SAME SEX MARRIAGE AND THE CHURCH OF ENGLAND: A STORM IN A TEACUP OR THE TIP OF AN ICEBERG?

EL MATRIMONIO ENTRE PERSONAS DEL MISMO SEXO Y LA IGLESIA DE INGLATERRA: ¿UNA TORMENTA EN UNA TAZA DE TÉ O LA PUNTA DE UN ICEBERG?

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Fecha de recepción: 06/09/2023.
Fecha de aceptación: 06/12/2023.

ABSTRACT

The role of the Anglican denomination in celebrating marriages is just one example of faith communities acting for, or in collaboration with, the State and its emanations, and there are countless similar activities (e.g. the running of religious schools, or the provision of services funded by local authorities). This article discusses the legal and political debate over same sex marriage and the Church of England, arguing that this issue is inextricably linked with the far broader question of law and/or state authorities regulating the policies of faith groups providing public services, and concluding that celebrating legally binding marriages is a special category of public service.

KEYWORDS

Human rights, religious freedom, marriage, church.

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* We are indebted to Prof. Alejandro Torres and Prof. Oscar Celador, for their kind and generous assistance during the process which led to the publication of this piece.

RESUMEN

La participación de la confesión anglicana en la celebración de matrimonios es sólo un ejemplo de las actuaciones que las comunidades religiosas realizan en el marco de la actividad pública del Estado o en colaboración con el mismo, pero existen un sinnúmero de actuaciones similares (por ejemplo, el papel de las escuelas de titularidad religiosa o la prestación de servicios financiados por las autoridades locales). Este artículo analiza el debate jurídico y político acerca del matrimonio entre personas del mismo sexo en el seno de la Iglesia de Inglaterra, mostrando que esta cuestión se encuentra inextricablemente vinculada a otra mucho más compleja, cual es la posición de la ley y/o las autoridades estatales ante la prestación de servicios públicos por parte de los grupos religiosos. En este sentido, los autores abordan la celebración de matrimonios legalmente vinculantes desde su consideración como categoría especial de servicio público.

PALABRAS CLAVE

Derechos humanos, libertad religiosa, matrimonio, confesión religiosa.

SUMMARY: *1. Introduction. 2. Background to the current controversy and our aims in analysing it. 3. Same sex marriage and the Church of England. 4. Public services offered by faith communities. 5. Weddings as a special form of public service. 5.1. Accommodating individual belief. 5.2. A Place, rather than Person Centric Approach, to the Formalities. 5.3. The large number of non-legally binding marriages. 6. Conclusion: celebration of marriage by the Church of England as a special public service.*

1. INTRODUCTION

This article addresses why the ongoing refusal of the Church of England to celebrate same sex marriages, despite many Anglican campaigners demanding it, is not simply an internecine squabble between different factions within a particular faith group, but has far reaching social, political and legal implications. We shall first set out the background to the controversy, and explain why it raises crucial, wider questions, explaining the structure of our study and its contribution to current literature. We shall demonstrate why the current and live issues surrounding same sex marriage in the Church of England not only relate to wider questions in relation to the status of religious marriages more generally, but also the bigger picture of cooperation between faith groups and the

State. Both the scope of our analysis and the conclusions reached are fresh contributions in an ever-evolving debate.

2. BACKGROUND TO THE CURRENT CONTROVERSY AND OUR AIMS IN ANALYSING IT

Is the current turmoil within the Church of England a purely internal issue for a particular religious denomination, or does it have wider implications? For British society, there is nothing new or remarkable about the Church of England getting hot under the (dog) collar in relation to questions of human sexuality. Controversies[1], and even scandals on this topic, provide regular fodder for both the ecclesiastical and secular press, a reality which demonstrates ongoing public interest[2]. Although inevitably conscious of this scrutiny, the Church maintains that it has a duty to uphold its doctrines, regardless of the world's approval or disapproval[3]. In addition, the trope of vicars as either hopelessly naïve or repressed is a staple of popular culture, with baffled or sinister clergy frequently depicted in literature and on screen[4]. It may, therefore, be tempting for observers to dismiss the strife over same sex marriage within Anglican Churches as a storm in a self-contained tea-cup.

Even if this understanding was correct, and the wrangling was essentially an intra-Anglican debate, the matter would be serious and the stakes would be high. The pain for those who are denied the opportunity to celebrate their marriage in the faith and tradition of their choosing should not be underestimated, nor should the strength of feeling on the part of some who oppose dogmatic change.

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[1] Martin., F., «General Synod Digest: Sexuality Dominates Questions to the Bishops» *Church Times,* 17 February 2023 https://www.churchtimes.co.uk/articles/2023/17-february/news/uk/general-synod-digest-sexuality-dominates-questions-to-the-bishops

[2] Dutton., A., «Vicar wearing only stockings caught performing sex act with Henry hoover in Church» *The Independent,* 15 July 2022, https://www.independent.co.uk/news/uk/crime/vicar-henry-hoover-sex-church-b2123488.html

[3] Anglican Communion News Service, «Church of England endorses bishop's decision not to change the doctrine of marriage» *ACN,* 11 February 2023, https://www.anglicannews.org/news/2023/02/church-of-england-synod-endorses-bishops-decision-not-to-change-doctrine-of-marriage.aspx

[4] Sorensen., S., «The Collar: Reading Christian Ministry in Fiction, Television and Film» Cascade Books, Eugene, 2014, pag LXXX.

However, in the course of this article we seek to demonstrate that the issues raised with regard to to same sex marriage, and its implications for the Church of England's wider engagement in Matrimonial Law are by no means confined to this ambit. In truth, this is merely the tip of an iceberg. The role of this Anglican denomination in celebrating marriages is just one example of faith communities acting for, or in collaboration with, the State and its emanations, and there are countless similar activities, e.g. the running of religious schools, or the provision of services funded by local authorities. When, if ever, should a religious group performing a function for the State be permitted to discriminate between citizens? As Human Rights and Equality Law ordinarily prohibit local or national Governments from imposing differential treatment on the basis of protected characteristics, why should this be allowed if authorities are acting through the agency of faith groups?[5]

In this piece we ask what the specific question of marriage and the Church of England reveals about dilemmas in these situations of representation or partnership, when the beliefs of religious groups clash with human rights, equality, or other pillars of the juridical system. If the thread of this denomination and same sex marriage is pulled, many other challenges are found to be hanging upon it, surprising though this might at first appear.

One factor at times obscuring these wider implications has been the bitter and lengthy nature of the issue itself, given that dialogue on same sex marriage within Anglicanism often generates more heat than light. Ever since the possibility of permitting same sex marriage within the English legal framework[6] was first mooted, there have been fierce debates about what this might mean for the Church of England.[7] The introduction of «civil partnerships» almost a decade prior had given same sex couples access to a legal institution that was functionally isomorphic to marriage in respect of burdens and benefits,[8] and as a result, the opening up of marriage was not about change in terms of rights,

[5] Equality Act 2010.

[6] This article focuses specifically on England, as opposed to the United Kingdom as a whole, because the ties between Church and State, and Constitutional Culture in respect of religion are profoundly different in each of the component nations.

