

CIVIL PARTNERS AND RELIGIOUS ORGANISATIONS

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INTRODUCTION

The Civil Partnership Act 2004 came into force on 5 December 2005 amidst a furore of media attention, much of it prurient, and under protest from evangelical Christian groups and others. It generated a spirited exchange in periodicals such as the *Ecclesiastical Law Journal*,¹ but the practical implications are yet to be fully evaluated. This chapter² will provide an analysis of some particular ways in which the Act necessitates a re-visiting of the constitutional relationship of Church and State: first, the sacramental and secular concepts of marriage and the degree to which they have been altered by the creation of the legal construct of the civil partnership;³ and secondly, the implications for clergy of the Church of England, who are commonly understood to be under a legal duty to solemnise the marriage of parishioners irrespective of the couple's religious beliefs or lack of them, and yet are canonically restrained from blessing a same-sex union.

GAY MARRIAGE?

The Civil Partnership Act 2004 was welcomed by civil rights jurists, and produced – perhaps inevitably – a flurry of camp innuendo from the popular press. Few could have missed the coverage of Sir Elton John and David Furnish at the same Windsor register office as had been used a few months earlier for the marriage of HRH Prince Charles (the future Supreme Governor of the Church of England) and Camilla Parker-Bowles.⁴ But what was the status and legal effect of the respective ceremonies and why was the

¹ J Humphreys, 'The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England' (2006) 8 *Ecc LJ* 289, M Scott Joynt, 'The Civil Partnership 2004: Dishonest Law?' (2007) 9 *Ecc LJ* 92.

² This short paper is re-focused version of my chapter 'Church, State and Civil Partners: Establishment and Social Mores in Tension' in N Doe and R Sandberg (eds), *Law and Religion: New Horizons* (Peeters, Leuven, forthcoming).

³ In a pastoral letter to the parishes of his diocese in March 2008, the Rt Revd Jonathan Gledhill, Bishop of Lichfield, criticized 'the Great British experiment to downplay marriage and the family'. He said the experiment had failed: <<http://www.lichfield.anglican.org/news&newsID=492>>.

⁴ I have elsewhere addressed the dubious legality of a Royal Marriage being contracted in a civil ceremony: (2005) 8 *Ecc LJ* 244, its status hinging in nothing more than a written statement of Lord Falconer of Thornton (then Lord Chancellor) in the House of Lords. Civil marriage is a creature of statute, and its application to members of the Royal Family was expressly excluded from the scheme: Marriage Act 1836, s 45. See now also: S M Cretney, 'Royal Weddings, Legality and the Rule of Law' (2007) *Family Law* 159-164

latter but not the former followed by an Anglican service of blessing in St George's Chapel, Windsor conducted by the Archbishop of Canterbury?

The answer, as is so often the case, lies in matters of definition: terminological precision articulates a conceptual distinction whereas linguistic laxity obfuscates and confuses. Prior to the introduction of the legislation, the Government asserted that it had no plans to allow same-sex couples to marry; its proposals were for an entirely separate concept: 'civil partnership is a completely new legal relationship, exclusively for same-sex couples, distinct from marriage'.⁵ Quite how distinct, however, is far from clear. In *Wilkinson v Kitzinger*, it was said that 'Parliament has taken steps by enacting the Civil Partnership Act to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name'; and the concept of civil partnership was described as a 'parallel and equalizing institution designed to redress a perceived inequality of treatment of long-term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage'.⁶ In *Secretary of State for Work and Pensions v M*, it was noted that civil partnerships have 'virtually identical legal consequences to marriage'.⁷ Herring criticises the judgment on the basis that although the President of the Family Division recognised that civil partnerships were as a matter of nature and common understandings different from marriage, it is not clear how he thought they were different.⁸ Attempts at jurisprudential precision have not prevented the expression 'gay marriage' achieving popular currency and widespread parlance.⁹ The great repository of English law, *Halsbury's Statutes*, now has a generic section entitled 'Matrimonial Law and Civil Partnerships' following directly after 'Markets and Fairs'.¹⁰

⁵ This statement was for a long time to be found in response to 'Frequently Asked Questions' on the website of the Women and Equality Unit of the Department for Trade and Industry.

⁶ *Wilkinson v Kitzinger* [2006] EWHC (Fam) 2022 at para 121.

