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PRIVATE INTERNATIONAL LAW IMPLICATIONS OF 'EQUAL CIVIL PARTNERSHIPS'

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Abstract The *Steinfeld and Keidan* campaign for 'equal civil partnerships' is focussed on English domestic law. However, it also has profound implications from a private international law perspective. If the UK parliament extends civil partnership to include different-sex couples, this will close a long-standing gap in English private international law. If, on the other hand, it was decided to abolish civil partnership, this would extend the existing lacuna in English private international law, and might generate further collisions with human rights norms. This article explores these lacunae and associated human rights concerns—and suggests possible solutions.

Keywords: civil partnership, human rights, private international law.

I. INTRODUCTION

A. The Campaign for 'Equal Civil Partnerships'

At present, English domestic law offers two modes of formalization for same-sex relationships (marriage and civil partnership), and only one for different-sex relationships (marriage). This asymmetry flowed from the parliamentary decision to extend marriage to same-sex couples[1] without simultaneously abolishing, or extending, civil partnership.

This disparity of treatment was challenged by two leading campaigners for 'equal civil partnerships',[2] Rebecca Steinfeld and Charles Keidan, a different-sex couple who wished to register a civil partnership at their local registry office in London. They found themselves disqualified by sections 1(1) and 3(1)(a) Civil Partnership Act 2004 (CPA) which confine civil partnership to same-sex couples. They subsequently initiated judicial review proceedings, seeking a declaration under section 4 Human Rights Act 1998 (HRA) that the disqualification of different-sex couples violated Article 14[3] of the European Convention on Human Rights (ECHR) taken with Article 8.[4] They argued that English law discriminated unlawfully in its treatment of different-sex couples by

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[1] Marriage (Same Sex Couples) Act 2013.

[2] See <http://equalcivilpartnerships.org.uk/>.

[3] Art 14 ECHR provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[4] Art 8(1) ECHR provides: 'Everyone has the right to respect for his private and family life … .'

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comparison with same-sex couples. Same-sex couples with an ideological objection to marriage would still have an opportunity for formalization of their relationship, whereas different-sex couples would not.[5]

This claim was rejected by the High Court[6] and by a majority of the Court of Appeal[7] but it succeeded before a unanimous Supreme Court.[8] While the High Court expressed the view that the claim fell outside of the 'ambit' of Article 8 ECHR (and therefore fell at the first hurdle),[9] the Court of Appeal was more sympathetic, dismissing the appeal only on the basis that the Government was entitled to take a 'wait and see' approach in order to determine how best to proceed.[10] The Court of Appeal accepted that in the longer term the maintenance of the status quo would give rise to unlawful discrimination.[11]

In the eyes of the Supreme Court, however, there had been an *immediate* violation of Article 14 ECHR as soon as marriage became accessible to same-sex couples on 13 March 2014. This opening up of marriage needed to be accompanied by a simultaneous abolition or suspension of civil partnership, *or* by its instantaneous extension to different-sex couples.[12] Condemning this 'manifest inequality of treatment',[13] the Supreme Court issued a declaration of incompatibility under section 4 HRA: '… sections 1 and 3 of CPA (to the extent that they preclude a different sex couple from entering into a civil partnership) are incompatible with Article 14 of ECHR taken in conjunction with Article 8 of the Convention'.[14]

The campaign for 'equal civil partnerships' also derived support from a number of Private Members' Bills which proposed the removal of the same-sex requirement laid down in the 2004 Act.[15]

In response to these initiatives, the UK Government committed to abandoning the status quo, and to the adoption of legislation which would *either* extend civil partnership to different-sex couples, *or* abolish or phase out civil partnership as a legal institution.[16] It was originally planned (prior to the Supreme Court decision) that the Government would engage in research on the demand for civil partnership until

[5] The claimants contended before the Court of Appeal that they had 'deep-rooted and genuine ideological objections to marriage' based on 'its historically patriarchal nature'. They preferred civil partnership as a secular institution which would 'give due recognition to the equal nature of their relationship': *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81; [2017] 3 WLR 1237 [5].

[6] *Steinfeld and Keidan v Secretary of State for Education* [2016] EWHC 128 (Admin); [2016] 4 WLR 41.

[7] *Steinfeld* (CA) (n 5).

[8] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

[9] For a critique of the High Court judgment, see L Ferguson, 'The Denial of Opposite-Sex Couples' Access to Civil Partnership as Discrimination' (2016) 38 Journal of Social Welfare and Family Law 450; A Hayward, 'Justifiable Discrimination: The Case of Opposite-Sex Civil Partnerships' [2017] CLJ 243.

[10] *Steinfeld* (CA) (n 5) [158], [170].

