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RENT ASUNDER: WESTMINSTER'S WAR ON MARRIAGE

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ABSTRACT

It remains a fundamental principle of English law that parishioners have a right to marry in their parish church. Anglican parish priests are under a legal duty to solemnise the marriage of those who are resident in their parish according to the rites of the Church of England regardless of the beliefs and affiliations of the couple. This paper explores how successive governments have sought, whether by accident or design, to change societal understandings of marriage and to diminish the status of the family in domestic law. Furthermore, it will be argued that the Church of England has been complicit in the erosion of the status of sacramental marriage.

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Introduction

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*¹ defined marriage as 'a voluntary union for life of one man and one woman to the exclusion of all others'.

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.² 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

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

² Marriage Act 1949.

of their parish regardless of religious affiliation.³ Civil marriage, by contrast, is a creature of statute, introduced by the Marriage Act 1836 [or 1823]. The Act, and its successor legislation, empowered 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* (1909):

‘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.’

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.⁴ Is he right?

Legislation

Legislation has seen a gradual re-appraisal of the understanding of the nature of marriage and the family. The passing of the Matrimonial Causes Act 1973 led in due course to the concept of ‘no-fault’ divorce, an ever-growing by-product of marriage. But more recent statutory provisions have had a direct and highly significant effect.⁵

Marriage Act 1994

This Act permitted marriage ceremonies to take place at venues other than designated places of worship and register offices. This is widely perceived as detracting from the solemnity of marriage.

Civil Partnership Act 2004

Prior to the introduction of this 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’. The Civil Partnership Act 2004 set out detailed procedures: notice must be given of an intention to form a civil partnership, which notice must be publicised, and the partnership cannot be entered into until 15 days thereafter. 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, as with marriage. The Act has the effect that civil partners are treated by law in a broadly similar way to married couples in relation to, amongst other things, property and inheritance. Like marriage, a civil partnership ends only on death, dissolution or annulment.⁶

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. Similarly,

³ Indeed the Church of England Marriage Measure 2008, extends the categories of persons entitled to be married in a parish church to include those with a ‘qualifying connection’. For background to provisions contained in the new Measure, see *Just Cause or Impediment?*, Report of the Review of Aspects of Marriage Law Working Group (GS 1436, November 2001); *The Challenge to Change*, Working Group Report (GS 1448, June 2002); *Marriage Law Review*, Interim Report by the Marriage Law Working Group (GS 1543, June 2004).

⁴ 26 February 2008: <http://www.lichfield.anglican.org/news&newsID=492>.

⁵ An organisation called the Cheltenham Group has published lobbying material suggesting that between 1967 and 1996 a total of 36 laws were passed which affected matrimonial and family rights. See generally *The Emperor’s New Clothes: Divorce Process and Consequence* (2nd edition, the Cheltenham Group, February 1998).

⁶ Civil Partnership Act 2004.

marriages that take place in register offices or non-religious 'approved premises' are also prohibited from including any religious service.

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

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. A convincing argument that it does has been made by Jacqueline Humphries in an article published in the *Ecclesiastical Law Journal*.⁷ 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. Whilst making provision for the formation and termination of civil partnerships, 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.

It therefore follows that the clergy of the Church of England are free under both civil law and canon law to register their own civil partnerships since the act of registration does not of itself constitute a declaration of homosexual orientation or practice.⁸ 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 existence of a civil partnership would be evidentially neutral.

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, although in practice some do. 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'.

Only time will tell how the tension between the legislation and faith communities will be played out. The statutory provisions of the Act currently have no explicit effect upon the concept of sacramental marriage as a lifelong union between one man and one woman. However this jurisprudential precision has not prevented the expression 'gay marriage' achieving popular currency and widespread parlance.⁹ The great repository of English

⁷ (2006) 8 Ecc LJ 289.

⁸ As for a prescriptive description of clerical lifestyle and sexual conduct, see the House of Bishops' teaching document 'Issues in Human Sexuality', 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.