⁷ *Secretary of State for Work and Pensions v M* [2006] 1 FCR 497 at para 99, per Sir Mark Potter P. He disavowed the concept of 'gay marriage' as a contradiction in terms.

⁸ J Herring, *Family Law* (Third edition, Essex, Pearson, 2007) 70.

⁹ Note that gay marriage in its full sense has been adopted in both Belgium and Spain. The Constitutional Court of South Africa in *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs* (CCT 60/04, 10/05, 1 December 2005) declared the common law definition of marriage (between a 'man' and a 'woman') to be inconsistent with the South African Constitution. However the Court suspended the declaration of invalidity for twelve months to allow Parliament to correct the defect by introducing, should it so wish, legislation permitting civil unions. The dissenting judgment of O'Regan J would not have allowed the suspension but would have corrected the law with immediate effect.

¹⁰ *Halsbury's Statutes of England and Wales* (Fourth edition, London, Butterworths LexisNexis, 2006 Reissue), Volume 27.

In England, the solemnization of matrimony traditionally lay with the churches. Sacramental marriages in religious ceremonies had – and continue to have – direct legal effect in English secular law. To this day, ministers of the Church of England are under a duty to conduct a marriage service according to the rites of the Church for any resident of their parish regardless of religious affiliation.¹¹ Civil marriage, by contrast, is a creature of statute, introduced by the Marriage Act 1836. The legislation empowers registrars (who are civil servants and officers of the state) to solemnize marriages. But, as was made clear in the case of *R v Dibdin*:¹²

Marriage ... is one and the same thing whether the contract is made in church with religious vows superadded, or whether it is made in a Nonconformist chapel with religious ceremonies, or whether it is made before a consul abroad, or before a registrar, without any religious ceremonies.

Marriage is the lifelong union of one man and one woman. This is not merely a Christian definition, but one recognised and articulated by the secular courts. Lord Penzance in *Hyde v Hyde* defined marriage as ‘a voluntary union for life of one man and one woman to the exclusion of all others’.¹³

In contrast, a civil partnership is a legally formed ‘relationship between two people of the same sex’,¹⁴ contracted in accordance with the detailed procedures of the Civil Partnership Act 2004:¹⁵ notice must be given of an intention to form a civil partnership, the notice must be publicised, and the partnership cannot be entered into until 15 days after the notice has been given. These preliminaries broadly replicate those for civil marriage under a registrar’s certificate. The partnership itself is entered into by signing a document in the presence of each partner, the registrar and two witnesses. The Act provides that civil partners are to be treated by law in the same way as married couples in respect to, amongst other things, property disputes between them, the law relating to wills, administration of estates and family provision.

¹¹ See M Hill, *Ecclesiastical Law* (Third edition, Oxford, Oxford University Press, 2007) paras 5.31-5.50.

¹² [1910] P 57, CA.

¹³ *Hyde v Hyde* (1868) LR 1 P&D 130 at 133.

¹⁴ Civil Partnership Act 2004, s1(1), 3(1)(a).

¹⁵ See, generally, N Gray and D Brazil, *Blackstone’s Guide to the Civil Partnership Act 2004* (Oxford, Oxford University Press, 2005).

Like marriage, a civil partnership ‘ends only on death, dissolution or annulment’;¹⁶ and the provisions of the Civil Partnership Act 2004 as regards termination ‘mirrors, to a large extent, the provisions contained in the Matrimonial Causes Act 1973’¹⁷ with the order of dissolution being equivalent to a divorce.¹⁸ There are two main differences between the termination of a marriage and termination of a civil partnership.¹⁹ First, whilst adultery is a ground for a divorce,²⁰ there is no like provision for the dissolution of a civil partnership.²¹ Second, in relation to annulment, whilst section 12 of the Matrimonial Causes Act 1973 provides that a marriage may be voidable if one party petitions that the marriage has not been consummated,²² there is no equivalent provision to that in the Civil Partnership Act 2004.²³

The Act contains specific provision relating to faith communities. A civil partnership may not be entered into on religious premises and no religious service may be used while the registrar is officiating at the signing of a civil partnership document.²⁴ Similarly, marriages that take place in register offices or non-religious ‘approved premises’ are also prohibited from including any religious service.²⁵ A Pastoral Statement issued by the House of Bishops of the Church of England on 25 July 2005 states,

The legislation does, however, leave entirely open the nature of the commitment that members of a couple chose to make to each other when forming a civil partnership. In particular, it is not predicated on the intention to engage in a sexual relationship. Thus there is no equivalent of the marriage law provision

¹⁶ Civil Partnership Act 2004, s 1(3).

