THE BOUNDARIES OF LEGAL RECOGNITION OF PERSONAL PARTNERSHIPS: WHERE AND WHY?

Professor Roger Kay, University College Chester, UK

Introduction

The Civil Partnership Act 2004 received the Royal Assent on November 18th 2004 and comes into force on December 5th 2005. Broadly, the Act will give similar rights to same sex couples who register their relationship as are enjoyed by married couples and will provide a similar regime on the breakdown of the relationship.

The purpose of this paper is not to explore the Act in detail – that task has already been embraced by others – but to question why Parliament has legislated in the way it has to give such rights and duties as it has, not only to same sex couples, but also to other relationships. Is there a coherent policy underpinning the legislation, and, if so, what is it? Is the extent of the rights and duties afforded to the particular relationships appropriate?

Brief Outline of Civil Partnership Act 2004

However, it is necessary to consider the Act in outline to set it in the context of other legislation regulating specific personal relationships. The Act is long, with 264 sections and 30 schedules applying generally to all the jurisdictions in the United Kingdom. 84 sections apply to England and Wales specifically. It adopts an “opt-in” system for those wishing to avail themselves of it, that is, as with marriage, there is ultimately a registration leading to an easily recognised legal status. Section 1(1) states that a civil partnership is a relationship between two persons of the same sex and they are known, imaginatively, as civil partners. The relationship is formed only when they register as civil partners of each other. Sections 2 to 36 of the Act then set out the conditions and procedures for registration. Briefly, the salient points are that normally the intended partners must give at least fifteen days’ notice of registration, which must be publicised, and the partnership must be registered. Registration will encompass signing the “civil partnership document” in the presence of each other, a “civil partnership registrar” and two witnesses. Once the document has been signed by the partners, registrar and witnesses, the details must be recorded in the registrar. Some detail has been given of the procedure only to highlight the remarkable similarity to a civil marriage ceremony. Also, as with civil marriage, the ceremony should have no religious connotations. Section 2(5) provides that “No religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership document.” S6(1) states that registration “must not be in religious premises.” However, of course, this does not rule out the possibility of some form of blessing after the ceremony, as in a civil marriage. There are proposals to amend the

---

1 S1(1)(a)
2 See sections 5-12
3 S2(1)
4 S2(3) and (4)
Marriage Act 1949 to allow some religious element in a civil ceremony. It will be interesting to see whether, if there is reform, it extends also to the Civil Partnership Act.

The consequences of registration are also remarkably similar to marriage. Chronologically, and some might say tellingly, the Act sets out how a partnership might come to an end before amending several pieces of legislation to afford rights and duties, similar to marriage, on registering same sex couples. These include pension rights and rights of succession. There are four ways, other than death, that a partnership may be legally terminated or the partners formally separated. Apart from the fact that they have been called orders rather than decrees, they are exactly the same as marriage - dissolution (essentially divorce in all but name), nullity, presumption of death and separation. Some of the components of divorce and nullity are different, as conceptually persons of the same sex cannot commit adultery or consummate a marriage and there are more differences between the grounds for nullity of a marriage and a civil partnership. As an aside, it should be said that this section of the Act perpetuates and, indeed, duplicates provisions on divorce that almost all academics and practitioners consider flawed and which should have been reformed in Part 2 of the Family Law Act 1996. Those provisions have since been repealed. The financial, property and pension orders available consequent to an order mirror those on the making of a decree in respect of a marriage.

Why Now and in this Form?

That, in essence, is what the Act will bring once it is in force. On 21st February 2005 it was announced by the Deputy Women and Equality Minister in the Department of Trade and Industry, Jacqui Smith that the Act will be brought into force on December 15th 2005. Certain provisions were brought into force on April 15th 2005 to allow for regulations to be made prior to December 15th.

However, the real issue is why this legislation has been enacted at this time and in this form. Why on the one hand does it apply only to same sex couples and not more widely and, on the other hand, if it does only apply to same sex couples, why not simply allow them to marry? These questions overlap to an extent but first the timing will be examined.

Government Reasoning

The official, and anodyne, line is that it will bring social justice and equality. “….it demonstrates the Government’s commitment to equality and social justice.” Also, “I hope this Act will help create a more equal society. It opens the way to respect, recognition and justice for those who have been denied it for too long.” As is often the case with politicians, statements that are very much relative are made absolutely. Equality and social justice are both temporal and value-driven concepts. That is not to say that the statements are wrong in this instance, but that they are made glibly. Quite
clearly, the social and moral climate has changed and the Act has created no real opposition and, little comment (this will be expanded on and evidenced later). However, even if the statements are taken at face value, they still do not explain why now in particular.

Thus one moves from the seemingly idealistic viewpoint to rather more pragmatic, or, indeed, cynical reasons. One of these is speculative, to an extent, but the other is very much founded in fact.

**Financial and Political Considerations**

The speculative reason is that the government could no longer ignore the financial clout of the gay community, the so-called “pink pound”. Both politically and financially, the gay community has been an effective pressure group and is not insignificant in terms of voting power.

**Human Rights Rulings**

Ultimately, the effective reason is that Parliament had to legislate in some form as one piece of legislation had been declared discriminatory as it treated same sex couples less favourably than unmarried heterosexual couples. This was the judgment in *Mendoza v Ghaidan*[^9]. However, in order to understand this decision, reference has to be made first to another case, *Fitzpatrick v Sterling Housing Association*[^10]. This decision by the House of Lords was the first occasion on which English Law recognised rights in family law emanating specifically from a same sex relationship. Briefly, for the purposes of succeeding to a housing tenancy, it had to be decided whether or not the survivor of a same sex cohabiting couple had been living with his partner as husband and wife and/or as a member of his family. The House of Lords decided, by a majority of three to two, that they had not been living together as husband and wife but that the survivor had been a member of his partner’s family. Thus he could succeed to the tenancy. However, the terms on which a member of the family succeeded to the tenancy are less favourable than those for someone who lived with the deceased tenant as husband and wife. This was the issue in *Mendoza v Ghaidan*. *Fitzpatrick* had been decided purely on English Law, more particularly on statutory interpretation. Although *Mendoza* was decided in an English court, the case was founded in European Human Rights Law. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) was incorporated into English Law by the Human Rights Act 1998 and thus cases founded on the Convention no longer had to be heard at the European Court of Human Rights but could be litigated in the domestic courts. Once the decision in *Mendoza* had been reached, some legislation was inevitable. It is conceded that this decision did not inevitably lead to the full legislation in the Civil Partnership Act. Technically, the decision was only authority for discrimination in the Rent Act 1977, the legislation in question. However, it did mean in principle that wherever heterosexual cohabitants were treated better than same sex cohabitants then the legislation was open to attack. So, at the least, the decision in *Mendoza* was a strong catalyst for the ensuing

[^10]: [2001] 1 AC 27
legislation and the timing of a consultation document, published in June 2003\textsuperscript{11}, to seek views on proposed legislation, was not a coincidence.

