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Articles

Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe

Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe

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Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe: Carmen Draghici

Draghici, Carmen: Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe

Civil partnership – respect for private and family life – non-discrimination – sexual orientation – gender-neutral marriage – declaration of incompatibility

Example3Begin

The fact that heterosexual couples still cannot form civil partnerships after the introduction of gender-neutral marriage contravenes Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Albeit optional under the Convention (like adoption, parental leave or child benefits), civil partnership is an institution engaging the right to respect for family life and its domestic regulation demands conformity with Convention principles, including non-discrimination. This article contrasts states' wide margin of appreciation in matrimonial matters under Article 12 with the limited discretion under Article 8 and discusses the strict proportionality test applicable to differences in treatment exclusively based on sexual orientation. It dismisses the justifications espoused by executive and judicial authorities in recent litigation for the indefinite postponement of reform, namely the overestimated costs of legislative amendment, the subordination of the equality principle to the number of takers, and attempts to gauge social demand through post-2014 statistics on gay partnerships. Finally, it provides arguments for removing discrimination by opening civil partnership to opposite-sex couples rather than abolishing it: obviating hardship for family units lawfully constituted abroad, ensuring privacy for individuals whose disclosure of civil status reveals sexual orientation, and fostering a pluralist, tolerant society, accommodating ideological objections to marriage.

Example3End

Introduction

At the time of its adoption, the Civil Partnership Act 2004 (CPA 2004) provided same-sex couples with the only avenue available to formalise their union in the eyes of the law. After the liberalisation of marriage legislation in 2013, the parallel existence of gender-neutral

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marriage and a civil institution accessible to same-sex couples only has become legally untenable. Whilst the Marriage (Same Sex Couples) Act 2013 (MSSCA 2013) aimed at removing the last remnants of inequality in family law, it paradoxically resulted in a new form of discrimination, in that same-sex couples now have a choice between two routes for formalising their union, whereas opposite-sex partners only have one; they can either marry or forego the protection of the law.

This article maintains that the situation described is in contravention of Article 8 (right to respect for family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the Convention) read in conjunction with Article 14 (non-discrimination). According to a well-entrenched Strasbourg principle, ‘differences based on sexual orientation require particularly serious reasons by way of justification’.¹ This stringent test benefits both sets of couples equally and, as discussed below, the objections of the UK’s authorities to removing the aforementioned difference in treatment rely on wholly unconvincing grounds. Contrary to the decisions of the High Court and Court of Appeal in *Steinfeld v Secretary of State for Education*,² this paper argues that the UK has an obligation to end discriminatory access to civil partnership without delay, even if the introduction of civil partnerships was not required under the Convention. In fact, the wide discretion enjoyed by Convention states in regulating marriage and deciding whether to offer alternative institutions stands in contrast to the close scrutiny of enacted civil partnership legislation.

Marriage remains a field of domestic regulatory freedom.³ The European Court of Human Rights (the European Court) has recognised that rules concerning the validity of marriage (capacity requirements, celebration formalities) are best left to the determination of each state; in fact, ‘Article 12 expressly provides for regulation of marriage by national law’.⁴ Moreover, since ‘marriage has deep-rooted social and cultural connotations which may differ largely from one society to another’, the European Court ‘must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society’.⁵ Predictably, the fact that several states have extended marriage to same-sex partners was interpreted as reflecting their own vision of marriage, rather than Convention obligations.⁶ Article 12 still ‘enshrines the traditional concept of marriage as being between a man and a woman’.⁷ Moreover, states have no positive obligation under Article 8 to legalise civil partnership.⁸ This tenet remains largely unaffected by the state-specific finding in *Oliari v Italy* that Italy’s failure to provide a legal framework for same-sex relationships breached Article 8.⁹ The court did not suggest that the Convention

¹ *Schalk and Kopf v Austria* (Application No 30141/04) (2011) 53 EHRR 20, para [97].

² [2016] EWHC 128 (Admin), [2016] 4 WLR 41; [2017] EWCA Civ 81, [2017] 2 FLR 692.

³ However, the conditions for the exercise of the right to marry do not lie entirely within the state’s margin of appreciation, otherwise the essence of the right could be nullified. See C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty?* (Hart, 2017), pp 39–68.

⁴ *B and L v United Kingdom* (Application No 36536/02) [2006] 1 FLR 35, para [36].

⁵ *Schalk and Kopf v Austria* (Application No 30141/04) (2011) 53 EHRR 20, para [62].

⁶ *Parry v United Kingdom* (Application No 42971/05) (unreported) 28 November 2006; *Hämäläinen v Finland* (Application No 37359/09) (2015) 37 BHRC 55.

⁷ *Rees v United Kingdom* (Application No 9532/81) [1987] 2 FLR 111, para [49].

⁸ *Schalk and Kopf v Austria* (Application No 30141/04) (2011) 53 EHRR 20; *Vallianatos and Others v Greece* (Applications Nos 29381/09 and 32684/09) (2014) 59 EHRR 12.

⁹ (Application Nos 18766/11 and 36030/11) (2015) 40 BHRC 549, paras [179]–[187]. See C Draghici, ‘The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?’ (2017) *Public Law* 11, pp 25–28.

law had moved on to require all Council of Europe (CoE) states to legalise same-sex unions; instead of an evolving European consensus, the court noted ‘the changing conditions *in Italy*’,¹⁰ the ‘repetitive failure of legislators to take account of [Italian] Constitutional Court pronouncements’,¹¹ and the fact that ‘there [wa]s *amongst the Italian population* a popular acceptance of homosexual couples, as well as popular support for their recognition and protection’.¹² The analysis thus focused on the narrow consideration that, in Italy, same-sex couples enjoyed a *constitutional* right to recognition, which Parliament had not secured. The violation therefore stemmed from an unconstitutional legislative lacuna rather than a failure to comply with a positive obligation under Article 8. Whilst the *Oliari* judgment might pave the way towards a future Convention obligation to provide legal recognition for same-sex couples, *de lege lata* the introduction of civil partnerships remains governed by state discretion.

Conversely, there is a narrow margin of appreciation in the regulation of civil partnerships, where available. Not only are permissible restrictions limited to those ‘necessary in a democratic society’ within the meaning of Article 8(2), but the cultural and religious factors justifying discretion in matrimonial matters are absent. The denial of access for different-sex couples therefore amounts to ‘treating differently, without an objective and reasonable justification, persons in relevantly similar situations’.¹³ The 2016 ruling of the High Court was largely based on a conflation between states’ discretion not to establish institutions akin to marriage and an absolute freedom to regulate such institutions when a state chooses to introduce them: ‘[t]he denial of a *further* means of formal recognition which is open to same-sex couples, does not amount to unlawful state interference with the [heterosexual] 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’.¹⁴ Restricted access to civil partnership in a jurisdiction offering gender-neutral marriage has never been assessed in Strasbourg, and hence municipal courts must consider the whole body of case-law on discrimination and Article 8 rights. This article will explore what I view as a more accurate application of that jurisprudence.

The first section rebuts the argument that Article 8 does not apply to the regulation of civil partnerships (which, astonishingly, enjoyed some initial success in domestic litigation); it also shows that this is not an area of exclusive, or even wide, discretion for domestic legislatures. The following section focuses on Convention principles governing *prima facie* discrimination: a narrow margin of appreciation in establishing differences in treatment based on suspect grounds, such as sexual orientation, and a strict proportionality test, placing the burden on the state to provide cogent justifications, rather than on the individual to demonstrate entitlement or detriment. I then consider the two options for remedying the discriminatory *status quo*, namely the repeal of CPA 2004 and the opening of civil partnership to opposite-sex couples, providing arguments for the latter. Finally, the last section examines the validity of the Government’s ‘wait and see’ justification for deferring

¹⁰ Ibid, para [186] (emphasis added).

¹¹ Ibid, para [184]. The concurring opinion (Judges Mahoney, Tsotsoria and Vehabović) specifically grounded the decision in the respondent’s constitutional framework and the expectation of good faith cooperation between the arms of government in a democracy characterised by the rule of law.

¹² Ibid, para [181] (emphasis added).

¹³ *Willis v United Kingdom* (Application No 36042/97) [2002] 2 FLR 582, para [48].

¹⁴ *Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [39] (emphasis in original).

the adoption of either route to equality,¹⁵ which disappointingly led to the dismissal of the *Steinfeld* appeal in 2017.

The ‘attached rights’ rationale and the limits of discretion

Whilst the issue of a positive obligation to offer *heterosexual* couples a means of formal recognition distinct from marriage was not addressed in Strasbourg litigation, the arguments employed in *Schalk* and *Vallianatos* to dismiss same-sex couples’ claim to a civil partnership (in particular the fact that the Convention is silent on the matter and that there is no European consensus) would probably lead to the rejection of heterosexual couples’ analogous claim. However, the issue under examination does not concern a claim to a *new* institution, but rather the existence of sufficient reasons justifying selective access to an *existing* institution. According to consolidated Strasbourg jurisprudence, a difference in treatment in the enjoyment of a Convention right is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or the means employed are disproportionate to the aim pursued.¹⁶ The distinction between access to an existing institution and claims to a new institution was decisive in *Vallianatos*: whereas Article 8 did not confer a right to form a civil partnership,¹⁷ the state had an obligation not to exclude certain couples from the scope of civil partnership legislation, once introduced, on grounds of sexual orientation; since same-sex and heterosexual couples are in a comparable situation as regards family life, any difference in treatment would require a compelling justification.¹⁸ *Vallianatos* thus suggests that, absent cogent reasons, the CPA 2004 eligibility system based on sexual orientation is not Convention-compliant.