¹⁷ Gray and Brazil, *Blackstone’s Guide to the Civil Partnership Act 2004* 25.

¹⁸ Herring, *Family Law* 63.

¹⁹ Another difference is that under the Civil Partnership Act 2004, s49(b), in the case of a minor, if a person whose consent is required has forbidden the issue of the civil partnership document then a later the civil partnership is void. In contrast, in relation to marriage, unless a person has objected to the calling of banns, a marriage contracted in the absence of the necessary consent is not void: N Lowe and G Douglas, *Bromley’s Family Law* (Tenth Edition, Oxford, Oxford University Press, 2007) 98.

²⁰ Matrimonial Causes Act 1973, s1(2) (a).

²¹ Although a relationship with a third party may constitute the ground of ‘behaviour’ under section 44(1) of the Civil Partnership Act 2004: see Lowe and Douglas, *Bromley’s Family Law* 301 and Gray and Brazil, *Blackstone’s Guide to the Civil Partnership Act 2004* 27.

²² Owing to the incapacity of either party to consummate or that it has not been consummated due to the respondent’s wilful refusal to do so: Matrimonial Causes Act 1973, s 12. Section 12 also provides that a marriage may be voidable if one of the parties was suffering from a communicable venereal disease at the date of the marriage. See Lowe and Douglas, *Bromley’s Family Law* 79.

²³ See Civil Partnership Act 2004, s 50. It is ‘unclear’ why the provision of section 12 of the Matrimonial Causes Act 1973 that a marriage may be voidable if one of the parties was suffering from a communicable venereal disease at the date of the marriage has been omitted from the grounds on which a civil partnership is voidable. Lowe and Douglas, *Bromley’s Family Law* 98.

²⁴ Civil Partnership Act 2004, s2(5), 6(1)(b).

²⁵ *Ibid*; Marriage Act 1949, s45A(4); Marriages and Civil Partnerships (Approved Premises) Regulations 2005/3168, Schedule 1.

either for annulment on the grounds of non-consummation or for its dissolution as a result of sexual infidelity.²⁶

Whilst it is self-evident that, in contradistinction to married couples, biological procreation cannot be achieved by civil partners, the issue of the extent to which civil partnerships carry with them the concept of a sexual union is debatable. An argument that it does has been made by Jacqueline Humphries.²⁷ She maintains that the Act has an understanding of civil partnerships that are voluntary, permanent, sexual, monogamous, mutually supportive and nurturing of children in the same ways that a marriage is understood to be within English law. I disagree. There is nothing in the provisions of the Act to suggest that it is concerned with anything more than the financial affairs of participating partners and inheritance upon death. Physical intimacy, still less sexual fidelity, fail to feature in the provisions of the Act, whether conceptually or substantively.

In relation to marriage, non-consummation has already been mentioned.²⁸ It is the act of heterosexual penetration²⁹ which is required to consummate a marriage, as opposed to the prospect of that act resulting in the birth of a child.³⁰ Does the omission of non-consummation as a ground for dissolving a civil partnership simply recognise that heterosexual sex is not an element of a civil partnership or is it an acknowledgment sexual intimacy of any type is not a component part?³¹ The second interpretation seems preferable. Since section 12 of the Matrimonial Causes Act 1973 underlines that 'heterosexual sex is an important element, if not the purpose of marriage',³² the absence of any equivalent provision in section 50 of the Civil Partnership Act 2004 may be taken to reveal that sexual intimacy is not an element of a civil partnership.³³ This interpretation is supported by Baroness Scotland's explanation of the omission: 'There is

²⁶ *Civil Partnerships: A Pastoral Statement from the House of Bishops of the Church of England*, July 2005.

²⁷ J Humphries, 'The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England' (2006) 8 *Ecc LJ* 289.

