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The Hierarchy of Marriage and Civil Partnerships: Diversifying Relationship Recognition *Alexander Maine, Lecturer in Law, University of Leicester.*

*In 2004, the UK Parliament created Civil Partnerships as a means of providing a marriage-like structure of registered partnership for same-sex couples. However, the legislation for same-sex marriage in the 2013 Act created a situation in which same-sex couples were thus offered two forms of relationship recognition, providing no recognition to different-sex couples beyond marriage. Doing so, the law stratified the forms of relationship deemed marital and familial and maintained systems of relationship recognition that focussed on dyadic, mononormative pairings. This chapter will demonstrate the significance of civil partnerships to LGBTQ+ participants, the perceptions of civil partnerships as lesser than marriage, and demonstrate the need for further reform in order to diversify the recognition of relationships in the United Kingdom. This will assess the use and functioning of both same-sex marriage and civil partnerships, using empirical and theoretical analysis, while also looking to the future and the pluralisation of relationship recognition for heterosexual couples, concluding that, despite the *Steinfeld* judgment, there remains a hierarchy of recognised relationships.*

Introduction

With the introduction of same-sex marriage in 2013, same-sex couples in the UK who wished to have their relationship legally recognised were able to choose whether to enter into marriage or civil partnership, benefitting from two separate institutions of relationship recognition. This is in contrast to different sex couples who could only enter into marriage, as traditionally defined by the Marriage Act 1949 and the Matrimonial Cause Act 1973, having no access to civil partnerships¹ nor any form of recognised cohabitation.² Although this situation created *more* opportunities for same-sex couples, the arguably hierarchical nature of such recognition may ensure that marriage retains its privileged status as the ‘gold standard’³ of relationship recognition. Prime Minister Theresa May⁴ noted that, following the *Steinfeld* decision,⁵ the Government would legislate to fully realise equality in relationship recognition. Her statement illustrates the focus on equality of opportunity for different, and same-sex couples relationship recognition in the United Kingdom.

This chapter will argue that the legal provisions of marriage and civil partnerships in the United Kingdom are still subject to a hierarchy of relationship recognition that privileges marriage and presents civil partnerships as a lesser option. This hierarchy will be constructed in this chapter as one that privileges heteronormativity⁶ (heteronormativity has been defined as the ‘truth regime’⁷ in which gender, sexuality, and desire coalesce,⁸ and in which heterosexuality is assumed, privileged and

¹ Civil Partnership Act 2004 (CPA 2004), s1.

² Anne Barlow, Simon Duncan and Grace James, *Cohabitation, Marriage and the Law* (Hart 2005) 49.

³ *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) [6] (Sir Mark Potter P).

⁴ ‘This change in the law helps protect the interests of opposite-sex couples who want to commit, want to formalise their relationship but don’t necessarily want to get married. As Home Secretary, I was proud to sponsor the legislation that created equal marriage. Now, by extending civil partnerships, we are making sure that all couples, be they same-sex or opposite-sex, are given the same choices in life.’: Theresa May in Joe Murphy, ‘Straight couples to be allowed to enter civil partnerships, Theresa May reveals’ *Evening Standard* (London, 2 October 2018)

⁵ *R (Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32

⁶ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2nd edn, Routledge 1999) 187.

⁷ Michel Foucault, *The History of Sexuality: An Introduction*, (1st edn, Vintage Books 1978).

⁸ Butler (n 6) 187.

naturalised in society)⁹ and relies on homonormativity,¹⁰ promoting coupled, domestic same-sex and different-sex relationships. This chapter will discuss the significance of civil partnerships, and their comparisons with same-sex marriage manifest in the hierarchical organisation of relationship recognition. The organisation of relationship recognition framework upholds marriage as the ultimate form of relationship recognition that civil partnerships emulate. I will argue that this reinforces Rubin's sexual hierarchy¹¹ in the awarding of marital rights to couples and the maintenance of marriage as the ultimate form of recognition that castigates those who do not marry. Empirical evidence will be used to demonstrate the roles of civil partnerships in the lived experiences of LGBTQ+ participants. This will then point to ways in which this hierarchy can be disestablished in the removal of barriers to entering a legally recognised relationship and develop further understandings of the way law may allow for diversified recognition of relationships.

Both marriage and civil partnership establish a form of relationship recognition hierarchy in which differing institutions of relationship recognition offer certain forms of legal and social value to different relationships and their choices of recognition. Same-sex marriage arguably emphasises this hierarchy, adding to the myriad of social, legal, and cultural factors that it consists of, which contribute to the enforcing of social norms regarding sexual behaviour. It will be argued that marriage has retained its place in society as the ultimate form of relationship recognition, bolstered by the introduction of same-sex marriage. Thus, this creates a hierarchy of relationship recognition, stratified by the exclusionary nature of marriage and civil partnerships. This chapter will argue that following *Steinfeld*, it may be possible to alter this hierarchy and instil further equality, however it will also note how this may not be enough.

This hierarchy will rely on the concepts of heteronormativity and homonormativity.¹² Homonormativity describes a dominant politics of liberal equality, one that upholds, and sustains desexualised, depoliticised perspectives of same-sex couples. This chapter will use the homoradical, in opposition to the homonormative, to describe an *anti-assimilationist politic*, one that is actively sexualised and politicised. The homoradical describes a sexualised body of queer identity, one that rejects normative discourse surrounding homosexuality. The homoradical may be excluded from norms surrounding marriage due to the active pursuit of sex outside of the normative realm, including public, group, kink, bareback, and non-monogamous sex. The homoradical will be used to demonstrate the exclusion still felt by those who reject marriage and civil partnership norms that demonstrate the law's focus on dyadic pairings.