[11] *Steinfeld* (CA) (n 5) [138], [161]–[162].

[12] *Steinfeld* (SC) (n 8) [48]–[50].

[13] *Steinfeld* (SC) (n 8) [3].

[14] *Steinfeld* (SC) (n 8) [62].

[15] See Civil Partnerships, Marriages and Deaths (Registration Etc.) HC Bill (2017–18) [11]; also A Hayward, 'The Future of Civil Partnerships in England and Wales' in J Scherpe and A Hayward (eds), *The Future of Registered Partnerships: Family Recognition Beyond Marriage* (Intersentia 2017) 550–1.

[16] See *Steinfeld* (CA) (n 5) [153]; also HC Deb 2 February 2018, vol 635, cols 1121–1122.

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Autumn 2019, and then make a final decision on how to proceed in 2020,[17] but this timetable has now been brought forward by one year.[18]

B. Private International Law Implications

The campaign for 'equal civil partnerships' is focussed on English domestic law—and on the domestic legal infrastructure for formalization of relationships. The implications of extension or abolition have been widely discussed in this internal context.[19] However, the UK Government's decision will also have significant cross-border implications, and this article seeks to identify and to analyse the consequences of extension or abolition from a private international law perspective.

While the Supreme Court declaration pertains only to domestic registration of civil partnership, the impugned section 1 CPA same-sex requirement applies both to domestic ceremonies *and* to overseas registered partnerships entitled to recognition in the UK under Part 5 of the 2004 Act.[20] Therefore the amendment of the same-sex requirement laid down in section 1 CPA will inevitably affect the statutory scheme for recognition of foreign partnerships, and it is expected that a decision to extend domestic registration to different-sex couples will trigger a corresponding extension in the scope of Part 5 CPA.[21]

This is highly significant because, at present, English law is silent on the question of recognition of the personal status of the many couples who have entered into different-sex registered partnerships in overseas countries. English common law rules provide for recognition of foreign marriages (provided both spouses have capacity under the laws of

[17] Secretary of State for International Development, *The Future Operation of Civil Partnership: Gathering Further Information* (Cm 9606, 2018) paras 28–29.

[18] HC Deb 3 July 2018, vol 644, col 186. At the time of going to press, extension seems the more likely course of action. Prime Minister May issued a statement on 2 October 2018 pledging to open civil partnerships to different-sex couples: J Murphy, 'Straight Couples to Be Allowed to Enter Civil Partnerships, Theresa May Reveals' *Evening Standard* (London, 2 October 2018).

[19] 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) 26 Child and Family Law Quarterly 173; R Gaffney-Rhys, 'Opposite-Sex Civil Partnerships in England and Wales? Let's Wait and See' [2017] Family Law 1216; 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) 28 Child and Family Law Quarterly 365; 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) 28 Child and Family Law Quarterly 347; C Bendall, 'Court of Appeal Rules Against Civil Partnerships for Different-Sex Couples … For Now' (2017) 39 Journal of Social Welfare and Family Law 354; H Fenwick and A Hayward, 'From Same-Sex Marriage to Equal Civil Partnerships: On a Path Towards "Perfecting" Equality?' (2018) 30 Child and Family Law Quarterly 97.

[20] Section 1(1) CPA: 'A civil partnership is a relationship between two people of the same sex ("civil partners") –

> (a) which is formed when they register as civil partners of each other – (i) in England or Wales …
> (b) which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship.'

[21] See Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation* (January 2014) 24.

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their respective domiciles and the marriage is formally valid under the law of the place of celebration)[22]—and Part 5 CPA provides a scheme for recognition of overseas same-sex registered partnerships (on condition that they are valid under the law of the place of registration).[23] However, there is a problematic gap in English law where recognition of overseas different-sex registered partnerships is concerned—and it is anticipated that an extension of domestic civil partnership (as sought by the 'equal civil partnerships' campaigners) would have the incidental effect of providing, for the first time, a clear framework for the recognition of overseas different-sex registered partnerships.

The practical implications of such an extension in scope of Part 5 CPA are considered in Part II of this article—and it is argued that such an extension will have positive consequences for English private international law.

The cross-border implications of abolition of civil partnership (or phasing out) are considered in Part III of this article. It is contended that the eradication of domestic civil partnership would lead to the suspension of Part 5 CPA—and ultimately to a widening of the existing 'gap' in English private international law. The suspension of Part 5 would leave *both* same-sex and different-sex couples without a dedicated legal mechanism for recognition of a partnership registered overseas.