⁹ Note that gay marriage has been adopted in both Belgium and Spain.

law, *Halsbury's Statutes*, now has a generic section entitled 'Matrimonial Law and Civil Partnerships' following directly after 'Markets and Fairs'.¹⁰

Gender Recognition Act 2004

The Gender Recognition Act 2004 provides transsexual people with legal recognition in their acquired gender. It was drafted in response to a commitment of Her Majesty's Government following adverse decisions in the courts, particularly *Goodwin v United Kingdom* (2002) 35 EHRR 447 in the European Court of Human Rights, and more recently, *Bellinger v Bellinger* [2003] 2 AC 467 in the House of Lords, when a declaration of incompatibility was made. In both instances, the court ruled that the inability of English law to recognise an individual's biological gender as anything other than that determined at birth was a contravention of the European Convention on Human Rights. The articles engaged were Article 8 (privacy and family life) and Article 12 (the right to marry).

The United Kingdom Parliament went further than most – if not all – European Union domestic jurisdictions by creating a criminal offence arising out of the disclosure of information concerning gender reassignment. While it may be laudable to underpin a civil right with a criminal sanction, this was strictly unnecessary to ensure that domestic law was Convention compliant.

Since gender reassignment may be inconsistent with the doctrine of a Church, it is legitimate for holders of office within that Church to enquire into such status and, to the extent that it may be necessary, to pass on the results of such enquiry. As a matter of teaching, tradition or practice, certain religious groups may regard the fact of actual or proposed gender reassignment as a bar to the reception of the sacraments and rites of the Church, including marriage. For the proper functioning of such Church and the upholding of its doctrine, it is essential that information relating to individuals who have undergone gender reassignment, or are seeking such process, is passed between members acting in their official capacity.¹¹

Human Fertilisation and Embryology Bill (2007/2008)

This Bill which has completed its passage through the House of Lords and is now being considered by the Commons extends the scope of scientific research on human embryos and allows the creation of animal human hybrid embryos for research. It removes a provision to have regard for the child's need for a father when IVF methods are used.

The pervasive effect of the Human Rights Act

The landscape of English jurisprudence was irrevocably changed on 2 October 2000 when the European Convention of Human Rights became incorporated into English Law by virtue of the Human Rights Act 1998.¹² In particular courts are now required to interpret United Kingdom legislation as far as possible in a manner compatible with convention rights (s 3(1)). It is unlawful for public authorities¹³ to act in a manner

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

¹¹ See the decision of the Court of Appeal in *R (Williamson) v Secretary of State for Education and Employment* [2003] QB 1300 on practice motivated by belief. See now the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005, SI 2005/916, discussed below.

¹² For a general discussion of the Act, albeit in the particular context of freedom of religion, see M Hill, 'A New Dawn for Freedom of Religion' in M Hill (ed) *Religious Liberty and Human Rights* (University of Wales Press, 2002) at pp 1-13.

¹³ For a discussion of what is or may be a public authority see the decision of the House of Lords in *PCC of Aston Cantlow v Wallbank* [2003] 3 WLR 283.

incompatible with a convention right (s 6), and since courts are public authorities (s 6(3)(a)) they must act compatibly with convention rights in determining disputes between individual litigants;

Rent Act 1977

Two cases under the 1977 Act illustrate the impact of the ECHR both pre- and post-incorporation by the HRA. In *Fitzpatrick v Sterling Housing Association Limited* [2001] 1 AC 27 the House of Lords was content to interpret the 1977 Act so as to permit a surviving homosexual partner to accede to a tenancy as a member of the deceased's 'family' but not as a person living with him 'as his husband or wife'. Those words, it as held, were gender specific.

In the subsequent case of *Ghaidan v Godin Mendoza*,¹⁴ the deceased was a protected tenant of a flat. Prior to the deceased's death the Defendant had lived with him at the flat for many years in a stable and permanent homosexual relationship. In resisting proceedings brought by the landlord, the Defendant contended that he had succeeded to the tenancy as the 'surviving spouse' of the original tenant under paragraph 2 of Schedule 1 of the Rent Act 1977. This argument failed at first instance but was reversed by the Court of Appeal, which held that it was possible to give an expansive reading to paragraph 2 so that it also included homosexual couples. The House of Lords upheld the decision of the Court of Appeal, and distinguished (effectively overruling) its earlier decision in *Fitzpatrick v Sterling Housing Association Limited* [2001] 1 AC 27 HL, the difference being the coming into force of the HRA. The Law Lords considered that the offending provision treated survivors of homosexual partnerships less favourably than survivors of heterosexual partnerships without any rational or fair ground for such a distinction, and concluded that Articles 8 and 14 of the Convention had been infringed. Rather than make a declaration of incompatibility they considered that the offending provision could be read so as to eliminate its discriminatory effect without contradicting any cardinal principle of the 1977 Act.¹⁵ The decision indicates an emergent readiness on the part of the higher courts to give effect to the HRA even if it means doing violence to the wording of statutory provisions.¹⁶