This argument can be supported by briefly examining the circumstances that led to the enactment of the Gender Recognition Act 2004. This Act, which also seems to have been passed largely unheralded and free of controversy, allows a person aged at least 18, who has lived in the other gender or has changed gender to apply for a gender recognition certificate. In other words, subject to certain conditions, which do not necessarily include gender reassignment surgery, a transperson’s new gender becomes for all purposes, in the wording of the Act, the acquired gender. There is a long history leading to the passing of this Act, but essentially, it had been English law since the decision in \textit{Corbett v Corbett (Otherwise Ashley)}\textsuperscript{12}, interpreting section 11(c) of the Matrimonial Causes Act 1973 that a marriage was void if the parties were not respectively male and female, that a person acquired a gender at birth and, unless there was a mistake, kept it for life. This principle was challenged many times in the European Court of Human Rights but the Court repeatedly allowed the United Kingdom some latitude. Finally, in \textit{Goodwin v United Kingdom}\textsuperscript{13} the European Court of Human Rights declared that English law was in breach of both Art 8 (the right to family life) and Art 12 (the right to marry) of the European Convention on Human Rights. This case, based on an administrative issue, was decided whilst a domestic case on the right to marry was being appealed from the Court of Appeal to the House of Lords. When \textit{Bellinger v Bellinger}\textsuperscript{14} came before the Lords, they found that \textit{Corbett} had correctly interpreted the relevant statutory provision and thus the marriage of the Bellingers was void as they were not respectively male and female as Mrs. Bellinger was a male to female transsexual. However, they then declared the statutory provision incompatible with the European Convention, rather than change the law themselves. This meant that reforming legislation was inevitable. Thus the Gender Recognition Act 2004 was passed, and came fully into force on April 4\textsuperscript{th} 2005. The history of this Act is used largely as an argument to support the contentions made regarding the genesis of the Civil Partnership Act 2004. However, it is also in part directly relevant to the thesis of this paper as the Gender Recognition Act does give recognition to some relationships that previously lacked legal validity. For instance, Mr. and Mrs. Bellinger could now contract a valid marriage once Mrs. Bellinger acquires a gender recognition certificate. However, the provisions are much wider than that and extend to such matters as changing gender on birth certificates, passports and so forth.

There is a much closer and clearer link between breach of the Convention and legislation in the case of gender recognition than civil partnerships, but it is submitted that these reforms only took place because they had to and that they go no further than they have to.

\textsuperscript{11} \textit{Civil Partnership: a framework for the legal recognition of same sex couples} published by the Women and Equality Unit of the Department of Trade and Industry on June 30 2003
\textsuperscript{12} [1971] P 83
\textsuperscript{13} (Application No 28957/95) (2002) 35 EHRR 18
\textsuperscript{14} [2003] UKHL 21, [2003] 2 AC 467
Why Separate Legislation for Same Sex Couples Only?

This leads to a consideration of how Parliament might have used the opportunity to legislate on same sex relationships. To summarise, the legislation provides an opt-in, registration scheme for same sex couples only. Why? If the provisions were to apply to same sex couples only, then why not give them the right to marry or give rights based on the relationship, without the need for formalities. However, why legislate for same sex couples only and not also heterosexual cohabiting couples or, indeed, any two persons who share a life together in the same household? Is there at least some coherent policy which explains and justifies the state of the current law?

These points will be taken in turn. First, then, why should same sex couples not have been given the right to marry? Typically, reasons given for this are objections from religious establishments or that public opinion is not yet ready for such a bold move.

Religious Objections

The religious issue is always thorny. However, an objective argument can be constructed that allowing same sex couples to marry would not actually strain the current law on marriage overly. The point that the Church of England is the established Church of the state is not entirely relevant either. In reality the state has long been secular, and so has the law on marriage. The Church has its place in the democratic process at present, with the Bishops sitting in the House of Lords. Whilst it is recognised that there is some opposition to same sex marriages, and indeed relationships, in the established and other religions, that is not a reason in itself, either constitutionally or legally, to deny the right to same sex marriage a priori. Incidentally, having decided that same sex couples should not have the right to marry, and explicitly banning any religious ceremony or registration in religious premises, the announcement from the Department of Trade and Industry stated that the Act will be brought into force on December 5th to “…allow the first civil partnerships to be formed in time for Christmas on 21 December, after the 15 day waiting period has passed.”

An interesting comparison with contrasting recent events in Canada and the United States of America can be made at this point. On 28 June 2005, a Bill approving same sex marriages was passed by the Canadian House of Commons despite strong opposition from religious leaders and conservative Members of Parliament. The Bill is expected to easily pass the Senate and become federal law by the end of July. Canada will be the third jurisdiction, following the Netherlands and Belgium, to allow same sex marriages. On 16 June 2005, in a federal case in a San Francisco District Court, a judge ruled that that the 1996 Defense of Marriage Act does not violate the United States Constitution and thus upheld the ban on gay marriage. The government’s desire to promote procreation and “stability” was noted. The issue of procreation in English law is considered in the section on voidable marriages and civil partnerships below.

---

15 See the report in the Guardian newspaper 29 June 2005.
Legal, Religious Grounds – Void and Voidable Marriages and Civil Partnerships

Also, the present law on marriage would not be distorted. The similarities on procedure for marriage have already been examined. Marriage can be contracted through an entirely civil ceremony. Same sex couples, if allowed to marry, could either have been given to right to marry in civil ceremonies only\textsuperscript{16}, or, as is the case with heterosexual marriages, any religious establishment can decline to perform a ceremony in a given situation. It is interesting to note that the Gender Recognition Act 2004 amends the Marriage Act 1949 so that it explicitly states that a clergymen is not obliged to solemnise the marriage of a person if the clergymen reasonably believes that person’s gender has become the acquired gender under the Gender Recognition Act\textsuperscript{17}. Very few principles would need to be changed as far as the substantive law is concerned. The current law regulates who can marry whom or not through a negative system. If certain requirements are not met, then a marriage may be either void or voidable. A void marriage is one that is treated as never having existed, whereas a voidable marriage is treated as valid until annulled by a court.

These rules are set out in the Matrimonial Causes Act 1973. Void marriages will be examined first. As previously mentioned, section 11(c) provides that a marriage is void if “the parties are not respectively male and female.” It is on that basis that same sex couples are unable to contract a valid marriage. Of course, merely repealing this provision would not in itself create a coherent regime for marriage of heterosexual and same sex couples. However, the remaining bars to marriage do not display any great tensions of principle. As far as the other grounds for a void marriage or civil partnership are concerned, the Civil Partnership Act has provisions relating to or, at least, parallel to prohibited degrees of relationship\textsuperscript{18}, age\textsuperscript{19}, lack of formalities\textsuperscript{20} and bigamy\textsuperscript{21}. There is, of course, a reciprocal provision in the Civil Partnership Act section 49(a) and section 3(a) to Matrimonial Causes Act s11(c), which provides that two people are not eligible to register as civil partners of each other and, if they do, the civil partnership is void if “they are not of the same sex.” Thus these parallel provisions ensure that there are two mutually exclusive but similar regimes. There is one ground for a void marriage that has no equivalent for civil partnerships. This is section 11(d) of the Matrimonial Causes Act, which states that a marriage is void on the ground that “in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.” Quite clearly, Parliament did not contemplate the possibility of a jurisdiction which might permit legally recognised polygamous same sex partnerships and thus, if such a jurisdiction does exist, a person domiciled in England and Wales is free to enter into such a relationship! Be that as it may, it is clear from the above that there is no conceptual difference, apart from gender, in the eligibility for marriage and civil partnership.