Of course, it is theoretically possible that Parliament might bring domestic registrations to an end without in any way altering the operation of Part 5 CPA; but this seems extremely unlikely in practice. As indicated above, Part 5 CPA facilitates the recognition of all overseas same-sex partnerships which are valid under the law of the place of registration—and there is no general reference to domiciliary capacity requirements (as there is in the common law rules on validity of foreign marriage).[24] It follows that the subsistence of Part 5 CPA (against a backdrop of domestic discontinuation of civil partnership) would allow same-sex couples to travel abroad to circumvent English domestic law and give them (but not different-sex couples) a de facto right of access to civil partnership. This could hardly be considered a satisfactory response to the Supreme Court judgment in *Steinfeld and Keidan*, and one would expect vigorous protest from the 'equal civil partnerships' campaign group in the event that such an approach were proposed.

In theory it is also conceivable that Parliament might combine a strategy of discontinuation of domestic civil partnership with an extension of Part 5 CPA to include overseas different-sex registered partners, but this scenario seems even more implausible. Whilst this approach might offer 'equal treatment' to different-sex couples, it would allow civil partnership 'by the back door' and would work in direct

[22] See P Torremans *et al.*, *Cheshire, North & Fawcett Private International Law* (15th edn, Oxford 2017) 891ff; J Hill and M Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford 2016) 353ff.

[23] Section 215(1) CPA. Thus, questions of formality *and capacity* are referred to the law of place of registration (celebration) where registered partnerships are concerned: this allows for recognition even in the event that one of the partners is domiciled in a country where registered partnership is unknown or where there is a hostility to same-sex relationships. Section 212(2) CPA defines the law of the place of registration as 'including its rules of private international law' but this *renvoi* is not thought to be of significance in practice: see Hill and Ní Shúilleabháin (n 22) 390.

[24] The imposition of domiciliary capacity rules tends to nullify attempts to sidestep domestic law: the unwanted incapacity travels with the forum shopper, thwarting evasive action.

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opposition to any general policy of discontinuation (as well as attracting criticism for discriminating against the less well-off and those unable to travel).

For the above reasons, it seems reasonable to assume (as this article does in Part III) that the abolition or phasing out of domestic civil partnership would be accompanied by a corresponding abolition or suspension of the statutory mechanism for recognition of overseas same-sex registered partnerships. The ramifications of the loss of the statutory recognition mechanism are analysed in Part III and it is argued that an abolitionist strategy has negative consequences from a cross-border perspective.

This article also explores the human rights implications of limping[25] registered partnerships, and it is argued that a general policy of non-recognition is liable to bring English law into further conflict with the ECHR, particularly where same-sex couples are concerned.

While this article is focussed on English law, similar concerns may arise in other jurisdictions which have extended marriage to same-sex couples, and in so doing, have chosen to abolish or phase out registered partnership, thus removing the legal infrastructure which provided an explicit basis for recognition of overseas registered partnerships.[26]

II. CONSEQUENCES OF AN EXTENSION OF CIVIL PARTNERSHIP

This Part considers the private international law implications of a Government decision to extend the personal scope of the CPA so that different-sex couples are treated in the same way as same-sex couples. As indicated above, this policy choice would address a long-standing lacuna in English private international law, namely the absence of any mechanism for recognition of overseas different-sex registered partnerships.[27] The discussion will begin with an exploration of the real-life consequences of this gap in English law, and will then consider whether non-recognition of overseas different-sex registered partnerships might be ECHR-incompatible.

A. Practical Problems Associated with Non-Recognition of Overseas Different-Sex Registered Partnerships

The current non-recognition of overseas different-sex registered partnerships is problematic for a number of reasons. Registered partnership is available to different-sex

[25] A 'limping' partnership is one which is valid and recognized in one country, but denied validity and recognition in another.

[26] For example, in Ireland, the Marriage Act 2015 closes off civil partnership to new entrants and removes the statutory recognition mechanism for overseas registered partnerships concluded after 16 May 2016 (see further, F Ryan, 'The Rise and Fall of Civil Partnership' (2016) 19 Irish Journal of Family Law 50; M Harding, 'Marriage Equality: A Seismic Shift for Family Law in Ireland?' in B Atkin and F Banda (eds), *The International Survey of Family Law* (Jordan 2016) 266, 272–3). The Appendix to the Court of Appeal judgment in *Steinfeld* (n 5) indicates that a number of other European States (including Finland and Sweden) abolished the institution of registered partnership at the time of introducing same-sex marriage.

[27] K Norrie, 'Recognition of Foreign Relationships under the Civil Partnership Act 2004' (2006) 2 JPrIL 137, 150ff. See also Department for Culture, Media and Sport (n 21) 19 acknowledging that 'overseas opposite sex civil unions … currently are not legally recognised in the UK'. Pt 5 CPA is specifically restricted to overseas same-sex registered partnerships (see sections 1, 212 and 216).

