

Conscientious Objection to Creating Same-Sex Unions: An International Analysis

Bruce MacDougall,¹ Elsje Bonthuys,²
Kenneth McK. Norrie³ & Marjolein van den Brink⁴

In jurisdictions that recognize same-sex marriages and unions, the question arises as to the extent to which civic officials who normally preside at such unions can refuse such participation for religious reasons. This paper examines this issue in the context of four jurisdictions: Scotland, Canada, the Netherlands and South Africa. What is striking is how different is the process of reaching a resolution in each jurisdiction, though the actual result might be the same. This difference arises because of the jurisdiction-specific reasons why same-sex marriages and unions are recognized, how they are recognized, the status of the officers who preside over the relevant services, and the historical-legal place of religion in each jurisdiction. Against these backgrounds, reasonably similar arguments relating to discrimination and accommodation are raised, but play out differently given the varying contexts. There results from this comparative analysis some lessons that can be transported across jurisdictions but also considerable caution as to the generic quality of such lessons.

Dans les juridictions qui reconnaissent les mariages et les unions entre personnes du même sexe, une question survient quant au sujet du droit des officiants présidant à ces unions de refuser d'y participer pour des raisons religieuses. Cet article examine la question dans quatre pays: l'Écosse, le Canada, les Pays-Bas et l'Afrique du Sud. Bien que chaque juridiction résout cette question par un processus différent, la solution retenue est semblable. Ces approches différentes sont dues aux circonstances nationales particulières quant aux raisons pour lesquelles les mariages et unions entre personnes du même sexe sont reconnus, comment ils sont reconnus, le statut des officiants qui y président ainsi que le rôle légal et historique de la religion. Dans ces contextes, des arguments semblables reliés à la discrimination et l'accommodation sont soulevés mais se répercutent de façon différente dépendant du contexte national. De cette analyse comparative ressortent des conclusions qu'il est possible d'appliquer aux autres juridictions, sans toutefois les généraliser.

¹ Professor of Law, University of British Columbia, Vancouver.

² Professor of Law, University of the Witwatersrand, Johannesburg.

³ Professor of Law, University of Strathclyde, Glasgow.

⁴ Universitair Docent (Lecturer in Law), Utrecht Law School, University of Utrecht.

I. Introduction

The issue of whether same-sex couples should be able to enter into marriage or an equivalent institution has been addressed in many jurisdictions in the past two decades. Those legal systems that have either created some form of legally-recognized same-sex partnership or opened the existing institution of marriage to such couples, have each faced difficult legal questions. One such question concerns whether or not government-employed or government-authorized persons (referred to here generically as “marriage officers” when not referencing a particular jurisdiction) may refuse to participate in the formalization of a same-sex union for religious reasons. On the one hand, it may be argued that states should respect the religious and conscientious scruples of their citizens and should not discriminate against marriage officers who claim that their religious convictions prevent them from conducting marriages or civil unions between same-sex couples. On the other hand, it may be argued that allowing state employees to refuse to do so perpetuates the very discrimination that the institutionalization of same-sex unions aims to abolish.

This article compares the different attempts at resolving this conflict in four jurisdictions: the Netherlands, South Africa, Scotland, and Canada. The primary purpose of the paper is to analyze both the nature of the complexities which arise in each jurisdiction as they attempt to resolve the conflict, as well as the practice of using arguments concerning discrimination and accommodation in order to seek such resolution. We will also discuss how these issues reflect the complexity of the larger issue of whether and how to extend legal recognition to formalized same-sex couples. This discussion will shed some light on the more general issue of the ability to transplant the legal resolutions from one jurisdiction to another.

The selected jurisdictions were chosen based on the areas in which each of the authors have conducted their research. These jurisdictions provide a useful context in which to situate a comparative analysis both because of their legal and social similarities, as well as the differences which are not immediately apparent. From a legal perspective all four jurisdictions have reputations for being progressive and each has its roots in some European tradition. In South Africa, however, the Roman-Dutch common law is accompanied by customary law, which may carry less legal weight, but may be more influential in the lives of a greater proportion of the population. Our chosen jurisdictions are all places where there is legal acceptance of homosexuality⁵ (decriminalization, protection from discrimination, relationship recognition) despite having

⁵ We deal only with what might be called “traditional” homosexuals: gay men and lesbians. Going beyond these categories would of course add yet another layer of complexity to the study.

differing degrees of social hostility towards it. They are all places where, because of immigration or political changes or both, there is some social or political flux in progress. As well, the jurisdictions are sufficiently different so as to generate questions about the ability to transport legal analyses or solutions to such socio-legal issues across jurisdictions.

The specific legal system in each jurisdiction is in fact different: a common law system with civilian roots in Scotland; Roman-Dutch common law in South Africa; civil law in the Netherlands; a mixture of the English common law and the French civil law in Canada. Different also have been the various responses to the common problem – how to accommodate same-sex couples within a system of family regulation that seeks to avoid discrimination on the basis of sexual orientation. The basic concepts are often the same but the history of legal developments affecting this issue is quite different in each jurisdiction. The way in which homosexuality and religious expression or ideas are legally protected in each jurisdiction is different. It is clear that the legal issue concerning the accommodation of each must be resolved in harmony with other historical legal developments in the given jurisdiction.

To a certain extent, then, this paper is a critique of the assumption that legal solutions to these (and similar) issues can simply be transported across borders to somewhat similar jurisdictions. The underlying issues that make this simple transport complicated or impossible will be evident from the discussion here. A signal service of comparative analysis is to problematize easy and adoptive solutions, however the main aim of this paper is to investigate which concepts, analyses, and solutions can transcend the boundaries between somewhat similar jurisdictions. The determination of which lessons and approaches might be adopted or adapted by the jurisdictions in question is also an important aspect of a comparative legal analysis such as this one.

Our primary concern is not the ability of religious officials to refuse to conduct same-sex marriages within their religious institutions or contexts. We accept (and, in fact, it is not much disputed) that religious institutions are entitled to conduct (or not conduct) marriages according to their own tenets and doctrines. We focus, rather, on civil servants (or their equivalents) who act as marriage officers and who object to participating in the legal institutionalization of same-sex unions.

II. Background: The Religious Associations of Marriage

Marriage is an institution laden with symbolism and deep social importance. Though the historical association of religion in the institution of marriage is common in each of the jurisdictions being considered here, there are different assumptions about the degree to which religious ideology may inform legal issues relating to marriage, including its very definition. Moreover, for many people and in most societies the institution of marriage remains linked with religious norms.⁶

A. The Netherlands

The Netherlands, where marriage – legally-speaking at least – has been an exclusively civil affair since 1795,⁷ is, among the considered jurisdictions, the one where religious bodies have least influence over the institution of marriage. This is probably due to the fact that Calvinism, the major religious tradition in the country, did not regard marriage as a sacrament, but as primarily a secular issue. Marriages officiated by religious representatives lack legal effect and religious weddings prior to the conclusion of a civil legal marriage are forbidden. A religious representative who performs such a premature religious wedding may be criminally sanctioned.⁸ Nevertheless, marrying couples often have religious ceremonies after the conclusion of the civil ceremony. Despite this long history of secularization of marriage, providing religious marriages with legal effect has been frequently debated and re-considered, most recently in 2001.⁹ Although secular authority over the institution of marriage has prevailed, the wish to reintegrate religion into marriage ceremonies persists in some quarters, carrying potentially detrimental consequences for same-sex couples.

B. South Africa

In 1652 the laws of Holland (which was at the time a province of what is now the Netherlands) were transported into South Africa by colonial occupation. At that time, marriages were preceded by the publication of banns and could

⁶ Robert Leckey, “Profane Matrimony” (2006) 21 CJLS 1.

⁷ L Westerhof, “Civiel effect voor het kerkelijk huwelijk?” [Legal Effect for the Church Marriage?] (2002) 77 NJB 80.

⁸ Art 1:68 BW (*Burgerlijk Wetboek*) [Dutch *Civil Code*].

⁹ See Netherlands, Tweede Kamer, *Kamerstukken II*, Vergaderjaar 2001-2002, 28078 *Burgerlijk huwelijk en kerkelijk huwelijk* [Civil Marriage and Church Marriage], No 1 “Brief van de Staatssecretaris van Justitie” [Letter of the Deputy Minister of Justice] (5 November 2001). It is quite telling that in the Netherlands, religious marriage is still referred to as “church marriage”.

be concluded either in a church or by a magistrate.¹⁰ Civil marriage before a state official was introduced in South Africa in 1804. Subsequently there were periods when marriages were concluded only in churches, as well as other brief periods when marriage was concluded only by secular authorities. Mostly, and with small variations between the four territories and states which would eventually form South Africa in 1910, marriages could be concluded either by religious or state authorities.¹¹ The adoption of the *Marriage Act, 1961*¹² standardized the different marriage laws in the four provinces. The current position is that marriages can be conducted either by state functionaries, or by religious officials who comply with the statutory requirements.¹³

The influence of Christianity on the legal definition and consequences of marriage in South Africa was manifest in various rules such as the prohibition of marriages between people who had committed adultery with one another,¹⁴ or the refusal to recognize the validity of Islamic marriages on the basis that they were “potentially polygamous”.¹⁵ The picture is further complicated by the historical and contemporary recognition of traditional African marriages,¹⁶ although these marriages have been regarded as lower status¹⁷ than civil marriages in terms of the *Marriage Act, 1961*. Many of the explicitly Judeo-Christian features of civil marriage have since been removed and therefore civil marriage can no longer simply be equated with religious marriage; however, some religious overtones remain, such as the insistence that civil marriage must be monogamous. In fact, the creation of separate legislation to cater for same-sex marriage is arguably motivated by the desire to maintain a form of marriage which would be acceptable to the Christian majority in South Africa.

¹⁰ As a result of the Political Ordinance of the States of Holland, adopted in 1580. For a historical overview, see HR Hahlo, *The South African Law of Husband and Wife*, 5th ed (Cape Town: Juta, 2005) ch 1.

¹¹ See June D Sinclair & Jacqueline Heaton, *The Law of Marriage: Based on H.R. Hahlo, the South African Law of Husband and Wife*, vol 1 (Cape Town: Juta, 1995) ch 2.

¹² (S Afr), No 25 of 1961.

¹³ Sections 2-10 of the *Marriage Act, 1961*, *ibid*, deal with the appointment of marriage officers and sections 12, 22, 24-30 set out the requirements for a valid marriage. In addition, the common law also regulates other aspects of the capacity to marry.

¹⁴ *Cloete v Resident Magistrate of Elliot*, 1914 CPD 1075. The Appellate Division in *Green v Fitzgerald*, 1914 AD 88, however, declared that adultery was no longer a crime.

¹⁵ *Ismail v Ismail*, 1983 (1) SA 1006 (A).

¹⁶ Currently enabled by the *Recognition of Customary Marriages Act, 1998* (S Afr), No 120 of 1998.

¹⁷ Likhapha Mbatha, Najma Moosa & Elsje Bonthuys, “Culture and Religion” in Elsje Bonthuys & Catherine Albertyn, eds, *Gender, Law and Justice* (Cape Town: Juta, 2007) 158.