[7] UK Government, *Equal Marriage,* London, 2015, https://www.gov.uk/government/news/equal-marriage

[8] Civil Partnership Act 2004.

responsibilities or financial security, but a matter of symbolism and social status.[9]

The Conservative/Liberal Democratic Coalition Government anticipated that same sex marriage would be a controversial proposition for some faith groups, and a doctrinal impossibility for others, and as a result, initially planned to restrict such unions to civil ceremonies.[10] Nonetheless, responses to a government consultation exercise were not favourable to this approach, given that various religious denominations wished to have the ability to perform same sex marriages, either immediately, or at some future point in time, should they decide to do so. Consequently, the legislation ultimately enacted to enable same sex marriage gave faith groups the scope to determine for themselves whether to conduct such ceremonies, whilst simultaneously granting protection from compulsion to do so, and carving out exemptions within equality legislation.[11]

Nevertheless, not everybody was convinced of the adequacy of such provisions, in light of the unique position of the Church of England as the established denomination. Commentators like Rivers[12] and McCrudden[13] asserted that English Anglicanism would be vulnerable to litigation if it refused to perform same sex marriages, and that such challenges might even prove successful in court. Other perspectives, including that of García Oliva and Hall, maintained that judicial compulsion to conduct same sex marriages was not a realistic threat, in light of either the wording of the proposed legislation, or the case law of the Strasbourg Court.[14]

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[9] Monk, D., y Barker, N., *From Civil Partnership to Same Sex Marriage: Interdisciplinary Reflections,* 1st edition, Taylor & Francis, Milton Park, 2015.

[10] UK Government Equalities Office, *Equal Civil Marriage: A Consultation,* Government Equalities Office, London, 2012.

[11] Marriage (Same Sex Couples) Act 2013 s2.

[12] Rivers., J., *Marriage (Same Sex Couples) Bill: Evidence to the Joint Committee on Human Rights (Bills 2013-14) (002A)* para 26 and fn 127.

[13] McCrudden., C., *Marriage (Same Sex Couples) Bill: Evidence to the Joint Committee on Human Rights, Bills 12-13 147* (2013) para 145.

[14] García Oliva,. J., and Hall, H., «*Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?*» in *Oxford Journal of Law and Religion,* vol. III(I), 2014, pp. XXIV-LVI.

A decade has now elapsed since the enactment of the Marriage (Same Sex Couples) Act 2013 and the latter analysis has so far proved correct. The Church of England has not been compelled to carry out sex marriages, neither has it faced an onslaught of litigation. This is in keeping with the wider European position. In *Buhucenanu v Romania,* the Strasbourg Court ruled that it was a breach of Article 8 for a State to fail to provide adequate civil law protection to same sex couples, in the form of a registrable relationship.[15] This was affirmed in *Fedotova v Russia,* but in both cases, it was clear that the orthodox position on Article 12 had not shifted, and that there was no requirement for such civil protection to take the form of marriage.[16] States are not obliged to facilitate same sex marriage, and *a fortiori*, religious denominations are under no duty to celebrate such unions.

The position in Greece provides a useful comparator, as another European State with an established faith. The debate in that jurisdiction over same sex marriage was framed in relation to Civil Law. While the Eastern Orthodox Church was vocal on the subject of a change to secular legal rules, there was absolutely no suggestion that it might or should be compelled to carry out same sex , if such a reform took place. That line of argument simply was not pursied in the controversy leading up to the recoginition of same sex marriages in 2024.[17] It is uncontroversial to state that all religious denominations etc denominations retain their collective Article 9 rights, regardless of the operative constitutional model in respect of religion.

It is unsurprising, therefore, that the ties between Church and State have survived the opening of marriage to same sex couples, just as they weathered the storm during various paradigm shifts in the progressive liberalisation of divorce law.[18] By 2013, there was nothing novel about the established Church and Civil Law applying different criteria with regard to the eligibility for marriage, and in reality, the differential treatment of same sex and heterosexual couples was just another example of a distinction.

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[15] *Buhucenanu v Romania* App. No. 20081/19.

[16] *Fedotova v Russia* App. Nos. 40792/10; 30538/14; and 43439/14.

[17] Rafanberg, M. «Greece: The Legalisation of Same Sex Marriage Remains Divisive» *Le Monde* 8 December 2023.

[18] Kha, H., *A History of Divorce Law: Reform in England from the Victoria to the Interwar Years,* Taylor and Francis, Milton Park, 2020.

Moreover, the legal regime proved itself robust enough to allow the Church of England to maintain the ties of establishment, while leaving it free to steer its own course on same sex marriage. It is true that internal conflicts meant that those on board of the Anglican ship have had a hard time reaching consensus on the direction of travel, as already noted, but that is an entirely separate issue.

The present controversy is not about whether Anglicanism in England *can* maintain its current stance of excluding same sex couples from its marriage provision, because that question is settled and proven in practice. The express liberty of the Church to do this is enshrined within domestic law, and these guarantees are undoubtedly compatible with national and international human rights clauses[19] Ultimately, faith groups, even those within an establishment relationship, are free to determine their own doctrines, and nobody is denying that whether an *Anglican* view of marriage encompasses same sex unions is a theological matter.

However, there remains the additional question of whether the gulf between the Church of England's understanding of marriage, and the concept of marriage within Civil Law, has implications for the reform of Wedding Law as a whole. For centuries, the Church has been at the heart of the legal framework in respect of matrimony, but it is timely to wonder whether its role needs radical revision to meet the needs of the twenty-first century world.

Campaigners highlight that the ongoing exclusion of same sex couples from weddings in the established Church is deeply problematic, given this position is at odds not only with mainstream societal values, but also the majority of observant Anglicans.[20] Should this be addressed by external legal change, and could this include moves to nudge English Anglicanism into closer line with contemporary values? This seemingly parochial question, pertaining to the specific circumstances of the Church of England, and its unique political and cultural context, is in fact just one example of a much more far reaching dilemma: when is it

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[19] For a detailed discussion an explanation of this, see: García Oliva,. J., and Hall, H., «*Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?*» in *Oxford Journal of Law and Religion,* vol. III (I), 2014, pp. XXIV-LVI.

[20] Ozanne Foundation, *Same Sex Marriage Research* 2022 https://ozanne.foundation/project/same-sex-marriage-research-2022/

appropriate for secular legal frameworks or state authorities to regulate the policies of faith organisations offering public services? This is the key question which we shall address in this article.

We argue that, as a general principle, the public service dimension to activities in most circumstances tips the balance between religious freedom and competing interests, and ordinarily fully justifies the imposition of human rights and equality provisions. If faith groups choose not to act exclusively for their membership, but undertake a role for the wider community, then they must respect the standards governing English collective life in general, as determined by democratic processes and the Rule of Law. The administration of marriage is a public function, because unions recognised by Civil Law have legal and social implications for the parties vis a vis the whole of society, and are not confined to internal dealings with their coreligionists. Yet we shall also propose that the celebration of legally binding marriages is an unique category of public service, both justifying and necessitating special consideration and tailored provisions in relation to both equality and human rights.

In order to give a response to our key question, we shall first address the present debate in respect of same sex marriage and the Church of England, as well as introducing, briefly, the public service nature of marriage. We shall then ask how this relates to the greater dialogue about regulating public services carried out by faith groups. At that stage, we shall conduct a thorough analysis of the nature of marriage as a public service, which will lead us to the conclusion that the administration of legally binding weddings constitutes a special category within the remit of public services.

Unlike most public administrative functions, which in a liberal democratic State are devoid of religious character, a Church of England wedding is also a rite performed by a faith community. Crucially, the same is true of other religious wedding ceremonies with effects in Civil Law, and this melange of generally applicable, secular norms derived from democratic processes, and requirements and practices rooted in the spiritual beliefs of a particular faith community, mean that «civil-religious» marriages have an inherently and indelibly dual nature. As we shall explore further, Church of England marriages are a subcategory within the family of civil-religious marriages, and there are cogent rea-

sons for imposing uniform standards and expectations. Any additional imposition of human rights or equality safeguards upon Anglican marriage would, therefore, demand similar restrictions being placed upon civil-religious weddings conducted in Islamic, Orthodox Jewish, Roman Catholic and other contexts, as establishment could never be a justification for such a differential treatment.