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couples in a significant number of countries, including Chile, Estonia, France, Greece, Malta, the Netherlands and New Zealand.[28] Although take-up is relatively modest in some of these countries (for example, the Netherlands),[29] in others (for example, France) it is very high and comes close to rivalling the institution of marriage in its popularity.[30] As things stand at present, it appears that different-sex registered partners from any one of these countries must endure a limping status if they reside in England. The undesirability of limping status has long been recognized (and was the impetus for the development of elaborate common law choice-of-law rules on validity of marriage). While the absolute numbers of affected parties are likely to be much smaller in this (registered partnership) context, the same logic which militated against limping marriages, also applies to limping different-sex registered partnerships.[31] Limping status can result in an arbitrary denial of all of the rights and obligations ordinarily associated with the status, particularly in the event of relationship breakdown.

It is true that some different-sex partners may be able to regularize their status through a marriage ceremony in England; however, this option will not be available to registered partners whose domiciliary law views a pre-existing registered partnership as an impediment to marriage.[32] Such partners will then be required to obtain an overseas dissolution of their registered partnership prior to marrying in England. This may be entirely impractical if the stay in England is for a limited period.[33] Even in the event of a longer-term move to England, the need for a prior dissolution of the partnership necessarily entails a disruption of status—and the grant of such dissolution may be contingent on a resumption of residence in the country where the partnership was

[28] Gaffney-Rhys (2017) (n 19) 1221; N Rowlings, 'The Quest for Equal Civil Partnerships' [2017] Private Client Business 28, 34–5; C Fairbairn and O Hawkins, *The Future of Civil Partnerships* (House of Common Library, Briefing Paper No 7856, 1 February 2018) 22.

[29] Wintemute (n 19) 380 refers to the fact that in 2015 in the Netherlands, 84 per cent of different-sex couples opted for marriage, whilst only 16 per cent opted for registered partnership.

[30] C Butruille-Cardew, 'A French Approach to Civil Partnerships: le Pacte Civil de Solidarité' [2012] International Family Law 414; A Cressent, 'Civil Partnership in France: Pacte Civil de Solidarité' [2011] International Family Law 57; F Swennen 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* (2nd edn, Intersentia 2012) 31.

[31] Norrie (n 27) 151.

[32] As indicated above (text to n 22), under English choice-of-law rules for validity of marriage, capacity to marry is governed by the law of the domicile: see Norrie (n 27) 151. Under French law, a registered partnership (*pacte civil de solidarité*—PACs) is automatically dissolved by marriage (whether to the partner or another) so no such impediment would arise in the event that French law is the law of the domicile and the registered partnership was by way of PACs: see I Curry-Sumner, 'A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe' in Boele-Woelki and Fuchs (n 30) 76. However, under Dutch law, a registered partnership is an impediment to marriage: see P Wautelet, 'Private International Law Aspects of Same-Sex Marriages and Partnerships in Europe – Divided We Stand?' in Boele-Woelki and Fuchs (n 30) 177 (fn 154).

[33] See C Draghici, 'Equal Marriage, Unequal Civil Partnership: A Bizarre Case of Discrimination in Europe' (2017) 29 Child and Family Law Quarterly 313, 328. Also B Crown, 'Civil Partnership in the UK – Some International Problems' (2004) 48 NYLSchLRev 697, 708–9: 'One would not expect married couples to have to get married again every time they move to a foreign country. The same principles should apply here.'

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registered (there being no dissolution mechanism available in England)[34]. This very complex route to status recognition is clearly non-viable as a general solution—particularly when one considers that all affected parties will have made a conscious choice to opt for registered partnership *in preference to marriage* in the jurisdiction of origin, and are likely to share the ideological objections raised in *Steinfeld*.

Where different-sex registered partners move to England, and do not formalize their status through marriage in England, they will be treated as ordinary cohabitants, and will not enjoy any of the special rights and obligations which attach to formalized relationships such as marriage and civil partnership. This may undermine party expectations and cause financial hardship for a dependent partner.