Although *Schalk*, *Vallianatos* and *Oliari* leave no doubt as to the applicability of Article 8 to civil partnership regulation (and hence of Article 14, since a Convention right is engaged), the High Court was unconvinced. It oddly equated the proposition that Article 8 did not require the introduction of civil partnerships with the conclusion that Article 8 does not *apply* to civil partnership legislation.¹⁹ It should therefore be recalled, before considering possible justifications for the difference in treatment, that the prohibition on discrimination extends to a number of rights that are not mandatory under the Convention but are somehow related to a Convention area (for example family life). The court has clarified that: ‘Article 14 comes into play whenever “the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed”, or the measures complained of are “linked to the exercise of a right guaranteed”’.²⁰ The essence of this principle can be traced back to the *Belgian Linguistic Case*, in which the court held that, although Article 2 of Protocol No 1 did not grant a right to a particular type of educational establishment (for example a French-speaking school), once it was instituted, entry requirements could not be discriminatory; by analogy, a state instituting a system of appeal courts goes beyond its Article 6 obligations, however it is not permitted to discriminate in granting access to an appeals process.²¹ Melchior helpfully

¹⁵ *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 2 FLR 692, para [12] (per Arden LJ).

¹⁶ See *Belgian Linguistic Case (No 2)* (1979–80) 1 EHRR 252, para [10].

¹⁷ See *Vallianatos and Others v Greece* (Applications Nos 29381/09 and 32684/09) (2014) 59 EHRR 12, para [75].

¹⁸ See *ibid*, para [78].

¹⁹ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, paras [55]–[56]. As expected, the judgment was met with negative comment (see for example C Fenton-Glynn, ‘Opposite-sex civil partnerships and the ambit of Art 8’ [2016] Fam Law 431).

²⁰ *Petrovic v Austria* (Application No 20458/92) (2001) 33 EHRR 14, para [28]; *Okpiz v Germany* (Application No 59140/00) (2005) 42 EHRR 671, para [31].

²¹ (1979–80) 1 EHRR 252, para [9].

described these as ‘attached rights’:²² neither expressly contemplated in the Convention nor implied (necessary for the exercise of express rights),²³ but connected *ratione materiae* with one of the rights protected, and hence requiring regulation consistent with the general Convention philosophy. I am borrowing the ‘attached rights’ label from the academic literature insofar as the court has not elaborated any specific terminology to encapsulate ‘those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide’.²⁴ The judicial recognition of a special category of rights, non-mandatory under the Convention but somehow ‘attached’ to it, cannot be overestimated. Article 14 does not protect a self-standing right to non-discrimination and for an application to be admissible it must engage a Convention Article. Bringing further rights within the Convention’s ambit expands the scope of Article 14: although applicants invoking ‘attached rights’ do not claim an entitlement to those rights, they ask not to be discriminated against in the regulation of those rights. As Greer explained: ‘Where states decide to provide a service which they are not required to do under the Convention ... an obligation arises to manage it in a Convention-compliant manner, for example, by ensuring that it functions without discrimination’.²⁵

Extensive case-law casts further light on the operation of ‘attached rights’. In *EB v France* the court held that the right to adopt a child, whilst not mandatory under the Convention, nevertheless ‘falls within the ambit of Article 8’.²⁶ Another example is the right to parental leave, which, according to *Petrovic v Austria*, comes within the scope of Article 8 insofar as, by granting it: ‘States are able to demonstrate their respect for family life’.²⁷ Also, even though ‘Article 8 does not impose any positive obligation on states to provide ... financial assistance’ to parents, ‘this allowance paid by the state is intended to promote family life and necessarily affects the way in which the latter is organised as ... it enables one of the parents to stay at home to look after the children’.²⁸ Another informative precedent is *PB and JS v Austria*: although Article 8 did not guarantee a right to have insurance benefits extended to a cohabiting partner, the possibility of doing so under domestic law functioned as a measure intended to improve the insured person’s private and family situation, and so the case fell under Article 8.²⁹

Adoption, parental leave, child allowance and insurance benefits for family members are all discretionary state initiatives, but where a domestic right granting them is created, it falls within the material sphere of Article 8. As a result, it cannot be granted on a discriminatory basis; eligibility to adopt cannot be restricted on grounds of sexual orientation,³⁰ nor can there be differences in treatment between servicemen and servicewomen or civilians in respect of

²² See M Melchior, ‘Rights Not Covered by the Convention’, in R St J Macdonald et al (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), pp 593–601.

²³ See *Golder v United Kingdom* (Application No 4451/70) (1979–80) 1 EHRR 524, paras [35]–[36].

²⁴ *EB v France* (Application No 43546/02) [2008] 1 FLR 850, para [48] (emphasis added). See also *PB and JS v Austria* (Application No 18984/02) (2012) 55 EHRR 31, para [32].

²⁵ See S Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000), p 30.

²⁶ (Application No 43546/02) [2008] 1 FLR 850, para [49].

²⁷ (Application No 20458/92) (2001) 33 EHRR 14, para [29]. Although the court found that the difference in treatment was justified, the recognition of the applicability of Articles 8 and 14 to a purely domestic right remains significant.

²⁸ *Ibid*, paras [26]–[27].

²⁹ (Application No 18984/02) (2012) 55 EHRR 31, paras [32]–[34].

³⁰ *EB v France* (Application No 43546/02) [2008] 1 FLR 850.

parental leave.³¹ Similarly, treating foreign parents differently with regard to child benefits on the basis of their immigration status amounts to discrimination.³² These rulings are all the more significant since, as Warbrick noted, the court has been traditionally reluctant to establish obligations in connection with economic rights, which remain in principle outside the sphere of the European Convention.³³

The far-reaching potential of ‘attached rights’ is demonstrated by their capacity to bring under international supervision measures adopted in largely discretionary areas of Article 8, such as immigration rules. In *Abdulaziz, Cabales and Balkandali v United Kingdom*, the court thus rejected the allegation that a state did not breach Article 14 ‘by reason of the fact that it acted more generously in some respects ... than the Convention required’ (*in casu*, facilitating the admission of non-national wives/fiancées of *men* settled in the country); on the contrary, discrimination includes ‘cases where a person or group is treated, without proper justification, less favourably than another, *even though the more favourable treatment is not called for by the Convention*’.³⁴

The approach to European consensus in *Petrovic v Austria* and *Weller v Hungary* is also noteworthy. The European Court held that ‘the lack of a common standard does not absolve those states which adopt family allowance schemes from making such grants without discrimination’.³⁵ Therefore the absence of European consensus on an obligation to introduce an ‘attached right’ does not detract from the prohibition of discrimination in the enjoyment of that right, where states choose to create it. Furthermore, the consensus analysis is not always decisive in discrimination cases; in fact, it did not feature in the court’s *ratio decidendi* in *EB v France* and *Karner v Austria*.³⁶ Having ascertained in *Fretté v France* that no consensus existed on homosexual adopters and therefore states enjoyed a wide margin of appreciation,³⁷ in *EB* the court chose not to engage with the respondent’s argument that ‘present-day conditions had not sufficiently changed to justify a departure from precedent’ and that ‘there was no European consensus on the subject’.³⁸ Similarly, in *Karner* the court merely took note of the third-party interveners’ submission that ‘a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners’,³⁹ without discussing whether any consensus existed on the recognition of same-sex partners as family members for the purposes of succession to tenancies.

All of the above considerations suggest that, from a Convention perspective, civil partnerships represent an ‘attached right’: their availability in this jurisdiction is not mandated by the Convention, however an institution allowing couples to gain legal recognition and

³¹ *Markin v Russia* (Application No 30078/06) (2013) 56 EHRR 8.

³² *Okpiz v Germany* (Application No 59140/00) (2005) 42 EHRR 671, para [32]. See also *Weller v Hungary* (Application No 44399/05) (unreported) 31 March 2005, para [34].

³³ See C Warbrick, ‘Economic and Social Interests and the European Convention on Human Rights’, in M Baderin and R McCorquodale, *Economic, Social, and Cultural Rights in Action* (OUP, 2007), p 246.

³⁴ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1984) 6 EHRR 28, para [82] (emphasis added).

³⁵ *Petrovic v Austria* (Application No 20458/92) (2001) 33 EHRR 14, para [34]; *Weller v Hungary* (Application No 44399/05) (unreported) 31 March 2005, para [34].

³⁶ (Application No 43546/02) [2008] 1 FLR 850; (Application No 40016/98) [2003] 2 FLR 623.

³⁷ (Application No 36515/97) [2003] 2 FLR 9.

³⁸ (Application No 43546/02) [2008] 1 FLR 850, paras [64]–[65]. The court’s analysis (paras [70]–[98]) makes no reference to consensus.

³⁹ (Application No 40016/98) [2003] 2 FLR 623, para [36].

rights constitutes a means through which the state ensures respect for family life, and hence it comes under the scope of Article 8. Once the UK has gone beyond Convention requirements and created a new right engaging family life, it cannot discriminate in granting access to it. It is thus irrelevant, although the Government attempted this argument in *Steinfeld*,⁴⁰ that the UK is not a party to Protocol No 12, which, unlike Article 14, establishes a general prohibition of discrimination in respect of any domestic right, not just Convention rights.