Viewed in totality, this article advances academic discussion in this area, because it illuminates why legal and political conflicts around same sex marriage in the Church of England, and religious marriages more generally, fit into overarching questions about how to manage the cooperation between the State and organised religion, in a way that adequately balances all of the competing interests.[21]

3. SAME SEX MARRIAGE AND THE CHURCH OF ENGLAND

The subject of same sex marriage, and indeed LGBTQIA+ issues more broadly, bitterly divides the Church of England. In 2017 the House of Bishops produced a report concluding that it would not be appropriate to move towards reforming its Canon Law, official doctrine or Civil Law, but at the same time, commended cultural change within the Church to make non-heterosexual people feel more welcome.[22] Yet despite gestures in this direction, it included an annex setting out legal advice, which explicitly indicated that ministers could not perform services which overtly, or even by implication, treated the civil marriage of a same sex couple as akin to holy matrimony.

Perhaps unsurprisingly, this triggered a negative backlash from those who had hoped for, and proactively pursued, a pathway towards equality and inclusivity. One senior cleric, Canon Leanne Roberts, made the following observation in a scathing sermon given in its aftermath:

«*Jesus offers us the wine of the Kingdom, and the Church offers us the Pharisaical water of ritual purity*».[23]

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[21] García Oliva, J., and Hall, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain,* Routledge, Abingdon, 2018.

[22] The House of Bishops, *Marriage and Same Sex Relationships After the Shared Conversations: A Report from the House of Bishops,* 2017, General Synod 2055.

[23] Equal: The Campaign for Equal Marriage in the Church of England, *What is Living in Love and Faith?* https://cofe-equal-marriage.org.uk/living-in-love-and-faith/

Equally predictably, those at the other end of the theological aisle were aggrieved that homosexual activity was no longer being regarded as a sinful and problematic behaviour.

The report aimed to hold steadily to what was deemed by the bishops to be the traditional line, whilst offering some comfort to the LGBTQIA+ community and their allies, and as it is often the case with compromise, the intended middle ground angered, rather than placated, both sides. In a humiliating development for the bishops, the General Synod voted to reject the report, and although the document received criticism from a variety of angles, this was widely perceived as a victory for liberals, rather than conservatives.[24]

In the aftermath of this debacle, the Church of England instituted a process of discussion and dialogue entitled «Living in Faith and Love».[25] After six years, this culminated in an announcement in 2023 that this denomination would offer blessings and services to same sex couples, but stressed that these did not alter the teaching that the institution of marriage was only available to heterosexual partners. Once again, the move failed to bring reconciliation between the opposing factions. Conservatives expressed their dismay at the blessing of same sex relationships,[26] and those striving for same sex weddings in church highlighted their disappointment about a continuing policy of negativity and exclusion.[27]

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[24] Mortimer., C., «Church of England General Synod Votes to Reject Controversial Same Sex Marriage Report» *The Independent,* London, 15 February 2017, https://www.independent.co.uk/news/uk/home-news/same-sex-marriage-church-of-england-anglican-general-synod-man-woman-report-lgbt-rights-gay-clergy-a7582611.html

[25] The Church of England, *Living in Faith and Love,* https://www.churchofengland.org/resources/living-love-and-faith

[26] Williams., H., «Conservative Anglicans add their Criticism of the Bishops Same Sex Blessing Plan» *The Church Times,* London, 19 January 2023, https://www.churchtimes.co.uk/articles/2023/20-january/news/uk/conservatives-add-their-criticism-of-the-bishops-same-sex-blessing-plan

[27] Evangelical Focus, «Both Evangelicals and Liberals Express Disappointment over Church of England's Decision on Blessing Same Sex Couples» *Evangelical Focus Europe,* 19 January 2023. https://evangelicalfocus.com/europe/20375/it-pleases-no-one-both-evangelicals-and-liberals-express-disappointment-over-church-of-england-decision-on-blessing-same-sex-couples

This background is essential to our discussion, because it is essential to appreciate that the Church of England is mired in a protracted internal conflict over same sex marriage, and to date has failed to find either a creative way forward that draws together opposing camps in an acceptable *via media,* or the will to opt unequivocally for one direction of travel, leaving those dissatisfied to either accept an unfavourable decision or find a new spiritual home. It should also be stressed that this is not an instance of a cohesive group of believers adopting a position at odds with that of prevailing social norms in their State.

This is the context in which a number of parliamentarians across the political spectrum demanded action from the established Church to bring its approach to same sex marriage into line with Civil Law, with the present Archbishop of Canterbury responding angrily. Justin Welby publicly declared that he would not be swayed by «*groups or lobbies or outsiders*».[28] The terminology is striking here, in particular the adoption of the word «outsiders», for a variety of reasons. In the first place, the Church of England claims to care for the welfare and needs of *all* people living within its parishes and dioceses, not just practising Anglicans: this is part of its justification for maintaining bishops in the Upper Chamber of the legislature, and indeed establishment more generally.[29] It is, consequently, hard to reconcile this stance with a primate telling *any* group of citizens, parliamentarians or otherwise, that they were strangers with no part in its life and operation. Secondly, the label is misrepresenting the reality, in so far as the parliamentarians most invested in the Church's debates on same sex marriage are either active members themselves, or self-consciously representing the concerns of believing constituents. Clearly, it is those who wish to participate in church services who have most at stake.

Nonetheless, whilst dismissing opinions as coming from «outsiders» is problematic, the appropriateness of those wielding temporal authority in Parliament intervening in spiritual matters is arguably a more complex point. As Maltby notes, there is most certainly precedent for this is recent history. It is well recorded that MPs heavily influenced the policy

[28] Sherwood., H., «MPs should not influence the church on same-sex marriage, says Justin Welby» *The Guardian,* London, 8 February 2023, https://www.theguardian.com/uk-news/2023/feb/08/mps-church-of-england-same-sex-marriage-justin-welby

[29] García Oliva, J., and Hall, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain,* Routledge, Abingdon, 2018, pp. L-CXXVI.

of the Church of England with regard to managing conflicting interests over the ordination of women, in particular, successfully campaigning for greater protection for male clergy who were in conscience opposed.[30] Of course, the mere fact that there have been previous instances of such behaviour does not render it desirable, or even orthodox; the reality is that the issue is neither straightforward nor clear-cut. On the one hand, actually having Parliament or its elected representatives direct the Church of England in any practical sense is clearly out of step with modern constitutional norms; consider, for instance, the evolution of the Prime Ministerial role in the appointment of bishops.[31] Yet on the other, expressing opinions, positive or negative, is not, at least in isolation, exercising undue influence. Where the line lies between commentary and coercion, or dialogue and meddling, is a highly subjective question.

Exploring that particular area in detail is to pick at the threads of the establishment relationship, and indeed the fabric of the uncodified Constitution itself. As it is widely known, in dealing with the United Kingdom, there is often a gulf between the abstract theory and contemporary convention, and debates on the margins can be blurry.