The non-recognition of different-sex registered partnerships may also encourage evasive forum shopping in England. A dependent partner's claims may be thwarted if the other partner chooses to move to England immediately after an overseas partnership has broken down abroad. Where the jurisdiction of origin was an EU Member State, the left-behind partner may be able to enforce maintenance orders granted by the courts of that Member State;[35] however, the UK is not party to the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations[36] so there can be no question of an English court applying a foreign maintenance law which confers entitlements on a different-sex registered partner.[37] Thus, English non-recognition of overseas different-sex registered partnerships creates a potential haven for those who seek to renege on responsibilities assumed in the country where the partnership was registered and where the partners lived together.[38]

B. Incompatibility with the ECHR?

The current treatment of overseas different-sex registered partnerships may also bring English law into conflict with the ECHR. While the European Court of Human Rights (ECtHR) tends to defer to Contracting State choices on how relationships are

[34] Registered partnerships probably fall outside of the material scope of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1 (the 'Brussels II *bis* Regulation' allocating jurisdiction in divorce matters): see R Lamont, 'Registered Partnerships in European Union Law' in Scherpe and Hayward (n 15) 517. Even if they fell within the material scope of the Brussels II *bis* Regulation, however, subject-matter jurisdiction remains a matter for individual Member States, and it follows that the Regulation does not impose any obligation to facilitate dissolution of different-sex registered partnerships, where national law makes no provision for such dissolution: see M Ní Shúilleabháin, *Cross-Border Divorce Law: Brussels II bis* (Oxford 2010) 103–19.

[35] Pursuant to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1. This possibility may be lost when the UK withdraws from the EU.

[36] Nor did the UK participate in Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L183/30.

[37] Torremans (n 22) 1078.

[38] See Z Willenbrink, 'Conflicts of Law and Policy Relating to Same-Sex Marriage Recognition in Wisconsin' (2010) 94 MarqLRev 721, 747 (making a similar argument in the context of non-recognition of same-sex marriage).

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formalized,[39] it has become increasingly interventionist where limping status is concerned.[40] For instance, in two adoption cases, *Wagner v Luxembourg*[41] and *Negrepontis-Giannisis v Greece*[42] the ECtHR found restrictions on cross-border recognition of adoptions to contravene Article 8 ECHR. In *Wagner* the Court emphasized the desirability of taking account of 'the social reality of the situation' and the unreasonableness of disregarding a 'legal status validly created abroad'.[43] Similarly in *Mennesson v France*, a surrogacy case, the ECtHR criticized the French authorities' denial of parental status and the resulting 'contradiction' where the children had been 'identified in another country' as the children of the intended parents.[44] It is therefore arguable that a blanket refusal of recognition of overseas different-sex registered partnerships violates Article 8 ECHR taken alone.

It may also be arguable that the recognition of overseas *same-sex* registered partnerships, but not *different-sex* ones, constitutes unlawful discrimination contrary to Article 14 ECHR taken with Article 8, by way of analogy with the claim in *Steinfeld*. However, this is an imperfect analogy, and the Supreme Court's reasoning is not entirely supportive of this argument. The Supreme Court in *Steinfeld* appeared to accept that any discrimination inherent in the original CPA scheme was legitimate[45]—and that it was only with the adoption of the Marriage (Same Sex Couples) Act 2013, and the extension to same-sex couples of choices denied to different-sex couples, that unlawful discrimination came about. Insofar as recognition of overseas relationships is concerned, the 2013 Act did not extend any preferential treatment to same-sex couples and did not bring about any significant change in the relative standing of same-sex and different-sex couples. Foreign same-sex marriages were already entitled to recognition as civil partnerships under the CPA, and while the 2013 Act provided for recognition *as marriage*, it did so in terms which provided somewhat less clarity for same-sex couples by comparison with the CPA.[46] Any discrimination case pertaining to non-recognition of overseas registered partnership would therefore entail a direct attack on the CPA as originally conceived, and the Supreme Court judgment in *Steinfeld* would be of limited precedential value.

C. *Recognition of Overseas Different-Sex Registered Partnerships as 'Marriage'?*

It is sometimes suggested that overseas different-sex registered partnerships might be directly recognized as 'marriage' in the English legal order[47] (in the same way that a foreign polygamous marriage can be recognized as 'marriage' even though it is a

[39] J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law* (Oxford 2016) 594.

[40] See P Kinsch, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law' in K Boele-Woelki *et al.* (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International 2010) 259; P Kinsch 'Private International Law Topics Before the European Court of Human Rights: Selected Judgments and Decisions (2010–2011)' (2011) 13 YrbkPrivIntlL 37; H Muir Watt 'European Federalism and the "New Unilateralism"' (2008) 82 TulLRev 1983; P Franzina 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' (2011) 5(3) Diritti Umani e Diritto Internazionale 609.

[41] App No 76240/01, Judgment of 28 June 2007.

[42] App No 56759/08, Judgment of 3 May 2011.

[43] *Wagner* (n 41) [132]–[133].

[44] App No 65192/11, Judgment of 26 June 2014 [96].

[45] *Steinfeld* (SC) (n 8) [1], [40], [48].

[46] Hill and Ní Shúilleabháin (n 22) 390, 393.

