only a state interest can justify this application of legal consequences, hence why the Government consultation had amongst its four guiding principles that '[a]ny changes should deliver clear benefits to individuals and society' and '[w]e should avoid taking action that we believe would be detrimental to society or individuals' relationships'.⁸⁵ The state interest may also be expressed in judicial reasoning as to the legitimate aim on which the state may ground an argument for differential treatment under Article 14 together with Article 8 ECHR.

There are two key aspects to the state interest in opposite-sex civil partnership: firstly, the scope of the relationship in which it is grounded; secondly, how it relates to the couple's presumed shared and/or individuals' understanding of the value of formal legal recognition. In respect of the first aspect, the state interest may relate to civil partnership as a broad, inclusive category; to the historical core of the relationship-type (here: same-sex couples), such that extending access either supports the interest in recognising the core or at least is neutral towards or does not undermine that core-oriented interest; or to the specific sub-category under consideration (here: opposite-sex couples). In respect of the second aspect, the nature of the connection between the state's interest and individuals' or the couples' presumed shared interest, the state interest may be directly shared with the couple's presumed interest or individuals' interest; be independent of, but causally flow from the benefit the couple presumably sees or individuals see it to have; or be independent of, and merely

⁸⁴ *Steinfeld*, *ibid* [4].

⁸⁵ Department for Culture, Media, and Sport, *Consultation* (n 2) [1.7].

correlate with the benefit the couple presumably sees or individuals see it to have. These various configurations highlight the potentially-complex nature of the necessary relationship between the state interest in, and the parties' claim for access to civil partnership.

Commonality of Content; Contingency on Content; Respect for Choice

There is no obviously correct view as to how to conceive of the state interest in marriage or civil partnership in practice. In respect of marriage, Schneider suggests that it 'is a social institution the government recruits as part of a socializing strategy, as a way to regulate people's behavior in intimate relationships'.⁸⁶ What does that mean in less abstract terms? We might draw on Baroness Stowell's introduction to the second reading of the Bill that led to the Marriage (Same Sex Couples) Act 2013:

I believe marriage to be one of the fundamental building blocks of a strong society because of the stability, continuity and security that it promotes. ... When we hear two people exchange their marriage vows, ..., we know that we are witnessing a couple commit to the kind of values that we associate with the special enterprise of shared endeavour – loyalty, trust, honesty and forgiveness. We know that through marriage existing families are extended, as is their commitment and support to new family members.⁸⁷

This suggests a functional basis for the state interest in all status relationships. Yet, whilst such stability claims are oft-repeated, available empirical evidence indicates that marriage status is correlatively, not causally connected to relationship stability.⁸⁸

Further, to the extent that the state's interest could relate to the functional content of relationships, it may be that the basis for the legal recognition of specific status relationships is contingent on the importance of the functional content of other status relationships. In particular, it may be that the formal legal recognition provided to civil partnership and extended to same-sex couples wishing to marry is best understood as a justifiable equality-based extension to enable the state to privilege – via legal rights and obligations – the perceived core. Given the differences in legal formalities for entry and exit carried over from

⁸⁶ Carl E Schneider, 'Essential to Virtue? The Languages of the Law of Marriage' in M. Garrison and E. S. Scott (eds) *Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty-First Century Families* (New York: Cambridge University Press, 2012) 241-259, 258.

⁸⁷ HL Deb 3 Jun 2013: Vol. 745 Col. 938.

⁸⁸ See, for example: Mavis Maclean and John Eekelaar, *The Parental Obligation: A Study of Parenthood Across Households* (Oxford: Hart Publishing, 1997); Claire Crawford, Alissa Goodman, and Ellen Greaves, *Cohabitation, marriage, relationship stability and child outcomes: final report*, IFS Report R87 (London: Institute for Fiscal Studies, 2013).

civil partnership to marriage for same-sex couples, that core might be construed as narrowly as opposite-sex marriage. If this is correct, it cannot advance the case for the extension of civil partnership to opposite-sex couples to focus directly on the actual or presumed functional content of relationships between couples wishing to obtain such recognition.

Even such a functionally-contingent argument may rely too much on the content of relationships since the Grand Chamber of the ECtHR in *Burden v United Kingdom* rejected a functional basis for the legal consequences of different relationship types. The Court reasoned that

[r]ather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.⁸⁹

This applies whether the functional argument is broad and focused on all status relationships or narrow and centred on the functional content of marriage with equality-based extensions to other relationship types.