Rather inexplicably, non-discrimination in the enjoyment of ‘attached rights’ was not considered by the High Court, which held: ‘there is nothing in *Schalk* or in *Vallianatos* to support the contention that if a state voluntarily extends an existing form of legal status (here, marriage) to couples of a particular sexual orientation, it must be *compelled* to simultaneously extend a different existing form of legal status specifically created for such couples in order to give them equal rights, to couples of a different sexual orientation who could always marry’.⁴¹ However, the applicable case-law is not limited to those two judgments. As briefly outlined above, the wider picture of the Strasbourg approach to optional national rights concerning family life is that such rights are capable of attracting the application of the Convention and hence any difference in treatment requires justification. The Court of Appeal has now accepted that the registration of a civil partnership falls under Article 8, either because it is ‘a means of, or modality for, promoting family life’,⁴² following the language of *Petrovic v Austria*, or because ‘a measure concerning the regulation of a same-sex or different-sex relationship’ is ‘close to the core values that Article 8 protects; namely “respect for family life”’.⁴³ It also dismissed the contention that the ‘fall within the ambit’ test includes a demonstration of adverse effect.⁴⁴ A conclusive authority on this point not referenced in *Steinfeld* is *EB*: ‘The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary *but it is also sufficient* for the facts of the case to fall “within the ambit” of one or more of the Articles of the Convention’.⁴⁵ This renders the discussion of whether introducing civil partnership might correspond to a positive obligation under Article 8⁴⁶ superfluous. The wording used by Beatson LJ is perhaps confusing insofar as it speaks about ‘establish[ing] that a *disadvantage* falls “within the ambit” of Article 8’.⁴⁷ *Abdulaziz*, surprisingly not cited by the appellate judges, indicated that being excluded from a *privilege* (a ‘more favourable treatment’) in a Convention area, rather than suffering a *prejudice*, also raises an Article 14 issue. Importantly, however, the Court of Appeal emphasised that it is not necessary to show a violation of Article 8 taken alone in order to bring the complaint within the scope of the Convention.

It is thus no longer disputed that Article 8 applies to the regulation of civil partnerships, including eligibility bars, and that any difference in treatment in respect of access to this institution requires objective and sufficient reasons. Major uncertainties seem to remain as to the criteria justifying interferences with this right. It is this area of jurisprudence and its application to the civil partnership regime that the next section will examine.

⁴⁰ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [24].

⁴¹ *Ibid*, para [54] (emphasis in original).

⁴² [2017] EWCA Civ 81, [2017] 2 FLR 692, para [25] (per Arden LJ).

⁴³ *Ibid*, para [139] (per Beatson LJ).

⁴⁴ *Ibid*, paras [26]–[29], [140]–[145].

⁴⁵ (Application No 43546/02) [2008] 1 FLR 850, para [47] (emphasis added).

⁴⁶ *Steinfeld v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 2 FLR 692, paras [30]–[32].

⁴⁷ *Ibid*, para [141] (emphasis added).

The burden of proof in discrimination cases

Heightened proportionality scrutiny

It is a well-established Strasbourg principle that '[w]here a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow'.⁴⁸ Moreover, '[d]ifferences based *solely* on considerations of sexual orientation are unacceptable under the Convention'.⁴⁹ The European Court has supported this position by reference to, inter alia, soft law of the CoE institutions, in particular the collective aim expressed in CoE instruments of combating discrimination based on sexual orientation. In an ultra-formalistic reading of the case-law, the High Court downplayed the importance of that principle and accepted the Government's submission that the Committee of Ministers Recommendation on measures to combat discrimination on grounds of sexual orientation was 'simply a recommendation', adding that the European Court 'said nothing specifically to endorse it, let alone to suggest that failure to follow it would engage Article 8 either in isolation or read together with Article 14'.⁵⁰ Naturally, the European Court cannot treat CoE soft law as technically binding; however, it was acknowledged as persuasive expression of European consensus to combat discrimination on grounds of sexual orientation.⁵¹ This is consistent with the court's mandate to seek indicators of the 'common heritage' of Convention parties and their shared understanding of what human rights protection requires.⁵² Failure to follow the CoE anti-discrimination agenda may not automatically lead to a violation of the European Convention, but it certainly places an expectation on the respondent state to justify its departure from the common position.

Another fundamental feature of cases involving *prima facie* discrimination (*Karner*, *Vallianatos*) is the application of a strict proportionality test, requiring states to demonstrate that the different treatment was *necessary* (that is indispensable, rather than merely adequate to support a legitimate aim). Thus, in *Karner* the court did not accept that in order to promote marriage it was necessary to exclude same-sex partners from the law on succession to tenancies:

'In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people ... from the scope of application of [the impugned law]'.⁵³

Similarly, in *Vallianatos* the court was not persuaded that, in order to improve the legal position of children born outside marriage, it was *necessary* to exclude same-sex couples

⁴⁸ *Vallianatos and Others v Greece* (Applications Nos 29381/09 and 32684/09) (2014) 59 EHRR 12, para [77]. See also *Karner v Austria* (Application No 40016/98) [2003] 2 FLR 623, para [41]; *Kozak v Poland* (Application No 13102/02) (2010) 51 EHRR 16, para [92].

⁴⁹ *Vallianatos*, para [77] (emphasis added). See also *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 47, para [36]; *EB v France* (Application No 43546/02) [2008] 1 FLR 850, para [96].

⁵⁰ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [48].

⁵¹ In *Vallianatos*, the CoE recommendation features in the *Comparative, European and International Law* section (paras [29]–[30]) and is implicitly endorsed as evidence of an emerging legal trend (para [91]).

⁵² See ECHR Preamble and Article 1(a), CoE Statute.

⁵³ (Application No 40016/98) [2003] 2 FLR 623, para [41].

from the scope of civil partnership law.⁵⁴ In addition, the court noted that out of the 19 CoE states having introduced registered unions, only two (Greece and Lithuania) reserved them to different-sex couples, and concluded that a consensus was emerging towards gender-neutral alternatives to marriage.⁵⁵

That emerging consensus should weigh considerably in the evaluation of the proportionality of the UK civil partnership scheme. As Gaffney-Rhys emphasised: ‘The UK is the only contracting state to extend marriage to same-sex couples and to retain the registered partnership as a same-sex institution, which may make it difficult to justify under the [Convention]’.⁵⁶ Although the state occupying an isolated position in Europe is not *ipso facto* in breach of the Convention, the existence of consensus greatly narrows the margin of appreciation, requiring the respondent to provide particularly weighty justifications; in practice, the demonstration of proportionality almost invariably fails.⁵⁷ Consequently, a restriction deemed unnecessary by the overwhelming majority of Convention states is hardly ever proportionate; this applies to the UK’s singular eligibility bar under CPA 2004.

Restrictions are even less likely to be proportionate where the institution in dispute was recently introduced. This is an important element in discrimination cases: long-standing tradition may expand the state’s margin of appreciation in imposing eligibility rules, whereas institutions with no historical claims leave less room for discretionary exclusions. For instance, in *Burghartz v Switzerland*, when considering whether the refusal to allow a husband to add his wife’s surname to his own had an objective and reasonable justification, the court placed weight on the fact that women had not enjoyed the right sought by the applicant until recently, and hence no genuine tradition existed.⁵⁸ The absence of a historical tradition in the UK for the newly introduced civil partnership stands in contrast to the deeply rooted understanding and practice of marriage, and therefore calls for a heightened proportionality scrutiny.

Whilst there is no Strasbourg precedent on this matter, the closest reference is *Vallianatos*, which concerned access to *existing* civil partnerships, and not *Schalk*, as the High Court suggested,⁵⁹ since the latter case regarded the putative obligation to *create* civil partnerships where none existed. The obligation to open civil partnership to heterosexual couples does not stem from a *positive* obligation to provide them with a ‘*further* means of formal recognition’,⁶⁰ but from the *negative* obligation to refrain from barring eligibility to an existing institution on a suspect ground such as sexual orientation. The Grand Chamber unequivocally established in *Vallianatos* that a difference in treatment as regards access to existing civil partnerships requires compelling reasons.

By recognising the importance of choice on conscientious grounds for some couples but not others, and allowing some couples but not others to manifest their belief by embracing either

⁵⁴ *Vallianatos*, para [90].

⁵⁵ *Ibid*, para [91].

⁵⁶ R Gaffney-Rhys, ‘Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?’ [2014] CFLQ 173, p 185.

⁵⁷ *F v Switzerland* (Application No 11329/85) (1988) 10 EHRR 411, paras [33]–[40]; *Paksas v Lithuania* (Application No 34932/04) (2014) 59 EHRR 30, paras [106], [112]; *Vallianatos*, paras [91]–[92]; *Kharchenko v Ukraine* [2011] ECHR 40107/02, paras [135]–[136]. See further C Draghici, ‘The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?’ (2017) *Public Law* 11, pp 21–25.

⁵⁸ (Application No 1632/90) (1994) 18 EHRR 101, para [28].

⁵⁹ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [71].

⁶⁰ *Ibid*, para [39] (emphasis in original).

of the two institutions available, the current regime is also potentially in breach of Article 9 read together with Article 14.⁶¹ After the MSSCA 2013, same-sex couples' beliefs *vis-à-vis* marriage are accommodated, whereas the beliefs of heterosexual couples are ignored. Briggs LJ rightly pointed out that, *within the group of individuals objecting to marriage*, only some are allowed to formalise their union through a different institution reflecting their beliefs, depending on their sexual orientation.⁶² Whilst this is a particularly problematic aspect, Briggs LJ appears unduly dismissive of the double standard as a concern *per se*, accepting it by analogy with a situation where an able-bodied individual can use both the ramp and the stairs to access a location, whereas the disabled person can only use the ramp.⁶³ The denial of the dual route to recognition for mixed-sex couples is not based on objective impossibility as in Briggs LJ's example, but on policy choice. A more relevant analogy would be between white persons being authorised to use either ramp or stairs, while black persons can only use the stairs; there is something intrinsically demeaning and discriminatory about a double standard.