We are not though primarily concerned with the question of how far it is appropriate for Members of Parliament to speak out on the Church's policy on same sex marriage. For our present study, the far more pertinent question relates to why this is territory into which politicans are inclined to step. There are plenty of other theological debates within contemporary English Anglicanism, but we do not witness such interest from parliamentarians in the admission of children to the Sacrament of the Eucharist, [32] or policy on Deliverance Ministry,[33] including exorcism, even though the latter is an arena in which vulnerable people of all ages

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[30] Maltby.,J., «Equality, Parliament and the Established Church: Some Recent Close Encounters» *Ozanne Foundation* June 2023, https://ozanne.foundation/westminster-same-sex-marriage-symposium/

[31] Fox., M., «Will Rishi Sunak Want To Appoint the Bishops?» *Reaction,* 26 October 2022, https://reaction.life/will-rishi-sunak-want-to-appoint-the-bishops/

[32] The Liturgical Commission, «Guidance on Celebrating the Eucharist with Children» The Church of England, https://www.churchofengland.org/prayer-and-worship/worship-texts-and-resources/common-worship/holy-communion/additional-0

[33] Church of England, «Deliverance Ministry» https://www.churchofengland.org/safeguarding/safeguarding-e-manual/safeguarding-children-young-people-and-vulnerable-adults/4-1

risk serious harm when good practice is not followed (e.g. if an individual experiencing a psychotic episode is encouraged to rely on prayer and dissuaded from seeking medical treatment).[34] Guidance issued by the Church does, in fact, demand a responsible approach to this issue, with clergy working in tandem with clinicians, but there are current concerns that this is not always adequately enforced by ecclesiastical authorities.[35]

In our view, a key distinction between these settings, and that of same sex marriage, is the dimension of public service. As already alluded to, there are a number of reasons why the celebration of Church of England weddings is the performance of a public service. In compliance with the legal framework, everyone resident in England has a right to marry in their parish church, or other church with which they have a qualifying connection, provided that their fiancé(e) is not of the same legal gender as themselves,[36] and neither party has a former spouse still living (the marriage of divorcees is dependent on the conscience and assessment of the officiating minister).[37]

For a wide variety of reasons, many people opt for a church marriage, sometimes despite not being regular worshippers, or even accepting the core beliefs of Christianity. Family tradition and the desire to marry in the same place as previous generations, beautiful medieval buildings or a scenic location with a lower price tag than a secular venue such as a castle or stately home may all play a part. Church weddings are a deep part of the cultural landscape of England, and novels, films and plays often feature ceremonies in these locations, for example popular adaptions of *Pride and Prejudice* or cinematic favourites such as *Four Weddings and a Funeral.*

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[34] Walker,. D., *The Ministry of Deliverance,* Dartmann, Longman and Todd, London, 1997, pp. XXXVIII- XLVIII.

[35] Sherwood., H., «Christian Thinktank Warns of Sharp Rise in UK Exorcisms» *The Guardian,* London, 5 July 2017, https://www.theguardian.com/world/2017/jul/05/christian-thinktank-warns-of-rise-in-exorcisms-mental-health

[36] Canons B30-36, E4, E7 and F11.

[37] Church of England, *Marriage After Divorce,* https://www.churchofengland.org/life-events/your-church-wedding/just-engaged/marriage-after-divorce. See also Canon B30 of the Church of England; House of Bishops «Advice to Clergy» November 2002 and Matrimonial Causes Act 1965 s8(2).

Overlaying all of this is the default right enshrined in English law to a church wedding, outlined above, which has helped to make these events part of the English Constitutional Culture, or in other words, the bundle of norms and expectations governing collective life.[38] Individuals who happen to be marrying someone of the same legal gender are just as likely as anybody else to harbour romantic dreams of a wedding in the parish church of a chocolate-boxy country village, and there is an entirely understandable dissonance and sense of resentment for someone in this position who is denied this opportunity, when it is available as of right to their neighbours in heterosexual relationships, regardless of their religious affiliation. Andrew and Ben may be committed active members of St Guthlac's church, but cannot marry there, whereas state law provides that Colin the atheist and Daphne, his Wiccan finance, can demand a ceremony.

In short, the general right to marry in an Anglican church has created a Constitutional Culture in which the performance of legally binding wedding ceremonies is seen as a public service, rather than a purely spiritual exercise. It should be stressed that this is not the consequence of establishment per se, but the peculiarly English model of establishment. For instance, although Scotland has a national Church, Scottish residents do not enjoy a right to marry in Presbyterian churches, irrespective of their personal faith or affiliation.[39]

Nevertheless, although these special considerations, springing from the establishment relationship, offer an *additional* layer of reasons for regarding Church of England marriage as a public service, there are other factors which apply equally to *all* civil-religious marriages. As we shall address in detail below, the State regulates marriage as a form of registered, voluntary adult partnership.[40] It is a highly specialised form of contract which imposes rights and duties on the spouses in respect of each other, but also has far reaching implications for third parties.[41]

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[38] García Oliva,. J., and Hall,. H., *Constitutional Culture, Independence and Rights: Insights from Quebec, Scotland and Catalonia,* Toronto University Press, Toronto, 2023.

[39] Church of Scotland, «Life Events» https://www.churchofscotland.org.uk/connect/life-events

[40] Radmacher v Granatino [2010] UKSC 42.

[41] Witte., J. and Ellison., E., Covenant *Marriage in Comparative Perspective,* Eerdmans, Grand Rapids, 2005, p. X.

As a result, there is an overriding public interest in regulating how marriages are entered into, and ensuring that adequate recording keeping takes place. The combination of outward facing implications and the welfare of the parties themselves demand that those carrying out legally binding marriages are equipped and accountable for following all of the protocols in place. For instance, if marriages are conducted without appropriate background and identity checks, they could be instrumentalised for those engaged in human trafficking and sexual abuse.[42] All of these issues effect Church of England marriage, but apply equally to other forms of civil-religious marriage, meaning that the administration of any civil-religious marriage is by definition a public service.

Therefore, given the public service dimension to civil-religious weddings in England, it is helpful to pause and consider the wider legal implications of faith groups offering services with a public character, and we now turn our focus to this topic.

4. PUBLIC SERVICES OFFERED BY FAITH COMMUNITIES

It is axiomatic within English law that individual and collective ideological freedom must be respected. In the contemporary framework this is enshrined in Article 9 of the European Convention of Human Rights, brought within the domestic setting via the Human Rights Act 1998. Moreover, in addition to this statutory provision, religious liberty and support for the practice of faith are values which suffuse the Common Law as a result of the transformation of establishment from an exclusive to an inclusive phenomenon.[43] The constitutional settlement of 1688/89 was predicated on Anglican privilege and reserving political, judicial and military power, as well as entrance to Oxford and Cambridge, to communicant members of the established Church,[44] but from the late eighteenth century onwards, this position became increasingly difficult to defend and maintain, even though it was never toppled by violent

[42] End Slavery Now, «Forced Marriage» End Slavery Now, http://www.endslaverynow.org/learn/slavery-today/forced-marriage

[43] García Oliva, J., and Hall, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain,* Routledge, Abingdon, 2018, pp. L-CXXVI.

[44] Schworer., L., *The Revolution of 1688-89: Changing Perspectives,* CUP, Cambridge, 1992.

revolution.[45] Instead of tearing down Anglican power, reforms gradually shared it with other groups, first other Christian denominations (excluding Roman Catholics), then little by little to other faiths and philosophical positions. If the dogma and practice of the Church of England were to be supported by the law, then fairness demanded that equal consideration be given to the beliefs of other citizens.

Consequently, both black letter Constitutional level law, and the values woven into the warp and weft of the legal system, are geared to uphold the liberty of religious groups, as well as facilitating their activities. It also means that there is no association between support for religion and the right or left of the political spectrum within England, or the wider United Kingdom. In this sense, faith itself is a less divisive issue than is the case within many neighbouring nations.

Nevertheless, this does not mean that faith-based organisations are supported at all times, and given *carte blanche* to manage their own operations, because freedom of belief is a fundamental right, as there are other equal basic interests that must be protected. Where there is a conflict, the law must seek to strike a balance, although how and where the line is drawn will depend upon the context in question.