C. Scotland

Scotland retained a closer connection between faith and marriage despite having somewhat similar connections to Calvin as existed in the Netherlands and South Africa. The reason was that, after the Reformation, canon law remained the law of the land except insofar as it was inconsistent with the reformed faith, and no such inconsistency was perceived in continuing the tradition of church ministers solemnizing marriages. Marriage could be solemnized in Scotland only by religious ceremony until 1940, when the *Marriage (Scotland) Act 1939* came into force, permitting civil marriage celebrated by a secular state official, in addition to religiously conducted marriage.¹⁸ The dominant Church of Scotland's ("the Kirk's") doctrinal interpretations of scripture continued to influence the law's conception of marriage and how it should be controlled, well into the 20th century.¹⁹

D. Canada

Distrust among the four original Canadian provinces, in particular between the French-speaking (largely Catholic) and the English-speaking (largely Protestant) provinces, over the role of religion in marriage and, particularly, divorce²⁰ was so fundamental that it influenced Canada's constitutional division of powers in 1867.²¹ The result is that the federal government defines marriage,²² but the provinces are in charge of the solemnization of marriage.²³ That is to say, the provinces (and territories) decide how marriages are conducted - including who is authorized to perform them. Currently, all Canadian jurisdictions recognize most religious marriages without the need for a separate state ceremony, although the provinces still issue marriage licences. In addition, the provinces (and territories) facilitate the performance of secular or civil marriages.

¹⁸ After the Reformation the celebration of marriage fell within the exclusive jurisdiction of the Kirk (the Established church in Scotland), but the *Marriage (Scotland) Act, 1834* (UK), 4 & 5 Will IV, c 28, permitted religious celebrants from churches other than the Church of Scotland.

¹⁹ See Jane Mair, "Public Ceremony and Private Belief: The Role of Religion in the Scots Law of Marriage" [2007] 4 Jurid Rev 279.

²⁰ See FJE Jordan, "The Federal *Divorce Act* (1968) and the Constitution" (1968) 14:2 McGill LJ 209.

²¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

²² *Ibid*, s 91(26).

²³ *Ibid*, s 92(12).

III. The Institutionalization of Same-Sex Unions

Each of the four jurisdictions under consideration here has in the past couple of decades dealt with demands for the recognition of same-sex relationships within a wider context of providing legal recognition to family formations outside of traditional marriage. As a result of the different legal and social contexts within these jurisdictions, there have been significantly varied responses to these demands.

A. The Netherlands

The Netherlands introduced legally-recognized registered partnerships for both same and opposite-sex couples in 1998.²⁴ Other than having fewer formalities for dissolution, registered partnerships are legally equivalent to marriage and can easily be converted into marriage or *vice versa*.²⁵ Three years later same-sex couples gained access to the institution of marriage itself²⁶ and article 1:30(1) of the Dutch *Civil Code* now explicitly states: “A marriage can be entered into by two people of different or same sex.”²⁷

Ironically, this opening up of marriage to same-sex couples provided the impetus for a proposal to re-introduce legally-effective religious marriages. GroenLinks, a left wing “green” party, proposed to lift the ban on marriages conducted by religious officials so as to accommodate orthodox Christians who strongly opposed the new legislation.²⁸ Like its predecessors, the proposal did not get much support, even from the groups which it intended to

²⁴ *Wet van 5 juli 1997 tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opening daarin van bepalingen voor het geregistreerd partnerschap* [Act of 5 July 1997 to Amend Book 1 of the Civil Code and the Code of Civil Legal Procedure in Connection with the Inclusion of Provisions Regarding Registered Partnership], Stb 1997, 324. The act entered into force on 1 January 1998.

²⁵ Katharina Boele-Woelki et al, *Huwelijk of geregistreerd partnerschap?: Een evaluatie van de Wet openstelling huwelijk en de Wet geregistreerd partnerschap in opdracht van het Ministerie van Justitie* [Marriage or Registered Partnership?: An Evaluation of the Act Opening Civil Marriage to Same-Sex Couples and the Act Introducing Registered Partnership, Commissioned by the Ministry of Justice] (The Hague: Ministerie van Justitie, 2006); Kees Waaldijk, ed, *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners: A Comparative Study of Nine European Countries* (Paris: Institut national d'études démographiques, 2004); I Curry-Sumner, “Private International Law Aspects of Homosexual Couples: The Netherlands Report”, online: (2007) 11.1 EJCL 8 <<http://www.ejcl.org>>.

²⁶ *Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* [Act of 21 December 2000 to Amend the Civil Code in Connection with the Opening up of Marriage for Persons of the Same Sex], Stb 2001, 9.

²⁷ Dutch *Civil Code*, *supra* note 8, art 1:30(1) [translated by author].

²⁸ Netherlands, Tweede Kamer, *Handelingen*, Vergaderjaar 2000-2001, No 19 (7 November 2000) 1428-31.

accommodate, possibly because it offered no real solution for those who want to see the institution of marriage retained for only opposite-sex couples.²⁹

B. Scotland

By way of contrast to the Netherlands, where same-sex couples are fully included in the institution of marriage, in Scotland marriage remains the exclusive preserve of opposite-sex couples, while same-sex couples have exclusive access to an equivalent and entirely statutory institution. The *Civil Partnership Act 2004* adopts what might be called an “equivalence model”, creating an institution exclusively for same-sex couples, called “civil partnership”. Civil partnership is equivalent to, but separate from, the existing institution of marriage that remains exclusively for opposite-sex couples.³⁰ Civil partnership may be equivalent to marriage, but it is, quite intentionally, an entirely secular institution. So, for instance, registrars do not “solemnize” civil partnerships, for that language brings to mind the solemnities of religious ritual, which is reserved for marriage. Instead, civil partnerships are “registered” (even though many do so in the course of individually designed and legally non-sanctioned ceremonies). The secularity of the new institution is further emphasized by the rule that the registration may occur in any place in Scotland, except any place that is or has been used solely or mainly for religious purposes.³¹

Both in Canada and South Africa the recognition of same-sex relationships was preceded by Law Commission investigations into the various possibilities for giving legal effect to non-marital conjugal relationships,³² which were overtaken by successful constitutional challenges to the exclusively opposite-

²⁹ C.f. Staatkundig Gereformeerde Partij, *Daad bij het Woord: De SGP stáát ervoor! Verkiezingsprogramma SGP, 2010-2014* [Act by the Word: The SGP Stands for It! Political Programme of the Dutch Calvinist Party], online: SGP <<http://www.sgp.nl/Media/download/19720/Verkiezingsprogramma%20SGP%202010-2014.pdf>> (“God himself has instituted marriage, meant as a lifelong union between man and woman. This means that marriage between persons of the same sex cannot be intended.” [translated by author] at 10).

³⁰ *Civil Partnership Act 2004* (UK), c 33. See *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (London: Department of Trade and Industry, 2003) at paras 2.7-2.8, Annex B; *Civil Partnership Registration: A Legal Status for Committed Same-Sex Couples in Scotland* (Edinburgh: Scottish Executive, 2003) at paras 5.7-5.8.

³¹ *Civil Partnership Act 2004*, *ibid*, s 93(3). Curiously, the equivalent rule in the English and Welsh part of the *Civil Partnership Act 2004* (s 6) was modified by the *Equality Act 2010* (UK), c 15, s 202, and authority may be given to register civil partnerships in religious premises in England and Wales; however, even in that jurisdiction religious officiants are not permitted.

³² See Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001); British Columbia Law Institute, *Report on Recognition of Spousal and Family Status* (Vancouver: British Columbia Law Institute, 1998); *Report on Domestic Partnerships*, South African Law Reform Commission, Project No 118 (March 2006). See also Thomas G Anderson, “Models of Registered Partnership and Their Rationale: The British Columbia Law Institute’s Proposed *Domestic Partner Act*” (2000) 17:1 Can J Fam L 89.

sex marital regime.³³ This, in turn, resulted in national legislation opening marriage to same-sex couples.

C. South Africa

The South African *Civil Union Act, 2006* allows for the solemnization of civil unions between two same-sex or opposite sex partners, either by a religious institution or by a state official.³⁴ The provisions relating to the place and formalities for the solemnization of civil unions mirror those applying to marriage. Additionally, at the time of solemnization the “marriage officer must inquire from the parties...whether their civil union should be known as a marriage or a civil partnership,”³⁵ and the certificate of registration will indicate that the parties have either entered into a marriage or a civil union.³⁶ The consequences of a civil union are exactly on par with those of marriage.³⁷ Thus, civil unions are institutions that share all of the characteristics and consequences of marriage; they can even be registered as a marriage, though the existing marriage regime, which is limited to opposite-sex couples, is retained, albeit rather clumsily.

D. Canada

Before the adoption in 2005 of the Canadian *Civil Marriage Act*, two provinces had introduced civil unions as equivalent institutions to marriage.³⁸ The *Civil Code* in Quebec was amended in 2002 to create the status of civil union, open to same-sex and opposite-sex couples and mirroring the rights and obligations of spouses.³⁹ The more conservative province of Alberta

³³ The most important Canadian cases were *EGALE Canada Inc v Canada (Attorney General)*, 2003 BCCA 251, 225 DLR (4th) 472, rev'g 2001 BCSC 1365, [2001] 11 WWR 685; *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (CA), aff'g (2002), 60 OR (3d) 321, 215 DLR (4th) 223 (Sup Ct (Div Ct)) [*Halpern* cited to OR]; *Dunbar v Yukon Territory*, 2004 YKSC 54, 8 RFL (6th) 235; *Vogel v Canada (Attorney General)* (2004), [2005] 5 WWR 154 (available on QL) (Man QB); *Boutilier v Nova Scotia (Attorney General)*, [2004] NSJ No 357 (QL) (SC); *W (N) v Canada (Attorney General)*, 2004 SKQB 434, 246 DLR (4th) 345; *Pottle v Canada (Attorney General)*, [2004] NJ No 470 (QL) (NL SC (TD)); *Harrison et al v Canada (Attorney General) et al*, 2005 NBQB 232, 290 NBR (2d) 70 (TD). In South Africa, a series of constitutional challenges to legal discrimination against people who have sex with others of the same sex started off with *National Coalition for Gay and Lesbian Equality v Minister of Justice*, [1998] ZACC 15; 1999 1 SA 6 (CC); 1998 (12) BCLR 1517 (CC), which attacked the criminalization of sodomy, and culminated in *Minister of Home Affairs v Fourie*, [2005] ZACC 19; 2006 (1) SA 524 (CC), in which the complete failure to give legal recognition to same-sex relationships was declared unconstitutional.

³⁴ (S Afr), No 17 of 2006 [*Civil Union Act*].

³⁵ *Ibid*, s 11(1).

³⁶ *Ibid*, s 12(3).

³⁷ *Ibid*, s 13.

³⁸ SC 2005, c 33.

³⁹ SQ 1991, c 64; see arts 521.1-521.19.

passed the *Adult Interdependent Relationships Act* in an attempt (albeit a vain one) both to pre-empt federal legislation allowing same-sex couples entry into marriage, and to preserve the existing limits of accessibility to marriage.⁴⁰

The impact of these provincial statutes and the expansion to other provinces of such approaches have now been pre-empted by court cases that opened civil marriage to same-sex couples and by the 2005 federal statute. Typical of the reasons in the court cases are those from the Ontario Court of Appeal. The Court of Appeal held that exclusion of same-sex couples from marriage “denies persons in same-sex relationships a fundamental choice – whether or not to marry their partner”.⁴¹ The Court accepted that the common law recognized only opposite-sex couples as capable of marrying, but held that “marriage” did not have a constitutionally fixed meaning. The Court said, “an argument that marriage is heterosexual because it ‘just is’ amounts to circular reasoning.”⁴²

The *Civil Marriage Act*, passed in response to both of these cases as well as political pressure, is clear, stating: “[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others” and “[f]or greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.”⁴³ It is worthy of note that the change of the definition of marriage in Canada does not differentiate between religious and civil marriage and therefore contemplates the availability of religious marriages for same-sex couples as well as for opposite-sex couples.