Constructing this hierarchy may be significant in developing understanding of the law's role in constructing and regulating choices regarding relationship recognition and the meanings attached to such recognition.¹³ This is important in assessing the role of legal recognition of relationships and the

⁹ Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1984) 151; María Do Mar Castro Varela, Nikita Dhawan and Antke Engel, 'Hegemony and Heteronormativity: Revisiting 'The Political' in Queer Politics' in María Do Mar Castro Varela, Nikita Dhawan and Antke Engel (eds), *Hegemony and Heteronormativity: Revisiting 'The Political' in Queer Politics* (Ashgate 2011).

¹⁰ Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Dana Nelson and Russ Castronovo (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press 2002) 178.

¹¹ Rubin (n 9) 151.

¹² Lisa Duggan, *The Twilight of Equality? Neoliberalism, cultural politics and the attack on democracy* (Beacon Press 2003).

¹³ See Rubin (n 9).

specific choices made by same-sex and different sex couples. This chapter will first assess the legal provisions of civil partnerships and same-sex marriage, and the Supreme Court decision that different-sex couples should have access to civil partnerships. I will then assess empirical evidence demonstrating the socio-legal construction of marriage and civil partnerships, particularly noting the lived experiences of civil partnerships to LGBTQ+ people in order to construct the symbolism attached to the institution.

Legal Hierarchies

Civil partnerships were introduced to be marriage in all but name, offering ‘virtually all’ of the rights and responsibilities of marriage¹⁴ to same-sex couples. The Civil Partnership Act 2004, which came at a time when only two jurisdictions in the world had legislated for same-sex marriage,¹⁵ preserved marriage as solely heterosexual while conceding a need, and political will, for some form of recognition of such relationships.¹⁶ The framework introduced was solely for the benefit of same-sex couples, offering similar rights and protections to marriage, while preserving the distinction between the two institutions. This distinction reaffirmed the special status of marriage that arguably maintained its social, legal, and religious privilege. Some have labelled civil partnerships as a ‘parody’ of marriage¹⁷ that attempts to mimic the functioning and performativity of marriage, while simultaneously ‘not marriage’, lacking in social and legal status¹⁸ that ensures the institutions are separate. Despite this, they do represent a significant institution for same-sex couples, particularly as the first UK recognition of LGBTQ+ relationships and are still demonstrably popular as a huge tranche of legal rights for same-sex couples.¹⁹

A civil partnership is a relationship between two people of the same sex, formed via registration²⁰ ending only in dissolution, annulment, or death.²¹ The registration of a civil partnership differs from the ceremonial process of marriage, as the former is purely a civil and non-religious procedure and does not require any distinct vows to be stated, while containing the same rights and responsibilities as marriage. The dissolution process replicates the divorce process, however adultery cannot be used as a factor in dissolution proceedings due to the heterosexual definition of adultery²² nor is consummation recognised in civil partnerships²³ or same-sex marriage.²⁴

¹⁴ Kenneth McK Norrie, ‘The Changing Concept of “Family” and Challenges for Family Law in Scotland’ in Jens Scherpe (ed) *European Family Law* (Edward Elgar 2016) 238.

¹⁵ The Netherlands and Belgium in 2001 and 2003 respectively.

¹⁶ Robert 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) *Child and Family Law Quarterly* 265.

¹⁷ HL Deb 22 April 2004, vol 660, col 405. (Baroness O’Cathain)

¹⁸ Carl Stychin, ‘“Las Vegas is not where we are”: Queer readings of the Civil Partnership Act’ [2006] 25 *Political Geography* 899, 902.

¹⁹ There has been a slight, continual rise in Civil Partnerships in the last few years, but the rate has still faced a significant decline since 2013 and is marginal compared to marriage. On average, there are around 1000 civil partnerships a year, and 7000 same-sex marriages. Office for National Statistics, ‘Marriages in England and Wales’ (2016).

²⁰ CPA 2004, s1.

²¹ CPA 2004, s3.

²² Defined as ‘ordinary and complete’ in *D v A* (1845) 1 Rob Ecc 279 which was further qualified as penetrative penile-vagina sexual intercourse.

²³ CPA 2004, s50.

²⁴ Carl Stychin, ‘Not (Quite) A Horse and Carriage: The Civil Partnership Act 2004’ (2006) 14 *Feminist Legal Studies* 79.

However, despite the disparities between marriage and civil partnerships, civil partnerships remain of significance to LGBTQ+ populations as a form of registered partnership free from the patriarchal, paternal requirements of marriage.²⁵ While for some, marriage represents the ultimate²⁶ symbol of legally and socially recognised relationship;²⁷ civil partnerships may present an opportunity to break free from a traditionally religious or patriarchal institution.²⁸ This gives weight to the importance of retaining, and opening up civil partnerships to all couples.