²⁸ See Lowe and Douglas, *Bromley's Family Law*. They contend that the reason for this omission is 'because the concept of consummation, which is inherently heterosexual (if not heterosexist) does not apply to a same-sex relationship': page 79.

²⁹ It has been judicially defined as the penetration of the vagina by the penis: *D-E v Attorney General* (1845) 1 Rob Eccl 279. See G Douglas, *An Introduction to Family Law* (Second Edition, Oxford, Oxford University Press, 2004) 34.

³⁰ Lowe and Douglas, *Bromley's Family Law* 79.

³¹ It has been suggested the absence of a non-consummation provision in the Civil Partnership Act 2004 'demonstrates the law's failure to recognise that gay sex is real sex': Herring, *Family Law* 64.

³² See Douglas, *An Introduction to Family Law* 34.

³³ Certain other grounds that are inherently heterosexual have not been omitted: for instance, being pregnant by someone else is a ground upon which the civil partnership can be voidable. See Lowe and Douglas, *Bromley's Family Law* 98.

no provision for consummation in the Civil Partnership Bill. We do not look at the nature of the sexual relationship, it is totally different in nature'.³⁴

Moreover, the fact that siblings, parents cared for by children, and others living together cannot enter a civil partnership further suggests that sexual intimacy is not a definitional element of a civil partnership.³⁵ If it were solely the sexual element that was distinctive then heterosexual cohabitants, who are not related, would be included. The Grand Chamber of the European Court of Human Rights has recently stated that: 'Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature'.³⁶ Commenting specifically on the allegation of discrimination made by two elderly sisters who had cohabited for many years and yet would not enjoy the inheritance tax benefits which automatically result to those in a civil partnership, the Grand Chamber of the Strasbourg court stated:

'the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the UK's Civil Partnership Act'.³⁷

A civil partnership, as the Civil Partnership Act makes clear, is no more and no less than a 'relationship between two people of the same sex'.³⁸ There is no requirement – either prescriptive or normative – that a civil partnership relationship must or should be sexual.

It therefore follows that the clergy of the Church of England are free under both civil law and canon law to enter into a civil partnerships since the act of registration does not of itself constitute a declaration of homosexual orientation or practice. Were a cleric to be disciplined on the basis that he or she were in a doctrinally offensive non-celibate same-sex relationship, the mere fact that a civil partnership had been entered would be

³⁴ Baroness Scotland of Asthal, House of Lords, Hansard 17 November 2004, col 1479.

³⁵ Henning, by contrast, contends that the arguments used against the unsuccessful 'wrecking amendment' introduced in the House of Lords to extend the application of the Bill to siblings and similar 'showed that it is the sexual element of the relationship, with what that represents, which leads us to regard a relationship as being different from a relationship between friends'. Herring, *Family Law* 68.

³⁶ *Burden v United Kingdom* (Application no. 13378/05) para 65.

³⁷ *Ibid*, at para 62. This evidences a misreading of the legislation because, as has been so amply demonstrated already in this paper, the UK legislation provides a statutory institution for **same gender** couples and not (or at least not necessarily) for **homosexual** couples. It is highly regrettable that the Strasbourg judges promote this common misconception, and the cynic may be critical of the Government's lawyers for causing or permitting them so to do.

³⁸ Civil Partnership Act 2004, s1(1), 3(1)(a).

evidentially neutral, and would not of itself demonstrate an infringement of the doctrinal Statement 'Issues in Human Sexuality'.³⁹ The document is lengthy and closely reasoned but its ultimate conclusion is that whilst homosexual orientation is acknowledged and accepted, the active practice of such orientation in a same-sex relationship incorporating physical intimacy is regarded as incompatible with the clerical state:

We have, therefore, to say that in our considered judgement the clergy cannot claim the liberty to enter into *sexually active* homophile relationships. Because of the distinctive nature of their calling, status and consecration, to allow such a claim on their part would be seen as placing that way of life in all respects on a par with heterosexual marriage as a reflection of God's purpose in creation. The Church cannot accept such a parity and remain faithful to the insights which God has given it through Scripture, tradition and reasoned reflection on experience.⁴⁰

The House of Bishops' statement also 'affirms' that clergy of the Church of England should not provide services of blessing for those who have registered a civil partnership. However, 'where clergy are approached by people asking for prayer in relation to entering into a civil partnership they should respond pastorally and sensitively in the light of the circumstances of each case'.⁴¹