To summarize the various legal regimes: in the Netherlands, both same and opposite-sex couples can either marry or enter into registered partnerships. In Canada, the institution of marriage is open either to same-sex or opposite-sex couples and some provinces offer a civil union-type alternative to both types of partnerships. South Africa retains opposite-sex only marriage, but also has civil unions, which are open to same or opposite-sex couples and which may be called marriage if the partners so wish. Only in Scotland is there no institution open to both categories of partners, with marriage reserved for opposite-sex couples and civil partnership reserved for same-sex couples.⁴⁴

⁴⁰ SA 2002, c A-4.5.

⁴¹ *Halpern*, *supra* note 33 at para 87.

⁴² *Ibid* at para 71.

⁴³ *Supra* note 38, ss 2, 4. The constitutional validity of the *Civil Marriage Act* was confirmed in *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

⁴⁴ The major technical complexity caused by this insistence on gender-mix exclusivity concerns transgender individuals who seek to have their new gender recognized while in a marriage or civil partnership. The *Gender Recognition Act 2004* (UK), 2004, c 7, requires the termination of the existing relationship, followed by the recognition of the new gender, leaving the person free to enter the other type of relationship with his or her partner.

IV. Conducting Same-Sex and Opposite-Sex Marriages

A. The Netherlands

In the Netherlands secular marriage ceremonies and the registration of registered partnerships are the tasks of civil servants who work for the Registrar's Office (*Burgerlijke Stand*); however, in practice the ceremonial part of the marriage is often conducted by people who may or may not work for the government but who are in any case sworn in just to carry out this ceremonial function on a kind of stand-by contract. A person carrying out this latter function is known as a "special civil servant of the Registry".

Municipalities are obliged to ensure that all couples who wish to marry are able to do so, but they have some scope of discretion concerning the local practice and execution of these obligations. For instance, some municipalities prefer to send only special civil servants to officiate marriages. Others publish the names of all available regular and special civil servants on their websites, accompanied by a resume, a photo, and sometimes information on their private life, hobbies, or their (non)religious affiliations. There have been cases where the (un)willingness to officiate same-sex marriages has been explicitly mentioned.⁴⁵

Despite the absence of a provision allowing marriage officers to object to performing same-sex marriages, in 2011 there were approximately 105 objecting civil servants in the Netherlands, employed by 58 different municipalities; however, 72% of the municipalities have indicated that they are not willing to countenance these objections (so-called *weigerorijs gemeenten*) and 234 municipalities hire new servants only on condition that they are willing to perform all marriages.⁴⁶

This refusal, at the municipal level, to allow for such conscientious objections has caused job seekers and employees to file complaints with the Dutch national equality body (*Commissie Gelijke Behandeling*, the "CGB"). This body is tasked with investigating discrimination complaints and may release non-binding, but socially persuasive findings on the discrimination issues. The complaints have been made on the basis that the municipal employers, by not appointing, or by refusing to renew the contracts of objecting officials, discriminate against them on the basis of religion.

⁴⁵ See e.g. the website of the municipality of Staphorst: "Buitengewone ambtenaren burgerlijke stand" [Special Officials Registry], online: Gemeente Staphorst <<http://www.staphorst.nl/index.php?simaction=content&mediumid=1&pagid=1000>> (two of the five special civil servants explicitly refer to the importance of marriage as a union between 'man and woman').

⁴⁶ "Inventarisatie trouwbeleid" [Inventory of Marriage Policies], online: COC Nederland <http://www.coc.nl/dopage.pl?thema=any&pagina=algemeen&algemeen_id=407> (statistics as of 25 May 2011).

The effect of the equality legislation on the employer-employee relationship, therefore, stands at the centre of these disputes in the Netherlands. The act of officiating at a marriage is legally regarded as a “unilateral” act of government. That is to say, such acts typically belong to the sphere of the legislator or the administration, comparable to the levying of taxes. Such acts have been deliberately left outside of the scope of the equal treatment legislation that focuses on relationships between citizens, and not between the government and its citizens. So, couples will usually not know that an official refused to marry them because they apply to the municipality, which in turn assigns a civil servant. Regardless, even if the couple were to know of the refusal by a particular civil servant, this would not engage the equality legislation if another official is willing to conduct the marriage.⁴⁷

B. Scotland

The Church of Scotland’s pre-eminent position in Scottish society means that Kirk ministers are, by dint of their office, state officials for the purposes of solemnizing religious marriages,⁴⁸ while it is required that celebrants from other religious organizations first be authorized to solemnize marriages.⁴⁹ Non-religious, or civil, marriages may be conducted only by district registrars.⁵⁰ There is no obligation upon ministers of the Church of Scotland to marry anyone within their parish and a minister is free to refuse to do so. Registrars, on the other hand, are state officials and as such are not able to refuse to marry any couple who are legally free to marry each other.

Registrars are employed by local councils who set their terms of employment and their range of duties, which may include registering marriages, civil partnerships, births, and deaths. Councils with larger geographical areas and less dense populations charge their Registrars with a larger variety of work, whereas in cities the Registrars tend to specialize in registration duties alone.

The purely secular nature of Scottish civil partnerships mean that they may be registered only by district registrars and that religious officers have no legal role in bringing civil partnerships into being. Registrars are authorized by the Registrar General of Scotland, who must ensure that there are sufficient

⁴⁷ A very explicit refusal, either directed at a specific couple or advertised in general on the internet might come within the ambit of arts 137(c)-(g) SR (*Wetboek van Strafrecht*) [Dutch Criminal Code]; however, no cases have followed this route yet.

⁴⁸ *Marriage (Scotland) Act 1977* (UK), 1977, c 15, s 8(1)(a)(i).

⁴⁹ *Ibid*, ss 8(1)(a)(ii), 9.

⁵⁰ *Ibid*, s 8(1)(b). A qualification to this is that the Registrar General of Scotland has authorized humanists to solemnize marriage on the same basis as he authorizes non-Church of Scotland religious officiants to do so.

registrars available to conduct civil partnerships throughout the country.⁵¹ The local demand for registrars who will conduct civil partnerships and marriages is assessed by the local authorities, who must ensure that there are enough registrars so authorized in their area to meet the demand. Despite calls for it to do so, the *Civil Partnership Act 2004* contains no conscientious objection provision. Nevertheless, registrars have argued that by forcing them to conduct civil partnerships the local authorities thereby violate their right to religious beliefs under article 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*,⁵² and under EU-inspired domestic legislation.⁵³ The issue is thus whether, in the absence of an explicit conscience clause, the employing local authorities have a legal obligation to allow an objector to be relieved of the duty to register civil partnerships where there are sufficient numbers of registrars willing to assume the duty instead. As in the Netherlands, objecting officials have cast their claims in terms of employment law.⁵⁴

C. Canada

In Canada, the provinces have different regimes relating to the appointment of people who can conduct same or opposite-sex civil marriages. There are also different names for the individuals authorized to perform them.⁵⁵ Different solutions were adopted by the different jurisdictions, regarding the issue of refusing marriage commissioners.⁵⁶ Some decided that marriage commissioners would have to indicate a willingness to perform such ceremonies or else resign their positions. Others permitted refusals on

⁵¹ *Civil Partnership Act 2004*, *supra* note 30, s 87, mirroring *Marriage (Scotland) Act 1977*, *supra* note 44, s 17.

⁵² 4 November 1950, 213 UNTS 221, Eur TS 5 [European Convention].

⁵³ See *Employment Equality (Religion or Belief) Regulations 2003*, SI 2003/1660 [Employment Equality Regulations] (designed to implement EC Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ, L 303/16; now replaced by the far more comprehensive *Equality Act 2010*, *supra* note 31).

⁵⁴ See *Islington London Borough Council v Ladele*, [2009] EWCA Civ 1357, [2010] ICR 532 [Ladele]; *McClintock v Department of Constitutional Affairs* (2007), [2008] IRLR 29 (available on BAILII) [McClintock] (both cases discussed in Andrew Hambler, "A No-Win Situation for Public Officials with Faith Convictions" (2010) 12:1 Ecc LJ 3); *McFarlane v Relate (Avon) Ltd*, [2010] EWCA Civ 880, [2010] IRLR 872 [McFarlane].

⁵⁵ In Ontario, for example, judges, justices of the peace and municipal clerks can perform marriages, but are not called marriage commissioners: *Marriage Act*, RSO 1990, c M.3, s 24. See *Solemnization of Marriage Act*, RSNS 1989, c 436, s 4 (certain judges); art 366 CCQ (e.g. clerk or deputy clerk of the Superior Court). Newfoundland and Labrador and the western Canadian jurisdictions have specially-designated marriage commissioners: *Marriage Act*, RSA 2000, c M-5, s 3; *Marriage Act*, RSBC 1996, c 282, s 7; *The Marriage Act*, RSM 1987, c M50, s 7; *Solemnization of Marriage Act*, RSNL 1990, c S-19, s 3; *Marriage Act*, RSNWT 1988, c M-4, s 7; *The Marriage Act, 1995*, SS 1995, c M-4.1, s 3; *Marriage Act*, RSY 2002, c 146, s 5.

⁵⁶ These solutions generally appear to have been informally and not always consistently adopted. See Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006), 69 Sask Law Rev 351, at fn. 11.

the basis of religion or conscience.⁵⁷ Still others took what might be called a middle-ground approach and permitted opt-outs only where the marriage commissioners could provide a replacement. Yet another middle-ground approach was to allow opt-outs for existing marriage commissioners, while exclusively appointing as new marriage commissioners only those who will agree to marry same-sex couples. There also exists a “single entry point” system where marriage commissioners are not contacted directly by members of the public but instead through a central office. By centralizing the process, the religious beliefs of individual marriage commissioners can be accommodated “behind the scenes”, much as is the case in the Netherlands.⁵⁸ The method of implementing these approaches varies by jurisdiction, with some being very casually implemented, it would seem.⁵⁹

The Canadian federal *Civil Marriage Act* does not, for constitutional jurisdiction reasons, regulate the performance of marriage ceremonies. Nonetheless, section 3.1 was added late in the drafting process of that statute and states that:

[N]o person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

D. South Africa

In South Africa, the *Marriage Act, 1961* dictates that marriages can be performed either by religious officials or by public servants, who are automatically deemed marriage officers by virtue of their occupation.⁶⁰ In addition, marriages can also be conducted by officers of certain religions who have been appointed as marriage officers by the State.⁶¹ Religious marriage officers may object to conducting marriages which do not conform to the tenets, doctrines, or disciplines of their religions.⁶² For instance, Catholic marriage officers who solemnize marriages in their capacity as religious

⁵⁷ See the Prince Edward Island *Marriage Act*, RSPEI 1988, c M-3 s 11.1, as amended by *An Act to Amend the Marriage Act*, SPEI 2005, c 12, s 7 [*Marriage Act* (PEI)]. New Brunswick proposed similar legislation: Bill 76, *An Act to Amend the Marriage Act*, 2nd Sess, 55th Leg, New Brunswick, 2005.