The advent of same-sex marriage in the United Kingdom followed a burgeoning international trend in Western Europe and North America, as discussed by the other chapters in this collection. The passing of the Marriage (Same-Sex Couples) Act 2013 allowed same-sex couples to finally enter into an institution symbolically similar to traditional marriage, following David Cameron's (small-c) conservative goal²⁹ of encouraging marriage rates.³⁰ This equality-based³¹ reform follows the incremental familiarisation of LGBTQ+ rights.³² This development is often critiqued as reliant on normalisation and assimilation,³³ yet is a clear sign of the advancing acceptance and tolerance of LGBTQ+ identity (reliant on recognising certain forms of relationship). However, the 2013 Act coupled with the 2004 Act has created a situation in which same-sex marriage and civil partnerships, are arguably restrictive institutions, both of which restrict access to certain couples based on sex. The system of relationship recognition, I will argue, constructs a hierarchy that preserves marriage as the best form of recognition, and denies the opportunities to recognise relationships in different ways: marriage is represented as the 'justifiable'³⁴ location for sex, with civil partnerships replicating marriage. Non-marital relationships, therefore, are still excluded from recognition, meaning that the homoradical form of relationships and other familial relationships are still not recognised.³⁵

²⁵ Sarah Beresford, 'We're All Same (Sex) Now?: Lesbian (Same) Sex; Consummation; Adultery and Marriage' [2016] *Journal of GLBT Family Studies* 1.

²⁶ Chris Ashford, Alexander Maine, Giuseppe Zago, 'Normative Behaviour, Moral Boundaries, and the State' in Chris Ashford and Alexander Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar forthcoming 2019).

²⁷ Notably, marriage's significance was emphasised in the *Wilkinson v Kitzinger* case: "I want my marriage, and same-sex marriages more generally, to be recognised in Britain, and elsewhere, because I want to be able to refer to Celia as my wife and have that immediately and unproblematically understood as meaning that she is my life-partner with all the connotations and social consequences that using the term "wife" or "husband" has for a heterosexual couple. [...] This symbolic status of marriage as a fundamental social institution is, in many ways, as important as its formal legal status. It provides for social recognition of key relationships, and to have our relationship denied that symbolic status devalues it relative to the relationships of heterosexual couples." (n 3) para 5.

²⁸ Nicola Barker, *Not The Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan 2013), Rosemary Auchmuty, 'Same-Sex Marriage Revived: feminist critique and legal strategy' (2004) 14 *Feminism and Psychology* 101, Duggan (n 10).

²⁹ The ex-Prime Minister, David Cameron, noted this as one of his favorite achievements in office: HC Deb 13 July 2016, vol 613, col 286.

³⁰ Office for National Statistics, 'Marriages in England and Wales: 2015' (2018).

³¹ Martha Nussbaum, 'A Right to Marry?' (2010) 98 *California Law Review* 667.

³² Frances Hamilton, 'Strategies to achieve Same-Sex Marriage and the Method of Incrementalist Change' (2016) 25 *Florida Journal of Transnational Law and Policy* 121.

³³ Diane Richardson, 'Desiring Sameness? The Rise of a Neoliberal Politics of Normalisation' (2005) 37 *Antipodes* 519.

³⁴ Rubin (n 9).

³⁵ For instance, see *Burden v United Kingdom* App no. 13378/05 (ECtHR, 29 April 2008): In this case, a pair of elderly sisters sought to have the law changed regarding civil partnerships, in order to have their own caring relationship recognised in order to avoid paying inheritance tax. Kenneth McK Norrie, 'Inheritance tax, civil partnership and the rights of spinster sisters' (2008) 23 *Edinburgh Law Review* 438; Nancy Polikoff, 'Law that Values All Families: Beyond (Straight and Gay) Marriage' (2009) 22 *Journal of the American Academy of Matrimonial Lawyers* 85.

Consideration of the position post-*Steinfeld*

Following the introduction of same-sex marriage, same-sex couples wishing to have their relationship recognised by the state were presented with a choice to marry or enter into a civil partnership. This ‘somewhat absurd’³⁶ situation meant that different-sex couples could only register their relationship by marriage, and those cohabitating were bereft of any relationship rights.³⁷ This inequality was the focus of litigation in the Supreme Court, brought by a heterosexual couple and backed by the ‘Equal Civil Partnership’ campaign,³⁸ claiming discrimination based on their sexual orientation as to their being unable to register a civil partnership. The Supreme Court in *R (Steinfeld and Keidan) v Secretary of State for International Development*³⁹ decided that the withholding of civil partnerships from heterosexual couples did indeed engage, and constitute a breach of Article 14 (the prohibition of discrimination) of the European Convention of Human Rights when read in conjunction with Article 8 (the right to respect for private and family life). The ruling declared section 1 of the Civil Partnership Act 2004 to be incompatible with the Human Rights Act 1998, constituting an act of discrimination interfering with the couple’s right to their private and family life.