Critically, generally speaking, with regard to the management of their internal, spiritual affairs, religious groups will be given free rein, and any disputes will be non-justiciable.[46] This is reflected in the range of exemptions that faith groups enjoy from Equality Law: for example, legislation carves out space for religious groups to discriminate on the basis of protected characteristics such as belief, gender or sexual orientation in relation to the recruitment of ministers,[47] and schools with a designated religious ethos are allowed to preserve this, even if they are publicly funded, as well as being entitled to apply faith based admissions criteria and incorporate acts of devotion into the school day.[48]

Nonetheless, two key points should be noted here. First, even in respect of their internal affairs, the regimes of Criminal and Tort Law apply

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[45] Royle., E., *Revolutionary Britannia: Reflections on the Threat of Revolution in Britain 1789-1848,* Manchester University Press, Manchester, 2000.

[46] Shergill v Khaira [2014] UKSC 33.

[47] Equality Act 2010, Sch 9 s2.

[48] Equality Act 2010, Sch 3 s1.1

in this ambit as elsewhere,[49] and equality provisions not within statutory safe-havens will continue to bite (for instance, requirements relating to disability discrimination cover the activities and premises of faith groups).[50] Second, where the conduct of a religious organisation has a direct impact upon third parties, the calculus of competing interests is different to that in play when only believers are involved.

Without any doubt, the ability of faith groups to autonomously regulate their *internal* affairs is predicated on collective religious freedom trumping individual liberty in this ambit. Clearly, if a minister to a Baptist congregation has an encounter and decides to join the Hare Krishna movement, he has every right to do so, but it would be onerous and unreasonable to require his religious organization to allow him to continue to keep his position whilst promoting his new world view, instead of the theology that he was appointed to teach.[51] In contrast, if an individual working in a secular context as a chemist or an engineer were to lose their job in consequence of such a conversion, they would rightly, and necessarily, be able to sue their employer.[52]

Having said which, even where religious groups are engaged in exclusively spiritual pursuits, if they are doing so in a manner which effects non-members, then collective religious freedom will ordinarily not be sufficient justification for infringing the legally protected interests of those external parties. For instance, if a group of Christian evangelists are using threatening language towards passers-by in a busy shopping street, and their messages are likely to cause «*harassment, alarm or distress*», then they will be committing a criminal offence, irrespective of whether their sole motivation lies in fulfilling what they believed to be a religious duty to preach the Gospel as they understood it.[53] In practice, courts will exercise caution in discerning whether the thres-

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[49] Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256.

[50] Church Buildings Council, «Equal Access to Church Buildings», Church of England, London, 2021, pp. I-XXVI.

[51] Zauzmer., J., «After 50 years, Hare Krishnas are no longer white hippies who proselytise in airports» *The Washington Post,* Washington, 27 October 2016, https://www.washingtonpost.com/news/acts-of-faith/wp/2016/10/27/after-50-years-hare-krishna-believers-are-no-longer-berobed-white-hippies-who-drum-up-donations-in-airports/

[52] Employment Rights Act 1996 Part X.

[53] Public Order Act 1986 s5.

hold for criminal liability has been attained, but if this is established, then it will be irrelevant whether the conduct was driven by spiritual ardour or personal malice.[54]

Even engagement in entirely spiritual ventures will not justify subjecting non-consenting fellow citizens to a detriment which interferes with their legally recognised rights. Therefore, if the activity of the faith group in question is not purely religious, it will be still harder to invoke collective religious liberty as a reason to allow negative repercussions to go unchecked.

Significantly, Law and Religion only exists as a discipline in the first place because organisations with spiritual purposes still need to function in the world and manage their earthly affairs.[55] Moreover, it is very common for faith groups to offer services to the public, or subgroups of the public, which are wholly or partly temporal in character, being the reasons behind wide ranging.

Some traditions consider service for its own sake to be a spiritual duty, and administer food, shelter or other help to non-members for this reason. For example, the *Langar,* or community kitchen within Sikhism, is one illustration of this.[56] Operating within gurdwara, langar offer meals to all irrespective of faith, caste, gender, ethnicity or other characteristics. The purpose of this practice is not to win converts, especially since Sikhism is not a proselytising faith, but to express universal charity and hospitality.

At the same time, other groups may well perceive facilitating practical aid as a means to attract new followers, or at least consider this to be a potential benefit of charitable activity,[57] while still others provide services primarily as a way of generating income and thereby funding their

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[54] D., Higgins., «Christian Street Preacher Found Guilty of Harassing Transgender Woman Has Conviction Quashed» *The Independent,* London, 9 March 2023, https://www.independent.co.uk/news/uk/crime/preacher-harassment-trans-woman-conviction-quashed-b2297563.html

[55] Sandberg., R., *Religion Law,* CUP, Cambridge, 2011.

[56] Singh., S., *Faith and Philosophy of Sikhism,* Kalpaz Publications, New Delhi, 2009, pag CCXXX.

[57] Toynbee., P., «The Christmas, Beware Evangelical Christians Bearing Gifts», *The Guardian,* London, 8 November 2018.

spiritual work.[58] For instance, it is common for church halls to be rented out to community groups for purposes such as exercise classes, carer and toddler sessions or even children's parties, and in these cases, the interaction is essentially a business transaction.

At one level, it should be noted that faith groups are as free to operate in the public or commercial sphere as any other legal entity, and third parties can decide whether to deal with them in much the same way as they can make choices about whether to donate money to medical research charities involved in vivisection, or shop in stores selling goods manufactured by exploited and economically vulnerable labourers. Nonetheless, the situation becomes more nuanced when faith groups are facilitating «public services» in the sense of cooperating with state authorities, at local or national level, because in this instance, those receiving them may be especially vulnerable, and may not have agency in practical terms to decide whether to accept or decline involvement.

Back in 2010, the administration of David Cameron had stressed what was labelled «Big Society», encapsulated in a speech delivered on that year. A key passage summed up the notion as follows:

«*where people in their everyday lives, in their homes, in their neighbourhoods, in their workplace, don't always turn to officials, local authorities or central government for answers to the problems they face, but instead feel both free and powerful enough to help themselves and their communities*».[59]

This ideology has been carried forward by subsequent Governments, and is predicated on the conviction that grassroots action is preferable to what is couched as «over reliance» on the state sector. Where provision is limited by fiscal factors or political policy-making, this philosophy calls upon the third sector to fill the gap, and is undeniable that faith based organisations make up a substantial part of the voluntary

[58] Church of England, «Parish Resources: Growing Income» https://www.parishresources.org.uk/growing-income/

[59] UK Government, «Big Society Speech» 19 July 2010 https://www.gov.uk/government/speeches/big-society-speech

sphere. In fact, according to some estimates, over one in four charities are linked to religion.[60]

Without doubt, the desirability of voluntary activity taking on the mantel of the State is a political question which is not part of the scope of our analysis, and is most certainly controversial for a variety of reasons, not all of them concerned with the involvement of faith groups in both the background and foreground. Commentators such as Lowndes and Pratchett argue that the «Big Society» was motivated by budget constraints, and lacked any coherent theoretical underpinning,[61] but the policy has been pursued for well over a decade, and there is no sign of a shift for the current executive. This means that in the short and medium term, the voluntary sector will continue to facilitate services which in previous post-war generations were the purview of the State, and the composition of this grouping has a very significant religious contingent. For example, in summer 2022 it was announced that sixteen faith groups would share £1.3 million of funding to help support communities.[62]

On the other hand, campaigning organisations such as the National Secular Society highlight the undesirable nature of faith groups proselytising when offering such services,[63] even though this point is relatively uncontested, given that the majority of religious organisations strongly endorse it.[64] In addition, guidance issued to local government organisations firmly conveys that public money may not be channelled into specifically religious purposes, and further emphasises the legal

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[60] Third Sector, «In-depth: Is Faith Still Relevant in the Charity Sector?» *Third Sector,* 21 April 2023 https://www.thirdsector.co.uk/in-depth-faith-relevant-charity-sector/management/article/1820424#:~:text=It%20found%20that%20more%20than,charities%20and%20490%20Hindu%20charities.