\textsuperscript{16} As they will be in Canada
\textsuperscript{17} See Gender Recognition Act 2004 Sch. 5, para 3.
\textsuperscript{18} Civil Partnership Act 2004 s49(a) and s3(d), Matrimonial Causes Act 1973 s11(a)(i)
\textsuperscript{19} The civil partnership or marriage is void if either of the parties is under the age of sixteen Civil Partnership Act 2004 s49(a) and s3(c), Matrimonial Causes Act 1973 s11(a)(ii)
\textsuperscript{20} Civil Partnership Act 2004 s49(b), Matrimonial Causes Act s11(a)(iii). The details differ, but the concept is the same.
\textsuperscript{21} Civil Partnership Act s49(a) and s3(b), Matrimonial Causes Act s11(b)
The grounds for voidable marriages and civil partnerships do differ a little more. Nevertheless, there are some grounds in common, basically lack of valid consent\(^\text{22}\), suffering from a mental disorder\(^\text{23}\), pregnancy at the time of the ceremony/registration other than by the other spouse/partner\(^\text{24}\) and also grounds related to the Gender Recognition Act 2004. Schedule 2 paragraph 2 of the Act inserts a new section 12(g) and Schedule 4 paragraph 4 a new section 12(h) into the Matrimonial Causes Act 1973. Section 12(g) provides that a marriage is voidable if “…an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage.” This is subject to proceedings being commenced within six months from the date of issue of the certificate. The certificate is an interim one because it cannot become a full certificate until after the decree of nullity has been granted, otherwise, ironically, there would be a *de facto* same sex marriage. Section 12(h) states “that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004.” In other words, if one of the parties has changed gender, the other party can apply to have the marriage annulled. It must be stressed in passing that this provision, as with pregnancy by another, must be read subject to s13(3) which states that a decree of nullity will not be granted unless the court is satisfied that the petitioner is ignorant of the facts alleged. So a person who marries another knowing the other is pregnant or has an acquired gender cannot use the pregnancy or acquired gender to have the marriage annulled. The Civil Partnership Act has exact parallels to section 12(g) and (h) in section 50(1)(d) and (e) respectively, so that persons of the opposite sex cannot be in civil partnership and similar bars to relief in section 51.

Two points need to be made quickly regarding the content of the previous paragraph. One is that a little more time has been spent on the gender recognition provisions as these are new. The second is to demonstrate, as a foretaste of more germane arguments to come, how legislation can defy rationality when attempting to effect compromises. Logically, a marriage (or a civil partnership) should only be void or voidable on the basis of a state of affairs that existed at the time of the marriage. The provision regarding interim gender recognition certificates renders a marriage or civil partnership voidable in respect of circumstances that occur after the time of the marriage.

Finally, in respect of voidable relationships, there are three grounds that exist in respect of marriage that have no equivalent in the Civil Partnership Act. These are inability to consummate the marriage, wilful refusal to consummate the marriage and that the respondent was suffering from venereal disease in a communicable form at the time of the ceremony\(^\text{25}\). It is worth considering the two grounds relating to consummation. First, consummation is ordinary and complete sexual intercourse. Presumably, it is the word “ordinary” that precludes similar provisions in the Civil Partnership Act. Two central points need to be made. First, in civil law, there is no concept of marriage being linked to procreation. In fact, there could be a perfectly

\(^{22}\text{Civil Partnership Act 2004 s50(1)(a), Matrimonial Causes Act 1973 s12(c)\}}
\(^{23}\text{Civil Partnership Act 2004 s50(1)(b), Matrimonial Causes Act 1973 s12(d)\}}
\(^{24}\text{Civil Partnership Act 2004 s50(1)(c), Matrimonial Causes Act 1973 s12(e)\}}
\(^{25}\text{Matrimonial Causes Act 1973 s12(a),(b) and (e) respectively\}}
valid marriage even if it has not been consummated. The grounds are inability and wilful refusal to consummate, not non-consummation. Thus, if a man and woman marry and agree never to have sexual intercourse, there will be a valid marriage. Any argument that same sex couples should not be allowed to marry because the union cannot produce children is legally unsound. Second, it is apparent that a valid civil partnership is not in any way dependent on a sexual relationship, as there is no equivalent in the Civil Partnership Act to Matrimonial Causes Act section 12 (a) and (b). Does this mean that same sex companions can register, without the validity of the civil partnership being impugned? This would appear to be another anomaly created because the legislature desires to delineate between different types of relationship. The final distinction between grounds for a voidable marriage and a voidable civil partnership seems equally odd. Subject to the bar of knowledge, a marriage can be avoided because one partner is suffering from venereal disease as set out at the beginning of this paragraph. The continuing existence and/or scope of this ground are questionable, but it remains. Why there is no equivalent for civil partners is a mystery. Perhaps the issue is that Parliament could not bring itself to recognise that same sex partners have sexual relations. The opportunity could have been taken to broaden or change the scope of the ground (venereal disease is not a major health problem and therefore no more devastating to an innocent partner who contracts it than many other diseases, AIDS is) or to repeal it in the Matrimonial Causes Act. Be that as it may, the conclusion has to be that a close examination of the legal basis of and eligibility for marriage and civil partnership reveals no rational legal reason why same sex partners could not have been given the right to marry.

Public Opinion

This leads to consideration of the second objection, that the public, whatever that concept really means, are not yet ready to tolerate same sex marriages. No direct quantitative evidence is offered, but there is some compelling circumstantial evidence that this is not an issue on which there is public sensitivity. Washington and Alexander state “One of the remarkable things about the passage of the new law through Parliament was the lack of controversy that it generated. Indeed, when the Bill became law on 18 November 2004, the hunting row was in full voice and it was almost impossible to find mention in the media of the advent of one of the most striking pieces of social policy legislation for years.” Whilst this does not directly go to the point of whether same sex marriage would be acceptable to the public, it strongly suggests that there is no real opposition to it. Alternatively, it might prove nothing more than confirmation that, where the British are concerned, there is no contest between an issue involving animals and one involving humans. Be that as it may, three newspaper articles, from organs across the quality and political spectrum of the media, provide evidence that there is both acceptance of the change in law and a perception that it is marriage that will be afforded to same sex couples.

The first article appeared in the Daily Mail, an organ not noted for its liberal social views, on 19 April 2005. The story largely focused on what the headline said was an “IVF first for lesbian couple.” However, in the body of the article was the sentence “The couple, from Banbury, Oxfordshire, will marry in a civil ceremony next February.” The whole story was reported without any judgmental comment.

26 Washington J. and Alexander A. Civil Partnership Made Easy Family Law Fam LJ 35 (243)
The second article, perhaps inevitably in these circumstances, featured Sir Elton John. This appeared in the *Daily Mirror* on 25th April 2005 under the heading “Sir Elton plans to wed” partner”. The musical knight told the newspaper that he “plans to marry partner David Furnish before Christmas.” This article did explain, later in the piece, that “Gay civil partnerships are being recognised to give couples more rights in line with heterosexual couples.” It also alluded to the bill passed in the Spanish lower house that would allow homosexual marriage.

