

Religion and Same-Sex Unions:

The Scottish Government's Consultation on Registration of Civil Partnerships and Same Sex Marriage

Kenneth McK. Norrie

University of Strathclyde

Introduction

When the angels visited Sodom, looking for a man worthy of being saved from God's wrathful vengeance against the Cities of the Plain, they were taken in and offered food and shelter by Lot, a nephew of Abraham. And when the men of Sodom demanded of Lot that he give up the angels, "so that we can have sex with them",¹ Lot pleased the angels and God, and saved himself, by offering the mob his virgin daughters instead.² It is not surprising, in light of this scriptural authority that it is better to give up your daughters to be gang raped than to endorse homosexual conduct, that some Christian bodies even today refuse to accept the moral equivalence of same-sex and opposite-sex relationships and are therefore strongly opposed to the legal recognition of same-sex unions.

Being entirely conscious of this opposition, the Scottish Government in its recent Consultation Paper, which suggests allowing religious registration of civil partnership, and opening marriage to same-sex couples, takes very great care to emphasise time and again that no religious body will be required to be involved in the creation of relationships to which they have doctrinal objections. Unsurprisingly, this has not avoided strenuous opposition, particularly from the Roman Catholic Church in Scotland, which predicts apocalyptic consequences were the Scottish Government to go ahead with these proposals.³

¹ In the unpoetic translation offered by the New International Bible.

² *Genesis* 19:5-8.

³ "Bishop Steps Up Attack on Gay Marriage" *Herald* 8th October 2011; "Catholic Church Bishop Calls Gay Marriage Cultural Vandalism": *Metro* 12th September 2011, in which the Bishop of Paisley is quoted as saying that opening marriage to same-sex couples would "shame Scotland in the eyes of the world". Countries as disparate as Canada and Spain, Iceland and Argentina seem to be living with such shame with phlegm.

Civil Partnership

Civil partnership is an entirely secular institution, and there are presently rules not only against the involvement of religious officials in its creation but also against the use of religious premises.⁴ This complete secularity was designed to emphasise civil partnership's separation from marriage, in the hope of neutralising the claim that the introduction of civil partnership constituted a governmental attack on marriage, which is claimed to be the foundation of society. Fundamentalist Christians did not accept that this met their objections. The district registrar Lilian Ladele's refusal to register civil partnerships,⁵ and Mr and Mrs Bull's refusal to allow civil partners a double bed in their hotel,⁶ were both based on these individuals' belief in the sanctity of marriage and their understanding that civil partnership breached that sanctity. Legally, they were wrong and all three were found to be seeking to discriminate unlawfully.

Though the legal consequences of civil partnership are virtually the same as the consequences of marriage⁷ the means by which the two institutions are created are very different, and since each institution is exclusively limited to particular gender-mixes, the choices available to same-sex couples are different from, and lesser than, the choices available to opposite-sex couples. Opposite-sex couples may choose religious ceremony or civil solemnisation; same-sex couples are limited to civil registration.⁸ That difference in itself justifies a change in the law to accommodate those same-sex couples of faith who wish to have the same opportunity as their opposite-sex counterparts to have their religious community involved in the creation of their legal relationship. Some religious bodies (including Unitarians, Quakers, the Metropolitan Community Church and the Liberal Jewish Community⁹) have already indicated their desire to conduct civil partnership registrations.

The Consultation Paper therefore suggests that those religious groups that are willing to become involved in the creation of civil partnerships be allowed to do so, but it emphasises, in an attempt to minimise opposition, that no religious body will be

⁴ Civil Partnership Act 2004, s.93(3).

⁵ *Ladele v. Islington Borough Council* [2010] 1 WLR 955.

⁶ *Hall and Preddy v. Bull* [2011] EW Misc 2.

⁷ The very minor differences are listed in the Consultation Paper at Appendix B.

⁸ Civil marriage is "solemnised", civil partnership is "registered".

⁹ <http://www.heraldscotland.com/news/politics/faith-groups-unite-to-back-gay-weddings-1.1126547>

required, against its own wishes, to be so involved. Providing equality of choice is easy, even in the face of religious objection, for religious tolerance demands that the rejection by Religion A of civil partnership must not be allowed to prevent Religion B from choosing to be involved in the creation of civil partnership. It is rather less clear, however, how to ensure that conservative religious organisations are shielded from existing equality legislation which, many fear, would force them against their will to offer services to same-sex couples contrary to their doctrinal beliefs. It will be recalled that the Roman Catholic Church sought, but were denied, an exemption from the requirements in the Adoption and Children (Scotland) Act 2007 for adoption agencies to provide their services in a non-discriminatory manner and including to same-sex couples. The fear is that, by analogy with adoption, it will be considered unlawful under the Equality Act 2010 to refuse to offer civil partnership celebrations to same-sex couples. The adoption analogy, however, is misunderstood: religious adoption societies were *already* offering services otherwise provided by the state and the non-discrimination rules meant that if they wished to continue to do so they would have to do so without excluding same-sex couples. No religious body is *required* to offer adoption services in place of the state, though if it chooses to do so it must comply with the general law, including of course the Equality Act 2010. Similarly with civil partnership, no religious body is or can be *required* to offer to perform the state function of civil partnership registration and so their refusal to do so will not conflict with the non-discrimination rules to which they are bound – but if a religious body did decide to offer civil partnership services, it could do so only in a non-discriminatory fashion. In other words, the fear of religious conservatives that the general prohibition on discrimination will require all religious bodies to engage with civil partnership is entirely unfounded. A change in the law that permitted religious groups to choose to conduct civil partnership registrations will not require all religious groups to do so, just as allowing an adoption society associated with a church to perform state functions in relation to adoption of children does not require all other churches to take on the provision of these functions.