Only time will tell how the tension between the legislature and faith communities will be played out. The statutory provisions of the Act currently ensure that the doctrinal purity of sacramental marriage as a lifelong union between one man and one woman is

³⁹ 'Issues in Human Sexuality': A Statement by the House of Bishops of the General Synod of the Church of England, December 1991 (Church House Publishing, 1991). For additional prescriptive description of clerical lifestyle and sexual conduct, see a resolution of the General Synod of the Church of England dated 11 November 1987, a resolution of the General Synod dated 14 July 1997, and resolution 1.10 of the Lambeth Conference 1998. For a discussion by a first instance Employment Tribunal of these doctrinal statements as a genuine occupational requirement for clerical office and other representative positions within the Church of England see *Reaney v Bishop of Hereford* (July 2007, unreported) noted at (2008) 10 *Ecc LJ* 131.

⁴⁰ 'Issues in Human Sexuality' at paragraph 5.17 (emphasis added). The rigour of this House of Bishops' Statement must be contrasted with the known fact of practising homosexual clergy ministering openly and effectively in the Church of England. Media attention surrounding the proposed appointment of Canon Jeffrey John as Bishop of Reading, and the consecration of the Reverend Gene Robinson to be a bishop in the Episcopal Church of the USA have exposed the divide which some perceive to exist between the official doctrinal teaching of the Anglicanism and its routine practice. These matters, though highly significant, are beyond the scope of this paper.

⁴¹ A survey of same-sex couples which found that a significant minority wanted a religious element in a civil partnership celebration: P Readhead, *Same-Sex Couples Tie the Knot* (ESRC, 2006). Note the media coverage of the ceremony conducted by the Reverend Martin Dudley at the church of St Bartholomew the Great following the registering of a civil partnership by two Anglican clergy. On newspaper headline on the day the Network met in Cardiff spoke of 'the Church of England in meltdown'. (*The Times*, 16 June 2008).

preserved. However this jurisprudential precision has not prevented the expression ‘gay marriage’ achieving popular and widespread parlance. As to the controversial question on whether the passing of the Civil Partnership Act 2004 undermines the institution of marriage, General Synod passed several resolutions in its February 2007 group of sessions including one which acknowledged:

the diversity of views within the Church of England on whether Parliament might better have addressed the injustices affecting persons of the same sex wishing to share a common life had it done so in a way that avoided creating a legal framework with many similarities to marriage.

CONSCIENTIOUS OBJECTION

The duty on the part of a priest of the Church of England to solemnise the marriage of parishioners who present themselves is subject to a number of statutory exceptions.⁴² The first of these, often styled a ‘conscience clause’ is to be found in the Matrimonial Causes Act 1965 and provides that clergy⁴³ cannot be compelled to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living.⁴⁴ This permits them not only to refuse to solemnise the marriage but also to prohibit the use of the church or chapel of which they are minister for such a purpose.⁴⁵ The same model was adopted by the Marriage (Prohibited Degrees of Relationship) Act 1986, which permits the clergy to refuse to marry those related by affinity whose marriage would have been void but for that Act, and to prohibit the use of his church accordingly.⁴⁶ However, the more recent exception created by the Gender Recognition Act 2004 is more narrowly drawn.⁴⁷ A Church of England minister is not obliged to solemnise the marriage of a person if he reasonably believes the person’s

⁴² Assuming that the legal requirements are satisfied, it is generally understood that there is a legal right to be married in the parish church: *Argar v Holdsworth* (1758) 2 Lee 515; M Hill, *Ecclesiastical Law* para 5.34.

However, the existence of this right has been questioned in recent years by N Doe, *The Legal Framework of the Church of England* (Oxford, Clarendon Press, 1996) 358-362 and M Smith, ‘An Interpretation of *Argar v Holdsworth*’ (1998) 5 *Ecc LJ* 34. For a defence of the orthodox view, see J Humphreys, ‘The Right to Marry in the Parish Church: A Rehabilitation of *Argar v Holdsworth*’ (2004) 7 *Ecc LJ* 405. The Marriage Measure 2008, which comes into force on 1 October 2008, will extend this right beyond parishioners to encompass those with a ‘qualifying connection’ with the parish church in question.