The final piece was in *The Independent*, a quality broadsheet. The headline here was “December date for Britain’s first gay wedding”. The story related to a couple who will “marry” as soon as it is possible to do so – “Brighton and Hove City Council has been eager to reinforce the area’s reputation as the gay capital of Britain by staging the first weddings within seconds of the go-ahead.” This is one minute past midnight on 21 December. Interestingly, the story also featured the fact that one of the partners “is a vicar with the Metropolitan Community Church.”

Thus strong arguments can be constructed that there is no compelling reason why same sex couples should not have been given the right to marry and that there would not be much opposition to such legislation. Indeed, the general perception appears to be that this is marriage, or something not very far removed from it. The responses to the consultation paper in June 2003 did include some who argued for marriage. It is true that these came from gay/lesbian rights groups. It is also true that there have been arguments that same sex couples want to distinguish their relationships from marriage. However, even in the two years since the paper was published, attitudes might have changed. Also, this paper is ultimately exploring whether there is any coherent policy or structure behind the current law and proposals for reform. Public opinion is merely one of a number of considerations.

**Opt-in?**

The final issue in this part of the paper is why rights should have been given on an “opt-in” basis, rather than being bestowed on persons who come within a certain category, definition or characteristics. Consideration of this will be postponed until the wider issues of recognition for all personal relationships are explored, as this cannot be seen in isolation for same sex couples.

**Extension of Rights to Other Relationships**

However, it is to be remembered that whether or not same sex couples should have been given the right to marry is only part of the argument. The previous theses have been predicated on the basis that it is accepted that only same sex couples would be given rights. However, this must be viewed only as part of the context in which recognition for all personal relationships is discussed. In turn, this has to be undertaken by examining what, if any, is the policy, coherent or otherwise, behind the current law and proposals for reform. In order to achieve this, a brief summary of the current law will be offered and legislative history explored.

---

27 See note 10 above
Unmarried Heterosexual Couples

The most significant group is that described as unmarried heterosexual couples. It is not proposed to explore in detail what rights and duties such a couple have in respect of each other, but an outline of the law is necessary.

Broadly, since the mid 1970s a number of statutory provisions have recognised and provided for heterosexual cohabitants. The rights and duties are bestowed on any couple who come within the definition – there is no opt-in scheme. The usual “qualification” is that they must be “living together as husband and wife”. Depending on the specific legislation, there might also be further hurdles to qualification, either that they are living in the same household and/or that they have lived together for a specified period of time. “Living together as husband and wife “is not defined in the statutes and is left to the courts to interpret. This concept will be considered further later in the paper. It is a common misconception, even amongst final year law students, that certain rights accrue from the de facto relationship, the notion of a common law marriage, for instance that rights in the property or the right to be maintained are acquired after six months’ cohabitation. Common law marriage has had no legal significance in England and Wales since Lord Hardwicke’s Act 1753 abolished marriage by consent alone. Statutory rights are given, for instance, in respect of intestacy 28, protection against molestation and violence 29, an action in respect of the death of the partner 30 and succeeding to the deceased partner’s tenancy 31.

However, perhaps more significantly, there are a number of areas in which a heterosexual cohabitant is not protected. The most important are on breakdown of the relationship. There is no right to be maintained, and property is divided on the basis of existing rights, which are decided on legal title and/or financial contributions and intention. Also, there are no rights to occupation of the home by virtue of the relationship.

Other Relationships

Other relationships are recognised to a very limited extent. The Family Law Act 1996 Part IV, provides for protection against molestation and violence in respect of certain relationships. A person can apply for a non-molestation order 32 or, if an “entitled occupant”, an occupation order 33 against a person with whom he or she is “associated”. A person is associated with another person if, amongst other relationships, they live or have lived in the same household 34. Household is not then

---

28 Inheritance (Provision for Family and Dependants) Act 1975
29 Family Law Act 1996 Part IV
30 Fatal Accidents Act 1982 as amended
31 Various Acts give this right. One example, and the subject of litigation in Fitzpatrick v Sterling Housing Association and Mendoza v Ghaidan above, is the Rent Act 1977. Landlord and tenant law is complex, with different Acts regulating different types of tenancy.
32 Family Law Act 1996 s42(1)(a)
33 Family Law Act 1996 s33(1)(b)(i)
34 Family Law Act 1996 s62(3)(c). There are certain exclusions to this definition, but they are not relevant in this context.
defined, nor, apparently, from the complete dearth of reported cases, does it pose any difficulties for the courts. However, this is very much a wider concept than cohabiting and would cover anyone sharing a domestic life.

The Domestic Violence, Crime and Victims Act 2004 originally amended the above provisions in two respects. Section 4, when it comes into force, will add a new sub-section to s62(3) of the Family Law Act, section 62(3)(ea). This will extend protection under the 1996 Act to persons if “they have or have had an intimate personal relationship with each other which is or was of significant duration.” In itself, this is laudable and corrects a lacuna in the Act. This will give protection to a boyfriend or girlfriend, or, indeed, a same sex couple, when the parties have never lived together. It does, however, create a further category of relationship.

The second amendment relates to the definition of “cohabitants”. “Cohabitants” and, indeed, “former cohabitants” are further categories of associated persons. However, as currently defined, they encompass only heterosexual cohabitants. Section 3 of the Domestic Violence, Crime and Victims Act 2004, when it comes into force, would have amended section 62(1)(a) of the 1996 Act so that it will cover “two persons who, although not married to each other, are living together as husband and wife or (if the same sex) in an equivalent relationship;”. However, that in turn has been amended by schedule 9 of the Civil Partnership Act so that it will now read “Two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners.”

In fact, the Civil Partnership Act contains eleven pages of direct amendments and three pages of consequential amendments to Part IV of the 1996 Act. There is one further amendment to section 62, an addition to the list of associated persons. By section 62(3)(aa) this will be that “they are or have been civil partners of each other.” That is not all. A sub-section 62(3)(eza) is introduced and provides for another new category “they have entered into a civil partnership agreement (as defined by section 73 of the Civil Partnership Act 2004)(whether or not that agreement has been terminated)”. A civil partnership agreement, which has no legal force, is equivalent to a heterosexual engagement, parties to which are already included in the list of associated persons in section 62(3).

Thus, to summarise, when the relevant provisions of the Civil Partnership Act and the Domestic Violence, Crime and Victims Act come into force, the following categories of person will be associated persons for the purposes of Part IV of the Family Law Act: married couples, formerly married couples, civil partners, former civil partners, cohabitants (either heterosexual or same sex, but separately defined), former cohabitants (as for cohabitants), persons living together in the same household, persons in an intimate relationship (or formerly so – and of any gender), persons who have agreed to marry one another (whether or not that agreement has been terminated) and persons who have entered into a civil partnership (whether or not that agreement has been terminated).