[47] See Norrie (n 27) 152; Gaffney-Rhys (2017) (n 19) 1222–3.

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notably different legal institution). This approach allows for continuity of status (and avoids the complexity associated with 'reaffirmation' by way of an English marriage ceremony, as discussed above[48]). However, as the law currently stands, this solution is also problematic: the use of a 'civil partnership' classification for overseas same-sex partnerships (under the 2004 Act), when a 'marriage' classification is being used for different-sex partnerships, is likely to be perceived as discriminatory.[49]

D. Impact of Extension of the CPA

If the CPA were extended in full to different-sex couples, it would provide a satisfactory resolution of the problems outlined above. Overseas different-sex registered partnerships would enjoy recognition as civil partnerships under Part 5 of the 2004 Act.[50] In the event of relationship breakdown, English law would entitle such partners to seek dissolution and ancillary relief under the 2004 Act.[51]

It must however be cautioned that while extension of the CPA to different-sex couples would resolve the existing (internal) problems with limping status, the availability of different-sex registered partnership in England is likely to raise new (external) problems with limping status.[52] English different-sex registered partners are likely to encounter obstacles to recognition if they travel abroad to countries where this legal institution is unknown to domestic family law.[53] English different-sex registered partners may also evade their responsibilities by removing themselves to foreign jurisdictions which do not recognize the partnership, leaving dependent left-behind partners without a remedy. However, as more and more countries introduce different-sex registered partnership, the pressure for cross-border accommodation (whether at national or international level) will increase.[54] As indicated above, this process may be accelerated by a development of the ECtHR's jurisprudence on limping status.[55]

III. CONSEQUENCES OF AN ABOLITION OF CIVIL PARTNERSHIP

If, in the alternative, it were decided to abolish civil partnership (or to phase out the institution), and to close Part 5 CPA to overseas same-sex partnerships registered after a particular date,[56] a new gap would appear in English private international law. Overseas same-sex registered partnerships would be refused recognition, and same-sex couples

[48] See text nn 32–34. [49] Norrie (n 27) 152–3. [50] See section 215 CPA.
[51] See section 37 and Sch 5 CPA.
[52] See K Norrie, 'Registered Partnerships in Scotland' in Scherpe and Hayward (n 15) 250 arguing for abolition of civil partnership on the basis that international recognition is much more straightforward for marriage.
[53] See eg I Lund-Andersen, 'The Nordic Countries: Same Direction – Different Speeds' in Boele-Woelki and Fuchs (n 30) 14 indicating that different-sex registered partnerships would not be recognized in any of the Nordic countries.
[54] The possibility of an international instrument is being considered by the Hague Conference on Private International Law: see Permanent Bureau, 'Update on the Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships' Prel Doc No 5 (March 2015), available at <www.hcch.net>. The International Commission on Civil Status adopted a Convention on the Recognition of Registered Partnerships in 2007 (see <www.ciec1.org>). This Convention covers different-sex as well as same-sex partnerships. However, it has attracted only one ratification (by Spain).
[55] See text nn 40–44. [56] This was the approach adopted in Ireland: see (n 26) above.

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would endure all of the problems associated with limping status described in Part II above. Indeed, it is likely that these problems would be even more pronounced where same-sex couples are concerned. Unlike different-sex couples, same-sex couples are often *confined* to registered partnership in overseas legal orders (for example, in Italy and Greece[57]), and are often denied the opportunity for marriage (and for acquisition of a status attracting recognition in England). This situation contrasts with that of different-sex couples who will have *chosen* registered partnership in preference to marriage, and who will have enjoyed a right of marriage (and access to a legal status attracting universal recognition).[58] It follows that same-sex couples have a unique vulnerability to policies of non-recognition of overseas registered partnerships—and that non-recognition is even more objectionable in this domain.

The jurisprudence of the ECtHR lends support to this analysis and it seems very likely that the eradication of civil partnership (and of the Part 5 CPA recognition regime)—as a response to the *Steinfeld* discrimination challenge—could put English law on course for a further collision with ECHR norms.

A. Non-Recognition of Overseas Same-Sex Registered Partnerships and the ECHR

As discussed above,[59] the ECtHR has indicated a willingness to find a violation of Article 8 ECHR in circumstances of limping status—and the recent cases of *Taddeucci v Italy*[60] and *Orlandi v Italy*[61] suggest that limping partnerships are likely to be of *particular* concern where same-sex couples are affected.