Nor can the alleged marriage/civil partnership equivalence salvage this anomaly. The High Court attached unwarranted importance to the finding in *Wilkinson v Kitzinger*⁶⁴ that the symbolic differences between marriage and civil partnership do not result in an interference with family or private life where only one institution is available.⁶⁵ *Wilkinson v Kitzinger* as well as the afore-mentioned *Parry* and *Hämäläinen* only support the proposition that the European Convention does not impose a particular form of legal recognition for committed intimate relationships. What these rulings do *not* legitimise is the existence of a double standard, whereby some couples have a further legal option in addition to marriage and others do not, depending exclusively on their sexual orientation.

The relevance of 'detriment' for persons treated less favourably

Admittedly, the position of heterosexual couples requesting access to civil partnership differs from that of homosexual couples for whom marriage is not an option. Nevertheless, this distinction does not adequately account for the crucial role played for the Government and the High Court by the 'lack of detriment' for opposite-sex couples unable to form a civil partnership.⁶⁶ This is yet another skewed application of Convention principles.

Firstly, as discussed above, in 'attached rights' cases Article 8 was found engaged not because of the existence of a detriment, but because the *subject matter* of the impugned law touched upon a Convention right. Indeed, in *Vallianatos* the existence of great detriment (complete absence of legal avenues for the formalisation of same-sex relationships) did not

⁶¹ See, mutatis mutandis, *Johnston and Others v Ireland* (Application No 9697/82) (1986) 9 EHRR 203, separate opinion of Judge De Meyer (para [6]) on the breach of the right to freedom of conscience arising from the imposition of the majority's belief in the indissolubility of marriage on individuals espousing different views.

⁶² [2017] EWCA Civ 81, [2017] 2 FLR 692, para [168]. This inequality amongst marriage-objectors renders moot any attempt to question the validity of their perception that marriage maintains patriarchal connotations. It has been suggested that, by extending access to marriage, the Government may have modernised the meaning of this institution, and hence the perception of marriage as immutable may be inaccurate; see L Ferguson, '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' [2016] CFLQ 347, p 355. The different treatment of holders of the same belief and the idea of 'objective' state scrutiny over the adequacy of personal beliefs do not sit well with Articles 9 and 14.

⁶³ *Steinfeld*, *ibid*, para [167].

⁶⁴ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295.

⁶⁵ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, paras [36], [40], [85].

⁶⁶ *Ibid*, paras [15], [42], [72].

attract the protection of Article 8 taken alone. On the contrary, the court carefully stressed that same-sex couples did *not* enjoy a free-standing right to civil partnerships in a jurisdiction where they did not exist; what explained the pro-applicant outcome was the operation of the non-discrimination principle.

Secondly, the Convention test for the legitimacy of differences in treatment has little to do with the quantification of detriment. For instance, the law successfully challenged in *Karlheinz Schmidt v Germany* required men (but not women) to pay a small fire service levy if they were eligible but unwilling to serve in the local fire brigade.⁶⁷ In *Adami v Malta*, the breach of the Convention arose out of the fact that male citizens were more frequently inconvenienced by performing jury duty.⁶⁸ In family name cases (for example *Burghartz*⁶⁹), the only stake is individual preference. None of these cases revolved around the *degree of detriment*. Rather, the starting point in Article 14 cases is whether persons similarly situated have been treated less favourably and, where that is the case, the *burden of proof is on the state* to demonstrate why the distinction was justified. The triviality of the detriment cannot salvage a measure which cannot be objectively justified. Moreover, even where a certain group similarly situated is excluded from a benefit accorded on a voluntary basis rather than pursuant to Convention obligations, the state still has the onus of proving that it was necessary to exclude those persons from the application of the law;⁷⁰ it is *not incumbent on the individual applicants* to demonstrate a *pressing need for them to be included*.

Even if we accept the relevance of detriment in the assessment of proportionality, under Article 9 states are expected to refrain from passing moral judgment on a person's beliefs. For those who object to marriage, being compelled to marry in order to enjoy recognition and benefits under the law may be a significant detriment; this is a subjective evaluation. Moreover, being treated as a citizen with fewer rights and denied a choice in the sensitive realm of family life on account of one's sexual orientation qualifies at least as *moral* detriment. As Gaffney-Rhys pointed out: 'To deny opposite-sex couples the right to choose whether to marry or form a civil partnership when same-sex couples have the ability to do so, contravenes human dignity or autonomy'.⁷¹ It is therefore startling how marginal the concern for *equality as a fundamental principle* is in both the Government's approach and the High Court's *Steinfeld* judgment. The appellate decision moved away from the requirement of adverse impact, relying on the intrinsic value of public recognition of the relationship.⁷²

Both courts dedicated more attention than justified to *M v Secretary of State for Work and Pensions*,⁷³ although quite sensibly the Court of Appeal determined that it did not preclude a finding that a couple's recognition is 'of moment'.⁷⁴ According to *M*, a law imposing lower child support contributions on non-resident parents living with heterosexual, but not same-sex, partners fell outside Article 8, because it did not affect the payers' family life. The relevance of *M* for a Convention appraisal of the current civil partnership regime is marginal.

⁶⁷ *Karlheinz Schmidt v Germany* (Application No 13580/88) (1994) 18 EHRR 513.

⁶⁸ (Application No 17209/02) (2007) 44 EHRR 3.

⁶⁹ (Application No 1632/90) (1994) 18 EHRR 101.

⁷⁰ *Abdulaziz, Cabales and Balkandali v United Kingdom* (1984) 6 EHRR 28; *Karner v Austria* (Application No 40016/98) [2003] 2 FLR 623.

⁷¹ R Gaffney-Rhys, 'Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?' [2014] CFLQ 173, p 180.

⁷² [2017] EWCA Civ 81, [2017] 2 FLR 692, paras [148], [25], [140].

⁷³ [2006] UKHL 11, [2006] 2 AC 91.

⁷⁴ [2017] EWCA Civ 81, [2017] 2 FLR 692, para [62].

It pre-dates the Strasbourg recognition of same-sex cohabitation as ‘family life’ in *Schalk*, which altered the minimum common standard in Europe, as well as the domestic reconsideration of personal status after MSSCA 2013.⁷⁵ Moreover, it was superseded by *JM v United Kingdom*,⁷⁶ where the European Court found no justification for the different application of a law which sought to avoid placing an excessive financial burden on the absent parent given their new domestic circumstances (whether qualified as ‘family life’ or not). A non-resident parent in a same-sex relationship was thus similarly situated to a non-resident parent in a heterosexual relationship, and the focus of *JM* on Protocol No 1, Article 1 rather than Article 8 merely reflects the fact that considerations of status (of the parent’s relationship) were subsidiary to the practical issue of financial treatment. *M* was also taken over by *PB and JS v Austria*,⁷⁷ which confirmed that financial measures aimed at improving a person’s private and family situation *are* caught by Article 8.

The irony of the egalitarian inspiration of MSSCA 2013 when contrasted with its discriminatory consequences has not gone unnoticed.⁷⁸ Before MSSCA 2013, the justification for the difference in treatment resided in the function of CPA 2004 as a means for same-sex couples to formalise their relationship, given that marriage was reserved to different-sex couples. That justification has now entirely lapsed. The Convention affords discretion to domestic authorities only in respect of matrimonial law, whereas a recent civil institution, incapable of narrow definition based on traditional or religious grounds, needs to be accessible to everyone without distinctions concerning sexual orientation, in the pursuit of equal dignity and individual autonomy.

Reform costs, social demand and the all-important principle of equality

Considerations relating to the costs involved in changing the law featured prominently in the recent *Steinfeld* litigation. According to the respondent’s submissions, accepted by the High Court and the Court of Appeal, ‘it is a legitimate aim for the government to avoid the unnecessary expenditure of large amounts of taxpayers’ money as well as the disruption and potential waste of time and effort that could be caused by immediate legislative change’.⁷⁹ This argument is problematic on several grounds.

Firstly, the allegation of high costs does not appear substantiated. The Government depicted the change in the law as a colossal enterprise of ‘amending numerous provisions of statutes and rules to allow heterosexual couples to register civil partnerships’ ‘only to find ... that there is virtually no demand for civil partnerships’.⁸⁰ The sole major change needed is the omission of the reference to sex in section 3(1)(a) CPA; desirable amendments would include the modification of section 2(1) of the Children Act 1989 so as to allow male civil partners in heterosexual unions to automatically acquire parental responsibility for biological children⁸¹

⁷⁵ Insofar as it redefines status, MSSCA 2013 is therefore a significant change, even though domestic courts had already favoured a more generous interpretation of the term ‘family’ under our housing legislation before the *Schalk* judgment; see *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, para [80].

⁷⁶ *JM v United Kingdom* (Application No 37060/06) [2011] 1 FLR 491.

⁷⁷ (Application No 18984/02) (2012) 55 EHRR 31.

⁷⁸ See JM Scherpe, ‘Quo Vadis, Civil Partnership?’ (2015) 46(3) *Victoria University of Wellington Law Review* 755, p 763.

⁷⁹ [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [79].