In *Ghaidan* the acknowledged discrimination was not between a spouse and a homosexual partner but between a heterosexual unmarried partner and a homosexual unmarried partner. Note paragraph 2(2) of Schedule I to the Rent Act 1977 now provides, 'a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant'.¹⁷

Housing Act 1988

In *Nutting v Southern Housing Group Ltd* [2005] 1 FLR 1066, a similar claim under the Housing Act 1988 failed for want of an objectively discernible commitment to permanence in the relationship. The enquiry seems to have moved on from the genders

¹⁴ [2004] 3 WLR 113.

¹⁵ On this latter point, Lord Millett dissented.

¹⁶ See the very helpful Appendix to the speech of Lord Steyn in which he presents in tabular form a comprehensive list of the occasions when, respectively, a declaration of incompatibility has been made, where they have been overturned, and where generous statutory interpretations given.

¹⁷ Inserted by amendment by virtue of the Housing Act 1988, s 39(2), Sch 4, Pt I, para 2..

of the parties to the quality of the relationship. In affirming the Recorder's decision at first instance, Evans-Lombe J stated:

'Without a lifetime commitment at least as some point in the relationship there is no sufficient similarity to marriage ... that the relationship must be openly and unequivocally displayed to the outside world, is an entirely adequate test and one which is consistent with the authorities.'

This is not an entirely satisfactory proposition since, for legitimate and understandable reasons, parties to a same-sex relationship may be reluctant to make public the nature or extent of their relationship. The overly-restrictive test of 'open display' engages the right to privacy under Article 8. Thus the evidential difficulty raised in cases such as these will need to be addressed on a case by case basis, with a more subtle human rights analysis.

Inheritance (Provisions for Family Dependents) Act 1975

The Law Reform (Succession) Act 1995 introduced into the 1975 Act a new section 1(1A), extending the categories of qualifying applicants in the case of the estate of persons dying after 1 January 1996, to include a person living in the same household as the deceased for two years immediately prior to the deceased's death as the husband or wife of the deceased. Those not entering into a civil partnership (for which specific provision is now made)¹⁸ might qualify for relief under the 1975 Act pursuant to section 1(1)(ba) or 1(1)(e).

(ba) any person (not being a person included in paragraph (a) or (b) above) to whom sub section (1A) below applies ...

(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or in part, by the deceased;

In *Saunders v Garrett* [2005] WTLR 749 Master Bowles gave detailed consideration to the possibility of a surviving same-sex partner qualifying as an applicant under s1(1)(ba). He found that while a conventional interpretation of "man" and "wife" required a gender specific interpretation (*Fitzpatrick*) the result of such an interpretation was discriminatory in the protection thus afforded to the applicant's enjoyment of his Article 8 rights (right to respect for family life and home)¹⁹ albeit his Article 1 rights (peaceful enjoyment of possessions) were not engaged. Thus Article 14 permitted a broader interpretation (*Ghaidan*).²⁰ The Master commented that the outcome would have been the same whether the applicant had been deemed to qualify under s1(1)(ba) or 1(1)(e).

Child Support Act Regulations

In *M v Secretary of State for Work and Pensions* [2003] EWCA Civ 1343, M successfully argued that the definition of "family" in the Child Support (Maintenance Assessment and Special Cases) Regulations 1992 (Reg 1(2)) was discriminatory. It was held that the

¹⁸ Section 1(1)(a) now refers to the 'spouse or civil partner', a change effected by the Civil Partnership Act 2004.

¹⁹ Family life can be widely defined so as to include homosexual relationships: *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343 per Sedley LJ (*sed quaere* Neuberger LJ), and rights of succession arising out of such communal living [81, 84].

