

Civil partnerships are open only to same-sex couples. Does this discriminate against opposite-sex couples? What effect will the Gay Marriage Bill have on this discrimination?

The current system of formal recognition of relationships allows marriages for heterosexual couples, and civil partnerships for couples of the opposite sex. The two institutions are largely similar, with equal legal rights and responsibilities, though some key differences remain, which run much deeper than factual considerations of sexual orientation. Many heterosexual couples are dissuaded from entering into marriage because of its deeply entrenched religious connotations, and oppressive history. This leaves them unable to formally register their relationship, and unable to acquire the attached legal benefits. It is submitted that this difference in treatment has no justification: it is discrimination against heterosexual couples. The Gay Marriage Bill will introduce civil marriage for homosexual couples. This will confer an alternative for same-sex couples, giving them two options for legal recognition of their relationship, while for opposite-sex couples the options remain marriage or nothing. The introduction of gay marriage, whilst undoubtedly a positive step for the gay community, actually furthers the unfair treatment to heterosexual couples, whose position becomes relatively less favourable. This paper argues that civil partnerships should be opened up to opposite-sex couples in order to fully remedy this discrimination.

The system of Civil Partnerships for homosexual couples allows them to formalise their relationships as part of an institution which has none of the historical baggage of marriage. This is an option which a significant number of heterosexual couples would prefer, for a multitude of reasons, such as the religious connotations of marriage, and the fact that its history is closely associated with female oppression. As Blackstone¹ commented: 'the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband: under whose wing, protection and cover she performs everything.' The legal rights of husbands were removed over the twentieth century, and wives were placed in a much better position through legal entitlements.

Now marriage has moved towards being a relationship of equals. Munby J in Sheffield City Council v E and another described the husband's duty of protection and the wife's duty of submission as no longer having 'any place in our contemporaneous understanding of marriage.'² He went on to say that 'today, both spouses are joint, co-equal heads of the family.' Marriage has therefore moved away from the idea of female submission, although one or two seemingly insignificant pointers from the past remain, for example a wife is still expected to

¹ Blackstone, W. (1765). *Commentaries on the Laws of England, Volume I: Of the Rights of Persons*. Facsimile Edition (1979) S. Katz (ed). Chicago: University of Chicago Press.

² (2004) EWHC 2808

take the family name of her husband. To some, the presence of such anachronisms indicates that marriage can never truly be a relationship of equals, and dissuades them from entering the institution. An equivalent to civil partnerships for heterosexual couples would solve this problem. This is campaigned for by a variety of organisations, including campaigning group Equal Love.³

Increasingly, couples are choosing to cohabit, some as a precursor and some as an alternative to marriage.⁴ Research has shown that those who choose cohabitation as a precursor to marriage, often never complete the process and marry. The absence of another form for legal recognition of a relationship is certainly a contributing factor to this, as evidenced by the high uptake of the Pacte Civil de Solidarité (PACs) system in France amongst heterosexual couples.⁵ In the UK, it is a concern that less and less cohabitants are aware of their legal vulnerability.⁶ The law should reflect societal understanding of relationships instead of retaining privileges for spouses and hoping that society will respond and turn back towards marriage. Research by the British Academy Working Group indicates that promoting marriage as the 'ideal' may not have the desired effect.⁷ Many cohabiting couples are in what are terms the 'high-risk groups,' whereby their relationship is less stable, for example young couples. As the Working Group points out: 'if the legal steps were taken to ensure that more people in the risk group married, what would happen to marriage stability? The evidence suggests that it would probably lessen and that the difference between the married and the cohabiting would diminish.' Therefore, a better approach would be to accept that some couples would prefer to cohabit than to marry. Thus, it is vital that the legal protection of cohabitants should improve. This could be achieved by encouraging couples to enter into a 'cohabitation agreement', as in the Netherlands, which would settle certain matters relating to the couple living together. However, another way to deal with this problem would be to allow heterosexuals to enter into civil partnerships. Those who are disillusioned with the institution of marriage may then obtain a civil partnership in order to achieve legal recognition of their relationship. This would have to be coupled with an awareness campaign designed to educate the public as to their lack of rights as cohabitants. There has already been such a campaign, which sought to dispel the myth of the 'common law marriage.' This myth relates to the widely-held perception that cohabitants have the same legal rights as spouses. However, the aforementioned campaign is thought to have had little success.⁸

³ Campaign Group, Equal Love, equallove.org.uk

⁴ Law Com (2006), Part 2.