This is instructive as it represents the widest spectrum of personal relationships recognised by law. It is entirely correct that this should be so where personal protection is concerned. However, even within this context, not all relationships are
treated equally. This will be expanded on later, when the history of Part IV of the Family Law Act is considered. Also, this legislation is an extreme, but not untypical, example of the piecemeal and compartmental way in which law is enacted in England. There may be several reasons for this, and they are very much linked to the issues concerning recognition of personal partnerships. The most important of these are lack of a consistent and coherent policy and interference with legislation as it passes through Parliament.

Before considering these issues, it is necessary to consider, very briefly, the categories of relationship in a context wider than protection against domestic violence and molestation. Marriage, civil partnership and heterosexual cohabitants have already been considered. Apart from engaged and formerly engaged couples, and persons who have or had entered into a civil partnership agreement, who have (and in the case of those entering into a civil partnership agreement will have) limited additional property rights, recognition of the other categories is confined to personal protection. It should be noted especially that, outside personal protection, cohabiting heterosexual couples who choose not to marry have some rights, but cohabiting same sex couples who do not register will not. Those who live together as companions or carers have no further rights.

Reasons Given for Limited Recognition

What are the stated reasons for this, and what possible rationale might there be for distinguishing in this way?

The most significant relationship is that of the heterosexual cohabiting couple. What is the justification for the current regime of partial, conferred rights and duties? There are many sources for this, but they largely say the same thing and a selection will evidence this. In the response to the consultation paper on recognition of same sex couples the Women and Equality Unit stated “Opposite-sex couples can already attain legal (and socially recognised) status for their relationships through marriage, whether by a religious or civil ceremony.” There is then a discussion of the problems caused by misconceptions regarding common law status. The conclusion is “…to explore how best to raise public awareness about the rights and responsibilities of opposite-sex cohabitants and to dispel the myths around “common law marriage”.

Before that consultation paper, there had been two attempts to reform the law relating to partnerships outside marriage. Both the Relationships (Civil Registration) Bill and the Civil Partnerships Bill were private members’ Bills (that is, introduced without Government sponsorship). Both Bills would have introduced an opt-in regime for all partners outside marriage. Both Bills failed to become law. The content and history of these Bills will be expanded on a little in a survey of failed and amended

---

35 See note 10 above
36 Responses to Civil Partnership; a framework for the legal recognition of same-sex couples
November 2003
37 Ibid
38 Bill 36 of 2001-2
39 HL bill 41 of 2001-2
legislation below, but some of the comments made by the opponents of these bills are instructive.  

The Relationships (Civil Registration Bill) was introduced into the House of Commons by Jane Griffiths, a member of the ruling Labour Party. A speech opposing the Bill on its first reading on 24th October 2001 was made by Stuart Bell (now Sir Stuart). He declared his position as Second Church Estates Commissioner and some of his objections were on religious grounds, “…marriage is a pattern that is given in creation and is deeply rooted in our social instincts.” Civil partnership would be an attempt, according to one of his constituents, to bring in same-sex marriage by another route. He also states that registration is not needed for heterosexual couples (the implicit point again here is that they can marry) and, according to his constituent, there is nothing to prevent couples from making wills in one another’s favour.

The Civil Partnerships Bill was introduced into the House of Lords by Lord Lester of Herne Hill. It went to a second reading on 25th January 2002. In giving limited support to the Bill in respect of same-sex couples, Baroness Wilcox opposed a registration scheme for heterosexual couples because they either they could marry or “Cohabiting couples can still gain the majority of benefits included in the Bill by instructing a solicitor or by going through the courts. They can, for example, set up a cohabitation arrangement; they can write a will.” The Lord Bishop of Winchester, Lord Elton and Lord Ackner argued that the Bill undermined the institution of marriage. Lord Elton stated that it did so particularly as it gave official backing to the belief that life-long exclusive commitment is no longer really possible.

More recently and in a different context, Janet Paraskeva, the Chief Executive of the Law Society of England and Wales, opposed a registration scheme for heterosexual cohabitants. Speaking at the annual conference of the Law Society Family Law Panel in November 2004, she gave approval to the provisions of the Civil Partnership Act. However, she did say that the Law Society did not favour that the registration scheme should be opened up to opposite-sex couples and, again, cited that they had the option of getting married. She then stated that the Law Society position was to improve rights for heterosexual cohabitants but through a conferment regime provided that parties met certain criteria, including living together (as ascertained through certain criteria) for at least two years or having a child together.

Thus reasons for opposing an opt-in, registration scheme for heterosexual cohabitants include that it would undermine marriage, whether for religious reasons or by encouraging people to believe that a partnership is not for life, that they need no, or at least lesser, protection as they have the option to marry, and that they can achieve most of the rights and duties flowing from marriage by arranging their own legal affairs, or going through the courts. Also, if cohabitants do not know that they may have fewer rights than they think, then they should be informed.

---

40 A summary of the bills, a report of the debates and a comparison of these proposals with law in other jurisdictions can be found The House of Commons Library Research Paper 02/17, 19th March 2002. This can be accessed online through the parliamentary website www.parliament.uk/commons/lib/research
41 A reported in Newsline Extra Family Law February 2005 Fam LJ 35 (170)
There are other reasons that have been cited. One of these is that cohabitants have made a positive choice not to marry in order to avoid formalities, and thus to give them the chance to register for rights akin to marriage, or bestow those rights on them, is missing the point. Incidentally, a similar point of view has been advanced for not allowing same-sex marriages – that the parties do not want to be the same as heterosexual couples.

**Attitudes and Beliefs of Cohabitating Heterosexual Couples**

It is acknowledged that an academic lawyer will have a rather different perspective on this than a romantic couple, but the fact is that choosing a particular relationship will have different legal consequences – and not just if the relationship breaks down. One of the problems with many of the arguments put forward is that there is a tacit assumption that people make legally informed choices. This leads to an examination of what heterosexual cohabitants themselves think – there is no research on other groups such as companions and carers. Various pieces of research suggest that they do not make such an informed choice.

First there are the results from the initial stage of a Nuffield Foundation research project exploring cohabitation, marriage and the law. The research found that reasons for cohabiting included: avoidance of stereotyped gender roles; disillusionment with marriage; trial marriage; avoiding divorce; emotional security of living together; unexpected pregnancy; and the cost of a “proper” wedding being outweighed by other priorities. Reasons for choosing marriage after cohabitation included: the wish to have children; the desire to achieve greater emotional security (including having the same family name); greater financial security; and religious belief.

It would be wrong to draw any firm conclusions from a mere list, but at least it can be said that this does not provide any conclusive evidence either way on whether cohabitants make an informed choice on whether to opt out of the legal rights and duties of marriage.

Other research challenges the common assumptions. Barlow and her colleagues asked 3101 respondents whether a cohabitant does and should have the same rights as a married person in relation to financial support, property inheritance and parental consent. 38%, 37% and 50% respectively thought they did have and 61%, 93% and 97% thought they should have. One further piece of research concludes that married and unmarried couples differ little except in their lack of rights if their relationship ends and that statistics that seem to show that marriages last longer than cohabitation may be distorted as those in the higher risk groups for unstable relationships may now include many more unmarried couples.