Whilst the state interest cannot justifiably lie in recognising or strengthening any evidenced functional relationship stability, can it lie in a possible normative commonality between marriage and civil partnership? What of an argument from autonomy? Might the state simply have an interest in respecting individuals' choices to enter into status relationships to the extent that the ability to ascribe rights and obligations to individuals within and upon exit from status relationships is seen as of longer-term benefit to the state? There is some academic support for this perspective. Gaffney-Rhys, for example, sees her Article 8 ECHR respect for private life argument for opposite-sex couples' access to civil partnership as 'underpinned by autonomy[, which] requires respect for choice'.⁹⁰ The Grand Chamber's analysis in *Burden*, however, undermined the potential of an argument from autonomy:

Just as there can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand..., the absence of such a legally binding agreement between the [sister] applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.⁹¹

⁸⁹ *Burden v United Kingdom* (Application no. 13378/05) (29 April 2008) [65].

⁹⁰ Gaffney-Rhys (n 49) 189.

⁹¹ *Burden* (n 89) [65].

Whilst one might posit that the distinction the Court draws between status and non-status relationships turns on respect for the autonomous decision whether or not to enter into a status relationship, the rejection of the sisters' claim in *Burden* forestalls this interpretation. As there is no permitted privileged status relationship into which the sisters could have entered, rejecting their claim simply for not being in a status relationship suggests that the state interest in status lies elsewhere than in respect for autonomy.

The State Interest and the Impact of New and Extended Status Relationships

Fixing the state interest is further complicated by the value that the state gains from individuals seeing that interest as having an open-textured nature; if individuals 'can attribute to it as many meanings as they wish',⁹² they may be more likely to marry and thereby benefit the state through the opportunity for legal regulation. Yet, it is clear that reform to entitlement to enter into status relationships might either strengthen or weaken the institution of marriage, whatever the precise state interest, as was asserted and debated during the passage of the Civil Partnership Bill.⁹³

Whether the introduction of civil partnership in 2004 strengthened or weakened marriage in society is determined by which of two perspectives we use to frame the regulation of adult intimate relationships generally – one that emphasises the importance of the formal legal status or one that centres on the functional aspects of relationships. We may take the view that it emphasises status because it involved the creation of a further status relationship; this would strengthen marriage compared to cohabitation as it would highlight the critical difference between status and non-status relationships. But it would only strengthen marriage within the hierarchy of status relationships if the *differences* between marriage and civil partnership in substantive terms were plainly understood and treated as significant by a sufficient proportion of the population. If civil partnership were understood as a response to the functional *similarity* of opposite-sex and same-sex couples, that would risk weakening marriage within the hierarchy of status relationships, though it may reinforce the status/non-status divide in public perception.

⁹² John Eekelaar, 'Review of Marriage Proposals: Questioning a Legal Status' (2012) 8: 2 *International Journal of Law in Context* 320-324, 323.

⁹³ HL Deb 22 Apr 2004: Vol. 660 Col. 387-433.

The extension of marriage to same-sex couples is arguably best understood as strengthening marriage, both within the hierarchy of status relationships and as the critical relationship on which the status/non-status divide turns. From the couple's perspective, however, no clear signal is provided as to whether the extension values their autonomy to choose the same status relationship as opposite-sex couples; their functional equivalence to opposite-sex couples; both; or, to the extent that the state interest lies elsewhere, neither. To the extent that extending marriage to same-sex couples strengthens marriage, it suggests that any functional commonality must be exclusive to the content or presumed content of marriage as a class. In any event, whilst the marriage-centred basis for the scope of the extension remains elusive, making the pinnacle formal legal relationship available to an additional group – same-sex couples – arguably reinforces its social significance generally.

By contrast, the extension of civil partnership to opposite-sex couples seems capable only of undermining marriage. It is important to recognise that the language of 'undermining' marriage conflates two issues, namely the strict numerical impact on individuals marrying and the broader normative impact on how individuals in society generally understand their intimate lives. Damage could be done to marriage as a social institution even in the absence of significant impact on the numbers entering marriage. I suggest the extension of civil partnership to opposite-sex couples risks highlighting that marriage of itself does nothing special to transform couples' relationships. This is not an argument that marriage should be 'de-moralized – that it does not have a *sui generis* moral status or a transformative moral power',⁹⁴ which is outside the scope of this discussion. Rather, it is an argument that, whatever normativity can be attributed to marriage, is not inherent to the bare legal status.

The very claim made by the *Steinfeld* couple shows the risk of inverting the hierarchy of status relationships, with the ostensibly more modern civil partnership being seen as more desirable. This also casts doubt on any suggestion that the extension of civil partnership could be neutral toward marriage, rather than necessarily risk undermining it. Any inversion of the hierarchy of status relationships could have far-reaching consequences: whilst there is no magic in marital status and the couple themselves unconsciously take on the role of the man behind the curtain, the public perception of the specialness of marriage may be fundamental to a flourishing society. As Probert notes, '[t]he evidence suggests that the

⁹⁴ Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford: Oxford University Press, 2012) 1.

public still perceives marriage as having something to offer that goes beyond the sharing of a bed and a bank balance'.⁹⁵