⁵ In 2012, 94% of PACs were between heterosexual couples

⁶ British Social Attitudes Survey, 2000.

⁷ British Academy Working Group, *Social Science and Family Policies* (London: British Academy, 2009)

⁸ British Social Attitudes Survey, 2006

Notwithstanding this failure of the previous campaign, further education of the public is needed, and is achievable through greater publicity.

The enactment of the Civil Partnership Act 2004 (CPA) has led to more questions being asked about the traditional aspects of marriage, and whether they are strictly necessary. Obscure consequences have arisen from the fusion of legal personalities upon marriage, such as spouses being unable to be guilty of conspiring with each other, and the defence of marital coercion. The latter has recently been unsuccessfully relied upon by Vicky Pryce, wife of ex-cabinet minister Chris Huhne. The case has led to questions being asked about the appropriateness of the defence in modern society. The prosecutor Andrew Edis QC described Ms Price as a "woman who had spent her life making important choices... and here she is saying that she was unable to choose whether to commit a crime or not because a man, whether her husband or not, was telling her what she had to do".⁹ In the current climate it would be inappropriate to state that the majority of wives are under the control of their husbands. For those that are, the defence of duress should be sufficient. For such reasons, the Law Commission recommended abolition of the defence in 1977.¹⁰ As of yet, the proposals have not been acted upon. The CPA has deliberately avoided inclusion of such clauses, highlighting that the law is outdated, and alteration is needed.

Civil partnerships cannot be annulled because of lack of consummation, whereas marriages can.¹¹ It is presumed therefore that spouses will engage in sexual relations. This cannot be for reproductive reasons however, since it was declared in Baxter v Baxter¹² that the consummation requirement was fulfilled despite the fact that contraception had been used. Consummation acts as a remnant of female oppression, as noted by O'Donovan: 'the requirement of consummation places primacy on penetrative sex, an act constitutive of masculinity,' and, 'although personal autonomy over sexuality has largely been won by women today, elements of the history of marriage remain.'¹³ The fact that it was deliberately excluded from the CPA indicates that it may be an outdated aspect, which is no longer required in modern society, but can also be explained by an inability to create a definition of sex in the context of homosexual relations. However, the anachronistic nature of the requirement cannot be ignored, and its removal would be a positive step towards equal treatment. Removal would also serve the purpose of indicating that the legislature and legal system are concerned with ensuring marriage is an institution which can adapt to keep up with changes in society.

⁹ <http://www.bbc.co.uk/news/uk-21496566>

¹⁰ Defences of General Application (Law Com No.83)

¹¹ Matrimonial Causes Act 1973, s12(a) and (b). No equivalent provision in the Civil Partnership Act 2004

¹² (1948) AC 274

¹³ (1993) Family Law Matters. London: Pluto Press

Another difference between marriage and civil partnership is the adultery fact upon divorce of a marriage. This was not included in the CPA. This was because it was impossible to define sex in the context of homosexual relationships. However, any form of cheating of a civil partner can nevertheless result in divorce, and will be placed into the 'behaviour' fact.¹⁴ There is no real reason to keep adultery separate for marriages. The divorce 'fact' used has no impact on ancillary relief proceedings, and so the behaviour fact would suffice for cases of adultery.

