Same-Sex Families in Scotland and in England and Wales

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Introduction

In both Scotland and England and Wales the political aim of removing legal discrimination based on sexual orientation has in the past ten years or so become pretty well-embedded, though speed of development has been noticeably different in the two legal systems. This is an inevitable consequence of the re-establishment of the Scottish Parliament in 1999 after 300 years of adjournment. So for example, Scotland has only this year caught up with England and Wales in making its sexual offences law both gender-neutral and sexuality-neutral, in including sexual orientation within its hate-crime legislation, and in permitting couple-adoption by same-sex couples. On the other hand, Scotland's hate-crime legislation is now more extensive than that in England and Wales because it includes crimes motivated by transgender identity. Similarly, the financial protection afforded to informal and unregistered families (whether same-sex or opposite-sex) is far more extensive in Scotland than that provided by English law. And of course the Scots got rid of s 28 three years before the English did.

Civil Partnership in Scotland and in England and Wales

Both jurisdictions, however, have civil partnership regimes, created by the same Act of the same Parliament and with the same aim of replicating the respective rules of marriage, so far as possible. The Civil Partnership Act goes at least as far as any equivalent Act elsewhere in Europe in equiperating civil partnership with marriage, without actually opening marriage to same-sex couples. But civil partnership does differ from marriage in both systems, in the same crucial respects.

First and most obviously, both institutions are gender-specific and exclusive. Legally, the Civil Partnership Act 2004 created a “separate but equal” regime so disliked in some other parts of the world. Secondly, civil partnership is constructed in the Act as an entirely asexual relationship and the marriage rules of adultery, consummation and impotency are not replicated for civil partnership. Thirdly, and perhaps most contentiously, civil partnership is explicitly designed to be a completely secular institution, unlike marriage. It is to be remembered that in both England and Scotland there are established (state) churches, respectively the Episcopalian Church of England and the Presbyterian Church of Scotland. Ministers of the established churches are, by dint of their offices, state officials empowered to create marriage. Civil partnership on the other hand can be created only by secular state officials through the act of registration of the relationship. And religious sensitivities are further protected by the rule that while marriage ceremonies can be conducted virtually anywhere, civil partnership registrations cannot be conducted in places associated with religious observances.

But these differences should not, in my view, be seen as a source of hurt to LGBT people, or a form of discrimination. The asexual nature of civil partnership is obviously not something to complain about, and is indeed the model that marriage needs to follow. It is ludicrous that the validity of a personal relationship that brings tax advantages, evidentiary privilege, parenthood rights and the rest should depend upon one’s sexual prowess. The secularity of civil partnership is also something to be celebrated. As an atheist I find the notion that religious officers can perform the functions of the state dangerously close to theocratic government; as a liberal, however, I am happy for churches to service the religious needs of the faithful, and to allow them the right to perform sacraments for their members which they may well name marriage. But I just don’t see why any civil legal consequence needs to follow from a religious sacrament.

Though some argue that the flaw in the Civil Partnership Act is its limitation to same-sex couples and the continued limitation of marriage to opposite-sex couples, it seems to me that the important distinction between marriage and civil partnership lies not in the gender-mix (or even in the name), but in the secularity of the new institution. The Scottish Parliament is currently considering two public petitions

calling for the opening of both marriage and civil partnership to all couples of any gender mix. The argument is that it is discriminatory to prevent religious same-sex couples from having their relationship sanctified before their church rather than by the state. But the flaw in this argument is that it accepts the claims of the churches that they should have secular power in the creation of civil legal relationships. That power is, in both Scotland and England and Wales, tied up very firmly with the concept of Establishment, or state churches, and is unlikely to be given up soon. To me, the ideal would be civil partnership for everyone who wanted a completely secular relationship, and marriage for anyone who wanted a relationship with religious overtones, though I'd remove the power of clerics to create marriage.

But I sometimes wonder if this all matters quite as much as theorists like me think. We need to remember that religion does not have ownership of the name "marriage" (Neither, indeed, does the law). It is clear that that word carries a wider understanding in social contexts. Most newspapers and media outlets in the United Kingdom continue to call civil partnership "gay marriage", mostly, I suspect, because the clumsy phraseology of civil partnership is not really embedding itself into everyday language. *The Independent* newspaper has indeed taken to talking of people "marrying in a civil partnership ceremony", which I rather like. More importantly, however, it seems to me that the judges are seeing civil partnership in exactly the same way.

Some Cases

Probably the best-known case, and the one in which the nature of civil partnership was most directly in issue, is *Wilkinson v. Kitzinger* [2006] EWHC 2022, where two English women who had married in Canada sought to have their marriage recognised in England as a marriage rather than as a civil partnership, as provided by the Civil Partnership Act 2004.