⁵⁸ See *Reference re Marriage Commissioners Appointed Under The Marriage Act, 1995 (Sask)*, 2011 SKCA 3 at para 85, 327 DLR (4th) 669 [*Saskatchewan Marriage Reference*].

⁵⁹ Only one jurisdiction, Prince Edward Island, has a statute on this matter: *Marriage Act* (PEI), *supra* note 57, s 11.1. The other jurisdictions simply use policy statements.

⁶⁰ *Marriage Act, 1961*, *supra* note 12, ss 2-3.

⁶¹ *Ibid*, s 3(1).

⁶² *Ibid*, s 31.

marriage officers may object to conducting marriages between persons who have been divorced, while certain Jewish marriage officers could object to conducting marriages between Jews and non-Jews. Conversely, no similar conscientious objection provision exists for public officials who are marriage officers, therefore they must conduct all marriages, regardless of their own beliefs.

The position is different for civil unions in South Africa. In respect of religious marriage officers, the *Civil Union Act* requires first, that a religious denomination or organization apply for approval to conduct civil unions.⁶³ Once the organization has been approved, an official from the organization may apply to be appointed as a marriage officer. Once religious organizations have obtained permission to conduct civil unions, religious officers no longer have statutory rights of conscientious objection on theological grounds.⁶⁴ This contrasts with the position of religious marriage officers who conduct heterosexual marriages under the *Marriage Act, 1961*. They may object to conducting marriages which do not conform to the “rites, formularies, tenets, doctrines or disciplines” of their religions.⁶⁵ This ground of objection would cover religious scruples relating to conducting same-sex marriages; however, its application is wider than this. The ground could apply to other situations, such as Catholic marriage officers objecting to conducting marriages of divorced people, or a Jewish marriage officer who objects to conducting the marriage of an atheist. The reason for the omission of this wider ground of objection from the *Civil Union Act* could lie in the fact that both the religious institution and the individual marriage officer must apply to conduct civil unions and it could, therefore, have been assumed that the issue of conscientious or religious objection would not arise. A person who objects to same-sex marriage would not actively apply under the *Civil Union Act*, thus putting themselves in a position to conduct such marriages. Nevertheless, this reasoning is clearly problematic, because not all objections would be based on the sexual orientation of the couple. For instance, a Jewish marriage officer could be asked to conduct a civil union for a Christian same-sex couple. Although the marriage officer may not object on the grounds of the couple’s sexual orientation, he might object on the grounds of their religion. Regardless, the *Civil Union Act* would not allow a marriage officer in this position to refuse to conduct the marriage on religious grounds. The absurdity of this should be clear.

⁶³ *Civil Union Act*, *supra* note 34, s 5(1).

⁶⁴ *Ibid*, s 6. See also Elsje Bonthuys, “Irrational Accommodation: Conscience, Religion and Same-Sex Marriages in South Africa” (2008) 125:3 SALJ 473 [Bonthuys, “Irrational Accommodation”].

⁶⁵ *Marriage Act, 1961*, *supra* note 12, s 31.

Turning to civil servants conducting civil unions, they “may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnizing a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnize such civil union.”⁶⁶ The only ground upon which they can object is the sexual orientation of the parties. Religious objections for all other reasons are not accommodated in the *Civil Union Act*. It will be remembered that there is no similar right of religious objection for civil servants conducting heterosexual marriages under the *Marriage Act, 1961*. The different forms of objection for the different kinds of marriage officers and the grounds upon which they can object are, therefore, problematic.⁶⁷

V. Legal and Constitutional Contexts

How countries have dealt with issues of marriage officers who refuse to conduct same sex marriages or unions depends on the legal context, and in particular on binding human rights norms in various constitutions or human rights instruments. This section sketches the human rights norms that have influenced state responses to the problem and against which state responses can be measured.

A. Scotland

The Scottish retention of marriage as a status reserved only for opposite-sex couples can perhaps be explained by the fact that the family rights of same-sex couples have been only gradually recognized since the early 1990s as result of a development of the principles of family law. Although earlier cases regarded same-sex families with deep suspicion,⁶⁸ the highest court in Scotland, the Court of Session, in *T, Petitioner* allowed a gay man to adopt the child that he and his partner had been looking after for some years.⁶⁹ This case clearly signalled that gay and lesbian people were no longer to be stereotyped by the courts as a bad influence or harmful to children, nor a danger to society. That message was confirmed and emphasized by the House of Lords which held in *Fitzpatrick v Sterling Housing Association Ltd* that a same-sex couple could be considered a “family” for the purposes of allowing the surviving

⁶⁶ *Civil Union Act*, *supra* note 34, s 6.

⁶⁷ Bonthuys, “Irrational Accommodation”, *supra* note 64.

⁶⁸ *Early v Early* (1989), [1990] SLT 221 (Ct Sess), where a seven year old boy was removed from the custody of the mother with whom he had always stayed when she entered into a lesbian relationship, and delivered into the custody of a father who had three convictions for child neglect.

⁶⁹ *T, Petitioner* (1996), [1997] SLT 724. This case was followed shortly thereafter in England by *In re W (A Minor) (Adoption: Homosexual Adopter)* (1997), [1998] Fam 58, [1997] 3 WLR 768.

partner to inherit the tenancy held by the deceased partner.⁷⁰ The House of Lords subsequently built upon this ruling in *Ghaidan v Godin-Mendoza* by requiring all rules relating to cohabiting couples to be interpreted, where at all possible, to include same-sex couples.⁷¹ Discrimination on the ground of sexual orientation is now explicitly prohibited in the provision of services, the performance of public functions, employment, pensions, and education, by s. 12 of the *Equality Act 2010*.

After a long hesitancy from the European Court of Human Rights (the “European Court”) to accept that same-sex couples represented an aspect of family life as well as private life, that Court has now firmly established that, just like legal differences based on sex, legal differences based on sexual orientation may be justified only by particularly serious and persuasive reasons.⁷² In 2010, the European Court, while rejecting the proposition that limiting marriage to opposite-sex couples was contrary to articles 8, 12 and 14 of the *European Convention*, finally accepted that the legal regulation of same-sex relationships engaged “family life” as protected by article 8.⁷³ The Court also accepted that, for those European states that have opened marriage to same-sex couples, any difference in treatment between them and opposite-sex couples would necessitate justification based on particularly persuasive and legally proportionate reasons.

The *European Convention* also protects the right to hold religious beliefs, as does domestic UK law.⁷⁴ Both the European Court itself and the British domestic courts take a robustly secularist approach to the need to balance religious freedoms with the demands for equality. Munby J put it thus:

[I]t is important to realise that reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law. An invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim. Some cultural beliefs and practices are simply treated by the law as being beyond the pale.⁷⁵

Laws LJ elaborated upon this with a classically secular judgment in *McFarlane*.⁷⁶ Here the court held that it was not unfair or unlawful to dismiss a relationship counselor from his post when he refused to offer the

⁷⁰ *Fitzpatrick v Sterling Housing Association*, (1999), [2001] 1 AC 27, [1999] 3 WLR 1113 [Fitzpatrick].

⁷¹ [2004] UKHL 30, [2004] 2 AC 557 [Ghaidan].

⁷² See *Salgueiro da Silva Mouta v Portugal*, No 33290/96, [1999] IX ECHR 309, 31 EHRR 47; *SL v Austria*, No 45330/99, [2003] I ECHR 71, 37 EHRR 39; *Karner v Austria*, No 40016/98, [2003] IX ECHR 199 at para 37, [2003] 2 FLR 623; *EB v France* [GC], No 43546/02 (2008), 47 EHRR 21 at para 91 (available on BAILII).

⁷³ *Schalk and Kopf v Austria*, No 30141/04 (2010), 29 BHRC 396 (available on BAILII) [Schalk].

⁷⁴ *European Convention*, *supra* note 52, art 9; *Equality Act 2010*, *supra* note 31, s 10.

⁷⁵ *R (E) v Governing Body of JFS*, [2008] EWHC 1535 (Admin) at para 108, [2008] ELR 445. See now *R (E) v Governing Body of JFS*, [2009] UKSC 15, [2010] 2 AC 728.

⁷⁶ *Supra* note 54.

organization's services to same-sex couples. His argument that this amounted to an infringement of his right to religious beliefs was rejected, Laws LJ holding that:

[T]he conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other.⁷⁷

B. The Netherlands

The Dutch *Constitution* contains an explicit prohibition against discrimination on several grounds, including religion, but not explicitly including sexual orientation.⁷⁸ The protection offered by the non-discrimination clause acquires horizontal application by way of a number of specific equality acts, closely resembling European Union (sex-)equality legislation.⁷⁹ Generally, direct discrimination is not allowed on any of the enumerated grounds, unless the law explicitly provides for an exception. Indirect discrimination, on the other hand, may be objectively justified. The objective justification test, developed by the European Court of Justice, demands that discrimination must serve a legitimate government purpose and that the means to achieve this purpose are both appropriate and necessary. Despite the fact that sexual preference is not contained in the Dutch *Constitution*, it is an enumerated ground in the *Equal Treatment Act* of 1994.⁸⁰ The jurisprudence of the European Court in its interpretation of the European Union (sex-)equality legislation, as described above, applies in the Netherlands as it does in Scotland.

In addition to the constitutional provision prohibiting discrimination on the basis of religion, article 6(1) of the Dutch *Constitution* also determines that “[e]veryone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his

⁷⁷ *Ibid* at paras 21-22.

⁷⁸ *Grondwet voor het Koninkrijk der Nederlanden* [Constitution for the Kingdom of the Netherlands], art 1 Gw [Dutch *Constitution*].

⁷⁹ See *Algemene wet gelijke behandeling* [General Act on Equal Treatment], 2 March 1994 [*Equal Treatment Act*] (an English translation is available at: “Equal Treatment Act”, online: Commissie Gelijke Behandeling <<http://www.cgb.nl/english>>).

⁸⁰ *Ibid*, art 1(b).

responsibility under the law.”⁸¹ Whereas protection against discrimination depends on comparison, freedom of religion can be regarded as an autonomous claim, which may extend beyond the right to religion, thus also protecting deeply held non-religious beliefs. Finally, the Dutch *Criminal Code* prohibits abuse and incitement of discrimination, both on grounds of belief and sexual preference.⁸²

C. Canada

The constitutional position in Canada is very similar to that in the Netherlands. The Canadian Charter of Rights and Freedoms contains a provision prohibiting discrimination on various grounds, including religion, but without explicitly including sexual orientation.⁸³ The Charter also provides in section 2 that “[e]veryone has ... freedom of conscience and religion.” The Charter applies to regulate only government action, and not action between private individuals and entities.⁸⁴ There is no doubt, however, that the creation of a civil marriage constitutes government action. Another pertinent feature of the Charter is section 1, the so-called “reasonable limits” clause which determines that “[t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁸⁵ This means that discrimination may be justifiable in particular contexts, similar to the Dutch provision. Furthermore, s. 33 of the Charter, termed the “notwithstanding provision”, permits governments to override certain constitutional protections for a period of five years, provided they specifically invoke this section. Canadian governments have, however, been extremely reluctant to use this clause, though there were certainly those who, during the marriage debates at the federal and provincial levels, advocated its use.

By 1995, the Supreme Court of Canada came to accept that it was unconstitutional to discriminate against gay and lesbian couples on the basis of their sexual orientation. In *Egan v Canada*,⁸⁶ the Court agreed that sexual orientation was an ‘analogous ground’ (analogous to other prohibited forms of discrimination) under section 15 of the Charter. At the same time, however, by the narrowest of majorities, the Court allowed for differential treatment in

⁸¹ Dutch *Constitution*, *supra* note 78, art 6(1) Gw [translated by author].