Lord Kerr’s judgment, with whom the rest of the Supreme Court unanimously agreed, sets out the conditions in which the Declaration of Incompatibility was made. The judgement held that sections 1 and 3 of the Civil Partnerships Act 2004, (which stated that a civil partnership is a relationship between two people of the same sex⁴⁰) and those who are of a different sex are not eligible to register as civil partners was in fact in breach of the right to a private family life.⁴¹ The judgment draws extensively on jurisprudence from the ECtHR, notably set out in *Schalk and Kopf v Austria*⁴² which determined that the ECHR does not oblige contracting states to legislate for same-sex marriage. However, there is a positive obligation to provide legal protection for same-sex couples, following *Oliari v Italy* decision,⁴³ providing this is socially acceptable on the ground. Lord Kerr notes a contrast between the *Schalk* circumstances to the one presented, in that the Austrian Registered Partnership Act 2009⁴⁴ was a ‘product of evolving societal acceptance of the need to provide some legal recognition of same sex partnerships.’⁴⁵ Whereas, the inequality produced by civil partnerships and same-sex marriage in the UK was a deliberate decision, as a ‘creature of Parliament’.⁴⁶ Such a creation should have been rectified immediately:

‘In the case of MSSCA, however, it was Parliament itself that brought about an inequality immediately on the coming into force of the Act, where none had previously existed. The redressing by the legislature of an imbalance which it has come to recognise is one thing; the creation of inequality quite another.’⁴⁷

³⁶ Samuel Fulli-Lemaire, ‘Legal Recognition of Same-Sex Relationships in Central Europe: Steady Progress’ in Katharina Boele-Woelki and Angelika Fuchs (eds) *Same-Sex Relationships and Beyond* (3rd edn, Intersentia 2017) 27.

³⁷ Barlow et al (n 3) 49.

³⁸ ‘Equal Civil Partnerships’ <<http://equalcivilpartnerships.org.uk>> accessed 28th November 2018.

³⁹ *Steinfeld* (n 5).

⁴⁰ CPA 2004, s 1.

⁴¹ CPA 2004, s 3(a).

⁴² *Schalk and Kopf v Austria* App no. 30141/04 (ECtHR, 24 June 2010)

⁴³ *Oliari and Others v Italy* App nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015).

⁴⁴ Eingetragene Partnerschaft-Gesetz 2009.

⁴⁵ *Steinfeld* (n 5) 35 (Lord Kerr SCJ)

⁴⁶ *Ibid* 45.

⁴⁷ *Ibid* 35.

Lord Kerr establishes that the introduction of same-sex marriage in England and Wales initiated an inequality that had previously not existed, in the denial of different-sex couples from the right to a civil partner. The creation of this inequality should, according to Lord Kerr lead to the extension of civil partnerships to different-sex couples. Lord Kerr then notes that this is undeserving of a margin of appreciation for the state, as to how the inequality is ‘cured’.⁴⁸

Kerr draws an analogy with *Vallianatos v Greece*. In *Vallianatos*, same-sex couples were excluded from civil unions and Strasbourg ruled that this breached Article 14 in conjunction with Article 8,⁴⁹ which is compared to *Steinfeld* as a direct reversal of position.⁵⁰ Kerr goes on to point out that the government and Parliament had knowledge of the position created in which an inequality of treatment was bound to arise, one that was not justifiable as a qualification of the Article 14 right.⁵¹ Therefore, Kerr states, the government should have eliminated the inequality of treatment immediately. The 5 year delayed consultation could not have been justified as a legitimate aim for the continuance of discrimination. Kerr suggests that civil partnerships should have been immediately abolished or opened up to different sex couples in order to rectify the breach of Articles 14 and 8,⁵² thus demonstrating the importance and substance of the equality-driven nature of relationship recognition rights, at odds with the hierarchical organisation of relationship recognition. Civil partnerships were not opened to different-sex couples immediately because of concerns from religious institutions, as the Government explicitly ruled out their involvement in religious affairs and made efforts to distance civil partnerships from religious groups.⁵³

Following the ruling the government has quickly incorporated the decision and factored this in to the legislation for civil partnerships. The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 received royal assent on 26th March 2019.⁵⁴ This requires the Secretary of State to make regulations to amend the 2004 Act so that different sex couples are eligible to form a civil partnership.⁵⁵ The Act is a welcome step towards eradicating the hierarchy of relationship recognition in the UK by requiring the government to take action over different-sex civil partnerships, however the dyadic form of recognition still excludes certain groups. The Act and the *Steinfeld* case demonstrate the effective use of human rights instruments as methods to enact change, particularly concerning the construction of private family life as incorporating non-marital legal institutions. Doing so, will disestablish the separation between heterosexuality and civil partnerships, acting as a conduit to further disestablish marriage’s heterosexual underpinnings. In providing an alternative form of recognised relationships for different sex couples, marriage’s presupposed heterosexual nature becomes no longer viable, which, coupled with same-sex marriage, goes further to disestablish the marriage/civil partnership hetero/homosexual binary.⁵⁶ The creation of civil partnerships in 2004 was the first step taken towards

⁴⁸ Ibid 35.

⁴⁹ *Vallianatos v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013)

⁵⁰ *Steinfeld* (n 5) 36 (Lord Kerr SCJ).

⁵¹ Ibid 37.

⁵² Ibid 49.

⁵³ Women and Equality Unit, ‘Responses to Civil Partnerships: A framework for the legal recognition of same-sex couples’ (2003) 19.

⁵⁴ An Act to make provision about the registration of marriage; to make provision for the extension of civil partnerships to couples not of the same sex; to make provision for a report on the registration of pregnancy loss; to make provision about the investigation of still-births; and for connected purposes.

⁵⁵ Civil Partnerships, Marriages and Deaths (Registration, Etc) Act 2019, s2.