---


43 See above – this research was published in “Just a piece of paper? Marriage and cohabitation”, chapter 18 of British Social Attitudes, the 18th Report: Public Policy, Social Ties, park A., Curtice J., Thomson K., Jarvis L., and Bromley C. (eds.) (2001)

44 By Eekelaar J. and Maclean M. for the Oxford Centre for Family Law and Policy
Of course, it is easy to draw more than one conclusion from any statistical research, but none of the above supports the straightforward view that cohabitants opt out of marriage on an informed basis or that cohabitation is less secure than marriage.

Since the autumn of 2003, there has been a growing momentum for change, but to add to the rights and protection for cohabitants, not to produce any coherent, consistent and comprehensive code for adults living together. There are two processes to note before examining the philosophy, or lack of it, behind the objections to an opposite-sex registration scheme, or, indeed, any other radical reform.

In March 2005 the Law Commission published its 9th Programme of Law Reform. One of the projects is a review of the law on the rights of cohabiting people when their relationship ends through separation or death. This immediately betrays the limited nature of the reform. It is clear that the terms of reference are confined to particular issues and relationships. It will only apply to opposite sex or same sex couples in clearly defined relationships. What these relationships might be is interesting. They will include cohabitation but not necessarily a sexual relationship. Blood relatives, carers and “commercial” relationships (for instance, landlord and tenant or lodger) will be excluded. Any new system might be opt in or opt out. Interestingly, the document refers to the recent motion passed on 7th May 2004 by the General Synod of the Church of England which recognised that there were issues surrounding unmarried couples which needed to be addressed by the creation of new legal rights. It is true that there are some much needed reforms being considered, including the financial and property implications of breakdown, but once again, it is clear that whatever emerges will provide further fragmentation and confusion in the law. The possible inclusion of unregistered same sex cohabitants is also to be welcomed, but they have rights only in respect of personal protection at the moment and it will be interesting to see if they are put on exactly the same footing as heterosexual cohabitants. It would be illogical to give them rights in the narrowly defined areas of the Law Commission’s remit and not the, albeit limited, rights enjoyed by their heterosexual counterparts. It would also be challenged under the Human Rights Act 1998. Interestingly, this proposal from the Law Commission has only just been noted in the media.

In the article, it is stated that even this review is likely to face criticism that greater rights for cohabitees will undermine marriage.

The second piece of reform is not in England. The Family Law (Scotland) Bill, published by the Scottish Executive on 7th February 2005, will give new rights to cohabitants, both heterosexual and same sex. These will broadly be in the areas of finance and property, the remit of the Law Commission in England and Wales. However, this Bill, when it becomes law, will amend the Civil Partnership Act in certain respects. This will provide some alignment between opposite sex and same sex couples in Scotland, but it is limited in scope. Incidentally, the Bill will also amend the law on divorce to an extent, something that has singularly failed to happen in England.

---

45 Dated 18th March 2005 but embargoed until 22nd March. The programme can be found on the Law Commission website www.lawcom.gov.uk
46 Couples who live together to get more legal rights, Frances Gibb, The Times 27 June 2005
47 For an interesting and penetrating article on the Civil Partnership Act and the Family Law Scotland Bill (2005) see Norrie K McK What the Civil Partnership Act 2004 does not do SLT 2005, 6, 35-40
Possible Rationales for Policy

Therefore, notwithstanding the proposed reforms, the law is fragmented and confusing. If that is the case, do the stated reasons for not giving greater rights to cohabitants (and, arguably, that could encompass any two people living together in a mutually supportive relationship) justify the compartmentalising of the law? It is suggested that they do not because they do not provide any coherent policy or rationale for the law as it is – and even might be.

Public Policy/Religious Principle

There are a number of bases on which family law legislation might be founded. The first is what might be called public policy, or exemplary. This would involve making a value judgment as to the way that society is organised, in this case that marriage is the best system for the well-being of individuals and society and it ought to be encouraged. Closely allied to this is religion or principle– that marriage is founded in religion and that it would be against religious beliefs to encourage and formally and legally recognise personal relationships outside marriage or that for some other moral reason marriage is supported in principle. It is these two reasons that underpin the objections of those who say that allowing same sex couples to marry or to extend a registration scheme to heterosexual couples would undermine marriage.

Is this the case? There are two ways of looking at this. One, negatively, is to say that marriage is already undermined. It is no longer a union for life. The latest available figures, for 1993, show a third annual increase for divorce of 3.7% to 166,700. This, it has to be said is 7.4% less than the peak of 180,000 in 1993. Also, cynically it can be argued that marriage does not involve any more commitment. Once a person is married, they acquire all the rights and duties connected with marriage regardless of how the marriage is actually conducted. The same will be true of civil partners. The way the parties have lived together may, to an extent, affect how the assets will be distributed if the relationship breaks down, but otherwise, legally the status in itself governs the legal position of the parties. For instance, to take one hypothetical example, a marriage takes place (it could just as easily be a civil partnership registration after December 20th 2005). The parties spend one night together in the house owned by one of them and then the non-owning party leaves. That party has acquired occupation rights in what is now the matrimonial home and is entitled to register those rights against the property, effectively preventing the other party from selling the property. Of course, this does not mean that the non-owning party will obtain any possessory rights in the property in any subsequent proceedings arising out of divorce (or dissolution). What commitment has been given? Of course, and this must be stated firmly and clearly, a legal, and in a non-civil ceremony, religious commitment has been made by the exchange of promises and/or vows in the wedding ceremony. It is not the intention of the author to ignore, minimise or insult any religion or any person with religious beliefs, but, objectively, religious law has not governed marriages for many centuries. Indeed even before Lord Hardwicke’s Act,

---

48 These categories are the author’s.
49 National Statistics Online www.statistics.gov.uk
50 See Family Law Act 1996 ss30, 31 and 32
common law marriages existed alongside religious marriages. The primary motives for the Act were to provide visible, provable and recorded procedures for marriage, for legal, administrative and social purposes. Therefore, whether or not marriage is undermined religiously by current law or proposals for reform, there are arguments for saying that this is not the case legally.

To consider the position positively, do cohabitants give any less commitment? As has been seen, there is firm evidence to prove that in like for like situations marriages do not last any longer than cohabitation. Also, cohabitants have to qualify for rights under the present regime in that, typically, they have to “live together as husband and wife”. This phrase is never defined in statute and has been defined differently judicially in different contexts. These definitions do not matter in this context. The point is that there is a qualification to attain rights based on how it is perceived a marry couple should live. The irony is, as has been demonstrated in the last paragraph, a married couple to not have to live together as husband and wife to obtain rights.

Public Opinion

What other bases are there for a rational approach to formulating the law of personal relationships? Public opinion is one. This can take two forms, either what the general public thinks of cohabitation outside marriage and why cohabitants do not marry. However, the bare statistics cannot be taken as an absolute indication of what the law should be. Statistics can be interpreted in many ways. It may be the case that 67% of the respondents to the British Social Attitude Survey in 2000 thought cohabitation was acceptable51 and that 61% of cohabitants thought they should have rights to financial and property settlements on breakdown, but there still has to be a value judgment made as to what is in the public interest. Public opinion does not always influence law (capital punishment is an example of this).

An allied argument is that the law should be changed merely because something is more prevalent than it was52. However, again, this in itself is not evidence for change. A value judgment has to be made. The debate as to how to react to the increased use of cannabis is an example of this. Thus both public opinion and level of incidence are subservient to public policy.