⁸² Dutch *Criminal Code*, *supra* note 47, arts 137(c)-(f) SR.

⁸³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 15 [Charter].

⁸⁴ *Ibid*, s 32.

⁸⁵ *Ibid*, s 1.

⁸⁶ [1995] 2 SCR 513, 124 DLR (4th) 609 [Egan].

terms of access to the particular benefits involved in the case (old-age spousal security benefits). Not long afterwards however, it was held by the Supreme Court of Canada to be constitutionally unjustifiable to discriminate in terms of benefits on the basis of sexual orientation. In *M v H*,⁸⁷ it was held that the exclusion of members of same-sex couples from the definition of “spouse” in Ontario’s *Family Law Act*,⁸⁸ thus excluding them from spousal support claims, was an infringement of section 15’s equality provisions. Such an infringement was found not to be demonstrably justified under s. 1 of the *Charter*. Though worded within a different constitutional framework, the principles underpinning this decision are the same as those identified by the UK’s House of Lords in the cases of *Fitzpatrick* and *Ghaidan*. The Supreme Court of Canada in *M v H* held that a denial of the potential benefit of a spousal support claim, possibly imposing a financial burden on a member of such a same-sex relationship that a member of an opposite-sex couple would not have, “contribute[d] to the general vulnerability experienced by individuals in same-sex relationships.”⁸⁹ The majority stressed that “[b]eing in a same-sex relationship does not mean that it was an impermanent or a non-conjugal relationship.”⁹⁰

There were a series of legislative changes shortly afterwards at both the federal and the provincial levels to make laws conform with the decision in *M v H*. References to couples were amended to include same-sex couples as well as opposite-sex couples; however, the federal government hoped to “save” marriage for only opposite-sex couples, in part by stipulating in the *Modernization of Benefits and Obligations Act* of 2000 that: “For greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others.”⁹¹ The court cases on same-sex marriage, referred to earlier, put paid to this hope of so “protecting” marriage, as same-sex marriages were permitted as a result of those decisions.

D. South Africa

As a result of its more recent origin, the South African *Constitution* is unique in this study in that it contains an explicit prohibition of discrimination on the basis of sexual orientation alongside the more common prohibited grounds of

⁸⁷ [1999] 2 SCR 3 at para 2, 171 DLR (4th) 577.

⁸⁸ RSO 1990, c F.3, ss 1(1), 29.

⁸⁹ *Ibid* at para 69.

⁹⁰ *Ibid* at para 70.

⁹¹ *Modernization of Benefits and Obligations Act*, SC 2000, c 12, s 1.1. This section has since been repealed by the *Civil Marriage Act*, *supra* note 38, s 15.

discrimination such as race and religion.⁹² Similar to, but somewhat broader than the Dutch and Canadian constitutions, it also protects rights to “freedom of conscience, religion, thought, belief and opinion” and holds that the state may recognize marriages conducted “under any tradition, or a system of religious, personal or family law.”⁹³ The non-discrimination provisions also have horizontal application⁹⁴ and, as in the Netherlands, are further enforced in equality legislation.⁹⁵ The South African *Constitution* contains an additional right for “[p]ersons belonging to a cultural, religious or linguistic community... to enjoy their culture, practise their religion and use their language”; however, the latter right “may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”⁹⁶

VI. Responses to Objecting Marriage Officers in the Different Jurisdictions

In the Netherlands and Scotland, which lack conscientious objection provisions, the issue of objecting marriage officers has nevertheless surfaced in the indirect guise of employment discrimination claims. Employees and job applicants have claimed that employers discriminate against them on the basis of their religious convictions by refusing to allow them to abstain from conducting same-sex marriages. In Canada and South Africa, both of which have conscientious objection provisions, the arguments are based more directly upon the competing claims of the religious objectors on the one hand, and the same-sex couples on the other hand. We will consider in turn how such cases have been dealt with in each jurisdiction.

VII. Claims of Employment Discrimination

In the UK,⁹⁷ the Employment Appeal Tribunal (the “EAT”) has twice in recent years faced claims by state officials seeking to be relieved of the obligation to perform public functions for same-sex couples, as doing so was

⁹² *Constitution of the Republic of South Africa*, 1996, No 108 of 1996, s 9(3) [South African Constitution].

⁹³ *Ibid*, ss 15(1), 15(3)(a)(i).

⁹⁴ *Ibid*, s 9(4).

⁹⁵ See *Employment Equity Act*, 1998 (S Afr), No 55 of 1998; *Promotion of Equality and Prevention of Unfair Discrimination Act*, 2000 (S Afr), No 4 of 2000, [Promotion of Equality Act].

⁹⁶ *Supra* note 92, s 31.

⁹⁷ Both cases about to be discussed are English, but the employment legislation and the discrimination provisions at issue are common across the jurisdictions that make up the United Kingdom (including, of course, Scotland).

contrary to their own personal views. In *McClintock*,⁹⁸ a Justice of the Peace who sat in family cases asked to be relieved from dealing with adoption cases which might involve him having to make adoption orders in favour of same-sex couples. His request was refused and he felt obliged to resign. He then made a claim of unfair dismissal. The claim was dismissed by both the Employment Tribunal and the EAT on the ground that judges could not “cherry pick” which laws to apply and which to refuse to deal with.⁹⁹ The EAT did not directly address the issue of sexual orientation discrimination because the claimant based his argument on the supposed clash between the *Civil Partnership Act 2004* and the obligation under the *Children Act 1989*¹⁰⁰ to treat the welfare of the child as the paramount consideration. This argument was dismissed.¹⁰¹ The principle in this case was not limited to those objectors exercising judicial functions. This was confirmed in *Matthews v Northamptonshire County Council*, where a council employee who refused to be involved in the council’s adoption process, insofar as it might have led to children being adopted by same-sex couples, was held to have been lawfully dismissed from her employment.¹⁰²

In *Islington London Borough Council v Ladele* a registrar refused to register civil partnerships on the ground that to do so would be inconsistent with her “orthodox Christian” beliefs, and particularly her belief in the sanctity of marriage.¹⁰³ She was disciplined and threatened with dismissal, which she claimed amounted to both harassment, as well as direct and indirect discrimination, contrary to the *Employment Equality Regulations*,¹⁰⁴ as read with article 9 of the *European Convention*. The Employment Tribunal found in her favour in July 2008, but this was overturned by the EAT in December of that year. A year later, the Court of Appeal dismissed an appeal from the EAT decision.¹⁰⁵

⁹⁸ *Supra* note 54.

⁹⁹ *Ibid* at para 19.

¹⁰⁰ (UK), c 41 (applicable in England and Wales). The equivalent Scottish legislation is the *Children (Scotland) Act 1995* (UK), c 36.

¹⁰¹ *Ibid* at para 17.

¹⁰² (16 November 2010), 1901629/2009 (Employment Tribunal) (as discussed in “Christian Advisor Loses Gay Adoption Case Tribunal”, *BBC News* (16 November 2010), online: BBC News <<http://www.bbc.co.uk>>).

¹⁰³ (2008), [2009] ICR 387 (available on BAILII) at paras 2, 48 (EAT) [*Ladele* (EAT)]. The claimant ignored or dismissed as irrelevant the legal distinction between the secular and the religious.

¹⁰⁴ *Supra* note 53. See now *Equality Act 2010*, *supra* note 31.

¹⁰⁵ *Ladele*, *supra* note 54.

The Court of Appeal held that there was no direct discrimination against Ladele because the Council's actions were a response to her refusal to carry out civil partnership duties and not a response to her religious beliefs. As well, it held that there was no indirect discrimination because the Council's (legitimate) aim was not only to ensure that all couples who wished to register a civil partnership had access to a registrar who would do so, but also to ensure that the Council acted consistently with its stated policy of fighting discrimination against gay and lesbian citizens and employees. The Court endorsed the finding of the EAT that "[o]nce it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then ... it must follow that [the Council] was entitled to require all registrars to perform the full range of services."¹⁰⁶ Importantly, the Court held that the council's policy of requiring all of its registrars to perform civil partnership duties was a proportionate means of achieving its aim of providing a non-discriminatory public service, notwithstanding that some other councils might not impose this requirement on its registrars. Indeed, the Court was willing to contemplate that councils could not lawfully exempt their registrars from performing their civil partnership duties. The Court held that the *Equality Act (Sexual Orientation) Regulations 2007*,¹⁰⁷ which prohibits discrimination on the basis of sexual orientation in regards to the provision of goods and services, "takes precedence over any right which a person might otherwise have by virtue of his or her religious belief or faith, to practise discrimination on the ground of sexual orientation."¹⁰⁸

The Strasbourg jurisprudence was fully explored by the Court of Appeal, which concluded that the case law was fully consistent with the conclusion it reached. Article 9 of the *European Convention* has never been interpreted to require that everyone should be allowed to manifest their religion at any time and place of their own choosing. Generally, article 9 protects beliefs as opposed to actions motivated by these beliefs. The only acts protected are those forming part of the performance of religious rites. So, while the conduct of a ceremonial ritual might be protected by article 9, the refusal of a pharmacist to sell contraceptives was not.¹⁰⁹ Likewise, the refusal to enrol university students wearing Islamic headscarves was also not upheld under article 9.¹¹⁰

¹⁰⁶ *Ibid* at para 49, citing *Ladele* (EAT), *supra* note 99 at para 111.

¹⁰⁷ SI 2007/1263.

¹⁰⁸ *Ladele*, *supra* note 50 at para 69.

¹⁰⁹ *Pichon and Sajous v France*, No 49853/99, [2001] X ECHR 381.

¹¹⁰ *Sahin v Turkey* [GC], No 44774/98, [2005] XI ECHR 173, 44 EHRR 5.

The first Dutch case on the issue concerned a special civil servant whose fixed term contract was not renewed because she was unwilling to officiate at same-sex marriages.¹¹¹ The official argued that this amounted to indirect discrimination on the basis of religion. The CGB accepted the indirect discrimination argument and found that the exclusion of the special civil servant was not objectively justified. It opined that it would not be very difficult for the local authorities to organize work so that the civil servant did not have to marry same-sex couples and that same-sex couples would be able to marry without any problems or delay. Thus, the decision not to renew the contract on the basis of the special civil servant's objection was found to violate the principle of equal treatment.

The CGB decision precipitated various attempts by the Dutch Parliament to settle the issue. First, in 2006, there was a motion to oblige all newly appointed marriage officials to officiate all at forms of marriage; however, this motion was rejected.¹¹² In 2007, a new government included in its coalition agreement a statement that: "marriage officials with conscientious objections are allowed to excuse themselves from officiating same-sex marriages on the condition that another official is available. If problems arise, initiatives will be taken to ensure legal security for the objecting officials."¹¹³ The most recent government did not discuss the issue at all.¹¹⁴ Whether this removes the ability of local authorities to formulate their own policies on the issue, is still unclear.¹¹⁵

The second complaint was directed at a municipality requiring newly hired civil servants, both regular and special, to marry all couples, regardless of sex.¹¹⁶ A member of an orthodox reformed church was interested in serving as a special civil servant but did not apply because the municipality had declared itself unwilling to accommodate objections. The CGB deviated from its former opinion, explaining that, whereas the first opinion had focused on pragmatic

¹¹¹ Decision No 2002-26 (2002), (CGB), online: <<http://www.cgb.nl/oordelen/oordeel/218825/volledig>>.