²⁰ Master Bowles stated 'The courts' power and duty under s 3 of the 1998 Act to construe legislation in a Convention-compliant way "so far as it is possible to do so" enable the court construing a statutory provision to depart even from the clear and unambiguous ... language of the relevant provision in order to render it Convention-compliant by, if need be, reading in (or excluding) words that change the meaning of the statute to that end; providing always that in so doing the court does not offend the underlying thrust of the legislation or ... go against the grain of the legislation'.

definition of unmarried couple: ‘...a man and a woman who are not married to each other but who are living together as husband and wife ...’ should effectively be deleted thus liberating the meanings of “family” and “partner” from any requirement of gender specificity.

Government Policy

Through its various organs, Government may express its own policy or seek to influence of reflect societal trends.

Adoption

The Equalities Act 2006 aims to protect gay and lesbian people from discrimination. Regulations made under the Act were designed to ensure that same-sex couples are not treated unfairly by adoption agencies. The Catholic Church expressed concern over these new regulations, stating that their adoption agencies (which currently handle 4% of the annual cases of adoption) would have to close rather than comply with the regulations, and this would bring them into conflict with the teaching of the Church. After initially indicating otherwise, Tony Blair succumbed to Cabinet pressure not to afford an exemption. Cardinal Murphy-O'Connor, Archbishop of Westminster, stated, ‘We believe it would be unreasonable, unnecessary and unjust discrimination against Catholics for the government to insist that if they wish to continue to work with local authorities, Catholic adoption agencies must act against the teaching of the church, and their own consciences, by being obliged in law to provide such a service’. The Government refused to give the exemption sought.

Polygamy

Recent press reports have indicated that social security benefits are being paid to people in polygamous relationships, and that the Crown Prosecution Service has issued directions not to prosecute in cases of bigamy. These matters, if true, represent a further erosion of the concept and status of marriage as perceived by the state.

Co-habitation

Government statistics dropped the expression ‘marital status’ in 2003 and recent government-sponsored family research refers only to ‘couple parent families’. Where the common law imposes a resulting or constructive trust the Trusts of Land and Appointment of Trustees Act 1996 Act regulates the execution of that trust. The law of trusts has filled a statutory vacuum in the regulation of the proprietary rights of unmarried cohabitants and those principles apply equally to same-sex couples. It is interesting to note the language used by Chadwick LJ in *Oxley and Hiscock* [2005] Fam 211.

‘I have referred, in the immediately preceding paragraphs, to “cases of this nature”. By that, I mean cases in which the common features are: (i) the property is bought as a home for a couple who, although not married, **intend to live together as man and wife**; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust.’ (emphasis added).

Even if (as is unlikely) Chadwick LJ intended his observations to be narrowly interpreted, cases indicate that rights of co-ownership arise whatever the sexual orientation of the couple concerned. Examples abound of same-sex couples having their property rights defined by reference to constructive and resulting trusts.

In May 2006, the Law Commission published a consultation paper entitled '*Cohabitation: The Financial Consequences of Relationship Breakdown*'. The consultation paper recognised that more people live together outside marriage than ever before. The law that applies when cohabitants separate is unacceptably complex and often gives rise to results which many people would consider unfair. The Law Commission believed there to be a strong case for introducing financial remedies where cohabiting couples have children, and possibly in other circumstances. The discussion in the consultation paper focused on three main areas. First, whether there should be reform. Secondly, how a new scheme of remedies might be designed in terms of eligibility criteria and respective contributions and sacrifices and not as a replication of ancillary relief. Thirdly, it considered to whom any new scheme should apply: only to cohabiting couples with children; all couples subject to an opt-out provision; relationships of a minimum duration requirement; heterosexual and/or homosexual. The Report commended adapting the discretionary jurisdiction under the Inheritance (Provision for Family and Dependents) Act 1975 Act to ensure as far as possible that there is consistency between the remedies proposed on separation and the family provision regime on death. However, Bridget Prentice, the Justice Minister announced on Thursday 6 March 2008 that the Government was taking no further action and would instead wait to see the results of legal changes made in Scotland.