That extending civil partnership to opposite-sex couples might undermine marriage and its social aims featured heavily in the debates over Lord Lester's earlier-introduced Civil Partnerships Bill.⁹⁶ Baroness Wilcox, for example, argued that

[t]o give heterosexuals who choose not to take on the responsibilities of marriage the privileges of those who do marry would not fulfil the aim of all legislation; namely, promoting the well-being of society'.⁹⁷

As with the recently-expressed disavowal that binding nuptial agreements would undermine marriage,⁹⁸ there is no evidence either way. There are comparative European insights available, including evidence of the democratisation of PACS in France so that socio-economic, educational, and career backgrounds correlate less strongly with whether a couple marries or enters into a PACS.⁹⁹ But such comparative perspectives are only partial and jurisdictions' distinctive social contexts make comparative data unreliable indicators of the impact of domestic legal change.¹⁰⁰

Further, it is notable that Lord Lester later changed his view on the justification for including opposite-sex couples within civil partnership. During the debates over the Civil Partnership Bill that became the 2004 Act, he suggested that civil *marriage* provided opposite-sex couples with the 'legal equivalent' of civil partnership.¹⁰¹ If this is correct, there is no need to risk undermining marriage by extending civil partnership to opposite-sex couples. Indeed, the trend towards civil marriage, which, at 70 percent of all marriages, was a 'record proportion' in 2012,¹⁰² both serves as indirect evidence that extending civil partnership risks undermining marriage and demonstrates the modernisation of marriage.

⁹⁵ Rebecca Probert, 'Marriage at the Crossroads in England and Wales' in M. Garrison and E. S. Scott (eds) *Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty-First Century Families* (New York: Cambridge University Press, 2012) 73-86, 83.

⁹⁶ [HL] 9 Jan 2002.

⁹⁷ HL Deb 25 Jan 2002: Vol. 630 Col. 1691.

⁹⁸ See, for example: *Radmacher v Granatino* [2010] UKSC 42, Lord Phillips: [52]; Law Commission. (2014). Report No 343, *Matrimonial Property, Needs and Agreements* (London: HMSO) [4.20].

⁹⁹ Estelle Bailly and Wilfried Rault, 'Are Heterosexual Couples in Civil Partnerships Different from Married Couples?' (2013) 497 *Population and Societies* 1-4.

¹⁰⁰ Marsha Garrison, 'The changing face of marriage' in J Eekelaar and R George (eds) *Routledge Handbook of Family Law and Policy* (London: Routledge, 2014) 3-13, 10; Gaffney-Rhys (n 49) 193, noting that the French public seem to treat PACS as a 'trial marriage'.

¹⁰¹ HL Deb 24 June 2004: Vol. 662 Col. 1407.

¹⁰² Haskey (n 50) 57.

Tim Loughton MP argued for the opposite during the first reading in the House of Commons of his proposed amendment Bill to the 2004 Act. He contended that extending civil partnership to opposite-sex couples would bring benefits for couples and children, as well as increased stability for society.¹⁰³ But he did not consider the impact on marriage, only on cohabitants, hence his reference to the ‘common law marriage’ myth.¹⁰⁴ Similarly, Haskey argues that ‘the advent of civil partnerships for same-sex couples has highlighted the relative disadvantage of opposite-sex cohabiting couples’.¹⁰⁵ By contrast, I suggest that it is important to distinguish concerns about marriage from those that relate to lack of provision for cohabitants. If the latter is our concern, why not address that directly? Otherwise, the debate over extending civil partnership to opposite-sex couples seems to collapse into an argument for abolishing the distinction between status and non-status relationships. In other words, the extension of civil partnership risks undermining *both* marriage and civil partnership.

Yet, if an equality-based discrimination argument requires such an extension, does that not mean the only question is at what price equality? Even if any extension were aimed at providing the opportunity to choose the full range of status relationships rather than providing for those in non-status relationships, any such autonomy-oriented intention cannot avoid the functionally-grounded levelling of the treatment of status and non-status relationships. Thus, despite the Government being explicit that it will not make any changes to cohabitants’ rights in this Parliament,¹⁰⁶ might such change be unavoidable?

Given that public policy and public debate is ongoing, as evidenced by the inconclusive Government consultations, one logical conclusion is that, if they continue to press their case, the claimants risk that civil partnership will be abolished in response. This is particularly so given that, as Andrews J notes,¹⁰⁷ only two out of 43 member states of the Council of Europe have a form of civil union equivalent to marriage that is open to both same-sex and opposite-sex couples. Whilst, as noted, the Government most recently stated a preference for maintaining civil partnership, this is not inevitable. Conversely, if the *Steinfeld* couple’s

¹⁰³ HC Deb 21 Oct 2015: Vol 600 Col. 960 ff.

¹⁰⁴ *ibid*, Col. 961.