Consumer Protection

A further rationale for legislation is what might be termed consumer protection in a broad sense. In other words, the focus of the legislation should be to protect vulnerable individuals. In a personal context, this would also involve consideration of human rights, although this aspect will not be pursued here. The logic here would be that legislation should provide for greater protection of unmarried or unregistered cohabitants (perhaps widely defined to include all couples living under the same roof and mutually dependent) as many of them are not aware of their lack of rights.

51 Figures provided by the Department of Constitutional Affairs, as quoted in the Law Commission 2005 paper – see n.42. This figure may very well be higher now, of course.
52 There are now 2 million heterosexual cohabitant couples and this is expected to reach 3.8 million by 2031- see the article noted at n.46 above
Logically, it would either be conferment or opt-out. Such legislation, arguably, would be in line with consumer protection in many other aspects of life (Consumer Credit Act 1974, various Rent Acts and Landlord and Tenant Acts, Unfair Contract Terms Act 1977 and so forth). This is the counter-argument to the contentions that cohabitants have the choice to marry or that they can achieve most of the status of marriage through solicitors or the courts. Those arguments assume that the choice that is being made is an informed one. It has already been seen that this is often not the case. It is also a possible counter-argument to the assertion that cohabitants do not know how few rights they have, then they should be educated and informed. First, similar arguments have been raised in respect of reducing the divorce rate. Those intending marriage should be informed about the consequences, legal and otherwise of marriage and of ending the marriage. There has been no evidence of any concerted governmental effort in this direction. However, a website has very recently published a checklist to help cohabiting couples to arrange their financial affairs when the relationship breaks down. However, the checklist is a practical one relating to breakdown only and does not set out what rights and duties cohabitants have. Finally, it is often those who are most in need of help who do not seek it or are not able to avail themselves of it. Of course, this argument can also be used to highlight the flaw in any legislation designed to protect people.

Financial Interest

A final reason might be that it is in the financial interest of the state to legislate. The cynical view is that this is often the ultimate motivation behind much legislation, including, in the law of personal relationships, the Child Support Act 1991, and the now repealed reform of divorce in the Family Law Act 1996. However, in this case there are conflicting arguments. Leaving aside all personal considerations, it is in the interests of the state that people stay together as the more households that are split, particularly those in which there are young children, the more that is paid out in benefit. Recent research suggests that an average couple with two children will cost the state £80,000 over ten years if they split up. Professor Bob Rowthorn, who carried out the research, is quoted as saying “The long-term cost of subsidising family break-up is unsustainable. It is time to switch resources towards a system that encourages and supports two-parent families to ensure their survival.” The cynical view then is that people are encouraged to enter into legally binding relationships, which are then rendered more difficult to end. This line of argument, in keeping people together, does not distinguish between saving relationships in human and emotional terms and keeping people together. Nevertheless, this, on one interpretation, would be an encouragement to give more rights to cohabitants outside marriage or civil partnership, because either they would be less inclined to separate or there would be a more equitable distribution of assets and maintenance between partners available on the breakdown of the relationship, thus reducing the calls on social security money.

Conclusion on Policy Rationales

53 See the figures on p. 14 above
54 www.advicenow.org.uk - see an article in The Times 29 June 2005 by Frances Gibb.
55 Research for the Centre for Policy Studies carried out by Professor Bob Rowthorn, Professor of Economics at Cambridge University. Reported in The Times 22 June 2005
The conclusion is that the stated reasons for and against giving greater rights to unmarried couples and allowing same sex couples do not correspond to any particular policy or rationale. The arguments for and against reforming legislation are often shallow. In the desire to differentiate between different types of relationship, but give a modicum of protection to all, Parliament has produced legislation that is fragmented and confusing. If the intention is to promote marriage, then why give those living outside marriage any protection? If they are given some recognition and protection, why choose some issues and not others?

**Haphazard Legislation**

The lack of coherence and logic has been compounded by the way that legislation has not been enacted or implemented, amended in a haphazard fashion in the process of becoming law or amended, often more than once, after becoming law. Sometimes this is through political interference sometimes it is with the best intentions. However, the tinkering with provisions is at once a symptom and a cause of the lack of coherence in this area of the law.

**Failed Legislation**

Two Bills that did not reach the statute book have already been mentioned, the Relationship (Civil Registration) Bill and the Civil Partnerships Bill. The reason why they did not reach the statute book has been explained also, that they were Private Members’ Bills and without government support they were doomed to fail. If there is a political point here, it is in the corollary to the last sentence. They could have succeeded if the Government had wanted them to. In fact the first Bill ran out of time, but Lord Lester announced that he would not proceed with the Civil Partnerships Bill in the current session of Parliament. This was to allow the completion of a cross-departmental review of the impact the reforms would have. The Bill was not seen again.

The Civil Partnerships Bill in particular would have produced coherent legislation. While introducing the second reading of the Bill on 25th January 2003 Lord Lester stated “The Bill enables unmarried couples living in a mutually supportive relationship to make provision for their joint protection within a coherent framework…” This statement, taken with clause 1 which referred to couples who had lived together in the same household for at least six months, shows that the intention was to cover all relationships, beyond the living together as husband and wife or as if husband and wife definitions. This could have included two lifelong companions. Whatever a person’s political, personal or religious views, it has to be conceded that this Bill did have a rationale and coherence.

**Non-implementation**

A prime example of non-implementation is the Family Law Act 1996, which would have radically reformed the law on divorce, by implementing no fault divorce. Briefly, there had been a number of recommendations made over the years regarding
divorce reform. The basis of the new regime was perfectly acceptable and workable. It was to be divorce over a period of time, with a period of reflection and consideration both as to whether the parties wanted to end the marriage and also as to the consequences of dissolution. However, two political or financial considerations were introduced. One was the emphasis on using a divorce process to try and save marriages and the other, closely related, was the exhortation to use mediation. Two provisions appeared in the legislation that had not been contemplated or recommended. One was that, at least three months before commencing proceedings, one or both parties was to attend an information meeting about divorce, including how the marriage might be saved. The other was in effect, that anyone who was in receipt of legal aid had to submit to mediation before bringing proceedings in relation to children, finance or property. At first sight, the imputations here appear uncharitable. In some ways both provisions seem laudable. However, the real motives were financial. Keeping people together, whether or not a relationship is really saved, prevents government money being spent on either legal aid and/or benefits, as has already been discussed above. Mediation is much cheaper than court proceedings, particularly if the parties are encouraged not to take legal advice initially. After pilot schemes for information meetings and mediation, it was announced that the legislation would not be implemented.

This can be fairly categorised as political interference in what were apolitical proposals. In an address given on 9 December 2004 to the conference of the Commission on European Family Law Cretney lamented the growing significance of pressure groups in the divorce reform process and of the difficulty of securing a rational approach to law reform in the area. In the context of discussing contact with children, he notes that “…the complaints may prevent changes being made which informed opinion would regard as desirable. That is part of the price we pay for parliamentary democracy.” This statement does, of course, beg certain questions, such as what is informed opinion and who is the judge of it. Also, and here the author is in danger of straying too far from any even partial expertise, are not all aspects of social life ultimately political? Having acknowledged these points, however, Cretney is right. Although his comments relate to divorce law, they equally well apply to other areas of personal relationships.