⁴³ It also applies to clergy of the Church in Wales.

⁴⁴ Matrimonial Causes Act 1965, s 8(2).

⁴⁵ *Ibid*, s 8(2)(b).

⁴⁶ Marriage Act 1949, s 5A (amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 3). Note also the Marriage Act 1949 (Remedial) Order 2006, which preserved the clerical conscience clause in relation to the marriage of former parents-in-law to children-in-law. This underlying legislative change came about in consequence of the decision in the European Court of Human Rights in *B and L v United Kingdom* (2006) 42 EHRR 11.

⁴⁷ And they differ as between the Church of England and the Church in Wales.

gender to be an acquired gender under the 2004 Act.⁴⁸ It should be noted that section 22 of the Gender Recognition Act 2004 creates a general offence of unauthorised disclosure of information relating to a person's 'gender history'.⁴⁹ Although this applies only to those who have gained the information in an official capacity, that concept is broad enough to include receipt of information in connection with a voluntary organisation. The Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005⁵⁰ makes provision for exceptions for certain legal, medical, financial and religious purposes. In respect of the religious purposes, disclosure is permitted to enable any person to make a decision whether to officiate or permit the marriage of the person.⁵¹

The teaching and the practice of the Church of England with respect to a further marriage by a divorced person whose spouse is still alive has been subject to review and re-articulation.⁵² The Canons still provide that 'marriage is in its nature a union permanent and lifelong' terminable by the death of one partner.⁵³ With the rescission of paragraph 1 of the 1957 Act of Convocation,⁵⁴ the term 'indissoluble save by death' was lost, as was the exhortation not to use the marriage service in the case of anyone who

⁴⁸ Marriage Act 1949, s 5B (1) (amended by the Gender Recognition Act 2004, s 11, Sch 4). A clerk in holy orders of the Church in Wales is not obliged to permit the marriage to be solemnised in his church or chapel: *ibid* s 5B (2) (as so amended).

⁴⁹ This is punishable by a fine of up to £5,000.

⁵⁰ Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005, SI 2005/916.

⁵¹ It also includes whether to appoint the person as a minister, office-holder or to any employment for the purposes of the religion, whether to admit them to any religious order or to membership, or to determine 'whether the subject is eligible to receive or take part in any religious sacrament, ordinance or rite, or take part in any act of worship or prayer, according to the practices of an organised religion': *ibid* art 4. If a decision other than one relating to marriage is being made, the person making the disclosure must reasonably consider that that person may need the information in order to make a decision which complies with the doctrines of the religion in question or avoids conflicting with the strongly held religious convictions of a significant number of the religion's followers.

⁵² See *An Honourable Estate* (Church House Publishing, London, 1988), *Marriage: A Teaching Document* from the House of Bishops (Church House Publishing, London, 1999), *Marriage in Church After Divorce*, the Winchester Report (GS 1361, 2000), *Marriage in Church After Divorce*, A Report from the House of Bishops (GS 1449, May 2002). The latter states, 'The Church of England has sought both to uphold the principle of life-long marriage and to provide a pastoral ministry to divorced persons who seek a further marriage in church': para 1.

⁵³ See Canon B 30 para 1. The unanimous advice of the legal officers of General Synod (appearing as annex 2 to *Marriage in Church After Divorce*, A Report from the House of Bishops (GS 1449, May 2002)) was that the further marriage of a divorced person was not necessarily incompatible with the Church's doctrine of marriage since the characteristic and normative nature of marriage as a lifelong union was unchanged.

⁵⁴ *Regulations Concerning Marriage and Divorce*, Canterbury Convocation passed in May 1957, and declared an Act of Convocation on 1 October 1957, affirming resolutions of 1938 common to both the Canterbury and York Convocations.

had a former partner still living,⁵⁵ but marriage should always be undertaken as ‘a solemn, public and life-long covenant between a man and a woman’.⁵⁶