Royal marriages

The proposed marriage of the Duke and Duchess of Cornwall (Charles and Camilla) provoked a forthright discussion in the English 'chattering classes' on whether it is lawful for a member of the Royal Family to marry in a register office. Civil marriage is a creature of statute. It was introduced in England by the Marriage Act 1836, section 45 of which said that the Act shall not extend to the marriage of any of the Royal Family. Then came the Marriage Act 1949 and the Registration Service Act 1953, neither of which extended the concept of civil marriage to royalty. Indeed this was the advice given to ministers at the time of Princess Margaret's proposed marriage to Group Captain Peter Townsend. But on 24 February 2005, the Lord Chancellor provided a written statement in the House of Lords expressing the opinion that this earlier advice was 'overcautious'. He further asserted that read in the light Article 12 of the European Convention on Human Rights (the right to marry) and Article 14 (concerning discrimination) the 1949 Act would permit a civil marriage.

Some may think it a little surprising that the Lord Chancellor declared the proposed civil ceremony to be lawful by means of a parliamentary statement rather than using the specific powers contained in the Human Rights Act 1998 allowing remedial action to cure by amendment legislation which is incompatible with the European Convention as the Marriage Acts so clearly were and remain. However benign the intention, the re-writing of legislation by the executive without the checks and balances of judicial process and parliamentary procedure is not a happy precedent: it represents the usurpation by a minister of state of the judiciary's constitutional function of statutory interpretation. Rather than putting the matter beyond doubt under the procedure expressly created by New Labour under the Human Rights Act, there remains dubiety as to the lawfulness of the purported civil marriage of the heir to the throne and future Supreme Governor of the Church of England and Defender of the Faith.

Government's taxation regime

It is widely acknowledged that the current taxation regime disadvantages married couples. The Married Man's Allowance was abolished by the Labour Government in 1999.

Essentially it took away the extra allowance given to married couples. In the tax year 1999/2000 married couples received an extra £1,970 to set against taxable income. From tax year 2000/2001 it had been abolished. Dawn Primarolo spoke for the Government:

‘We need to be reminded that the origin of the married couples allowance was the married man's allowance, which was meant to recognise a reduced taxable capacity when a man acquired a wife to support. Marriage is no longer the point at which taxable capacity is reduced; many couples continue to work. Taxable capacity is now reduced when children arrive and one partner reduces or gives up work, or the marriage or partnership faces the challenge of funding child care. It is right that the Government should shift support to the point at which that occurs, and should concentrate on the existence of children in that family unit. That is what the children's tax credit does. It is right to support the family with a child whatever their circumstances. It is important to invest in children, and to improve their life chances.’²¹

The Cheltenham Group has conducted an investigation which has concluded: The Group has also made a comparison of the benefits of the married state with that of cohabitation, and of the benefits for men and women. This comparison shows that for a married man continuing to live with a partner, marriage is of no financial advantage, as there are no benefits over cohabitation.²² See also the recent report of CARE²³ which demonstrates that in 2006 a one-earner married couple with two children on average earnings of £30,800 a year paid 40 per cent more tax in the UK than in comparable countries belonging to the Organisation for Economic Cooperation and Development. It also showed how married couples were disadvantaged over unmarried couples and single parent families.

The complicity of the Church of England

In various ways the Church of England has conspired with the Government in the erosion of its teaching on marriage.

Further marriage of divorced persons

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.²⁴ The Canons still provide that ‘marriage is in its nature a union permanent and lifelong’ terminable by the death of one partner.²⁵ With the rescission of paragraph 1 of the 1957 Act of Convocation,²⁶ the term ‘indissoluble save by death’ was

²¹ Hansard, 18 Jul 2000 : Column 293.

²² The Cheltenham Group, P.O. Box 205, Cheltenham, Glos, GL51 0YL.

²³ D Draper and L Beighton, *Taxation of Married Couples: How the UK Compares Internationally*, Christian Action Research and Education (January 2008).

²⁴ 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.

²⁵ 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.