[61] Lowndes., V., and Pratchett., L., «Austerity, Localism and the 'Big Society'» *Local Government Studies,* 2012, vol. 38(1), pp. XXI-XL.

[62] HM Government, «16 Faith Groups to Share £1.3 million 'New Deal' fund to help support communities» 29 July 2022, https://www.gov.uk/government/news/16-faith-groups-to-share-13-million-new-deal-fund-to-help-support-communities

[63] NSS, «Faith Groups Shouldn't Proselytise When Providing Public Services» *National Secular Society,* London, 7 December 2017, https://www.secularism.org.uk/news/2017/12/faith-groups-shouldnt-proselytise-when-providing-public-services

[64] Bickley., P., «The Problem of Proselytism», Theos, London, 2015, pag IX.

position discussed above: namely that faith groups are subject to the same overarching Equality Laws as all other actors.[65]

We are at pains to stress that the political debate as to the appropriateness of the voluntary sector in general, and faith groups in particular, filling gaps in public functions, is beyond the scope of this article. However, what is pertinent to our discussion is the legal context which demands that religious groups in charge of public services must not only refrain from proselytising, but also from discriminating against service users on the basis of protected characteristics. Therefore, if a church or mosque chooses to run a group assisting individuals seeking work with their job search, aiding them in revising their CVs or practising interview skills, they cannot close their doors on someone because they are of a different faith, or are openly in a same sex relationship.

This is the unambiguous legal position, and neither academic nor social commentators are arguing for any revision or retreat. As noted, there are most certainly critics of the entire «Big Society» project, but for as long as faith groups are going to offer this type of public services, there is a solid consensus that they must do so in a non-discriminatory and human rights respecting manner.

All of which raises an interesting question. If celebrating religious marriages with Civil Law effects is a form of public service, why should there be any exception from the overarching prohibition on discrimination? In order to explore this, we shall now go back to the concept of conducting legally binding weddings as a public service, which we have previously introduced.

5. WEDDINGS AS A SPECIAL FORM OF PUBLIC SERVICE

At this point, we need to dig deeper into the assertion that «religious-civil marriage» (i.e. marriages carried out by faith communities with civil effects) are a form of public service, but one with a special, hybrid character. In order to do so, we must first summarise the legal framework

[65] HM Government, «Ensuring a Level Playing Field: Funding Faith-Based Organisations to Provide Publicly Funded Services», *Department for Communities and Local Government,* London, 2010, pp. II-III.

on matrimony, and the space within this occupied by Church of England marriage, as well as other forms of religious-civil marriage.

Marriage Law in England is a patchwork quilt, woven together by a series of historical accidents. In many respects, it is a paradigm example of the process described earlier, whereby the privilege once enjoyed exclusively by the Anglican community slowly trickled out to other societal groups.

Since the Middle Ages, marriage had been the province of the church courts, and the English Reformation simply transferred the responsibility to the newly created, or at least, newly independent, Church of England.[66] Marriage Law, and the other aspects of Family Law which flowed from it (e.g. relating to legitimacy of children), was regulated and adjudicated by the ecclesiastical jurisdiction, and as a result, the established Church, obviously, set the parameters for legally binding unions.

By the eighteenth century, however, the status quo was causing concern in a number of quarters. There were fears that vulnerable young people, especially heiresses, were being persuaded into clandestine marriages, and that this posed a threat to property, morality and individual welfare (essentially in that order of priorities).[67] This led to legislative action to tighten up on the administrative requirements, with an Act of Parliament stipulating that marriages must ordinarily be conducted by an Anglican minister in a church or chapel in order to be legally binding.[68] Special provision was made for the Jewish and Quaker communities, although Roman Catholics, Protestant Non-Conformists and other faith groups were forced to marriage in Church of England ceremonies if they wished to enjoy legal protection.

Probert proposes that commentators are sometimes apt to exaggerate the extent to which the 1753 Act represented a break with the past, on the basis that the Church of England had long implemented, as well as encouraged, formalities such as banns, and also that it should be

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[66] Kesselring., K., and Stretton., T., *Marriage, Separation and Divorce in England 1500-1700,* OUP, Oxford, 2022, pag VIII.

[67] Outhwaite., R., *Clandestine Marriage in England: 1500-1850,* Bloomsbury, London, 1995.

[68] Marriage Act 1753.

viewed within the wider processes of consolidation and formalisation in the Georgian era, when the broad trend was the metamorphosis of flexible custom into hard law.[69] This is a reasonable and well supported contention, and a critical observation for our purposes, as the Church was being tasked with an administrative, rather than a purely spiritual function. The statute represented a staging post in the development of modern bureaucratic institutions, and from its very inception, the system of Marriage Law which now exists saw the Anglican faith appointed to facilitate a public service, with dimensions stretching well beyond the religious.

Of course, it must be acknowledged that several realities may coexist, and a plurality of factors often converge to bring about legal change. It is not coincidental that Jews and Quakers were permitted to marry according to their own rites, a consideration proving that the religious implications of a church wedding were never eclipsed from view. Ousting Jews and Quakers from all legal protection was deemed unjust, but expecting Anglican clergy to preside at their nuptials was equally unpalatable. The conclusion was that members of these minority communities should be allowed to marry, but it was preferable for all concerned if they could do so according to their own traditions. The fact that this was a sticking point, and that special legal mechanisms were required to solve it, powerfully demonstrates that although performing marriages was a public service, it was certainly not one devoid of spiritual importance.

Over time, two further routes to a legally binding marriage were introduced: Civil Marriage, free from any religious character and conducted by a registrar, and marriages carried out by faith groups other than Anglicans, Quakers and Jews, where the community in question had chosen to opt-in to the system.[70]

In summary, marriage within the Church of England is one of four parallel tracks to achieve a legally binding marriage, and despite the fact

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[69] Probert., R., «The Impact of the Marriage Act of 1753: Was it Really 'A Most Cruel Law for the Fair Sex'» *Eighteenth Century Studies,* 2005, vol. 38(2), CCXLVII, CCLX.

[70] Garcia Oliva, J., and Hall, H., *Law, Religion and the Constitution: Balancing Beliefs in Britain,* Routledge, Abingdon, 2018, pp. CLXX-CLXXIV.

that this denomination might be argued to be offering a public service, it is by no means the only provider.

After this discussion, the reader is unlikely to be surprised about the calamitous present state of Marriage Law in England, which is the consequence of commendable, but higgledy-piggledy attempts down the centuries, to render the law more inclusive, without any systematic approach ever having been taken. The Law Commission has now proposed a series of radical reforms to consolidate and simplify the regime as a whole.[71] According to its report, the current model is both confusing and unduly bureaucratic, and as might be anticipated, the quadruple pathways to matrimony are fraught with opportunities for misunderstanding, especially since the formalities are distinct for each of the four routes.

We now need to take a step back, in order to understand how this whirlwind of provisions relates to our conclusion that 1) offering legally binding wedding ceremonies is a public service, for the Church of England as the established denomination, but also other groups conducting religious-civil marriages; 2) but it is a *special* form of public service with a dual religious and secular character.