The judge emphasised the parliamentary intention to create an entirely secular institution. But beyond this not insignificant difference, civil partnership was designed, he said, to be as close to marriage as possible. The intention of

Parliament, he said, “was not to create a ‘second class’ institution, but a parallel and equalising institution designed to redress a perceived inequality of treatment of long term monogamous same-sex relationships” (para 50). Civil partnership is, in this judge’s view, marriage in all but name. That perception allowed him to reject the women’s claim on the basis that an Act designed to remove discrimination in effect cannot be criticised for being discriminatory merely in name.

The need to protect same-sex couples from discriminatory practices also underpins *Islington London Borough Council v. Ladele* (2009) IRLR 154. Here, a marriage registrar refused to participate in the registering of civil partnerships on the ground that to do so would be inconsistent with her “orthodox Christian” beliefs, particularly her belief in the sanctity of marriage. She clearly saw civil partnership as nothing more nor less than marriage for gay people, however the law technically characterised it. This is exactly the approach adopted by the judge in *Wilkinson.* Ladele, however, was working on the dangerous assumption that the religious institution is only worth its name if it has civil legal consequences. This is where she is wrong, for reasons I’ve already explained. In the event, she lost her case on the ground that the refusal of the council to accommodate her beliefs was proportionate to its own legitimate aim in seeking to provide an inclusive and non-discriminatory public service.

The nature of civil partnership was again addressed in *Baynes v. Hedger* [2008] EWHC 1587. This case concerned the question of whether an unregistered couple were living together as civil partners, in the context of a claim for succession rights on the death of one of the couple. The claimant in this case had been in a relationship with a very wealthy woman for over 50 years, until the latter’s death at the age of 92, but her claim failed since she could not show that she had been living with the deceased as her civil partner. The problem was that neither woman had ever openly acknowledged the relationship, being of a generation when such a relationship was not a socially acceptable life-style to adopt. The judge held that for a couple to live as spouses or as civil partners it was essential that the relationship is one which has been presented to the world “openly and unequivocally so that society considers it to be of permanent intent ... It seems to me that it is not possible to establish that two persons have lived together as civil partners unless their

relationship as a couple is an acknowledged one". So publicity and openness are essential characteristics of civil partnership, as of marriage. Again we see the close equiperation of civil partnership with marriage.

This equiperation can also be seen in the few cases in which the European Court of Human Rights has discussed UK civil partnership. *Burden v. United Kingdom* (2008) involved two elderly sisters who lived together in a mutually supportive relationship and who wanted to be treated as analogous to civil partners for the purposes of qualifying for the spousal exemption from paying inheritance tax. The Court rejected their claim, holding that the position of siblings is of an entirely different nature from that of married couples and civil partners, however supportive, interdependent and companionate the relationship is. The major difference lay in the fact that both marriage and civil partnership involve a "public undertaking, carrying with it a body of rights and obligations of a contractual nature" (para 65). Unregistered cohabitants, parents and children, siblings and other family forms do not give this public undertaking of contractual obligations and so are not in an analogous position. The European Court clearly saw civil partnership as being in the same category of relationships as marriage, rather than as a wholly separate and different type of relationship.

More interestingly, the Court said this:

> "The Convention explicitly protects the right to marry in article 12, and the Court has held on many occasions that sexual orientation is a concept covered by Article 14 and that differences based on sexual orientation require particularly serious reasons by way of justification" (para 47).

This is a curious collocation of these two articles. If this means, as it seems to, that in those European countries where marriage is available to same-sex couples, such couples will be able to access article 14 if the rules of marriage discriminate on the basis of sexual orientation, then it follows that art 12 is engaged by marriages involving couples of the same sex where this is permitted. It clearly does not require that marriage, or even a civil partnership regime, be opened to same-sex couples across Europe, but I think it gives notice that the onus will lie on states to justify their

position if same-sex couples have no means to access the various substantive rights that opposite-sex couples can access via the institution of marriage.

Finally, just last month, the European Court in *MW v. United Kingdom* rejected the admissibility of a claim that the law prior to the enactment of the Civil Partnership Act was discriminatory. The Court held that pre-Civil Partnership Act same-sex couples were more like unmarried opposite-sex couples than married couples since they had not made a public declaration of their undertaking of obligations towards each other. The fact that same-sex couples had no means of making this public declaration before the CPA was dismissed as really a criticism of the time it took the United Kingdom to introduce civil partnership. But this was no breach of the Convention since timing was within states' margin of appreciation. The Court pointed out that there was no consensus in Europe in 2001 as to how to deal with same-sex couples and so the UK could not be criticised for not having a civil partnership regime in 2001. This decision follows the earlier decision in *Courten v. United Kingdom*, except that in *MW* the Court did recognise that by 2004 the UK was part of an "emerging European consensus".

Conclusion

The message from these cases is clear: civil partnership in Scotland and in England and Wales is an institution explicitly designed to remove all discrimination between same-sex and opposite-sex couples in family life (though not in religious life), and even though this has been achieved by adopting a "separate but equal" approach, the lines of separation are blurred in both the public and the judicial minds. If we deny that marriage is a necessarily religious institution, it could therefore be claimed that in the United Kingdom, we have already achieved same-sex marriage, but we lawyers just don't call it that.