¹⁰⁵ Haskey (n 50) 57.

¹⁰⁶ Department for Culture, Media, and Sport, *Consultation* (n 2) [1.8].

¹⁰⁷ *Steinfeld* (n 1) [69].

argument is successful and marriage is undermined, civil partnership may be said to have been a ‘stepping stone’¹⁰⁸ to both an extended version of marriage that is less than fully equal and a devalued institution of marriage generally, albeit one that now includes same-sex couples, though on less-than-fully-equal terms.

7 Conclusion: The Means of Law Reform and the Public Interest

At the heart of the *Steinfeld* couple’s legal challenge lie two crucial issues: Firstly, is it for the courts or Parliament to pursue reform in the regulation of adults’ intimate relationships? Secondly, how amenable to change are marriage and civil partnership, the legal institutions that regulate intimate life?

In the United Kingdom, all of the other critical developments in this field have come from Parliament. If we revisit the difference between equality-based and liberty-based discrimination arguments, we might see this as grounded in the fact that, to date, these issues have been matters for the exercise of moral judgment. In *Wilkinson*, for example, Potter P suggested Parliament ostensibly introduced civil partnership ‘not because it felt obliged to in order to comply with the norms of European law or the rulings of the European Court or the ECtHR, but because it elected to do so as a policy choice’.¹⁰⁹ However, the Government’s wait-and-see policy, procedurally justifiable though it is, has created a situation in which an equality-based discrimination claim undercuts the freedom for public policy and public debate. This is why it cannot be determinative that in excess of 75 percent of the more than 10,000 online survey responses to the Government’s consultation were opposed to extending civil partnership to opposite-sex couples.¹¹⁰

This conclusion holds even though, as noted above, the distinction between equality-based and liberty-based claims is a matter of emphasis only. The equality-based argument is able to rely on the justifiability of the comparison as immediately instantiated by the end-product of two liberty-based developments; the moral value of marriage has been determined in a way that precludes a narrower view of the moral value of civil partnership. It is for this reason

¹⁰⁸ Department for Culture, Media, and Sport, *Consultation* (n 2) [3.3].

¹⁰⁹ *Wilkinson* (n 4) [49].

¹¹⁰ Department for Culture, Media and Sport, *Report* (n 31) 4.

that Andrews J is mistaken to conclude that the issue of the extension of civil partnership to opposite-sex couples is a matter of social policy for a democratically-elected government to address and does not fall within the ambit of the Court's supervisory powers.¹¹¹

The *Steinfeld* couple's appeal to the Court of Appeal is scheduled to be heard before the end of 2016. As an equality-based discrimination claim, it seems correct that the claim should be allowed on appeal. Yet, as the preceding discussion of the public interest highlights, the impact on the broader public interest in marriage of allowing such a claim is both much more complex and potentially undesirable. However, if the Court of Appeal were to explicitly adopt an equality-based perspective on the discrimination claim, it would allow it to strike down the restrictions on the access to civil partnership with only a thin account of the institutions that regulate adult intimate status relationships. This would reduce the risks attendant to allowing the *Steinfeld* couple's appeal and address Andrews J's expressed concerns about this development coming from the court, and not Parliament.

As discussed above, the claimant couple assumes marriage is immutable but civil partnership is not; the government contends that civil partnership should be seen as immutable and the justifiability of constraining the couple's choice of status relationships to marriage requires seeing marriage as not. The *Steinfeld* couple's view of marriage accords with the earlier view of its development. Writing in 1957, Jolowicz:

The family law of modern Europe derives less than most branches from Roman models. ... [I]n the main it is due to the fact that the central institution of family life – marriage – is based on Christian ideas which had penetrated only to a limited extent into the *Corpus Juris*. Even in countries in which secularization has gone very far, where a religious wedding is not recognized by the state and divorce is permitted on many grounds, the basic way of looking at marriage is still that of Canon law.¹¹²

The social trends discussed above, however, suggest that the meaning of marriage is now more fluid. The dominant organisational role played by marriage in society, of which we are 'rare[ly] reminded',¹¹³ highlights the need to ensure any law reform has at its heart its broader social implications, including its substantive and expressive consequences. If the Court of Appeal were inclined to seek to avoid risking any negative impact on marriage, it might explicitly develop Lord Lester's suggestion, discussed above, on the nature of the comparison

¹¹¹ *Steinfeld* (n 1) [22].

¹¹² Herbert Felix Jolowicz, *Roman Foundations of Modern Law* (Oxford: Clarendon Press, 1957) 141.

¹¹³ Probert (n 95) 74.

between marriage and civil partnership. If civil marriage can be seen as the equivalent of civil partnership, and the more modern perspective on marriage that eschews the anachronistic and patriarchal aspects to which the *Steinfeld* couple object, there may yet be scope to justifiably deny their equality-based claim.