²⁶ *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.

lost, as was the exhortation not to use the marriage service in the case of anyone who had a former partner still living,²⁷ but marriage should always be undertaken as ‘a solemn, public and life-long covenant between a man and a woman’.²⁸

Legislative independence

Two sections of the Civil Partnership Act 2004 sit somewhat uncomfortably with this process of autonomy.²⁹ They provide that a Minister of the Crown may by order amend, repeal or revoke Church legislation, a term defined so as to include Measures of the Church Assembly or General Synod and any orders, regulations or other instruments made by virtue of such Measures.³⁰ This amounts to a curtailment of autonomy on the part of the Church of England, albeit partial, with a specificity of purpose, and reliant upon benign and consensual exercise by the Government.³¹ The words of the statute are clear and unambiguous, and the absence of any express provision for seeking the concurrence of General Synod gives considerable power to the Executive, rather than to Parliament as a whole, in theory if not also in practice, to legislate for the Church of England.³²

Exemptions from the general law

The duty on that part of a priest to marry those who present themselves is subject to a number of statutory exceptions. The first of these, often styled a ‘conscience clause’, is to be found in the Matrimonial Causes Act 1965 and applies to clergy in the Church of England³³ who cannot be compelled to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living.³⁴ This

²⁷ 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.

²⁸ See the pastoral introduction to the *Common Worship* Marriage Service. 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’.

²⁹ See M Hill, ‘Uncivil partnership with the state?’ *Church Times* 2 February 2007, and ‘Editorial’ (2007) 9 *Ecc LJ* 1, and, for a contrary view by way of response, see S Slack, ‘Church Autonomy and the Civil Partnership Act: A Rejoinder’ (2007) 9 *Ecc LJ* 206.

³⁰ Section 255 of the Civil Partnership Act 2004 is anodyne enough, limiting this new form of ministerial intervention to amendments, repeals or revocations in any Church legislation relating to pensions, allowances or gratuities with respect to surviving civil partners or their dependants. However, section 259 goes further and is much more widely drafted. It empowers a Minister by order to make ‘such further provision as he considers appropriate for the general purposes, or any particular purpose, of the Civil Partnership Act, or for giving full effect to the Act or any provision of it’.

³¹ In the course of parliamentary debate on the proposed Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order on 19 July 2005, Lord Sainsbury of Turville, the Under-Secretary of State in the Department for Trade and Industry stated, ‘by convention the Government do not legislate for the Church of England without its consent. I stress that the provisions in the order amending Church legislation have been drafted by Church lawyers, consulted on internally within the Church, and finally have been approved by the Archbishops’ Council and the House of Bishops. The Church has asked that we include the amendments in the order, which we are content to do’. (Grand Chamber, 19 July 2005, GC192-193). This was confirmed in debate by the Bishop of Worcester and there was a similar exchanges on the Civil Partnership (Judicial Pensions and Church Pensions, etc) Order in which Lord Evans of Temple Guiting spoke for the Government and the Bishop of St Albans for the Church of England (30 November 2005, Column 293-295).

³² The Parliamentary debates in the above instances referred to consent being forthcoming from the Archbishops’ Council and the House of Bishops. No reference is made to the General Synod, which is the legislative body of the Church of England.

³³ It also applies to clergy of the Church in Wales.

³⁴ Matrimonial Causes Act 1965, s 8(2).

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.³⁵ 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.³⁶ However, the more recent exception created by the Gender Recognition Act 2004 is more narrowly drawn.³⁷ A Church of England minister is not obliged to solemnise the marriage of a person if he reasonably believes the person's gender to be an acquired gender under the 2004 Act.³⁸ 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'.³⁹ 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 2005⁴⁰ 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.⁴¹

Discussion

Is it the Government or the judges who are in the driving seat? In at least one high profile case, the judiciary has not felt able to re-write legislation. In *Bellinger v Bellinger* [2003] 2 AC 467, the House of Lords ruled that the inability of English law to recognise an individual's biological gender as anything other than that determined at birth was a contravention of the European Convention on Human Rights. But the Law Lords, consistent with established principles of parliamentary sovereignty, refused to interfere judicially with the clear provisions of section 11(c) of the Matrimonial Causes Act 1973 which provides for marriage to be between a 'male' and a 'female'. Lord Nicholls of Birkenhead stated:

'This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court

³⁵ *Ibid*, s 8(2)(b).

³⁶ 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*.

³⁷ And they differ as between the Church of England and the Church in Wales.

³⁸ 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: Marriage Act 1949 s 5B (2) (as so amended).