¹¹² Netherlands, Tweede Kamer, *Kamerstukken II*, Vergaderjaar 2005-2006, 27 017 *Homo-empancipatiebeleid* [Homosexual Emancipation], No 17 "Motie van het lid Timmer cs" [Motion by Member of Parliament Timmer cs] (13 April 2006).

¹¹³ *Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA en ChristenUnie* [Coalition Agreement Between CDA (Christian Democrats), PvdA (Labour) and CU (Christian Union)] (7 February 2007), online: <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2007/02/07/coalitieakkoord-balkenende-iv/coalitieakkoord-cda-pvda-cu-tcm149-92516.pdf>> at 37 [translated by author].

¹¹⁴ "Vrijheid en verantwoordelijkheid: Regeerakkoord VVD-CDA" [Freedom and Responsibility: VVD-CDA Coalition Agreement] (7 October 2010), online: Kabinetsformatie 2010 <http://www.kabinetsformatie2010.nl/Documenten_formatie_2010>.

¹¹⁵ See eg "Wetgeving staat weigerambtenaren toe" [Law Allows Officials to Refuse] (19 April 2007), online: Art 1 <http://www.art1.nl/artikel/7568-Wetgeving_staat_weigerambtenaren_toe> (legal research assigned by the Dutch national association on discrimination, Art. 1, an NGO).

¹¹⁶ Decision No 2008-40 (2008), (CGB), online: <<http://www.cgb.nl/oordelen/oordeel/215285/volledig>>.

aspects of the issue, this current opinion was based on principled reasoning. It held that municipalities could refuse to accommodate religious objections because they also had a duty not to discriminate against people on the basis of their sexual orientation. Although civil servants are free to harbour any religious, political, or other ideas, they may not express discriminatory beliefs in the execution of their office. Municipalities could accommodate religious objectors by employing them as regular civil servants who did not perform marriages. This is a similar approach to that of the English Court of Appeal in *Ladele*. Of course, this judgment does not assist special civil servants, whose only function is to officiate at marriages.

Unfortunately, this solution does not seem to be clear or settled. The deputy minister responsible for gay emancipation policies announced that, according to her, municipalities should be allowed to accommodate objecting officials, on condition that there is another civil servant available to perform same-sex marriages.¹¹⁷ In reaction, members of parliament have requested that the government formally end the practice of accommodating objecting officials.¹¹⁸ The consequences of the holding of the European Court in *Schalk* that marriage rules, in countries where marriage is available to same-sex couples, need to be applied without unjustified discrimination, seem at least to rule out current local practices of indicating the (un)willingness of marriage officials regarding the performance of same-sex marriage.

A. Claims Based on Constitutional Rights

The South African *Civil Union Act* is still relatively new and there have been no legal challenges against the conscientious objection provision. Nevertheless, it has been suggested that, at the very least, the peculiar way in which this provision accommodates religious objections, as described above, fails to meet the standards of reasonable accommodation.¹¹⁹ A related case was recently heard by the Equality Court in terms of the *Promotion of Equality Act*.¹²⁰ The case of *Strydom v Nederduitse Gereformeerde Gemeente Moraleta*

¹¹⁷ Netherlands, Tweede Kamer, *Kamerstukken II*, Vergaderjaar 2010-2011, 27017 *Homo-emancipatiebeleid* [Homosexual Emancipation], No 76 “Brief van de Minister van Onderwijs, Cultuur en Wetenschap” [Letter of the Minister of Education, Culture and Science] (24 May 2011).

¹¹⁸ Netherlands, Tweede Kamer, *Kamerstukken II*, Vergaderjaar 2010-2011, 27017 *Homo-emancipatiebeleid* [Homosexual Emancipation], No 77 “Motie van het lid Van Gent cs” [Motion of Member of Parliament Van Gent cs] (23 June 2011). Currently, the majority of Dutch Parliament opposes the practice of accommodation. The debate is expected to take place in the fall of 2011. See JP Loof, “CGB sluit deur voor gewetensbezwaarde trouwambtenaren” [CGB Closes the Door for Marriage Officials with Conscientious Objections] (2008) 33:6 NJCM Bulletin 791 at 799.

¹¹⁹ Bonthuys, “Irrational Accommodation”, *supra* note 64.

¹²⁰ *Supra* note 95 (designed to give practical effect to the basic freedoms and equality guarantees in the Bill of Rights).

*Park*¹²¹ involved a church which dismissed Strydom, who was employed as an independent contractor to teach music to students in its arts academy, when it became clear that Strydom was involved in a relationship with another man. The church justified the dismissal by referring both to its religious doctrine, which held that homosexuality is sinful, and its fear that Strydom would set an incorrect example for parishioners. The Court dismissed these arguments on the basis that Strydom was not in a position of religious leadership, since he did not teach religious doctrine. He was merely a contract worker who taught music and was not even a member of the church.¹²² In weighing Strydom's rights to equality and freedom from discrimination on the basis of sexual orientation against the impact upon religious freedom,¹²³ which would result from failing to grant the church an exemption from the anti-discrimination legislation, the Court found in favour of Strydom.

In Canada, within jurisdictions which oblige marriage commissioners to marry all couples, some marriage commissioners have resigned in direct response to the obligation. There have been at least two sets of complaints launched by affected marriage commissioners in Manitoba and Saskatchewan, with all initial decisions being against the marriage commissioners.¹²⁴

Out of all of the countries discussed in this paper, the only complaint by a person who was refused a same-sex marriage ceremony was brought before the Saskatchewan Human Rights Tribunal. The Tribunal rejected the marriage commissioner's defence that he ought to be able to decide whether or not to provide government services based on his religious beliefs.¹²⁵ This was effectively the same reasoning as the UK Employment Appeal Tribunal in *McClintock*, discussed above.

This decision was upheld by the Saskatchewan Court of Queen's Bench which agreed that the commissioner had discriminated in refusing to officiate a same-sex ceremony and that an accommodation of his religious beliefs was not required.¹²⁶ A marriage commissioner was, the court held, "government" because he or she implements a specific government scheme. As such, the

¹²¹ [2008] ZAGPHC 269; 2009 (4) SA 510 (EqC).

¹²² *Ibid* at paras 17, 20, 22.

¹²³ *Ibid* at para 25.

¹²⁴ These cases are discussed in Geoffrey Trotter, "The Right to Decline Performance of Same-Sex Civil Marriages: The Duty to Accommodate Public Servants; A Response to Professor Bruce MacDougall" (2007) 70:2 Sask L Rev 365 at 390-91. See, in Manitoba, *Kisilowsky*, File No 04 EN 462 (Manitoba Human Rights Commission); and, in Saskatchewan, three cases before the Saskatchewan Human Rights Tribunal: *Bjerland v Saskatchewan (Department of Justice)* (2006), CHRR Doc 06-888; *Goertzen v Saskatchewan (Department of Justice)* (2006), CHRR Doc 06-889; *Nichols v Saskatchewan (Department of Justice)* (2006), CHRR Doc 06-887.

¹²⁵ *MJ v Nichols* (2008), 63 CHRR D/145.

¹²⁶ *Nichols v Saskatchewan (Human Rights Commission)*, 2009 SKQB 299, [2009] 10 WWR 513.

marriage commissioner is “empowered to act only in accordance with” the relevant law, in this case that governing marriages.¹²⁷ The court held that when acting as a marriage commissioner, a person’s “freedom of religion ought to be limited to exclude discrimination on the basis of sexual orientation.”¹²⁸ The ability to refuse to perform a ceremony for religious reasons applied only to religious officials performing religious marriages. McMurtry J said:

Regardless of the religious basis of Mr. Nichols’ views, his acting on them in this manner constitutes discrimination in the provision of a public service on the basis of sexual orientation. Any accommodation of Mr. Nichols’ religious views, if the duty to accommodate exists, is not the responsibility of those who seek the services that he is legally empowered to provide. If any accommodation is due to Mr. Nichols for his religious views, it must be accomplished without risking what occurred here – where the complainant sought a service and was expressly denied it on the basis of his sexual orientation.¹²⁹

The Saskatchewan government then submitted a proposed law on marriage commissioners to the Saskatchewan Court of Appeal for its opinion on the law’s constitutional validity. This proposed legislation had two versions. One version would have “grandfathered” existing marriage commissioners so as to allow them to refuse to perform a marriage if it would be contrary to their religious beliefs. The second version would have allowed any marriage commissioner to refuse to perform a marriage contrary to his or her religious beliefs. In the *Saskatchewan Marriage Reference*, the Court unanimously held both versions of the law to be unconstitutional as unjustifiably infringing equality guarantees. R.G. Richards JA, writing one of two sets of concurring reasons, said:

It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer “I won’t help you because you are black (or Asian or First Nations) but someone else will” or “I won’t help you because you are Jewish (or Muslim or Buddhist) but someone else will.” Being told “I won’t help you because you are gay/lesbian but someone else will” is no different.¹³⁰

Richards JA also expressed concern about the impact on gays and lesbians if a number of marriage commissioners refused to perform same-sex marriages, especially in more geographically isolated areas.

¹²⁷ *Ibid* at para 53.

¹²⁸ *Ibid* at para 73.

¹²⁹ *Ibid* at para 57.

¹³⁰ *Saskatchewan Marriage Reference*, *supra* note 58 at para 41.

VIII. Discrimination and Accommodation Arguments

Resolution of this issue is a task fraught with complexity. It depends very much on the constitutional and legal background of the jurisdiction, as well as on the broad characterization of the issue and the emphasis placed on specific facets of the issue. Developments in the Netherlands and Scotland show that the issue of conscientious objection will arise even where there is no statutory authorization for it. From the Canadian and South African discussions we learn that, even where conscientious objection clauses exist, their content and their actual application will often be in dispute. A defining feature of the debate on conscientious objections to officiating same-sex unions is the polarization of views, either favouring *accommodation* of religious beliefs or taking a stance against *discrimination* against homosexuals. To a certain extent, the perspective informing the approach of a participant in the debate – “pro-gay” or “pro-faith” – is recognizable in the description of the problem, whether based on a discrimination or on an accommodation analysis.¹³¹ So, those in favour of the accommodation of objections tend to define the problem as the unnecessary exclusion of people adhering to specific faiths, whereas those opposed to this accommodation tend to emphasize the necessity of preventing discrimination on the basis of sexual orientation. The different starting points can determine the flow of the argument: a focus on the problems of the conscientious objectors tends to result in a focus on the practical possibilities to accommodate objectors. A focus on the problems of same-sex couples tends to result in an objection to the idea that a more historically marginalized group should have to “give” to ensure the continuity of the scope of protection for the group that has historically spearheaded this marginalization.

Is it possible to satisfy both concerns by finding ways in which a government can accommodate religious convictions whilst also guaranteeing the right of same-sex couples to have their relationship institutionalized and protected from directly discriminatory reactions? Such a pragmatic solution is usually unacceptable to those who reject the accommodation of discrimination against homosexuals, because of its general message that discrimination of homosexuals is, at the least, tolerable (while discrimination based on, say, race, is “beyond the pale”). Such a differentiation was rejected in the *Saskatchewan Marriage Reference* by Richards JA in the passage quoted above.¹³²

¹³¹ It is important to note that being gay or religious is not decisive for the stance taken. Quite a number of gay people agree with the pragmatic solution to accommodate objections, mostly because they feel they would not like to be married by someone who secretly rejects their lifestyle. On the other hand, some orthodox Christians take either the view that one should accept the consequences of ones’ religious principles, whereas others contest the correctness of the belief that a believer should not celebrate a marriage between two people of the same sex. Similarly, not all Roman Catholics (for example) follow their church’s teachings on matters like contraception and divorce.