⁵⁶ Butler (n 6) 187; Lauren Berlant and Michael Warner, ‘Sex in Public’ (1998) 24 *Critical Inquiry* 547, 548; Michael Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* (2nd edn, Harvard University Press 2000).

deconstructing the sexual hierarchy, which had previously only recognised heterosexual sexuality as marital and legitimate. Same-sex marriage, and the creation of different-sex civil partnerships, will further create equality and act to disestablish this hierarchy. However, this still focuses on dyadic pairings, ultimately contributing to a sexual hierarchy in which those outside of the mononormative couplings are not recognised, nor are same-sex couples offered marriage in Northern Ireland.⁵⁷ The empirical evidence collected in this research will now be discussed in order to reveal the socially constructed meanings of civil partnerships.

Empirical significance attached to civil partnerships

The meanings attached to civil partnerships and same-sex marriage will now be discussed in order to assess the institution's continuing significance to the lives of the LGBTQ+ participants of this study. This section will demonstrate the significance of civil partnerships, but also their maintained 'lesser' status below marriage, recognising a social hierarchy dependent on the legal hierarchy. Investigations into the lived experience of the hierarchy are essential in order to assess the impact of law and to re-evaluate the stratification of relationship recognition that prioritises marital relationships. The institution, however, is one that is facing being subsumed by same-sex marriage as the ultimate form of legal recognition, with more people opting for marriages over civil partnerships.⁵⁸ The research utilised semi-structured interviews with 20 self-identified LGBTQ+ people aged 20-67 years old. The interviews were conducted in 2016 in Newcastle-upon-Tyne city centre. These participants were collected through mixed-method sampling including online strategic and snowball sampling, representing a mix of socio-economic backgrounds in the North-East of England. Interviews were used in order to broadcast the voices of the LGBTQ+ people,⁵⁹ giving emphasis to their lived experiences and realities.⁶⁰

The Significance of Civil Partnership

Participants often described civil partnerships as a significant institution that, in lieu of marriage provided them with a requisite familial structure. In ascribing significance to civil partnerships, participants often appropriated the language of marriage, denoting the similarity and coinciding of the two that demonstrates its aspirational position:

“I mean I nearly did get married actually, many years ago, well, would have been civil partnership actually, and erm, it was really important to my partner at the time, and I did love him.” (Gay man, 28)

This participant discusses a previous relationship that presents an important point to note in terms of the lived experience of civil partnerships as analogous, and representative of aspiring to marriage. This reflects Heaphy et al.'s research⁶¹ which found that overwhelmingly the language of marriage

⁵⁷ Bernadette Hayes and John Nagle, 'Ethnonationalism and attitudes towards same-sex marriage and abortion in Northern Ireland' (2018) *International Political Science Review* 1; Jocelyn Evans and Jonathan Tonge 'Partisan and religious drivers of moral conservatism: same-sex marriage and abortion in Northern Ireland' (2018) 24 *Party Politics* 335; Fulli-Lemaire (n 36) 30.

⁵⁸ ONS (n 30).

⁵⁹ Denise Levy and Corey Johnson, 'What does the Q mean? Including queer voices in qualitative research' (2011) 11 *Qualitative Social Work* 134.

⁶⁰ Catherine Pope and Nick Mays, 'Qualitative Research: Reaching the parts other methods cannot reach: an introduction to qualitative methods in health and health services research' (1995) 311 *British Medical Journal* 4.

⁶¹ Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 5.

was appropriated by civil partnered couples as a means of naturalising and emphasising the significance of their relationship. In doing so, this emphasises the similarity and function of civil partnerships to marriage, and confirms the social significance of the terms ‘husband’ or ‘wife’, reaffirming the place of marriage within society. The next participant attributes the improved social and legal standing of LGBTQ+ populations to the impact of civil partnerships as they have become naturalised in the decade of their existence. He states that civil unions in their long-standing status, have had a greater effect than the more recent same-sex marriage when asked if society is more accepting of LGBTQ+ people:

“Yeah, they are, but I don’t know if marriage has helped that, it was only two year ago anyway, civil unions definitely have helped.” (Gay man, 32)

In this, the participant posits civil partnerships as a beneficial step forward in equality measures. This may be because of the public status of civil partnerships representing a shift in social understanding of same-sex relationships, that same-sex marriage replicates, rather than transforms understandings of sexual relationships.⁶² Due to the recent passage of the 2013 Act, same-sex marriage falls in line with the incremental development of familial rights⁶³ and as a prerequisite for marriage, civil partnerships, in this participant’s view, have had a larger effect on society. This the first step taken for same-sex couples who wished for statutorily recognised relationships, and the beginning of the disestablishing of the sexual hierarchy⁶⁴ in 2004, in which relationship recognition was exclusive to different sex relationships. Thus, different-sex civil partnerships will confirm the status and significance of the institution.