The provisions proposed in the Gay Marriage Bill are very similar to those in the CPA. This means that the differences between marriage and civil partnership will also be reflected in the distinction between marriage and gay marriage. Such differences have been criticised. In particular, former Conservative (now independent) MP Nadine Dorries states that: "a basic legal requirement of The Marriage Act 1973 is for 'ordinary and complete sex to have taken place'". She adds: "the Act defines sex as between members of the opposite sex only."¹⁵ Her argument is that the bill would 'legally patronise' same-sex couples, since they would not be held to the same 'standards' as heterosexual marriages under the Marriage Act. Ms Dorries mistakenly sees the consummation requirement as an advantage of heterosexual marriage. In fact, as previously stated, the consummation requirement for marriage is a relic from the past, and should be abolished for heterosexual couples. Similarly her criticisms of the absence of a definition of adultery as a divorce 'fact' in the Gay Marriage Bill fail to recognise that the 'behaviour' fact for any type of cheating could still be relied upon by gay spouses in an application for divorce. She is, therefore, wrong to suggest that same-sex spouses will be held to different standards to opposite-sex spouses. It is possible that the introduction of gay marriage could draw further attention to these historic anomalies left in marriage, and further encourage the government to amend the relevant provisions, thus rendering the law of marriage less discriminatory.

Such positive steps remain speculative. Should the Bill be enacted, the immediate result would be further discrimination against heterosexual couples as whilst homosexual couples would be afforded the luxury of two options for the formalisation of relationships, for heterosexual couples, only marriage would be available. For this reason, it is submitted that the current proposals will not present a long-term solution, and that a civil partnership equivalent for heterosexual couples is necessary.

There are a number of models in other jurisdictions that can be adopted. Two are to be examined. The model existing in France continues to present marriage as an institution solely for couples of opposite-sex. However, there is an alternative to marriage available for both

¹⁴ Civil Partnership Act 2004, s44(5)(a)

¹⁵ Speaking in Parliament, February 5 2013

opposite-sex and same-sex couples: the *pacte civil de solidarité* (PACs). This has none of the religious aspect of marriage, and is very similar to civil partnership. Differences nevertheless remain between the two systems. The joint tax and financial privileges for a couple who are PACs partners are not as beneficial as they are for married couples. Another difference is that breaking off the relationship is simpler for those involved in the PACs system, than divorce proceedings for spouses. These differences mean that PACs are perceived as 'inferior' to marriage. Therefore, complete equality has not yet been achieved. The current trend, however, is to make the two systems increasingly similar, conferring more rights onto PACs couples. This is partly due to the surprisingly high uptake of the PACs system amongst heterosexual couples. This unforeseen extensive use of PACs is similar to the demand in the UK, where an alternative to marriage is sorely needed.

The problem with the French system is that it discriminates against homosexual couples, since they have only one option whereas heterosexual couples have two. Thus, should this model be adopted in the UK, the gay marriage proposals should not be abandoned. This would provide all couples with a choice between marriage, or some other registered partnership. This is the system that is currently adopted in the Netherlands, where the alternative form of registered partnership does not suffer from the 'inferiorities' of PACs. The most important difference between marriage and registered partnership under the Dutch system is the presumption of legitimacy of any children that exist for married couples, but not for registered partners. This difference is lamentable, and it is suggested that should the UK adopt this system, that this difference in treatment is not adopted. It is submitted that the approach of the Netherlands is the better of the two alternatives to the UK system explored. It does not discriminate against anyone because of their sexuality. It also appreciates, in a way which the PACs system does not, that those who are unmarried may wish to benefit from the advantages of marriage, while still disliking it as an institution. This is due to the fact that there are no significant legal differences between marriage and registered partnership. To adopt a similar approach in the UK would be a substantial improvement to the current system.

The current approach to formal recognition of relationships in the UK is far from a perfect model. There is discrimination against heterosexual couples which will only be made more apparent should the Gay Marriage Bill succeed in Parliament. While gay marriage can be seen as a positive step for society as a whole, as it sends out a clear message that gay couples will not be treated as inferior to their straight counter-parts, further reforms are needed to place heterosexual couples in a similarly strong position. Civil partnerships should be opened up to opposite-sex couples, so that less people are dissuaded from formalising their relationship because of the historical background associated with marriage. A smaller, less controversial

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step in the right direction would be to remove the historical anomalies from the law of marriage, such as the consummation requirement, which currently serve as a reminder of the oppressive nature of traditional marriage.