For perhaps the quintessential example of how political interference has hijacked and complicated the law on personal relationships, Part IV of the Family Law Act 1996 will be revisited. It will be recalled that these provisions reformed the law on personal protection. The intention was to expand the law to include more relationships and to codify it into one statute and to simplify it. The Law Commission produced a report in those terms and in 1995 the Government introduced the Family Homes and Domestic Violence Bill, which closely followed the recommendations in the Law

57 See the Law Commission Annual Report 1996, available on the website detailed in n.42., where, at para 6.2 it is noted that the government “published its own consultation paper linking our recommendations to its own proposals about mediation and about other arrangements on the breakdown of marriage.”

58 For a slightly more detailed and referenced discussion of this issue, please see Kay R. December [2004] Fam Law 892

59 Cretney S. Breaking the Shackles of Culture and Religion in the Field of Divorce? A full summary can be found in International Family Law [2005] 1

60 Domestic Violence and Occupation of the Family Home Law Com. No. 207 (1992)
Commission Report. However, the Bill was withdrawn in controversial circumstances. At the time, the Conservative Government had an extremely small majority. Some right-wing backbench members objected to the Bill on the basis that it gave cohabitants the same property rights as a married person and thus undermined marriage. The Daily Mail also campaigned against the Bill. In fact, the Bill did not even seek to achieve what was so vociferously opposed. It changed occupation rights to a home on a temporary basis, not rights of ownership. Indeed, this was no different to some existing legislation. Be that as it may, the Bill was withdrawn and modified legislation introduced the next year. The current law on occupation orders is complicated in the extreme, differentiating between those who are entitled to occupy or not, and for non-entitled occupants, between cohabitants, former cohabitants and formerly married persons and also on the basis of whether the partner against whom the order is sought has the right to occupy the home or not. Thus the twin bastions of English law, property rights and marriage, were bolstered. Lind and Barlow summarise it succinctly: “The ideological importance of the superiority of the married state has prevented pragmatic and coherent reform.”

The full impact of the above can be evidenced by a brief examination of section 41 of the Family Law Act as it currently stands. By section 41(1) “This section applies where the parties are cohabitants or former cohabitants.” Section 41(2) states that “Where the court is required to consider the nature of the parties’ relationship, it is to have regard to the fact that they have not given each other the commitment involved in marriage.” The court is required to consider the nature of the relationship when a party who is not entitled to occupy the home is seeking an occupation order, that is broadly that the other party should be excluded. This would normally only be granted in extreme cases, typically involving physical violence. Surely, the notional lesser commitment of a cohabitant can have no relevance in such circumstances. When section 2 of the Domestic Violence, Crimes and Victims Act 2004 comes into force, it will repeal section 41. However, it will introduce in another place, that, when considering a relationship, the court must consider “…in particular the level of commitment involved in it.” Thus there will be a shift from a comparison with marriage to a comparison with other cohabitant relationships. However, once again, some distinction (and petty at that) is maintained between marriage (where commitment is assumed) and cohabitants.

Amendments during Enactment

Two, brief examples will suffice when examining amendments during the passage of a Bill through Parliament. The first is the Civil Partnership Act itself. Whilst it was passing through the House of Lords, the Bill was amended to include carers, of any gender or sexual orientation, as well as same sex partners. This amendment was taken out in the House of Commons before the Bill became law, but it shows the potential price we pay for the democratic process, as Cretney put it. Worthy though the thought was, to extend the Bill to only one particular set of persons would have once again produced fragmentation and incoherence.

The second example comes from an Act not previously mentioned, the Domestic Proceedings and Magistrates’ Courts Act 1978. The relevant part of the Act reformed the basis on which estranged married couples could apply to a Magistrates’ Court for financial provision. The Act envisaged two grounds for this, broadly failure to provide reasonable maintenance and an application by consent. Section 7 of the Act was added as a result of an amendment by a backbench Member of Parliament, who doubtless thought of or knew of an instance where there might be an injustice if it was not covered by the legislation. Section 7 is rather complicated but the essence is that if a married couple have lived apart for a continuous period exceeding three months, neither has deserted the other and one has been paying maintenance to the other or a child, the recipient of the maintenance can apply for a maintenance order. The section is far more detailed and complex, but the point to be made is that, as far as the author is aware, it is never used.

Amendment after Legislation

The prime example of politically motivated legislation that has been heavily amended in an attempt to make it work is the Child Support Act 1991. This Act makes it a duty for non-resident parents to support their children. This may sound unexceptional, but the reasons behind the Act, and its subsequent history, tell another story. The Act was passed during the “family values” period of the Thatcher Conservative government. Its avowed aim was to make absent fathers (one of the recent changes was to substitute “non-resident” for “absent”) pay for their children. However, behind the Act lay the conviction that the courts were not to be trusted and that they were too lenient in the orders they made for child maintenance. If more fathers were traced and made to pay, and all fathers paid more, the social security bill would be reduced. So responsibility for child maintenance was taken from the courts and given to a government agency. Calculation was no longer in the discretion of the court subject to guidelines and viewed holistically with the whole package of finance and property orders for the family, but calculated as an administrative task by reference to a strict and Byzantine formula. What happened was a disaster. A new under-funded and under-trained department targeted those who were already paying and the payments increased hugely under the new formula. Embarrassing mistakes were made. So there have been two radical overhauls, one included the addition of some discretion to the formula and the second scrapped the formula and adopted a percentage system of calculation. There is a lot more besides, but this Act is a salutary reminder of what can happen if political ideology and expediency ride roughshod over delicate social and financial matters.

Conclusion

What conclusions can be drawn? There is abundant evidence to show that the law relating to personal relationships has no consistent rationale and no coherence. Each relationship and each piece of legislation are considered in a piecemeal fashion. Even when there is reform, and it is generally beneficial, it is often spoiled by compromise and petty distinctions of classification.

It is recognised that much of what has been analysed may appear negative. To return to where this paper began, much of the Civil Partnership Act 2004 is to be applauded.
However, yet another opportunity to produce an integrated statutory code based on a consistent and rational policy has been lost. Cretney is right. The recommendations from informed opinion should be enacted free of political interference. However, what should the recommendations be?

The last refuge of the academic family lawyer is to assert that there is no right answer. However, there must be a better one than the current law. The issue of whether legislation should be on an opt-in or conferment basis is a delicate one. Opt-in provides certainty of which relationships are within the legislation. However, it places the onus on couples to have the knowledge, money and organisational skills to register (ultimately even any form of marriage requires registration). Conferment bestows the rights and duties automatically, but, allegedly, creates difficulties in defining the categories of persons. Also, is there is any difference between not knowing what rights are conferred and not realising the significance of non-registration? It makes sense to make initial qualification broad-based and certain, that is have an opt-in scheme for all “partners” who live mutually dependent lives in the same household and then give judicial discretion in respect of many of the rights. This is not so far away from Lord Lester’s Civil Partnerships Bill. Ideally, such legislation would be allied to a real drive to educate people about the legal and social implications of partnership.