A further participant discusses the role civil partnerships had in lieu of marriage:

‘I suppose civil partnerships was again about protecting people’s rights in property and security, in terms of, I suppose where people, yeah it provided some financial and legal security but no, we’ve never thought about doing anything like that, we wouldn’t do it actually. Civil partnerships was a stepping stone for same-sex marriage, and now people aren’t doing it, you don’t hear of anyone getting a civil partnership now, it’s like oh that was the weak thing on the way to marriage so people would now get married rather than get married.’ (Lesbian, 68)

The participant notes the legal protections secured by civil partnerships which may lack the social recognition received by marriage. Though recognising their significance, the participant demonstrates her own reluctance to recognise their relationship, demonstrative of the ways in which resistance to formally recognising a relationship takes on a political meaning. Such resistance may represent polarisation against the norm, and a reluctance to participate in heteronormative structures.⁶⁵

Younger LGBTQ+ people may best represent the impact of the decade-long standing of civil partnerships. The next statement, from a 21-year-old male participant is demonstrable of Plummer’s polarisation theory, in which favourable social attitudes towards LGBTQ+ people are leading younger people to grow less polarised or embittered than those who have grown up when social attitudes were less favourable.⁶⁶ The participant, using Plummer’s theory, is less likely to have become polarised or

⁶² Amy Hequembourg and Jorge Arditi, 'Fractured Resistances: The Debate over Assimilationism among Gays and Lesbians in the United States' (1999) 40 *The Sociological Quarterly* 667.

⁶³ Hamilton (n 32).

⁶⁴ Rubin (n 9)

⁶⁵ Ken Plummer, 'Symbolic Interactionism and the Forms of Homosexuality' in Steven Seidman (ed), *Queer Theory/Sociology* (Blackwell 1996) 81.

⁶⁶ *Ibid.*

embittered by prejudicial or negative social stigma associated with homosexuality, because of the registered partnership:

“so if you look kind of at different generations, there probably is a trend towards there being less stigma and sort of prejudice I suppose, and having preconceived ideas of gay people, erm, like I’ve grown up where the age of consent was the same and Civil Partnerships were introduced and all that, [...] so, gay marriage is another step towards that.” (Gay man, 21)

Plummer’s theory states that societal hostility towards homosexuality creates the potential for polarisation, and thus less hostile environments may lead to younger LGBTQ+ populations occupying ‘simultaneous heterosexual and homosexual roles’.⁶⁷ In the above quote, the participant notes the improved legal framework established in the early 2000s that have led to the improved social acceptance. He posits civil partnerships as a stepping-stone towards same-sex marriage that furthers the equality agenda that relies on assimilationist strategies that benefit LGBTQ+ populations in the constructing of sameness⁶⁸ between heterosexual and LGBTQ+ people. These quotes represent the participants’ perceptions of civil partnerships as a transformational institution in society that began the recognition of same-sex couples by the law that allowed for calls for same-sex marriage to develop. This demonstrates that in the organisation of relationship recognition, civil partnerships were a necessary stepping-stone, while the introduction of heterosexual civil partnerships will confirm their potential as a transformative institution in relationship recognition.

Civil Partnerships as ‘lesser’ than marriage

Despite the significance of civil partnerships, many LGBTQ+ participants continued to express their opinions that they are lesser than marriage, due to their standing as ‘not’ marriage and their exclusionary nature. The next participant uses this stepping-stone argument to explicitly spell out the notion that civil partnerships are a ‘lesser marriage’ due to the politico-legal landscape at the time of their creation:

“Civil partnerships seemed to be the furthest we could go at that point, and it did always feels like it was a, this was a lesser thing than marriage, I know that was how the public presented it, but actually, erm, my friends, no one got civil partnered, I’ve no intention of getting civil partnered or married because I’ve never thought about that personally, [...] I, I think there’s always the case that civil partnerships were the best that we can do, I think if the government thought it was possible, or if society had maybe been there at the time.” (Gay man, 25)

In presenting civil partnerships as the best available option in 2004, this reinforces the notion that a lesser form of relationship recognition was needed in order to be able to move on to the more equal institution of marriage. Civil Partnerships created an institution similar to marriage but maintained marriage’s distinctiveness, framed by Stychin as cultural parochialism.⁶⁹ This parochialism is representative of the narrow focus of assimilationist relationship recognition, firmly based within the traditional marriage model. This represents a hierarchy between civil partnerships and marriage, with marriage containing more social and legal value, and in the introduction of same-sex marriage, this hierarchy is maintained and reinforced as these institutions replicate traditional marital structures that normatively presume and privilege⁷⁰ domesticity and monogamy. Robinson has stated that this is an

⁶⁷ Ibid 81.

⁶⁸ Richardson (n 33).

⁶⁹ Carl Stychin, ‘Couplings: Civil Partnerships in the United Kingdom’ (2005) 8 *New York City Law Review* 571.

⁷⁰ Jeffrey Weeks, Brian Heaphy and Catherine Donovan, *Same Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge 2001) 40.

inadequate means to enact radical social change in favour of LGBTQ+ populations.⁷¹ If civil partnerships do indeed replicate marriage, they continue to be seen as a ‘lesser’ institution in their restriction to same-sex couples. This is further reinforced by a participant who, despite having been previously civil partnered, viewed the institution as a lesser form of registered partnership:

“Erm, I actually entered into a civil partnership at the time, it was a cop-out basically, I did it in Scotland where it came before England if I remember correctly, but it was a cop-out, but was always going to go in the right direction as people’s attitudes change, [...] certainly that was a watered down bullshit thing, again it was better than nothing at the time, but you gotta keep pushing for more.” (Gay man, 46)

For this individual, civil partnerships represented a failure to achieve full equality in registered partnerships with marriage. This failure thus encompasses the view that marriage, as distinct from civil partnerships, is unique as an institution encompassing social and legal privileging.