⁸⁰ *Ibid.*

⁸¹ Although s 4 achieves that result through other routes.

and the inclusion of male civil partners in section 35 of the Human Fertilisation and Embryology Act 2008 so as to recognise their parenthood in relation to children born to the couple through assisted reproduction with donor gametes.⁸² Reform may also reconsider the few deliberate distinctions between civil partnership and *heterosexual* marriage reflecting biological differences, namely the omission of non-consummation as a ground for annulment and of adultery as a basis for dissolution.⁸³ With the adoption of CPA 2004, virtually all legislative areas were modified to equalise the position of civil partners and spouses; by amending the eligibility criteria in section 3 CPA, all other statutory provisions will be automatically aligned, in the same way that removing the gender requirement for a valid marriage in section 11 of the Matrimonial Causes Act 1973 has expanded the scope of numerous statutes, which now apply to ‘spouses’ of either sex. The purported costs therefore appear grossly overestimated and certainly insufficient to justify the preference for protracted discrimination.

Secondly, official statistics and empirical research suggest that social demand does exist for the introduction of opposite-sex civil partnerships. Scherpe pointed out that the 2014 report on the *Civil Partnership Review* consultation published by the Department for Culture, Media and Sport indicated that 20 percent of the unmarried heterosexual respondents to the consultation would rather form a civil partnership than marry, and hence ‘there *is* a need’.⁸⁴ Gaffney-Rhys further observed that empirical studies regarding the attitudes of cohabitants towards marriage reveal that some couples who reject marriage on ideological grounds would enter a civil partnership if this option were available.⁸⁵

Thirdly, concerns over numbers cannot outweigh the importance of upholding a fundamental principle. Regrettably, the proposition that the costs would only be justified by a high demand for civil partnerships was accepted by both High Court and Court of Appeal. According to Beatson LJ, a waiting period before contemplating reform is appropriate in order to ‘determine how many people would continue to enter into civil partnerships or want to do so because they share the appellants’ sincere objections to marriage’.⁸⁶ Quite why legislative reform is primarily predicated on the number of persons benefitting from it (or, seen from the reverse perspective, on the number of potential victims if reform is not effected) is not explained in the judgment. Scherpe convincingly argued: ‘The fact that this might be a rather small number of people cannot, in itself, serve as an acceptable argument when the issue at stake is one of equality and non-discrimination. The number of “takers” and thus “market considerations” simply do not apply in this context’.⁸⁷ If numbers could justify legislative inaction, transsexual persons’ rights may well have been overlooked; apparently, in 2004, when the Gender Recognition Act was adopted, there were only approximately 2,000 transsexuals in the UK.⁸⁸ As the dissenters emphasised in *Hatton v United Kingdom*, rejecting an argument that individuals sensitive to aircraft noise pollution were too small a section of

⁸² Although this is available under s 36 via the ‘agreed fatherhood conditions’.

⁸³ See K McK Norrie, ‘What the Civil Partnership Act 2004 does not do’ (2005) 6 *The Scots Law Times* 35. Those differences were replicated by MSSCA 2013 in relation to same-sex marriage.

⁸⁴ JM Scherpe, ‘Quo Vadis, Civil Partnership?’ (2015) 46(3) *Victoria University of Wellington Law Review* 755, p 766 (emphasis in the original).

⁸⁵ R Gaffney-Rhys, ‘Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?’ [2014] CFLQ 173, pp 187–189.

⁸⁶ [2017] EWCA Civ 81, [2017] 2 FLR 692, para [158].

⁸⁷ JM Scherpe, ‘Quo Vadis, Civil Partnership?’ (2015) 46(3) *Victoria University of Wellington Law Review* 755, p 767. See also Gaffney-Rhys, n 85 above, p 189.

⁸⁸ D Batty, ‘Q&A: Transsexualism’ *Guardian* 4 August 2004.

the community for their detriment to count, ‘one of the important functions of human rights protection is to protect “small minorities” whose “subjective element” makes them different from the majority’.⁸⁹ The balancing exercise should compare the impact on persons affected by a measure, numerous or otherwise, with the benefit to the community; thus, the prejudice of being discriminated against in the enjoyment of family life and freedom of belief weighs heavier than questionable savings for the public purse.

Finally, equality of treatment should be an overriding objective in a democracy based on respect for fundamental rights, and concerns over the time spent to remove discriminatory laws are inadequate. Unfortunately, the discourse of equality as a superior social good does not play an important part in the Court of Appeal decision allowing discrimination to continue on an indefinite (albeit purportedly provisional) basis. The swift abolition of discrimination is not merely, or even primarily, a pragmatic goal.

Removing discrimination: the two ways forward

Two options are available to rectify the current discriminatory scheme: amending CPA 2004 to allow heterosexual couples to register a civil partnership or repealing the Act, while continuing to recognise *extant* civil partnerships until the natural disappearance of all such relationships as a result of dissolution, conversion to marriage, or death.⁹⁰ The Government’s 2014 consultation on the *Future of Civil Partnerships* included a third option: the immediate abolition of civil partnership. I will not treat it separately insofar as the phasing-out and the immediate abolition essentially amount to one option, that is the elimination of this institution (whether abruptly or following a transitional stage). The abrupt abolition of civil partnerships is unlikely; requiring existing civil partners to convert their partnership into a marriage or have the relationship written off would be a highly controversial interference with their family life. As regards the two main options, arguments for opening civil partnership to different-sex couples rather than abolishing it appear more compelling.

A more tolerant approach to family law and extended legal protection

Maintaining civil partnerships and opening the institution to all couples would offer an opportunity for individuals who have ideological objections to marriage to formalise their relationship, achieve social recognition and greater legal protection. In a democratic society characterised by ‘pluralism, tolerance and broadmindedness’,⁹¹ the majority’s attachment to marriage should not preclude the acceptance of an alternative institution, especially after it has already been made available, unless there are good reasons to eliminate it.

The claimants in *Steinfeld*, who wished to formalise their *de facto* union before the birth of their child, were self-professed feminists and rejected what they considered to be the ‘patriarchal’ connotations of marriage.⁹² They argued that without access to civil partnership ‘they would be forced to enter into marriage against their conscience in order to obtain the legal protections and privileges to which they aspire, and the formal recognition of their relationship ...’.⁹³ Many feminists depict marriage as a ‘state-approved contract historically

⁸⁹ *Hatton v United Kingdom* (Application No 36022/97) (2003) 37 EHRR 611, joint dissenting opinion, para [14].

⁹⁰ This was the model adopted by other European countries upon legalising same-sex marriage. See below.

⁹¹ The expression is borrowed from *Handyside v United Kingdom* (Application No 5493/72) (1979–80) 1 EHRR 737, para [49].

⁹² [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [2].

⁹³ *Ibid.*, para [4].

implicated in the oppression of women and LGBT people'⁹⁴ and an 'institution symbolizing male supremacy and female subordination'.⁹⁵ As Gaffney-Rhys noted, numerous stakeholders, both in the heterosexual and gay communities, view marriage as having 'religious and patriarchal overtones' and a certain 'attached baggage of prevailing societal norms and expectations', whereas civil partnership is perceived as a 'more modern, egalitarian alternative'.⁹⁶ The availability of *civil* marriage for atheist couples, whereby the ceremony is stripped of religious trappings, does not remove all those historical associations and therefore does not obviate the need for reform. As Kitinger and Wilkinson pointed out, 'the symbolism of marriage, rather than its features as a civil institution, is key both to lesbian and gay couples' forced exclusion from it, and to some activists' refusal to accept or demand it'.⁹⁷ Whether one shares those views or not, a dismissive attitude towards the objection that some couples have to marriage is inconsistent with a pluralist society and respect for individual autonomy.

To revert to a system offering a single form of legal union would also be to ignore the extensive social and legal debate on whether marriage and civil partnership are equivalent. The enactment of MSSCA demonstrates that for the legislator the two institutions *are* different and ought to co-exist, otherwise 'marriage in all but name'⁹⁸ would have sufficed. It must have been ascertained by domestic decision-makers in the lead up to MSSCA 2013 that having access to one institution but not the other is inconsistent with full equality, and this conclusion should also be applied to resolve heterosexual couples' claim to gender-neutral civil partnerships favourably.⁹⁹ Nor can it be said that gay marriage was deemed necessary on account of the religious connotations previously reserved to marriage, indeed MSSCA did not introduce religious marriage for same-sex couples, but a mere opt-in for religious organisations willing to celebrate such marriages, largely analogous to what had already been achieved for civil partnerships with the Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011 (with the important caveat that the Church of England may not opt in). This shows that non-religious marriage and civil partnership are not seen as perfectly equivalent. The fact that CPA was not repealed in 2013 further indicates that civil partnership was not considered purposeless once marriage was liberalised. It would be illogical to claim that, for heterosexual couples, civil partnership would be redundant, whilst the imperfect equivalence marriage/civil partnership has been accepted in relation to same-sex couples. According to Wintemute, the failure to simultaneously liberalise marriage and repeal or reform civil partnership was actually explained by 'political expediency', that is the Government's attempt to combine the retention of civil partnerships demanded by Stonewall (the NGO promoting LGBT equality) with the preservation of marriage as the sole option for

⁹⁴ C Kitinger and S Wilkinson, 'The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership' (2004) 14(1) *Feminism & Psychology* 127, p 131.

⁹⁵ *Ibid*, p 136.

⁹⁶ See R Gaffney-Rhys, 'Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?' [2014] CFLQ 173, p 188.

⁹⁷ Kitinger and Wilkinson, n 94 above, p 145.

⁹⁸ *Wilkinson v Kitinger (No 2)* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295, para [88].