The *Taddeucci* case was concerned with Italy's refusal to extend a visa to a same-sex partner who had lived with his Italian partner in New Zealand in circumstances where they had enjoyed the status of 'unmarried cohabiting partners'. Italian law provided for visas for spouses and 'family members' but this latter concept had been construed as excluding cohabitants. The Italian authorities denied the existence of any discriminatory treatment, and it was clear that, on the face of it, Italian law treated same-sex and different-sex cohabitants in the same way. However, the ECtHR found that there was a violation of Article 14 ECHR taken with Article 8. Following *Thlimmenos v Greece*,[62] the Court ruled that the violation stemmed from the extension of the same treatment to couples in very different situations, namely same-sex couples who were incapable of marrying (in the eyes of Italian law) and different-sex couples who could marry and overcome the visa restriction.

[57] See *Orlandi v Italy*, App Nos 26431/12, 26742/12, 44057/12 and 60088/12, Judgment of 14 December 2017 [111]: it seems there are 11 Council of Europe Contracting States which extend registered partnership (but not marriage) to same-sex couples: Andorra, Cyprus, Croatia, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Slovenia and Switzerland. Following *Oliari v Italy*, App Nos 18766/11 and 36030/11, Judgment of 21 July 2015, it seems likely that other Council of Europe Contracting States will also extend registered partnership to same-sex couples in the near future. (In *Oliari*, the ECtHR indicated that—at least where there is a popular consensus in favour of recognition of same-sex couples—Contracting States owe a positive obligation under art 8 ECHR to make available a specific legal framework for the recognition and protection of same-sex unions.)

[58] On 'asymmetry of access' and the ECHR, see generally H Fenwick and A Hayward, 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' [2017] EHRLR (6) 544.

[59] See text nn 40–44.

[60] App No 51362/09, Judgment of 30 June 2016.

[61] *Orlandi* (n 57).

[62] (2001) 31 EHRR 15.

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The complaints in *Orlandi* concerned the ineffectiveness in Italy of same-sex marriages contracted overseas. At the relevant time, Italian law extended no recognition whatsoever to such marriages, although subsequently (in 2016) it introduced a form of registered partnership (the 'civil union') and made provision for the recognition of same-sex marriages as civil unions. The ECtHR appeared to accept that there was no obligation to recognize overseas same-sex marriages *as marriages*, and that recharacterization as civil unions was sufficient.[63] However, the Court also ruled that Article 8 ECHR required the availability of 'a specific legal framework providing for the recognition and protection of … same-sex unions'.[64] Echoing its earlier judgment in *Wagner v Luxembourg*, the Court noted that the Italian authorities had 'failed to take account of the social reality of the situation' and that the applicants had thus 'encountered obstacles in their daily life'.[65] It was therefore concluded that there was a violation of Article 8 ECHR where overseas same-sex marriages were denied *any* recognition and where there was no option for domestic formalization of such relationships. It was not acceptable for the applicants to be left 'in a legal vacuum'.[66]

Even following an eradication of civil partnership, English law would clearly offer a much higher level of protection to same-sex couples than that pertaining in Italy at the time of the complaints in *Taddeucci* and *Orlandi*. Pursuant to the Marriage (Same Sex Couples) Act 2013, same-sex couples have the same right of marriage as different-sex couples. Therefore complaints against the UK relating to non-recognition of overseas same-sex registered partnership (post-eradication of civil partnership) would not be as clear-cut as the complaints brought against Italy in *Taddeucci* and *Orlandi*.

However, as explained in Part II above, those who have already entered into a registered partnership abroad may be shut out from marriage in England if under their personal (domiciliary) law they are already in a formalized relationship. A dissolution of the overseas registered partnership may then be a necessary prerequisite to marriage in England. The complexity of such arrangements would strengthen an Article 8 complaint.[67] The British authorities would also struggle to articulate any principled justification for non-recognition, in circumstances where overseas same-sex registered partnerships were previously recognized.[68] As per *Taddeucci*, a same-sex couple forced to dissolve their overseas partnership, as a prerequisite to marrying in England, might reasonably argue that they were being treated in the same way as a different-sex couple who had *always* had the option of marrying and of acquiring a universally recognized status (if the same-sex couple *only* had the option of registered partnership under the relevant foreign legal order). This argument of '*Thlimmenos*' discrimination[69] is also reinforced by the recent case of *Ratzenböck v Austria*.[70] In *Ratzenböck* the complainants were a different-sex couple who argued that they suffered discrimination in Austria in being denied an opportunity for registered partnership. The complaint (under Article 14 ECHR taken with Article 8) was

[63] *Orlandi* (n 57) [194], [205].
[64] *Orlandi* (n 57) [210].
[65] *Orlandi* (n 57) [209]. cf *Wagner* (n 41) [132].
[66] *Orlandi* (n 57) [209]. The Court also emphasized that the margin of appreciation allowed to Contracting States is restricted where a particularly important facet of an individual's existence or identity is at stake (at [203]).
[67] See text nn 32–34.
[68] See *Orlandi* (n 57) [199], [209]: the Contracting State must put forward a 'community interest' to justify non-recognition.
[69] ie a failure to treat differently persons whose situations are significantly different.
[70] App No 28475/12, Judgment of 26 October 2017.