³⁹ This is punishable by a fine of up to £5,000.

⁴⁰ Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No 2) Order 2005, SI 2005/916.

⁴¹ 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.

procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.’
[para 37]

Lord Nicholls also pointed to the absence of clear guiding principle in Commonwealth jurisdictions and recorded that there was no uniformity among the (then) thirteen member states of the European Union which currently afford legal recognition to a transsexual person’s gender. The Government duly brought forward the Gender Recognition Act 2004.

Analogous reasoning can be found in the recent decision of 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). The Court declared the common law definition of marriage (between a ‘man’ and a ‘woman’) to be inconsistent with the Constitution. However is suspended the declaration of invalidity for twelve months to allow Parliament to correct the defect. The dissenting judgment of O’Regan J would not have allowed the suspension but would have corrected the law with immediate effect.

The status of civil partnership is conceptually different from that of marriage. This is plain from the language of the legislation as well as from Government statements made at the time. Such conceptual and substantive distinction was brought about – amongst other reasons – to safeguard the sensibilities of religious bodies for whom “marriage” had a sacramental meaning constituting the lifelong union between one man and one woman.

However, the judiciary has been consistently purposive in its interpretation of legislation such as to include same-sex couples within the definition of persons living together as husband and wife or as part of a family. Note however, *R v Pearce (Gary James)* [2002] 1 WLR 1553 in which the Court of Appeal refused to extend the definition of spouse in respect of the competence and compellability of witnesses in criminal proceedings.

Thus, even though the Government seeks robustly to maintain that a civil partnership is wholly different from a marriage, the current active liberalism of the judiciary, encouraged by the HRA, will seek to give to same-sex couples equal treatment with married couples and, where possible, to afford them equal rights. This is the case irrespective of the making of a civil partnership. However, upon the break-up of a same-sex relationship which is not a civil partnership, the court has no jurisdiction to adjudicate upon a just and equitable division of assets. Such a couple rank equally with an unmarried heterosexual couple. Married couples however look to the discretion under the Matrimonial Causes Act 1973 whereas civil partners look to those provisions in the Civil Partnership Act 2004.

Writing in 1980, Baroness Hale, then an academic but now a Law Lord, wrote:

Family law no longer makes any attempt to buttress the stability of marriage or any other union. It has adopted principles for the protection of children and dependent spouses which could be made equally to the unmarried. In such circumstances, the piecemeal erosion of the distinction between marriage and non-married cohabitation may be expected to continue. Logically we have already reached a point at which, rather than discussing which remedies should now be

extended to the unmarried, we should be considering whether the legal institution of marriage continues to serve any useful purpose.⁴²

Conclusions

So where does this leave us? The legislature has enacted a raft of provisions which afford equal (though different) treatment to homosexuals. The judiciary, animated and empowered by the Human Rights Act, now interpret legislation to promote equality. In doing so expressions such as 'family' and 'husband and wife' are given expanded – and arguably unsupportable – meanings. Marriage is not what it was, and the Church of England has been complicit in the redrawing of the definition and concept of the family.

This jurisprudential overview, however, is merely the factual foundation for a substantive debate yet to take place: one of principle and policy. Discrimination on the ground of sexual orientation is abhorrent, unless subjectively justifiable as a matter of conscience in accordance with the doctrines and teachings of a faith community (and arguably not even then). Historical accident has created a duty upon the established church to solemnise the matrimony of non-believers. The fact that many parties to such sacramental marriage do not subscribe to the teaching of the church on the doctrine of marriage creates an uneasy tension.

The changed understanding of the concept of the family as a matter of law and social policy cannot be reversed, irrespective of the posturing of the Lords Spiritual. Perhaps now is the time to abolish the right of marriage in the parish church and to assert with greater clarity the distinction between civil and sacramental marriage, one which has long endured in continental Europe, even in the most catholic of States.⁴³

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⁴² Brenda Hoggett, 'Ends and Means: the utility of Marriage as a Legal Institution' in Eekelaar and Catz (eds), *Marriage and Cohabitation in Contemporary Societies*, (Butterworth, 1980) page 101ff.

⁴³ The norm is for all marriages to be solemnised civilly with a sacramental act following for those couples who chose it.