⁹⁹ It is worth noting that heterosexual couples' claim to civil partnership eligibility is different from cohabitants' expectation to receive legal protection without assuming responsibilities analogous to marriage. Such demands were dismissed by the Strasbourg institutions. See *GAB v Spain* (Application No 21173/93) (unreported) 30 August 1993 (Commission); *Zapata v Spain* (Application No 34615/97) (unreported) 4 March 1998 (Commission); *Saucedo Gomez v Spain* (Application No 37784/97) (unreported) 26 January 1999; *Shackell v United Kingdom* (Application No 45851/99) (unreported) 27 April 2000. For a discussion see C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart, 2017), pp 89–97.

heterosexual couples, favoured by the Church of England.¹⁰⁰ Whether or not this legislative choice had a political rather than principled rationale, the Government can no longer invoke the marriage/civil partnership equivalence to harness reform once it has acted in a manner that negates that equivalence.

Moreover, the availability of an alternative to marriage would extend the protection of the law to more family units. One objection to opening civil partnership to opposite-sex couples was that it would weaken the institution of marriage – a concern notably voiced by former Prime Minister David Cameron.¹⁰¹ An increase in the number of couples willing to formalise their relationship one way or another would nevertheless ensure greater stability for families, thereby benefitting children and society as a whole. Unsurprisingly, in *Vallianatos* the European Court approved of the new civil partnership law's aim of strengthening the legal status of children born to unmarried parents.¹⁰² Given the precarious nature of cohabitants' rights, it is desirable for British authorities to provide for a 'third way', by opening the civil partnership option to opposite-sex couples. Some of the respondents to the 2014 consultation suggested that heterosexual civil partnerships would 'result in greater instability within families, by offering a parallel institution that provides all the legal rights and privileges of marriage without the need for lifelong commitment'.¹⁰³ This objection is without foundation: not only is marriage not indissoluble either, but civil partnership cannot be unilaterally ended 'on demand', in fact the same grounds and bars govern divorce and dissolution of civil partnership; moreover, entering a civil partnership presupposes not only rights, but also the same (potentially lifelong) obligations as marriage.

Recognition of foreign civil partnerships: avoiding hardship for families formed abroad

Removing the current bar would implicitly put an end to the hardship arising for foreign opposite-sex civil partners living in the UK from the operation of private international law rules. In fact, section 216(1) CPA makes the same-sex requirement a pre-condition for legal recognition in this country. The Act offers thus no protection for heterosexual civil unions/registered partnerships lawfully entered into abroad. This results in the discriminatory treatment, on grounds of sexual orientation, of certain civil partnerships lawfully constituted overseas. For instance, in France the civil union regime is gender-neutral; however, same-sex partners relocating to the UK receive legal recognition, whereas heterosexual partners are treated by the law as strangers.¹⁰⁴ Practical consequences for foreign resident couples further include the inability to dissolve a partnership formed abroad in an English court in order to reacquire the capacity to marry.¹⁰⁵

Admittedly, as Crown noted, because the obligations assumed under civil partnership schemes vary across the world, foreign civil partners should not necessarily receive automatic recognition as civil partners in this jurisdiction, but rather be given the option to gain this

¹⁰⁰ R Wintemute, 'Civil partnership and discrimination in *R (Steinfeld) v Secretary of State for Education*: should the Civil Partnership Act 2004 be extended to different-sex couples or repealed?' [2016] CFLQ 365, p 367.

¹⁰¹ See 'Gay marriage: PM rejects call to allow civil partnerships for straight couples' *Guardian*, 6 February 2013.

¹⁰² *Vallianatos and Others v Greece* (Application Nos 29381/09 and 32684/09) (2014) 59 EHRR 12, paras [82]–[83].

¹⁰³ Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales) – Report on Conclusions* (June 2014).

¹⁰⁴ See CF Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 FLS 79, p 84.

¹⁰⁵ See K Mck Norrie, 'Recognition of Foreign Relationships under the Civil Partnership Act 2004' (2006) 2 *Journal of Private International Law* 137, pp 151–152.

status.¹⁰⁶ However, any reservations to the automatic recognition of foreign heterosexual civil partners should also apply to foreign same-sex civil partners. Moreover, marriage itself does not generate identical consequences in all states, yet marriages validly celebrated abroad are not required to pass further hurdles in order to be recognised in the UK. The greater scepticism towards civil partnerships and the departure from the *lex loci celebrationis* principle cannot be adequately justified.

If, to remove the inequality between same-sex and heterosexual couples, the authorities were to abolish civil partnership, foreign civil partners of either sexual orientation would remain without legal protection. Closer to home, heterosexual couples registering a civil partnership in the Isle of Man, where this option was introduced in July 2016, would not receive legal recognition in the rest of the UK. It is questionable whether Manx same-sex civil partnerships formed after the repeal of CPA 2004 would continue to be recognised in the UK. The rationale for the recognition of foreign civil partners was to afford committed couples legal protection, and that should continue to be a valid objective of a cosmopolitan society. In a world characterised by the increased acceptance of civil partnerships and high international mobility, the legislation should aim to recognise all family units lawfully constituted in their country of origin (save for public order objections, for example child marriage). From this perspective, the repeal of CPA would be an anti-progressive and non-inclusive measure.

Naturally, foreign civil partners have the option of entering a marriage when relocating to the UK, but this is not an entirely satisfactory solution. Firstly, the option is not immediately available; the parties must wait for at least 28 days after giving notice of intention to marry to the register office, which in turn requires at least seven days of residence. They would therefore be treated as strangers by the law for a certain period of time; it is worth recalling that in *Marckx v Belgium* the brief gap in legal protection between the child's birth and the mother's act of formal recognition was considered problematic.¹⁰⁷ Secondly, in cases of temporary relocation, for example for study purposes or a fixed-term work contract, it seems excessive to expect foreign couples to marry and thereby dissolve their civil partnership in the eyes of their law of nationality. Thirdly, the marriage solution diminishes the parties' autonomy in choosing between different institutions available in their home country in a manner inconsistent with the aims of private international law: to 'minimize the problems of cross-border interactions' and 'integrate [unknown phenomena] into the domestic system' by comparing foreign institutions to functionally similar institutions in the law of the forum.¹⁰⁸

Societal support for the liberalisation of civil partnership legislation

Available data indicate sufficient societal support for legal reform. Sixty-one percent of the 228,000 responses to the 2012 Equal Civil Marriage Consultation disagreed with the proposition that civil partnerships should not be made available to opposite-sex couples.¹⁰⁹ Of the 24 percent opposing the change, it was suggested some were driven by the conviction that same-sex marriage should not be open to same-sex couples, and hence the *status quo*

¹⁰⁶ See B Crown, 'Civil Partnership in the UK – Some International Problems' (2004) 48(4) *New York Law School Law Review* 697, pp 708–710.

¹⁰⁷ (Application No 6833/74) (1979–80) 2 EHRR 330.

¹⁰⁸ See SL Gössl and J Verhellen, 'Marriages and Other Unions in Private International Law – Separate but Equal?' (2017) 31 *IJLFP* 174, p 182.

¹⁰⁹ See *Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin), [2016] 4 WLR 41, paras [12]–[15]. The second consultation in 2014 received a fraction of the initial consultation's responses, with only 10,634 addressing the question of whether civil partnerships should be opened to mixed-sex couples. See statistics at paras [16]–[19].

(heterosexual marriage and gay civil partnerships) should be maintained.¹¹⁰ The Government's rebuttal to public opinion arguments in *Steinfeld* cannot but inspire perplexity:

'Civil partnerships were created to allow equivalent access to rights, responsibilities and protections for same-sex couples as those afforded by marriage. They were not intended or designed as an alternative to marriage. Therefore the government did not believe that they should now be seen as an alternative to marriage for opposite sex couples, who have access to marriage ...'¹¹¹

The purpose of introducing civil partnerships *then* (when marriage was not accessible to gay couples) does not explain its rationale *now* as a further institution selectively accessible, nor does it explain why an alternative to heterosexual marriage would be detrimental or unnecessary.

Civil status, sexual orientation and privacy issues

Considerations of legal certainty and legitimate expectations suggest that, if CPA is repealed, existing civil partnerships, whether entered into in the UK or recognised here as validly formed abroad, would continue to produce legal effects. As a result, for a significant period of time the status of (gay) civil partner and that of spouse (of either sex) would continue to exist in parallel. Scholars have already criticised the obligation for civil partners to impliedly disclose their sexual orientation when indicating marital status on documents, which raises privacy concerns.¹¹² While marital status no longer reveals information on a person's sexual orientation, civil partner status does, and would continue to do so after a hypothetical CPA repeal. Conversely, opening civil partnership to opposite-sex couples would completely dissociate any information regarding civil status from the involuntary disclosure of sexual orientation.

Recognition of marriage and civil partnership as institutions of equal worth

Making civil partnership available to all couples regardless of their sexual orientation would remove any lingering perception of civil partnership as an inferior institution.¹¹³ In its current form, this institution carries connotations of 'otherness', inherited from its original function as a remedy for a minority problem. A gender-neutral formula would instead elevate civil partnership to the position of mainstream institution, a community-wide alternative to marriage. One of the concerns expressed in the 2014 consultation was, in fact, that a repeal of the CPA would signal that 'civil partnerships were never truly recognised ... and that they would become of a lesser recognised status'.¹¹⁴

Cumulatively, the above arguments suggest that a more rights-protective, tolerant and inclusive solution to end discrimination is upwards equalisation, by opening civil partnership

¹¹⁰ R Gaffney-Rhys, 'Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?' [2014] CFLQ 173, p 176.

¹¹¹ *Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [15].