As noted above, a priest is relieved of his duty to marry those who are entitled by law to be married in his church if one or both of the intended parties has been divorced and his or her partner is still living.⁵⁷ He may also refuse to allow his church to be used for such a purpose.⁵⁸ The Act does not preclude the priest from conducting such a marriage; it merely creates a permissive right entitling him lawfully to decline if his conscience so dictates. A capricious refusal, not based upon a conscientious objection, might be actionable under the Human Rights Act 1998.⁵⁹ Equally, the right being personal to the priest exercisable according to his conscience, it is not open to the bishop or archbishop to seek to fetter its exercise by mandatory direction.⁶⁰

Thus we find ourselves in the curious position whereby Church of England clergy (i) are under a legally enforceable duty to solemnise the matrimony of atheists, non-believers and adherents of other faiths; (ii) have a statutory discretion to refuse to marry divorcées, transgendered and certain others exercisable in accordance with their conscience irrespective of the religious beliefs and affiliations of the couple; and (iii) are canonically prohibited⁶¹ from conducting a service of blessing following the registration of a civil partnership. Ironically, devout Christians in the latter category are denied the ministrations of the Church by way of a blessing whereas Muslims, Buddhists, Sikhs, Jews and non-believer couples⁶² can compel the use Church of England rites and liturgy and the ministrations of its clergy. The pastoral damage which might result from this

⁵⁵ Paragraph 1 of the Act of Convocation of 1 October 1957, and the resolutions of 1938, were rescinded by General Synod with effect from 14 November 2003.

⁵⁶ See the *Pastoral Introduction* to the Common Worship Marriage Service.

⁵⁷ Matrimonial Causes Act 1965, s 8(2)(a).

⁵⁸ *Ibid*, s 8(2)(b).

⁵⁹ The right to marry is set out in Article 12 of the European Convention on Human Rights, and it is suggested that a minister of the Church of England, in performing functions relating to the solemnisation of marriage is a public authority for the purposes of s 6(1) of the Human Rights Act 1998: see *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546, particularly (albeit *obiter*) *per* Lord Hobhouse of Woodborough at para 86, and Lord Rodger of Earlsferry at para 170.

⁶⁰ There is nothing objectionable to the issuing of guidelines, and these may be useful to ensure procedural consistency, but the priest’s statutory discretion must not be eroded. *Advice to Clergy Concerning Marriage and the Divorced* was issued by the House of Bishops in November 2002, and is included in the supplementary material to the Canons of the Church of England.

⁶¹ See *Civil Partnerships: A Pastoral Statement from the House of Bishops of the Church of England*, July 2005 (discussed above) and note Canon C14 of the Canons of the Church of England which requires clergy to take the Oath of Canonical obedience to the diocesan bishop and his successors ‘in all things lawful and honest’.

⁶² Provided that one or both are resident within the particular parish.

mixed message cannot be adequately explained away as an anomaly of the historic accident of establishment in a plural society.⁶³

CONCLUSION

The Civil Partnership Act 2004 is one of a number of pieces of legislation that have had an impact upon religious communities and individuals.⁶⁴ The Act creates a newly recognised legal relationship which cannot be entered into on religious premises, at which no religious service can be used, and the blessing of which is expressly forbidden by the Church of England. Moreover despite political and judicial rhetoric that civil partnerships are different and distinct from marriage, the exact differences have yet to be fully explored and clearly articulated by the domestic judiciary or by the European Court of Human Rights in Strasbourg. Although the Act defines the relationship a being for two individuals of the same gender, physical intimacy, still less sexual fidelity, do not feature in the provisions of the Act. This means that the House of Bishops' Pastoral Statement is wholly consistent with the letter of the legislation; whether it accords with popular perceptions of the legislation is another matter. Future judicial interpretation of the Act may pose challenges for the clergy of the Established Church. The implications for Church of England clergy who are commonly understood to be under a legal duty to solemnise the marriage of parishioners creates what can at best be styled a pastoral anomaly. Whether promoted by accident or design, the effects of the Civil Partnership Act on the nature of Establishment in times of changing social mores are far from insignificant and not yet fully understood.

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⁶³ For a more forthright discussion of the subject see M Hill, 'Rent Asunder: Westminster's War on Marriage', a paper presented at the Tenth Anniversary Conference of the Centre for Law and Religion, Cardiff University, 11-12 March 2008 (publication forthcoming).

⁶⁴ See other chapters in this volume for discussion of the impact of other statutes such as the Charities Act 2006, the Racial and Religious Hatred Act 2006 and the new law on religious discrimination.