¹³² *Saskatchewan Marriage Reference*, *supra* note 58 at para 41.

Nevertheless, a pragmatic solution may be mandated by the constitutional duty of reasonable accommodation of religious beliefs. That, however, shifts the question to what would amount to *reasonable* accommodation.

A focus on discrimination against lesbians and gay men usually leads to fundamental human rights questions such as whether or not the non-discrimination principle has priority over freedom of religion and whether or not there is a hierarchy between protected identity markers. The right to religion was defined by the Supreme Court of Canada as follows:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹³³

Nevertheless, this right is generally subject to other public policy concerns, like “public safety, order, health, or morals or the fundamental rights and freedoms of others.”¹³⁴

Both sides in the debate will contest the severity of the plight of the other: one side will point out that conscientious objectors are merely excluded from a ceremonial office and that they can perform other bureaucratic functions. The contrary argument is that same-sex couples can have their relationship institutionalized by other marriage or registration officers whereas the objectors *are* excluded, even if only from one specific sort of job. This is what one might call the “who suffers?” argument.

A. Discrimination Arguments

The discrimination arguments made by same-sex couples are self-evident. The ability of a marriage or registration officer, a civil servant after all, to refuse such a service is *direct* discrimination on the basis of the sexual orientation of the members of the couple.¹³⁵ Whatever the motive for the discrimination, it clearly amounts to a most basic denial of a service on a prohibited ground of discrimination. That said, in the Netherlands system, where a member of the public may never know of a given official’s refusal and where there will be no delay resulting from such a refusal, it is arguable that the mere fact that an official officiates only at opposite-sex marriages cannot be qualified as “individual discrimination”; it is at most a kind of abstract, general discrimination, where there is arguably no concrete harm done.

¹³³ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321.

¹³⁴ *Ibid* at 337. See also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 72, 133 DLR (4th) 1; *South African Constitution*, *supra* note 92, s 31(2) which determines that the right to practice religion “may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

¹³⁵ *Saskatchewan Marriage Reference*, *supra* note 58.

Marriage or registration officers who refuse to be involved in the creation of marriages or civil unions involving same-sex couples argue that the failure to provide them with a right to refuse constitutes discrimination on the basis of their religion and infringes their fundamental rights to freely practise their religion. While this argument appears to be based on indirect discrimination (i.e. religious individuals are not denied a position so long as they give concessions relating to some of their beliefs, while concessions are not required of non-religious persons), it can also be argued as a form of direct discrimination. For instance, in the Dutch context, Loof has argued that having a job requirement for civil servants that they should be prepared to officiate all marriages is directly aimed at applicants having conscientious objections and thus amounts to direct discrimination.¹³⁶ This is not generally accepted, however, because facially neutral criteria or policies that nevertheless have a more severe impact on a specific group in comparison with others are usually regarded as indirectly discriminatory.¹³⁷ In theory, an apparently neutral criterion could amount to direct discrimination if it is employed specifically in order to disadvantage or exclude a specific group. In this case, however, the clear government purpose, which is to provide same-sex couples with an equal right to marry rather than to disadvantage religious believers, precludes such an argument.

There is an opposing argument that a refusal to accommodate conscientious objectors does not result in discrimination on the basis of religion because religious and non-religious marriage officers alike are required to officiate at all marriages. Instead, the issue is to be framed as the objecting marriage officers asking for (and being denied) a special privilege, namely the right to discriminate against same-sex couples. Governments cannot consent to such requests because they would thereby become complicit in the discrimination. The Saskatchewan Human Rights Tribunal has, for instance, held that a marriage commissioner appointed to perform purely secular marriage ceremonies is a part of “government” for constitutional purposes.¹³⁸

It has been argued that it is an “illiberal notion that persons performing public functions must leave their conscientiously held beliefs at home and church, and personally embrace all state policy when they are at work”.¹³⁹ In this context, however, an examination of the religious or secular nature of marriage can become important. It can be argued that the institution of marriage

¹³⁶ Loof, *supra* note 118 at 800. See also E Brems, “Religious Objections to Conducting Marriages of Same-Sex Couples in the Netherlands” (Paper delivered at the seminar Religion in the Public Sphere, University of Utrecht, 7-9 May 2008) [unpublished, on file with author Van den Brink].

¹³⁷ *Equal Treatment Act*, *supra* note 80, art 1(1)(c) (this part defines ‘indirect discrimination’).

¹³⁸ *MJ v Nichols*, *supra* note 125 at para 97.

¹³⁹ Trotter, *supra* note 124 at 366.

has for a long time not been regarded as central to many religious traditions. If that is the case, then civil servants would, as a result of this interpretation, not be required to participate in a ceremony of religious significance, but merely to perform an administrative act.¹⁴⁰ Moreover, civil servants do not, by officiating at same-sex marriages, become themselves parties to same-sex sexual relationships or acts, i.e. they do not engage in homosexuality; they simply engage in a function that accords status. Therefore, it can be argued that officiating at a same-sex civil ceremony is consistent with and conforms to the distinction between homosexual status (acceptable, often) and homosexual activity (unacceptable, usually) that many religions claim to be so important.¹⁴¹

The lack of religious significance in civil marriages was stressed by one of the judges in the *Saskatchewan Marriage Reference*. G.A. Smith JA concluded that the performance of a civil marriage by a marriage commissioner “is not a religious rite or practice.”¹⁴² The requirement to perform the ceremony did not limit or restrict religious belief. The judge said: “[i]t is far from clear that officiating at a civil marriage ceremony carries any implication or connotation at all that the marriage commissioner who officiates necessarily *approves* of the particular union.”¹⁴³

So, from the perspective of the conscientious objector, there are arguments for the existence of direct discrimination, indirect discrimination, or no discrimination at all. It is probably most accurate to characterize governments’ requirements that all marriage officers conduct same and opposite sex marriages as having a more detrimental effect on those who believe that their religions forbid them to officiate at such marriages – i.e., indirect discrimination. This does not, however, end the inquiry, since the question then becomes whether the discrimination is justified by other legitimate policy considerations, including the protection of the fundamental rights of other citizens and the achievement of governmental policy aimed at ending discrimination based on sexual orientation.¹⁴⁴

¹⁴⁰ This is the same argument that was accepted by the English House of Lords in *Janaway v Salford Health Authority* (1988), [1989] AC 537, [1988] 3 All ER 1079, in a quite different context. The *Abortion Act 1967* (UK), 1967, c 87, s 4 allows doctors to perform abortions but also gives them a right to conscientious objection. The House of Lords held that this statutory right does not extend to medical secretaries whose jobs involved making appointments for patients seeking abortions.

¹⁴¹ See Trotter, *supra* note 124 at 371, n 19, where he says that though Canadian law does not distinguish between homosexual behaviour and identity after *Egan* religious persons ought to be able to ignore that legal position because of their religious beliefs. Courts are noticeably reluctant to accept this; for example, the argument put forward by Christian hotel owners that they could lawfully refuse a double room to a same-sex couple because they would thereby become complicit in potential acts of “sin” was roundly dismissed in *Hall v Bull*, [2011] EW Misc 2 (CC) (available on BAILII) (Bristol Co Ct).

¹⁴² *Supra* note 58 at para 147.

¹⁴³ *Ibid* at para 142 [emphasis in original]. See also *Hall (Litigation guardian of) v Powers* (2002), 59 OR (3d) 423, 213 DLR (4th) 308 (Sup Ct).

¹⁴⁴ *Saskatchewan Marriage Reference*, *ibid* at paras 95-97.

If one accepts that fundamental rights to freedom of religion should be balanced against equality interests of the same-sex couples, many contradictory arguments present themselves. First, it could be argued that direct discrimination – by the marriage officers against same-sex couples – is more objectionable than the indirect discrimination against marriage officers. This was at issue in a CGB decision in the Netherlands which involved a Muslim student, whose religious convictions prevented her from shaking the hands of male teachers, parents, and fellow students.¹⁴⁵ Adhering to these convictions meant violating a social duty to shake hands as a respectful form of greeting, and this led to her expulsion from school. The student would be guilty of direct discrimination (against men), while the universal imposition of a duty to shake hands would discriminate indirectly on the basis of religion. The CGB solved the problem in a pragmatic way by suggesting that the student refrain from shaking the hands of both men and women. Although her attitude towards men would remain the same, equality legislation is concerned with actions and not with mere attitudes or thoughts.

It is, however, not immediately clear why direct discrimination should be regarded in a more serious light than indirect discrimination, particularly in a context where it is not certain that the discrimination involved is “merely” indirect. Moreover, where, as in the Netherlands, the couple does not apply directly to the marriage officer, but to the government, they would not face the refusing official or even know that someone refused to marry them, provided an agreeable marriage officer was available. In other words, is awareness of indirect discrimination more serious than unawareness of direct discrimination? Nevertheless, even in these circumstances, it could be argued that same-sex couples’ awareness of the fact that the government accommodates objections against same-sex marriage generally (while not accommodating objections to other marriages) is in itself insulting and unjustifiably discriminatory.

Possibly the strongest argument put forward by the CGB in the second conscientious objection case, is simply that the officials’ freedom of religion should be balanced against the rights of the same-sex couple and that the latter rights should take precedence because they are explicitly protected by law. Although rights to *hold opinions* or belief are also protected, rights to *put religious and other opinions into practice* are generally limited by other fundamental rights.¹⁴⁶ When the conduct of marriage officers is ascribed to the

¹⁴⁵ Decision No 2006-51 (2006), (CGB), online: <<http://www.cgb.nl/oordelen/oordeel/213922/volledig>>.

¹⁴⁶ For instance, in the South African *Constitution* the right to *hold* religious and other beliefs (s 15(1)) is subject only to the general limitations clause (s 36), but rights to *practise* religion (s 31(1)) are explicitly qualified and “may not be exercised in a manner inconsistent with any provision of the Bill of Rights” (s 31(2)). See Bruce MacDougall & Donn Short, “Religion-Based Claims for Impinging on Queer Citizenship” (2010) 33:2 Dal LJ 133.

government, they may not discriminate on the basis of sexual orientation.¹⁴⁷ Furthermore, it could be argued that the government must maintain a discrimination free environment. If governments accommodate staff members who hold discriminatory opinions, other gay and straight government employees are repeatedly confronted by expressions of that discriminatory opinion, as shown in the *Ladele* litigation in the UK.