¹¹² R Gaffney-Rhys, 'Same-sex marriage but not mixed-sex partnerships: should the Civil Partnership Act 2004 be extended to opposite-sex couples?' [2014] CFLQ 173, p 178.

¹¹³ *Ibid*, p 177.

¹¹⁴ Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales) – Report on Conclusions* (June 2014).

to opposite-sex couples, rather than precluding the formation of further civil partnerships. Unfortunately, none of these considerations, nor indeed policy arguments in favour of downwards equalisation through the repeal of CPA, were reflected in the *Steinfeld* debate.

Deferring choice: the ‘wait and see’ policy

Waiting for what? The demerits of temporisation

Unlike the High Court, the Court of Appeal held that heterosexual couples’ ability to marry does not mitigate the different access to civil partnerships and the *status quo* cannot be indefinitely maintained. However, both courts accepted that reform may be legitimately deferred to allow the authorities to evaluate the impact of opening marriage to gay couples.¹¹⁵ There are at least two major flaws in this approach.

First, whatever empirical evidence becomes available after a period of observation (in particular statistics as to how many gay couples choose civil partnership over marriage), it is unable to determine how many heterosexual couples would benefit from the liberalisation of civil partnership or to predict consequences on heterosexual marriage and cohabitation. Measures intrinsically incapable of achieving the legitimate aims pursued, such as an inconclusive waiting period, are bound to fail the Article 8(2) test; to remain proportionate, an interference must be suited for meeting its objective.¹¹⁶ A period of reflection cannot provide answers on the wider social demand for civil partnerships; in the short term, for gay couples marriage, a right secured after a lengthy campaign for equal recognition, may be a choice dictated by egalitarian sentiments. For heterosexual couples, the choice of marriage is likely to be prompted by entirely different motives. Moreover, no real balancing can be performed between the individual interest of heterosexual couples objecting to marriage and society at large if research does not include all stakeholders’ views on civil partnerships.

Secondly, any such waiting period would require a time limit for the restriction to remain proportionate, otherwise the existence of section 15 MSSCA requiring the future of CPA ‘to be reviewed’ would be deprived of all *effet utile*. Disappointingly, the High Court’s ruling suggested that postponing *sine die* is not inconsistent with the Convention. The Court of Appeal’s decision also accepted that postponing without a clear timeframe does not breach the Convention. For Briggs LJ, requiring the executive to provide a detailed plan would be ‘micromanaging’.¹¹⁷ Central to the other appellate judges’ analyses is the presence of a Bill before Parliament.¹¹⁸ The treatment of reform as a foregone conclusion appears, however, over-optimistic. The fact that the same Private Member’s Bill, previously unsuccessful,¹¹⁹ was before Parliament again did not corroborate the cabinet’s commitment to change (indeed the submissions before the High Court and the waiting policy invoked before the Court of Appeal suggested otherwise), nor did it guarantee parliamentary support. The question before the courts was whether the *current* civil partnership regime is lawful, and the mere consideration of reform cannot make lawful a measure that is not so otherwise. It is

¹¹⁵ See [2016] EWHC 128 (Admin), [2016] 4 WLR 41, paras [60]–[62], [71]; [2017] EWCA Civ 81, [2017] 2 FLR 692, para [156].

¹¹⁶ *B and L v United Kingdom* (Application No 36536/02) [2006] 1 FLR 35, para [38].

¹¹⁷ [2017] EWCA Civ 81, [2017] 2 FLR 692, para [175].

¹¹⁸ *Ibid*, paras [131], [161].

¹¹⁹ The Civil Partnership Act 2004 (Amendment) Bill 2015–2016, which aimed at opening civil partnership to opposite-sex couples, was discontinued after the first reading. Reintroduced in 2016–2017, it did not pass its second reading; the debate was adjourned and the Bill fell after Parliament was dissolved ahead of the snap election.

regrettable that the judiciary should condone procrastination when fundamental values such as equality are at stake. The acknowledgement by the Court of Appeal that the scheme is unlawful would have represented a momentous step towards reform, urging the executive and legislative authorities to take effective action. Instead, the Court of Appeal's ruling encourages further stalling by accepting as necessary and sufficient the Government's vague reassurances that the matter is being kept under review.

Thirdly, the entire 'wait and see' policy hinges on the need to avoid unnecessary costs. Arden LJ, delivering the minority judgment, makes the important point that both the repeal and the amendment of CPA involve costs and therefore the only legitimate concern is over 'resources unnecessarily incurred if there is a change in the law which has to be reversed'.¹²⁰ However, even the argument of deferring reform for fear that it may have to be reversed in the future should be cautiously considered when it comes to core human rights. If such an argument had any validity, it should follow that civil partnerships should have never been introduced in 2004 since only nine years later gay marriage achieved full equality; public money could have been saved while waiting for wider acceptance of same-sex marriage rather than proceeding to extraordinary legislative changes in order to accommodate a new institution which, as it turns out, only filled a gap for a few years. Briggs LJ spoke about the 'transitional purpose' of CPA 2004, but ironically, and somewhat inconsistently, he referred to the 'practical impossibility' of an interim measure to remedy discrimination against heterosexual couples (impossible insofar as it may have to later be abolished).¹²¹ Just like same-sex civil partnerships, a transitional solution such as opening civil partnership to heterosexual couples, subject to subsequent re-evaluation, is preferable to perpetuating discrimination. It should also be noted that, unlike the introduction of civil partnerships in 2004, which, as discussed above, did not respond to Convention obligations, the change of the *status quo* is needed to put an end to a Convention violation. If we repudiate the idea that CPA was a waste of public money, because the principle of equality is more important than public expenditure, then a waiting policy before removing discrimination against heterosexual couples should be firmly rejected. Moreover, as Arden LJ suggested, a limited use of civil partnership in the future would not necessarily require repealing the Act.¹²² An underused institution/ piece of legislation in no way hinders the functioning of the legal system and hence does not require formal removal. This observation completely nullifies the rationale of a waiting policy. In addition, there is actually a greater risk of unnecessary expenditure if civil partnerships are firstly abolished in light of a few years' statistics and subsequently reintroduced as a result of increased social demand (including from heterosexual couples, an aspect currently not investigated by the Government). Allowing legal reform now is the less hazardous option, and more consistent with the view that the law-making process should not rein in social experimentation. It is impossible to reach a future-proof decision, given the continuous evolution of social ideas and perceptions, and therefore the costs argument should be much more marginal than it was made to be in litigation so far. The focus should be on substantive public policy questions.¹²³ The excessive concern over the number of takers would seem to amount to a mere strategy of temporising and diverting attention from the more significant social issues underlying a gender-neutral alternative to marriage.

¹²⁰ [2017] EWCA Civ 81, [2017] 2 FLR 692, para [106].

¹²¹ Ibid, para [172].

¹²² Ibid, para [124].

¹²³ See *ibid*, para [117].

Regrettably, even Arden LJ was not prepared to make a declaration of incompatibility in respect of section 3(1) CPA, on the basis that Parliament must be afforded an opportunity to consider reform.¹²⁴ Courts should not refrain from a declaration of incompatibility merely because ‘Parliament will be informed of th[e] court’s judgments’.¹²⁵ Were it sufficient to informally advise Parliament of the highest courts’ views on Convention-incompatibility, a declaration would always be superfluous, and section 4 of the Human Rights Act 1998 would have no *raison d’être*; this cannot have been Parliament’s intention when enacting the statute. Moreover, courts’ confidence that a declaration of incompatibility is unnecessary once Parliament becomes aware of a legal challenge has already proven misplaced. Several Supreme Court justices in *Nicklinson*, a 2014 judgment regarding the blanket ban on assisted dying, deemed a declaration of incompatibility inappropriate before Parliament had an opportunity to reconsider matters in light of those proceedings;¹²⁶ over three years later, the only progress made by the Assisted Dying Bill is the formality of the first reading in the House of Lords. By contrast, faced with the same questions in *Carter* in 2015, the Canadian Supreme Court found a violation of several constitutional rights,¹²⁷ which prompted the legalisation of medically assisted dying in June 2016. The successful outcome of *Oliari* in Strasbourg was also owed to the Italian Constitutional Court’s unambiguous support for the right asserted by the claimants (legal recognition of same-sex unions), in the form of a decision of unconstitutionality. This speaks to the importance of the judiciary in promoting rights, rather than giving the executive and legislative authorities *carte blanche* on policy decisions and a mild slap on the wrist instead of a formal pronouncement on constitutionality issues. British courts’ refusal to issue a section 4 declaration in the presence of an ongoing situation of discrimination on the mere assumption that Parliament, informed of the judgment, will act upon it, is an abdication from a fundamental constitutional role expressly bestowed on them by the Human Rights Act.¹²⁸

Lessons from European practices and legal cross-fertilisation

Instead of waiting for evidence which in respect of heterosexual couples will never arrive from surveying gay couples’ post-MSSCA preferences, the UK could more usefully take stock of the experience of civil partnership elsewhere in Europe. The comparativist method, aimed at ‘constitutional borrowing’ or ‘cross-fertilisation’,¹²⁹ may thus fill in the observational gap in the UK by drawing inspiration from best practices elsewhere. Registered partnerships first became available in the Nordic countries as an alternative to marriage for same-sex couples, in Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996) and Finland (2001).¹³⁰ Subsequently, in Norway, Sweden and Iceland, the statutes introducing registered partnerships were repealed after the adoption of gender-neutral marriage (in 2008,

¹²⁴ Ibid, paras [111]–[114].

¹²⁵ Ibid, para [131].