To do this we must examine some of the detail of the Law Commission's findings, and to focus on three issues in particular: 1) The lack of flexibility in the accommodation of individual beliefs; 2) The place, rather than person centric approach, to the formalities; and 3) The large number of non-legally binding marriages.[72]

As previously pointed out, it is undeniable that undertaking responsibility for administering marriages is a public function, as this is a process which radically alters the status, rights and duties of the couple, in relation to matters as diverse to parental responsibility for children[73] or occupation of the family home.[74] It also has important implications for the rights of third parties with regard to issues such as inheritance if one

[71] Law Commission, «Celebrating Marriage: A New Weddings Law» HM Stationery Office, London, 2022.

[72] *Ibid,* pp. VI-X.

[73] Children Act 1989 s2(1).

[74] Family Law Act 1996 ss 30 & 33.

party dies without making a will.[75] Nevertheless, the triad of factors that we shall immediately explore illuminate why in addition to this public dimension, religious-civil marriages also have an inherently spiritual character.

5.1. **Accommodating individual belief**

The present law in relation to «Civil Marriage» was constructed with a high view of religion in mind, and imposes a rigid distinction between religious and secular marriage, as Cranmer outlines.[76] This has a number of serious drawbacks, all of which the Law Commission suggests should be remedied. First, it requires couples to make a stark choice between a civil or a religious ceremony, whilst a hybrid option of a civil wedding with some religious elements cannot be accommodated. In our view, it is difficult to find any rational justification for this restriction.

Moreover, the fact that this was recognised as a serious issue by the Law Commission, following a public consultation exercise should not be underestimated. Many citizens see marriage as an occasion upon which they wish to express their own spirituality, even if they do not choose to participate in organised religion. As the work of Beaman demonstrates, not attending collective worship regularly, and not subscribing to a formal set out doctrines, does not equate to individuals identifying as atheist or humanist. [77]

Citizens without allegiance to either a faith group, or a secularist/humanist organisation, are arguably the most disempowered in relation to the assertion of their Article 9 rights, as they have no group with which to identify, nor supporters to lobby for their cause. Therefore, a legal framework which goes out of its way to further marginalise this section of the population is clearly unjust.

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[75] Intestates Estate Act `1952.

[76] Cranmer., F., «Civil Law, Religion and Marriage in the United Kingdom: A Long Read» *Law and Religion UK* 11 November 2020, https://lawandreligionuk.com/2020/11/11/civil-law-religion-and-marriage-in-the-united-kingdom-a-long-read/

[77] Beaman,. L., «A focus on getting along: respect, caring diversity» *Argument* (2016) vol. 6(1) pag LXXXI.

At least, the fact that lack of accommodation for them is currently recognised in relation to Wedding Law, shows that celebrating these ceremonies is not a straightforwardly administrative activity, akin to making a will or completing a passport application, even in the eyes of those who do not identify with a religion. If the social institution of marriage in broad terms is still understood as having a spiritual character, then *a fortiori*, weddings conducted by faith groups, including the established Church, must necessarily be perceived both internally and externally as a religious occasion.

5.2. **A Place, rather than Person Centric Approach, to the Formalities**

Civil marriages can only take place within indoor, registered venues, and religious weddings (aside from those of Jews and Quakers) must be celebrated within an Anglican church or chapel, or in the case of other «opt-in» weddings a building registered for religious worship[78] Historically, this regime was constructed largely to clamp down upon secret marriages, making it more difficult for young people to successfully elope and marry without parental consent, and for nefarious individuals to commit bigamy with impunity, but the restrictions make little sense in an era of digital record keeping and communication.

In addition to this, it has the undesirable unintended consequence of preventing faith communities from conducting legally binding weddings if they do not have a building to register for public worship, either because their tradition involves rituals that take place outdoors or in private homes, or due to the lack of numbers or economic resources to make this viable.[79] This alone would justify radical revision, but a further difficulty is that these unnecessarily restrictive rules artificially reduce the number of available wedding venues, thereby rendering Anglican parish churches, especially those with spectacular historical architecture, more desirable and desired by those looking for a picturesque or spiritually meaningful setting.

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[78] Law Commission, «Celebrating Marriage: A New Weddings Law» HM Stationery Office, London, 2022, VI-X. See also, Marriage Act 1949 ss41-42 and the Marriage (Registration of Buildings Act) 1990 s1(1).

[79] Proct., F., *Guide of the Modern Witch*, Guillame, Guilllemet and Filles, London, 2018, pag LXIX.

The Law Commission contemplates licensing individuals to carry out legally binding weddings, as well as removing the complex and somewhat unyielding requirements as to location. This may also assist in the separate problem of confusion for some couples about the status of their religious marriage, which also strengthens our conclusion of the mixed nature of marriage, as a public service and a religious institution. Concerningly, at present it is entirely possible for one couple to marry in a mosque or independent church and have a legally binding wedding, whilst their friends or relatives who are also coreligionists celebrate a religious only ceremony in the same tradition, in what appears to be a very similar mosque or church ten minutes drive away. This brings us naturally to another important issue, which is the existence in England of a large number of non-legally binding marriages.

5.3. **The large number of non-legally binding marriages**

The third factor of the non-exclusive public service nature of marriage, whether or not is Anglican, is the existence of a large number of non-legally binding marriages carried out by faith groups, particularly, but by no means exclusively, within Islam.[80] Sometimes this is done deliberately, as one or both parties may prefer to have any disputes on separation resolved exclusively by religious courts, family representatives or community elders. Needless to say, where this is a conscious choice, it is entirely legitimate, and no different from any other couple choosing to cohabit as far as Civil Law is concerned, as opposed to taking on legally enforceable obligations to one another.

The difficulty is that on many cases there is genuine confusion about the status of the union, and parties may not discover their economic vulnerability until the relationship breaks down or one of the partners dies.[81] Cohabitees have very few rights in English law, the consequences of such a revelation may be catastrophic, and in the worst case scenario, a spouse (usually the wife) may find herself trapped in an abusive relationship, because leaving would render her homeless and wi-

[80] Fairbairn., C., «Islamic Marriage and Divorce in England and Wales» House of Commons Briefing Paper, London, 18 February 2020.

[81] Bennett., Y., *Women and Religion in Britain Today-Belonging,* Vernon Art and Science, Wilmington, 2023, pag IC.

thout an income stream. The Law Commission suggests, in our view appropriately, legal reforms to ensure that a greater proportion of Islamic and other religious marriages are also binding in Civil Law, whilst abolishing the four track system and adopting a single set of administrative requirements.

There are academic, as well as political debates, to be had about whether this strategy alone will be effective in tackling a wider problem, and some of these considerations are relevant to our discussion. On the one hand, the prevalence of religious only Muslim marriages illustrates that for a significant part of the English population, getting married is part and parcel of the practice of their faith, and indeed an expression of their culture. In a context in which sexual, and even intimate emotional relationships, between two unrelated persons of the opposite gender are not permitted, the purpose of a wedding is not simply, or even primarily, to protect the legal and economic interests of the parties[82]. As a result, undoubtedly, presiding at marriages is not a purely administrative function.

Yet another side of the coin also raises the question of whether performance of marriages which have effects in Civil Law is, in fact, both an administrative and a public service. One of the reasons for concern that an overhaul of Wedding Law will not, in and of itself, solve the problem of unregistered Islamic marriages is that whatever shape the hypothetical new legal provisions were to take, they would need to comply with certain formalities, and these would have to be backed up by coercive sanction imposed on the person responsible for their celebration.