Further to this, the next participant notes his experiences of a civil partnership as representative of a legal process, distinct from a marriage ceremony:

“it was very unceremonious ceremony if you think, it was just a signing of a piece of paper, whereas I think a marriage is more the ceremony, the inviting people, the celebration, I think it’s to do with that, it’s more the celebration of that than the legal side of it I think...” (Gay man, 36)

This experience of the legal registration of a civil partnership is recounted by the participant as a purely civil event, divorced from the traditional ceremonial minutia and celebrations of a wedding, that Stychin has called an ‘empty vessel’⁷² in failing to sufficiently replicate the socially recognised components of a marriage celebration. While a marriage may be conducted with very little ceremony, it still requires two witnesses and the reciting of vows; in contrast, civil partnerships may be conducted entirely silently. Both institutions allow for couples to conduct their own ceremonies and celebrations, but there is a socially recognised ‘culture’ of marriage that has traditionally relied on heteronormative and patriarchal imagery.⁷³ Civil partnerships may further be viewed as ‘empty’ in the legislative exclusion of consummation and adultery due to the law’s failure to recognise same-sex intercourse.⁷⁴ Further qualifying this, the participant went on to state that because of such differences, heteronormative society does not see such registered partnerships in the same way as marriage:

“and I think, although we did have civil partnerships, erm, there was some elements of heterosexual society said “oh well you’re not actually married”, and that’s eradicated that now, because obviously there’s a proper marriage ceremony.” (Gay man, 36)

In doing so, he confirms the notion that same-sex marriage was intended to create equality, going further than that established in 2004, by claiming ownership of the term ‘marriage’ and including the possibility of legitimate marriage ceremonies. However, the steps taken towards such equality continue to establish a hierarchy, as though same-sex couples may have two opportunities, the fact that marriage is still reserved for different-sex couples, maintains the centrality of heterosexuality to marriage and reaffirms its normative status. This organisation of relationship recognition reinforces hierarchies, in which traditional marriage is maintained as an ideated, undiluted institution, while civil partnerships

⁷¹ Hequembourg and Ardit (n 62).

⁷² Stychin (n 69)

⁷³ Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford University Press 2017).

⁷⁴ Nicola Barker, ‘Sex and the Civil Partnership Act: The Future of (Non) Conjugal?’ (2006) 14 *Feminist Legal Studies* 241; Stychin (n 24); Brian Heaphy, Catherine Donovan and Jeffrey Weeks, ‘A Different Affair? Openness and Nonmonogamy in Same Sex Relationships’ in Jean Duncombe and others (eds), *The State of Affairs: Explorations in Infidelity and Commitment* (Routledge 2014); Lucy Crompton, ‘Where’s the Sex in Same-Sex Marriage?’ (2013) 43 *Family Law* 564; Beresford (n 25).

and same-sex marriage are socially recognised according to their prefixes, marking their distinctiveness from the natural conjugal whole.⁷⁵ The empirical evidence presented suggest that while civil partnerships are a significant institution that should be preserved, they are still maintained as ‘lesser’ than marriage, exacerbated by the introduction of same-sex marriage. This contributes to a hierarchy of relationship recognition, preserving marriage’s privilege.

A further participant’s comments may be used to illustrate an apparent disparity between perceptions of civil partnerships and sexual relations outside of such relationships that maintains the ideation of recognised relationships:

‘Been a civil partner now for 8 years, and it’s only something I think about if it’s a conscious thing, reinforced by someone else, so if someone points out ‘are you in a civil partnership?’, or, in the case of us, we have an open relationship, so as soon as you mention your civil partner to someone else, it takes on a whole new meaning to them.’ (Gay man, 36)

The participant’s sexual partners posit non-monogamy as antithetical to civil partnerships, and may illustrate the mononormative expectations of such relationships. His relationship status is often at the back of his mind while he pursues non-monogamous sex, demonstrative of the compartmentalisation of sex,⁷⁶ and the freedom to construct sexual relationships outside of normative boundaries.⁷⁷ This presumes monogamy in legally recognised relationships that may lead to feelings of exclusion for those described as ‘homoradical’, in line with Warner’s comments that sex outside of legally recognised relationships will become stigmatised.⁷⁸ While there is no legal bar to non-monogamous relationships in civil partnerships or same-sex marriage (however, different-sex marriages could rely on adultery in divorce proceedings, while same-sex could not⁷⁹), social expectations may heavily influence perceptions of civil partnerships,⁸⁰ which contribute to the hierarchical organisation of legally recognised relationships, upholding their mononormative⁸¹ expectations.

Heterosexual civil partnerships breaking down the hierarchy

In analysing the narratives and lived experiences of LGBTQ+ participants, particularly those who have experienced the process of registering their partnership, it becomes possible to conceptualise a hierarchy of relationship recognition with marriage represented as encompassing the natural conjugal whole, and civil partnerships as a lesser institution. The hierarchy which has been argued to exist, through social and legal structures that construct civil partnerships as lesser and uphold marriage as the greater institution has significant social implications. This hierarchy may lead to pressure to marry due to hegemonic discourse and the exclusion of non-dyadic relationships that upholds and sustains dominant expectations of domesticity, monogamy, and procreation. Reforming relationship recognition,

⁷⁵ Michael Warner, 'Homo-Narcissism; or, Heterosexuality' in Joseph Boone and Michael Cadden (eds), *Engendering Men* (Routledge 1990).