Most directly in issue for many are the fundamental rights of the same-sex couples who wish to institutionalize their relationship by marriage or civil union. MacDougall has argued that a constitutional protection of sexual orientation should make it immune to any sort of argument based on morality. The government and its public servants ought not, in any circumstances, to be entitled to qualify the equal provision of services and entitlement based on morality arguments. To do otherwise makes such constitutional protection contingent in a way that contradicts the protection itself.¹⁴⁸

Arguments that seek to balance the rights of the objecting officials against the rights of the couples seeking the institutionalization of their relationship obscure another issue of discrimination on the basis of religion. Meyerson argues that, where the State's constitutional responsibility in relation to religion is not merely to distance itself from religion, but to actively foster religious diversity and tolerance, conflicts between religion and equality become more complex. When the state accommodates certain religious groups there will also be equality claims by members of religions which have not been similarly accommodated or by people who are not religious.¹⁴⁹ The State has a duty not to favour certain religions above others, nor to favour the religious over those who hold no religious beliefs.¹⁵⁰

The problem may therefore be more difficult than it first appears. We are faced not only with a choice between the conflicting equality claims of same-sex couples, on the one hand, and those who argue for the right to live in accordance with one's faith on the other hand. There is the additional issue that governments which allow objections on one basis must also consider the rights of those people who would want to object on other bases. In South Africa and Scotland, the only basis upon which marriage officers can object is the sexual orientation of the couple. In contrast, both in the Netherlands and Canada (specifically, in Prince Edward Island, and in the proposed Saskatchewan legislation discussed above), religious objections on other

¹⁴⁷ *Saskatchewan Marriage Reference*, *supra* note 58 at para 97.

¹⁴⁸ Bruce MacDougall, "The Separation of Church and State: Destabilizing Traditional Religion-Based Legal Norms on Sexuality" (2003) 36:1 UBC L Rev 1; Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2000) 32:2 Ottawa L Rev 235. See also MacDougall & Short, *supra* note 146.

¹⁴⁹ Denise Meyerson, "Multiculturalism, Religion and Equality" [2001] Acta Juridica 104 at 110-12.

¹⁵⁰ In the UK's *Equality Act 2010*, *supra* note 31, s 10(2), "belief" is defined to include a lack of belief.

bases are or would have been permitted. In practice, however, the objection will generally be based on sexual orientation alone. This fact was recognized in the *Saskatchewan Marriage Reference*, where Richards JA said that same-sex marriage “occupies centre stage” in this issue.¹⁵¹

B. Duty to Accommodate

The other – and clearly, related – perspective on the problem focuses more on the duty to accommodate than on the hierarchy of discrimination protections. The arguments here are centred around the employer’s duty to provide reasonable accommodation of disabilities, pregnancy, disease, language, and so forth. The question then becomes whether an employee may claim to be exempted from a law or rule of general application in order to accommodate the employee’s religious or other beliefs. The general approach seems to be that determining whether reasonable accommodation is necessary or not depends on a context-sensitive balancing exercise between the various competing rights and interests. The first consideration concerns the nature and the importance of the right which has been limited – in these cases the right to practise religion. Included within this factor is also a consideration of the nature and history of the group whose religious or cultural rights have been affected. Smaller and less influential groups may be in special need of constitutional protection. The second leg of the inquiry asks whether the legislation or legal rule functioning to limit the right to put religious beliefs into practice serves a legitimate government purpose and whether it effectively achieves this purpose. The final aspect of the test is to determine whether or not a less restrictive method exists, which would attain the same government purpose. A proportionality inquiry such as this is a familiar concept in human rights law.¹⁵²

This approach highlights two additional issues not canvassed by a mere comparison of the competing rights. The first is the need to compare the social and historical power relations between the different groups and the second is what might be called “the burden of inconvenience.”

Comparing the two groups, it is clear that lesbians, gay men, and bisexuals have been historically marginalized, largely at the hands of socially and economically powerful religious institutions. In at least three of the jurisdictions

¹⁵¹ *Supra* note 58 at para 25.

¹⁵² See *Christian Education South Africa v Minister of Education*, [2000] ZACC 11; 2000 (4) SA 757 (CC) at paras 31-32; *Prince v President of the Law Society of the Cape of Good Hope*, [2002] ZACC 1; 2002 (2) SA 794 (CC) at para 114; *MEC for Education: Kwazulu-Natal v Pillay*, [2007] ZACC 21; 2008 (2) BCLR 99 (CC) at paras 76, 97; Patrick Lenta, “Religious Liberty and Cultural Accommodation” (2005) 122:2 SALJ 352; Kenneth Norrie, “Accommodating Religion to the Gay Equality Imperative in Family Law” in Jane Mair & Esin Orucu, eds, *The Place of Religion in Family Law: A Comparative Search*, European Family Law, vol 30 (Antwerp: Intersentia, 2011) 303.

surveyed, same-sex couples are probably numerically disadvantaged as against members of established religions which disapprove of their relationships.¹⁵³ This disapproval is commonly publicly and unapologetically vocal in a way that is not accepted for other discriminatory views and beliefs. They also continue to experience stigmatization and exclusion, sometimes because of government exclusion in the areas of education, pensions, and so forth. According to a Dutch survey from 2007, over a third of the population regarded sex between males as “disgusting” and about half of the population finds men kissing in public offensive, whereas only 16% feels the same about a man and a woman kissing.¹⁵⁴

This context of numerical, social, and possibly economic power imbalance, between same-sex couples and those who hold homophobic views, suggests that religious objections to officiating same-sex unions should not be accommodated, since such accommodation will inevitably strengthen the existing prejudice against gay men and women. Withholding accommodation from illegitimate beliefs, such as anti-Semitism, while seeking to accommodate other beliefs, such as homophobia, suggests that these latter beliefs are to be accorded legitimacy and respect.

Since same-sex couples are unable to celebrate their marriages in most religious institutions, even in countries where legally-recognized religious marriage remains possible, they are more dependent on the state to formalize their relationships.¹⁵⁵ Thus, their exclusion from religious institutions provides reason for the refusal by the state to accommodate conscientious objectors in the civil context. This argument does not apply, of course, in a jurisdiction like the Netherlands where religious marriages are not recognized.

Another fact to consider is whether the refusal to accommodate conscientious objections serves a legitimate purpose (which involves the balancing of the competing rights above) and whether there are less restrictive ways of doing so. The proportionality inquiry in an accommodation analysis directs us to the practical question of whether there are ways of accommodating which could protect rights to religion without unduly infringing equality rights of same sex couples.

It has been argued that same-sex couples are not unduly burdened by having some marriage officers refuse to serve them, but that they will, at most, have to make “one or two” more phone calls to find somebody

¹⁵³ MacDougall & Short, *supra* note 146.

¹⁵⁴ Saskia Keuzenkamp, SCP, “Monitoring van sociale acceptatie van homoseksuelen in Nederland” [Monitoring of Social Acceptance of Homosexuals in the Netherlands] in *Gewoon homo zijn: Lesbisch en homo emancipatiebeleid 2008-2011* [Just Gay: Lesbian and Gay Emancipation] (The Hague: Ministerie van OCW, 2007) 65 at 67.

¹⁵⁵ As in *MJ v Nichols*, *supra* note 125 at para 109, where the complainant was Roman Catholic and so could not have a religious marriage.

who will provide the service.¹⁵⁶ This ignores the humiliation inherent in all discrimination, which is, after all, based on assertions of superiority. This burden is unwarranted given that there are clearly ways of accommodating religious objections without putting same-sex couples to this inconvenience and humiliation. Richards JA in the *Saskatchewan Marriage Reference* held that the proposed legislation allowing refusals to officiate “would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome. It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions.” The judge thought that the negative effects would be felt not just by the individuals involved but by the “gay and lesbian community at large”.¹⁵⁷

The Netherlands provide an example where couples do not approach marriage officers and risk rejection, but where the government simply assigns a marriage officer. That said, in the *Saskatchewan Marriage Reference*, the Court declined to decide whether such a “single entry point” system is constitutionally valid in Canada.¹⁵⁸

Another practical solution would be for the legal creation of either a marriage or a civil union to be reduced to a simple bureaucratic function, similar to the registration of births, deaths, and adoptions. There is no reason why the state should be responsible, or even able, to provide a celebratory element to what is simply a change of legal status. Parties should be free to celebrate their marriages or civil unions, whether by way of religious ceremonies or otherwise, but this does not have to be coupled to the governmental function. Such a secularization of marriage would remove the basis for religious objections, since marriage officers would be engaged in a simple administrative act. The United Kingdom’s civil union regimes are entirely secular, with the role of registrars being entirely administrative. Although this regime did not prevent the registrar in *Ladele* from objecting, it did make the rejection of her objections much easier. For this reason the breach of the principle of secularism in allowing civil partnership registrations on religious premises in England and Wales¹⁵⁹ may be seen as a retrograde step.

The benefit of viewing the problem from a reasonable accommodation perspective is that it creates opportunities for practical solutions to clashes of principle.¹⁶⁰ On the other hand, it has been suggested that reasonable

¹⁵⁶ Trotter, *supra* note 124 at 377.

¹⁵⁷ *Saskatchewan Marriage Reference*, *supra* note 58 at paras 94, 96.

¹⁵⁸ *Ibid* at para 89.

¹⁵⁹ *Equality Act 2010*, *supra* note 31, s 202.

¹⁶⁰ See Carl F Stychin, “Faith in the Future: Sexuality, Religion and the Public Sphere” (2009) 29:4 Oxford J

accommodation may not be the best vehicle for solving these kinds of problems because it would generally work in favour of the more socially and economically dominant parties.¹⁶¹

IX. Conclusion

Within each of the considered jurisdictions there is great complexity in the legal, political, and social backgrounds which surround the issues and resolutions concerning same-sex unions. The inherent complexity of the issue combined with the differences between the approaches taken in each jurisdiction may make it seem impossible to adapt solutions from one jurisdiction to another, in spite of the relative similarities between the jurisdictions vis-à-vis their degree of acceptance of homosexual unions. This makes it seem even more unlikely that such solutions could be transported into jurisdictions which do not share such similarities. The existence of constitutional rights, especially whether a particular jurisdiction recognizes the right not to be discriminated on the basis of sexual orientation, is of signal importance. Also important to the analysis are factors such as the way in which marriage is perceived in the jurisdiction generally, the given roles of civil servants, and whether or not a marriage officer is considered part of the “government”. The practical political clout of groups – in this case LGBT groups and their allies, and the opposing religious groups – is also very significant. Each of these factors varies between jurisdictions, creating a unique socio-political climate.

Despite the varied nature of the four jurisdictional settings in which the “refusal to officiate” question arises, it is interesting to observe how this issue generates a focus on similar underlying issues. Are the competing claims in fact claims concerning rights? What sort of discrimination is involved? Does either the history of discrimination on the basis of sexual orientation or the population ratios of LGBT people versus religious people play any role in resolving discrimination issues? Do direct discrimination claims trump indirect discrimination claims? What are the limits of “religion” in religion-based claims? Is it easier to facilitate one sort of accommodation rather than another? Should the government simply “get out of the business” of marriage ceremonies as much as possible and so perhaps end state involvement in the

Legal Stud 729 at 752-53.

¹⁶¹ See Elsje Bonthuys, “Reasonable Accommodation as a Mechanism to Balance Equality Rights and Rights to Religion in Family Law” (2010) 25:2 SA Public Law 666; Ayelet Shachar, “Group Identity and Women’s Rights in Family Law: The Perils of Multicultural Accommodation” (1998) 6:3 Journal of Political Philosophy 285.

celebration of such a private matter? Or, is it implicated in any event by virtue of according status on the basis of the ceremony?

These questions and the issue at large are not an easy one to resolve, and it does a disservice to those involved with it to pretend otherwise. No resolution will satisfy everyone. Nonetheless, the matter requires that the state and its institutions consider how they prioritize the protections and rights of various groups in order to, if not please everyone, at least do the least amount of harm. Consideration of the experiences (positive and negative) of somewhat similarly situated jurisdictions is a useful method for arriving at an optimal solution for a given jurisdiction. It is not necessary to reinvent the wheel – not entirely at least.