¹²⁶ *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38, [2015] AC 657, para [116].

¹²⁷ *Carter v Canada (Attorney General)* [2015] 1 SCR 331.

¹²⁸ See C Draghici, ‘The Blanket Ban on Assisted Suicide: Between Moral Paternalism and Utilitarian Justice’ (2015) 3 *European Human Rights Law Review* 285, pp 294–297.

¹²⁹ See C Dupré, ‘Globalisation and Judicial Reasoning: Building Blocks for a Method of Interpretation’, in A Halpin and V Roeben (eds), *Theorising the Global Legal Order* (Hart, 2009), p 107.

¹³⁰ See I Lund-Andersen, ‘The Nordic Countries: Same Direction – Different Speeds’ in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (Intersentia, 2012), pp 4–5.

2009 and 2010, respectively), although existing partnerships remained valid where partners chose not to convert them into marriage.¹³¹ Other countries followed suit: after deciding to open marriage to gay couples (in 2012, 2015 and 2016, respectively), Denmark, Ireland and Finland have repealed civil partnership legislation and currently offer only one option for public recognition (marriage) regardless of sexual orientation.¹³² Registered partnerships exclusively for the recognition of same-sex cohabitants are typical in countries where marriage is a heterosexual institution, for instance in Germany (available since 2001), Switzerland (2005), Austria (2010),¹³³ as well as in Eastern Europe, in the Czech Republic (2006), Slovenia (2006) and Hungary (2009).¹³⁴ In the aftermath of Strasbourg judgments, Italy joined this trend (2016) and Greece opened civil partnerships to same-sex couples (2015). A number of jurisdictions opted from the outset for gender-neutral non-marital unions; the Netherlands thus introduced registered partnerships in 1998 and maintained that scheme after the extension of the eligibility to marry to same-sex couples in 2001.¹³⁵ Before and after same-sex marriage was legalised in Spain at national level (2005), numerous Autonomous Communities enacted legislation allowing stable couples to register their union regardless of their sexual orientation: Catalonia (1998), Aragon (1999), Navarra (2000), Balearic Islands (2001), Valencia (2001), Basque Country (2003), Galicia (2006) etc.¹³⁶ Belgium, France and Luxembourg also offer both marriage and registered domestic partnerships to all couples.¹³⁷ What this overview indicates is that virtually all other jurisdictions in which a regulatory framework for non-marital unions exists either offer it as an alternative to marriage for all couples, or as a parallel route to recognition for same-sex couples ineligible to marry. It also suggests that there is ongoing social demand in Europe for a different form of public recognition for stable relationships.¹³⁸

Countries where this institution exists constitute the correct comparator against which the reasonableness of our civil partnership scheme ought to be measured, rather than the 47 CoE member states; in fact, what is in dispute is not an alleged obligation to offer mixed-sex civil partnerships. The High Court's observation that 'only 8 of the 43 [sic] member states of the Council of Europe have some form of civil union for opposite sex couples'¹³⁹ is therefore largely irrelevant. The pertinent question is not how many states have introduced civil partnerships for heterosexual partners, but how many other states in which marriage is gender-neutral reserve civil partnerships for same-sex couples; the answer is none. As

¹³¹ Ibid, pp 9–10.

¹³² R Wintemute, 'Civil partnership and discrimination in *R (Steinfeld) v Secretary of State for Education*: should the Civil Partnership Act 2004 be extended to different-sex couples or repealed?' [2016] CFLQ 365, p 366.

¹³³ See F Swedden and S Eggermont, 'Same-sex Couples in Central Europe: Hop, Step and Jump' in K Boele-Woelki and A Fuchs (eds), *Legal Recognition of Same-Sex Relationships in Europe. National, Cross-border and European Perspectives* (Intersentia, 2012), p 33.

¹³⁴ See M Jagielska, 'Eastern European Countries: From Penalisation to Cohabitation or Further?' in Boele-Woelki and Fuchs, *ibid*, pp 59–63.

¹³⁵ F Swedden and S Eggermont, 'Same-sex Couples in Central Europe: Hop, Step and Jump' in Boele-Woelki and Fuchs, *ibid*, p 23.

¹³⁶ See C González Beilfuss, 'All or Nothing: the Dilemma of Southern Jurisdictions', in Boele-Woelki and Fuchs, *ibid*, pp 45–49; T Piconó Novales, 'Cohabitation: The Ideological Debate in Spain' in M Maclean (ed), *Family Law and Family Values* (Hart, 2005), pp 226–228; A Sperti, *Constitutional Courts, Gay Rights and Sexual Orientation Equality* (Hart, 2017), pp 86–89.

¹³⁷ See R Wintemute, 'Civil partnership and discrimination in *R (Steinfeld) v Secretary of State for Education*: should the Civil Partnership Act 2004 be extended to different-sex couples or repealed?' [2016] CFLQ 365, p 377.

¹³⁸ See *ibid*, p 380, on the statistical evidence of such demand in The Netherlands.

¹³⁹ *Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin), [2016] 4 WLR 41, para [69].

Scherpe noted: ‘In those jurisdictions where the registered partnership was designed to be the functional equivalent of marriage for same-sex couples, the opening up of marriage for same-sex couples meant that the functional equivalent had outlived its usefulness’.¹⁴⁰ Alternatively, the two institutions may coexist side by side, responding to different social outlooks and philosophical convictions.

Concluding remarks

By enacting the CPA 2004, the UK went beyond Convention requirements. Thus, ironically, the law governing the formalisation of intimate relationships in England and Wales did not offend the Convention prior to the enactment of MSSCA 2013, which purported to further, rather than lessen, the protection of fundamental rights. Nonetheless, presently the combined effect of CPA and MSSCA is to treat couples differently as regards the choices available to formalise their relationships, exclusively on grounds of sexual orientation. Leaving the civil partnership regime unaltered, instead of either repealing CPA 2004 or removing gender restrictions, would amount to a violation of Article 8 (and arguably Article 9) read in conjunction with Article 14 of the Convention.

European human rights law continues to uphold the understanding of marriage as a heterosexual union, and the departure in several jurisdictions from the traditional paradigm is based on discretionary family legislation rather than Convention entitlements. Conversely, Strasbourg case-law shows that if a state elects to introduce civil partnerships, restricting access on grounds of sexual orientation requires cogent justification. The European Court has not yet pronounced on the legitimacy of gay-only civil partnerships in a country where marriage is accessible to all couples; however, there is sufficient clarity from the whole body of Strasbourg case-law to guide domestic authorities in their assessment of Convention-conformity. Following Strasbourg jurisprudence, as mandated by section 2 of the Human Rights Act 1998, does not simply mean seeking a like-for-like precedent, but also applying well-established principles to new legislative dilemmas.

From that perspective, the case-law suggests that the current regulation of civil partnerships is not defensible. Unlike marriage eligibility under Article 12 (a provision characterised by textual deference to domestic laws and historical reasons for conservative interpretation), access to the new civil partnerships, governed by Article 8, is not an area in which states enjoy wide discretion. The UK was not required to offer civil partnerships, but once it introduced this right, ‘attached’ to ‘respect for family life’, a preferential treatment based on sexual orientation in the stipulation of eligibility criteria is a *prima facie* violation of Article 8 read together with Article 14. Where a different form of legal union is available, *Vallianatos* uncontrovertibly established that it cannot be accessible on discriminatory grounds. Further, the difference in treatment based on a protected characteristic such as sexual orientation requires very serious justifications, and the state has the burden of proving the strict necessity of the restriction. In light of the justifications seen in the *Steinfeld* proceedings, it is submitted that the civil partnership scheme fails to meet that high threshold of necessity. Indeed, no other CoE state in which marriage is gender-neutral has found such a restriction necessary. Concerns over the cost of amending the law or the number of couples whom the revised law would benefit cannot outweigh the fundamental interest in removing discrimination. Nor can they legitimate temporisation.

After decades of struggling to establish that same-sex partners are similarly situated in respect of family life entitlements when compared to opposite-sex couples, British society is

¹⁴⁰ JM Scherpe, ‘Quo Vadis, Civil Partnership?’ (2015) 46(3) *Victoria University of Wellington Law Review* 755, p 761.

now faced with a paradoxical need to reassert that proposition in order to claim no lesser rights for opposite-sex couples. Admittedly, the availability of marriage makes the legal position of heterosexual couples less critical; however, the force of the principle of non-discrimination leading to the liberalisation of family law should be the same. Moreover, the importance of freedom of conscience and belief should not be under-recognised. Extending civil partnerships to opposite-sex couples rather than repealing the CPA 2004 would be more consistent with the equal dignity and autonomy of all individuals, in an open-minded, pluralist democracy. It would also position the UK as a tolerant cosmopolitan society, which extends protection to different family units lawfully constituted overseas.

There is no compelling reason to preserve equal marriage and unequal civil partnership for a further period of time. A gender-barred civil partnership scheme in a country embracing marriage equality is a legal aberration that has outlived its initial purpose and ought to be amended without delay. The *carte blanche* given by the Court of Appeal to the executive and legislative authorities as to the timing of reform, motivated by costs-related concerns, does not reflect the importance of non-discrimination in respect of family life and freedom of belief. One would hope that future litigation in the Supreme Court¹⁴¹ will bring about a declaration of incompatibility in relation to section 3 CPA, urging Parliament to reconsider a bizarre and backwards-looking case of discrimination.

¹⁴¹ On 8 August 2017, the Supreme Court granted permission to appeal in *R (Steinfeld and Another) v Secretary of State for Education* (UKSC 2017/0060).