⁷⁶ Kristoff Bonello and Malcolm Cross, 'Gay Monogamy: I Love You But I Can't Have Sex With Only You' (2009) 57 *Journal of Homosexuality* 117.

⁷⁷ Heaphy, Donovan and Weeks (n 74) 168.

⁷⁸ Warner (n 56) 96.

⁷⁹ Provided in Schedule 4(3) Marriage (Same-Sex Couples) Act 2013 which amends section 12 of the Matrimonial Causes Act 1973 to state that consummation requirements and adultery do not apply to same-sex couples. Matrimonial Causes Act 1973, s12; *Dennis v Dennis* [1995] 2 All ER 51; Beresford (n 25); Crompton (n 74).

⁸⁰ Michael Lasala, 'Monogamy of the Heart' (2004) 17 *Journal of Gay & Lesbian Social Services* 21.

⁸¹ Robin Bauer, 'Non-Monogamy in Queer BDSM Communities: Putting the Sex Back into Alternative Relationship Practices and Discourse' in Meg Barker and Darren Langdridge (eds), *Understanding Non-Monogamies* (Routledge 2010) 144.

following the *Steinfeld* declaration of incompatibility will provide a means of establishing more effective, substantive equality that may disturb such a focus and allow the pursuit of different forms of legally recognised relationships. This comes at a time when the government is currently on course to legislate for heterosexual civil partnerships which goes some way to achieving this goal.

Following the *Steinfeld* decision and the passage of Civil Partnerships, Marriages and Deaths (Registration, Etc) Bill, the Parliament at Westminster, has the opportunity to disestablish the hierarchy in the creation of equal standards of relationship recognition. By opening up civil partnerships to different sex couples, the lesser form of relationship recognition, which is currently restricted only to same-sex couples, will no longer be 'lesser'. In allowing different and same sex couples to enter into such a partnership, the ideation of marriage as the ultimate form of registered partnership will be diminished, in order to establish a more equal and equitable system of recognition. The sexual hierarchy will be diminished as heterosexual couples are provided with the choice that same-sex couples have had for some time: the ability to choose between marriage and civil partnerships. Such a choice will allow for pluralised forms of relationship recognition that facilitates equality in opportunity for couples. In creating two systems of relationship recognition that are open to all coupled relationships, the centrality of heterosexuality is removed from marriage, and the homosexual nature of civil partnerships would also be removed. By doing so, the maintenance of binary divisions based on sexuality would be disestablished and would therefore diminish the centrality of marriage as a patriarchal, normative institution and allow for the growth of civil partnerships. Following the Equal Civil Partnerships campaign and the publicised *Steinfeld* decision, the law has the opportunity to create equal standards of relationship recognition, following society's influence which demonstrates the significance of recognised relationships moving away from the historic reliance on marriage as a social and legal organiser.⁸² In giving choice to all those who wish to recognise their coupled relationship, this creates an opportunity to level the hierarchy, in which both marriage and civil partnerships are accessible to all, which would remove the hierarchical nature of marriage as an exclusive institution. This accessibility will deconstruct the hierarchy, allowing free choice of relationship recognition that is not based on identity or sexual partner, allowing for the further pluralisation of relationship recognition.

While the *Steinfeld* judgment and the future introduction of different-sex civil partnerships would begin to diminish the sexual hierarchy, the hierarchy would continue to exist. This exclusion is predicated on the dyadic focus of relationship recognition, further excluding those from non-normative relationships, be it the exclusion of other familial⁸³ or polyamorous and non-monogamous relationships that may encompass homoradical sexuality, deviating from normative constructions of sexuality. The hierarchy thus stigmatises those relationships who do not marry⁸⁴ and does little to further the rights of those cohabiting. Further reform should therefore focus on destabilising the sexual hierarchy and aim to improve the status of those who do not conform to normative relationship forms.

Conclusion

Parliament is presented with a chance to develop the ways in which law interacts with, and regulates sexuality via relationship recognition, offering a new narrative regarding marriage and civil partnerships

⁸² Barker (n 28); Chambers (n 73).

⁸³ *Burden* (n 35); Mck Norrie (n 35); Polikoff (n 35).

⁸⁴ Michael Warner, 'Beyond Gay Marriage' in Wendy Brown and Janet Halley (eds) *Left Legalism/Left Critique* (Duke University Press 2002) 260; Janet Halley, 'Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate' in Robert Wintermute and Mads Andenaes (eds) *Legal Recognition of Same-Sex Partnerships* (Hart 2001) 99.

that should ultimately lead to greater acceptance and recognition of the diversification of relationship recognition. Equal access to different institutions allows for difference and diversity in terms of recognition but maintains equal access and opportunity, and further eradicates the superiority of marriage in society. In analysing the narratives provided in the empirical data, it has become possible to conceptualise and establish a hierarchy of relationship recognition. Given the historical, social and legal value of marriage, and the ideation that stems from same-sex marriage, civil partnerships as they were, fell to the bottom of the hierarchy. However, the opening of civil partnerships to different sex couples, and the legislation for same-sex marriage in Northern Ireland,⁸⁵ will go further to balance out this hierarchy as relationship recognition becomes diversified, allowing for equality of opportunity to be achieved.

⁸⁵ Legalisation of same-sex marriage will take place automatically in Northern Ireland on 21 October 2019, unless the Northern Ireland devolved government no longer remains suspended following the Northern Ireland (Executive Formation) Bill 2017-19.

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