The Government's proposals to allow religious bodies to be involved in the creation of civil partnership and the application of equality norms pose no threat, therefore, to religious bodies who continue to deny the validity of same-sex relationships.

Marriage

The same line of reasoning does not work in relation to marriage, however, because many religious bodies have already put themselves forward (and in the case of the state church automatically so) to solemnise marriages, and presumably these bodies intend to continue to do so. It follows that if marriage is opened to same-sex couples any religious body that offers marriage services (as most of those who reject same-sex relationships do) might fear a discrimination claim under the Equality Act 2010 if it continues to offer these services to opposite-sex couples but refuses to offer them to same-sex couples. In fact, however, it has long been the case in Scotland that no religious celebrant may be required to solemnise a marriage contrary to his or her conscience. A minister or priest may refuse, for example, to marry a couple who are of different religions to each other. The Church of Scotland is not unlawfully discriminating on the basis of religion by offering marriage services only to (those who claim to be) Christian; so too, a minister or priest will be able to refuse to marry a couple on the ground of their sexual orientation.¹⁰

The real question is whether, in order to neutralise opposition (rather than actually to achieve any change in the law), a specific exemption from the Equality Act 2010 should be written into the legislation that opens marriage to same-sex couples. There are grave dangers in doing so, because a provision exempting an individual or body from the rules against discrimination on the basis of sexual orientation gives out a clear and shameful message that the demands of dignity and equality are less strong if based on sexual orientation than if based on race, religion or gender. If the political decision is nevertheless made that an exempting provision should be included in the legislation in order to assuage the fears of religious bodies and individuals, the Scottish Government might care to ask these bodies whether they also want a statutory provision explicitly confirming their power to refuse to solemnise mixed-race or mixed-faith marriages.

Hierarchy and Individuals

Another question that is troubling the Scottish Government in its Consultation Paper is whether individual religious celebrants should or should not be allowed to register

¹⁰ Both situations are explicitly covered by the general exceptions to the equality rules, found in Sched. 23, para 2 to the Equality Act 2010.

civil partnerships or solemnise marriages between same-sex couples if they belong to an organisation opposed to same-sex unions. This is not a matter that the law need get involved in at all. If a religious celebrant breaks the rules of the religious organisation to which he or she belongs, then the disciplinary consequences of that breach are for the organisation to determine and not for the law to be concerned about (except insofar as internal disciplinary proceedings require to comply with the general law of the land, as the House of Lords affirmed in *Percy v. Church of Scotland*¹¹). There can, however, be no justification for a *legal* prohibition on individuals performing *legal* acts just because they belong to a body that rejects the validity of such acts. Were the Church of Scotland (say) to ban its ministers from entering into civil partnership, the law could not and should not take it upon itself to enforce that rule, by creating an incapacity (additional to age, forbidden degrees etc) based on the fact that one of the parties is a Church of Scotland minister. Similarly with acting as a celebrant: if a minister or priest belonging to an opposing church acts against the rules of the church he or she must expect internal disciplinary consequences, but it would be entirely wrong for the law to disentitle individuals from being authorised by the Registrar General¹² to celebrate particular marriages. And of course the marriage or civil partnership itself would remain in existence even if the celebrant's authorisation were questionable.¹³

The Solution

Attempts to reassure conservative religious bodies that their religious freedoms will not be affected by the opening of marriage, or the religification of civil partnership, are probably futile. For it is not the structures of the law that, say, the Roman Catholic Church is actually objecting to, though these do give their objections a focus. The true objection is a more fundamental one: it is to the moral equivalence of same-sex and opposite-sex couples, an equivalence many churches vehemently deny. The law cannot, and probably should not attempt to, change the doctrinal understandings of such religious bodies – but nor may it reflect such understandings in its own rules.

¹¹ [2005] UKHL 73.

¹² Under s.12 of the Marriage (Scotland) Act 1977.

¹³ Marriage (Scotland) Act 1977, s.23A; Civil Partnership Act 2004, s.95A.

In fact, the legal solution is easy. The problem lies in the use of the same word, marriage, to describe two entirely different things: on the one hand marriage as a relationship is a state institution that acts as the legal identifier for various legal rights and obligations; on the other hand marriage as an event is (sometimes) a sacrament, or a contract with God, a religious blessing of a life to be led together. It is the failure to differentiate between the two, exacerbated by the law permitting religious officials to perform the state function of bringing marriage (and, soon, civil partnership) into existence, that is the root of the difficulties. The solution lies in the complete secularisation of all legal relationships: instead of achieving equality by making civil partnership more like marriage, equality should be achieved by making marriage more like civil partnership. Virtually all of the problems discussed in the Consultation Paper would simply evaporate by requiring that the state function of bringing legal relationships into existence is carried out only by state officials (that is to say, in Scotland, District Registrars) applying universally applicable laws. This would leave religious bodies free to perform their sacraments according to whatever principles they wish (and to call them whatever they liked).

In other words, I suggest that religious marriage be abolished, and religious civil partnership not be introduced. Religious freedom would be maintained by allowing any religious body to offer – or to withhold – a blessing to the relationship created by the state. There is, I accept, little chance of the Scottish Government adopting this as a policy, or of conservative religious bodies supporting a reduction in their legal powers. Yet the problem arises only because religious bodies jealously guard their power to exercise state functions, while at the same time being unwilling to give effect to changes in state law. Secularisation would free religious bodies to develop their own practices according to their own doctrinal imperatives; and the law would be free – as it must be – to develop its structures and principles in a way that serves all its citizens, irrespective of their religious beliefs, or their sexual orientation.