Furthermore, critically, any system of Family Law which aims to comply with core human rights has, of necessity, to ensure that vulnerable people are protected from abuse,[83] and in particular that there are adequate safeguards against forced marriage; it is for this reason that such a practice is now a criminal offence in England (whether or not the ceremony has or would have had Civil Law effects).[84] In addition, it is essential for both citizens and the State that accurate and reliable records of marriages are kept, so that it can be readily established whether or not

[82] Maqsood., R., *Islam,* Pearson, London, 1995 pag CXXXVI.
[83] Echr Article 8.
[84] Anti-Social Behaviour Crime and Policing Act 2014 s121.

a couple are legally husband and wife (or husband and husband/wife and wife, as the case may be). This means that individuals who officiate at legally binding marriages must be subject to penalties should they fail to comply with the necessary requirements in respect of formalities.

It remains to be seen whether some Muslim clergy, and indeed ministers in other faiths, will demonstrate any reluctance to take on this burden. The truth is that whilst the overall legal framework is in disarray at present, the process whereby local faith communities can opt-in to carry out wedding ceremonies with effects in Civil Law is in reality not all that onerous. This corner of the present model is actually quite well ordered and managed, including a step by step guidance set out on a government website, and for a group which has a building registered for public worship, completing the forms to enable a minister or other chosen individual to become an authorised person to officiate at weddings is comparable to filling in a passport application.[85]

Despite the simplicity of these legal requirements, there is, as discussed, a recognised concern of mosques and other faith groups declining to opt-in.[86] This might be because the comparative ease of the process is simply not widely known, or it could also be due to a lack of inclination on the part of the clergy or trustees concerned. However, any assumption of incapacity would be indefensibly patronising, and in the absence of available empirical work disclosing the underlying reasoning, we cannot pronounce on what this truly is. This being the case, we must allow for the possibility that taking on responsibility for compliance with state law is a burden, that at least some people, *choose* not to shoulder.

For non-Anglicans, conducting religious marriages does not need to equate to assuming the administrative task of satisfying a plethora of secular formalities, and it may be that some communities would like to keep it that way. For the reasons discussed, the Law Commission has made a convincing case that it would be desirable to increase the proportion of religious marriages which have effects in Civil Law, but the

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[85] HM Government, «Authorised Persons Certificate of Appointment» https://www.gov.uk/government/publications/authorised-persons-certificate-of-appointment

[86] Sandberg., R., *Religion and Marriage Law: The Need For Reform,* Bristol University Press, Bristol, 2021.

freedom of citizens to have religious only weddings if they wish, appears set to continue.

6. CONCLUSION: CELEBRATION OF MARRIAGE BY THE CHURCH OF ENGLAND AS A *SPECIAL* PUBLIC SERVICE

Where then does all of this leave us? We have observed that: 1) The Church of England has maintained its traditional refusal to conduct same sex marriages for a decade since the Marriage (Same Sex Couples) Act 2013; 2) The performance of public services by faith communities ordinarily demands compliance with secular norms in respect of human rights and equality; and 3) There is a public service dimension to the solemnisation of legally binding marriages as carried out in the established Church, in light of: a) The universal right to a church wedding for anyone wishing to enter into a heterosexual union; and b) The administrative burden in respect of compliance with formalities, which applies to *all* forms of civil-religious marriage.

So, what gives? At first blush appears to be a tension between the public service character of officiating at marriages on the one hand, and the exclusionary stance of the Church of England on the other, because in most circumstances public services are only governed by secular norms. The complication here lies in the hybrid nature of civil-religious marriage, as both a public service and a rite of a faith community.

We have been at pains to stress that the entire, creaking machinery of Marriage Law is in desperate need of replacement, as the Law Commission's findings attest.[87] That said, it is important to highlight that this institution is a statutory independent body, not a branch of the executive, and certainly not an entity with any legislative capacity.[88] Its recommendations may never become law in their present form, or indeed at all. Nevertheless, irrespective of this, its research has demonstrated serious flaws in the model operating at the time of writing, and also the degree to which these are rooted in the religious and social character of marriage in the understanding of many disparate groups of citizens.

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[87] Law Commission, «Celebrating Marriage: A New Weddings Law» HM Stationery Office, London, 2022.

[88] Law Commission, «About Us» https://www.lawcom.gov.uk/about/

A wedding is not perceived straightforwardly as a process whereby which two people undertake a defined set of rights and responsibilities, and effect a change of legal status. It is an occasion which for many people has a profound spiritual or religious dimension, and whatever shape the law takes, it needs to adapt to this reality.

The concerning picture in respect of Islamic marriage in England shows us that any attempt to hive off religious marriage and marriage in Civil Law will give rise to grave social problems. While the optimal manner to address the current challenges faced by the Muslim community is the subject of debate, the need to protect vulnerable people, and especially women and children, demands that we find a way to reduce the percent of unregistered, religious only Islamic marriages happening in England. Unquestionably, the last thing that we need to do is to replicate, rather than solve, these problems.

Crucially, as we have stated throughout this contribution, administering *any* form of civil-religious marriage is a public function, and for this reason, it would be difficult to justify imposing human rights and equality norms on Church of England marriages (due to its established position), without subjecting all other forms of civil-religious marriage to the same rigors. This would be untenable in terms of religious liberty, and would also drive many faith communities away from conducting civil-religious marriages, seeking refuge in religious only ceremonies with no external regulation, the exact opposite of what public policy is intending to achieve.

Marriage is a hybrid institution, and its dual character means that it cannot be placed in the same category as other public services carried out by faith groups, even where Anglicanism in England is concerned. Its spiritual and temporal halves need to coexist, and neither should be permitted to extinguish the other. In striking the balance between religious liberty and other interests, context is key.

For these reasons, the established denomination must be allowed to be the final arbiter of its own destiny in terms of its dogmatic boundaries, but autonomy does not amount to freedom of disapprobation or public condemnation. If Wedding Law is successfully reformed to render couples more able to choose a ceremony and venue tailored to their beliefs and values, the Church of England may well find itself an

unpopular option if it continues excluding a marginalised group, especially when this conflicts with majority opinion amongst its own clergy, faithful and the wider society.[89]

The same overarching principle, of course, applies to all other faith groups: the religious liberty which is preserved in treating marriage as a uniquely dual institution comes with a price tag, in the sense that freedom to make choices does not amount to freedom from facing consequences for those choices. Religious communities may look to their own dogma in deciding whom to admit to rites of marriage, even when these have effects in Civil Law, on the basis that the State cannot regulate or adjudicate on theological questions, but it remains expedient that civil-religious marriages are maintained as a part of the legal framework. Yet, if doctrines of any given group are repugnant to the values of the citizenship, then they can expect to have a dwindling number of takers.

The law has a crucial role in regulating human rights and equality, especially where there are competing claims to be managed, but it is not the only societal mechanism at work. Religious communities are not monolithic when it comes to ideas and values, and evolve as a result of the flow of cultural influences in both directions. The State can, and should, set the parameters governing the public, administrative requirements for marriage, and must draw some firm lines, e.g. setting minimum age requirements to prevent the sexual, emotional and financial abuse of minors.[90] Meanwhile, faith groups may manage the spiritual and dogmatic aspects of their practice, but should anticipate the judgement of both their members and neighbours in so doing.

[89] Topping., A., «Most Church of England Priests Back Gay Marriage, Survey Finds» *The Guardian,* 30 August 2023, https://www.theguardian.com/world/2023/aug/30/majority-of-church-of-england-priests-back-gay-marriage-survey-finds.

[90] Marriage and Civil Partnership (Minimum Age) Act 2022.