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therefore somewhat analogous to that raised in *Steinfeld*; however, the Austrian situation was notably different insofar as Austrian law confined marriage to different-sex couples and registered-partnership to same-sex ones. The ECtHR rejected the complaint expressing the view that different-sex couples offered an opportunity for marriage are not in a comparable situation to same-sex couples denied such opportunity and confined to registered partnership.

B. Recognition of All Overseas Registered Partnerships as 'Marriage'?

On the above analysis, a policy of abolition of civil partnership—and of the statutory mechanism for recognizing overseas same-sex registered partnerships, might bring English law into conflict with Article 8 ECHR taken alone, and taken with Article 14. It would, however, be possible to mitigate this situation by allowing for direct recognition of all overseas registered partnerships *as marriage* under English law—whether by legislative mandate or by way of judge-made law.[71] As discussed above,[72] this solution to the non-recognition of different-sex registered partnerships (under the existing law) is generally rejected insofar as it would have discriminatory consequences (characterizing overseas different-sex registered partnerships as marriage and overseas same-sex registered partnerships as civil partnership). This concern falls away, however, in a situation where civil partnership has been abolished, and where same-sex and different-sex registered partnerships are *both* being recognized as marriage.

Of course, there are also other objections to the recharacterization of overseas registered partnership as marriage. Those who consciously rejected formalization by marriage in the jurisdiction of origin (perhaps for the reasons articulated in *Steinfeld*[73]) are likely to be opposed to such a reclassification. *Orlandi* suggests, however, that recharacterization is compatible with the ECHR[74]—even in circumstances where the new status accorded by the recognizing State might be considered inferior from the parties' own perspective (in *Orlandi* civil union instead of marriage[75]).

[71] This would not be without precedent: in *Hincks v Gallardo* [2013] ONSC 129 the Ontario Superior Court of Justice ruled in favour of recognizing a UK civil partnership as a Canadian marriage. However, it is noteworthy that the Ontario court emphasized the non-availability of marriage to same-sex couples in the UK (at the time). It was therefore implicit in the judgment that recognition would have been denied if this couple had opted for civil partnership in preference to marriage (and if both methods of formalization had been on offer in the UK). It follows that civil partnerships registered in England since the coming into force of the Marriage (Same Sex Couples) Act 2013 are no longer entitled to recognition as 'marriage' in Ontario: S Wiggerich, 'Civil Partnership as Marriage: the Recognition of Foreign Same-Sex Unions in Canada' [2014] International Family Law 42. [72] Text (n 49). [73] See (n 5).

[74] For a contrary view that reclassification is a human rights violation, see A Lester, 'Should Same Sex Marriage Be Legally Recognised in Northern Ireland?' [2017] (5) EHRLR 432 criticizing the rejection of the application in *Re X* [2017] NIFam 12. In *Re X* the applicant sought a declaration that the recognition of an English same-sex marriage as a civil partnership in Northern Ireland is inconsistent with the ECHR.

[75] See *Wilkinson v Kitzinger (No 2)* [2006] EWHC 2022 (Fam) [5] where the reclassification of a Canadian marriage as an English civil partnership was considered to be 'offensive and demeaning'.

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The conflation of marriage and 'lighter' forms of registered partnership (for example the French 'PACs'[76]) might also prove controversial. Arguably, the marriage characterization is inappropriate where it triggers rights and obligations which are much more onerous than those attaching to the registered partnership status in the jurisdiction of origin. This argument is, however, less convincing when one considers that the implications of marriage itself (financially and otherwise) vary significantly from one country to the next, and there has never been any sense (in English law at least) that a foreign marriage should be denied recognition on account of such variation.

IV. CONCLUSION

The extension of civil partnership to different-sex couples will close a significant gap in English private international law. Of the Government's two options, this is the more satisfactory one from a private international law perspective.

The abolition (or phasing out) of Part 5 CPA (the statutory mechanism for recognition of overseas same-sex registered partnerships) would be much more problematic. Same-sex couples are often restricted to registered partnership (and denied a right of marriage) in overseas legal orders and are therefore particularly vulnerable to blanket policies of non-recognition. A marriage recharacterization (whilst objectionable in certain respects) could, however, substitute for Part 5 CPA recognition—and in the event of a policy of abolition of civil partnership, might even prove necessary in order to avoid a fresh violation of the ECHR.

[76] See Cressent (n 30).

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