The Church of England, Conscience and Legal Change: Divorce, Remarriage and Same Sex Relationships 1857 - 2013

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Introduction

This article looks at key legal changes affecting divorce, remarriage and same sex relationships in English law between 1857 (a major turning-point for divorce law) and 2013 (when same-sex marriage legislation was passed).[1] It considers their impact on the Church of England and their implications for the use and meaning of the concept of conscience. Its central research questions are, what is the place of conscience in these changes, does this differ in the secular and ecclesiastical spheres, and what changes are apparent in the way in which conscience is understood? The changes discussed here undoubtedly challenged the doctrine and self-understanding of the Church of England but they also reflected shifting societal and ecclesial opinion, with ecclesiastical unity at least increasingly rare. The article suggests that the legal and conceptual changes examined below contributed to a felt need for self-reform in the twenty-first century Church of England.

The Church of England was not the only denomination in which divorce, remarriage and same-sex partnerships caused consternation. However, between the sixteenth-century protestant Reformation and the creation of the General Synod (1969), almost all Church of England law was parliamentary law. The Church had no vehicle for the revision of its canon law.[2] Bishops sat, and still sit, in the Upper House of Parliament. The Church's courts were part of the judiciary of the realm with jurisdiction over marriage and divorce. This legal context brought Church of England concerns fully into the realm of public procedure when law concerning marriage was created, debated or revised.

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1 'Relationships' is used here to denote the legally distinct civil partnerships and same sex marriage, both of which became legal in England and Wales in the twenty-first century.

2 The Convocations of Canterbury and York debated and enacted canon law with royal permission. The Convocations were prorogued against their will in 1717 and not allowed to transact business again until 1852 (Canterbury) and 1861 (York). They continue to have residual existence: the Upper and Lower Houses of the Convocations of each Province comprise the House of Bishops and the House of Clergy of the General Synod.

The article begins with a summary discussion of the concept of conscience as its meaning demonstrably persisted around the time of the publication of the *Book of Common Prayer* (1662). The article then proceeds chronologically to look at the major divorce and marriage reforms of 1857, 1907 and 1969, and the civil partnership and same-sex marriage laws of 2004 and 2013. These legislative changes demonstrated the Church's lack of an objective, agreed body of doctrine out of which to speak with a united voice. They showed the ecclesial and secular understandings of marriage diverging to the point of genuine legal conflict between statute and canon law. They raised the connected questions of the Church's relationship to the state and its own identity. Concomitantly, however, the article shows the way in which the concept of conscience shifted during these legal changes. It concludes that the relationship between Church and state in England is, at least in relation to marriage law, one of continued negotiation, while the understanding of conscience could usefully become that of a faculty brokering principled compromise.

Section 1: Conscience

'Conscience' has its etymon in the classical Latin word, *conscientia*, 'holding of knowledge in common'. Its primary senses involve 'consciousness of morality or what is considered right' but it also denotes the 'practice of, or conformity to, what is considered right or just, equity'.[3] It is a faculty of discernment and alignment, keeping a person true to the moral dictates it perceives.

In Joseph Hall's *Susurrium Cum Deo, Soliloquies or Holy Self-Conferences of the Devout Soul* (1651), what is considered right resides with God. Conscience is God's 'Officer under thee, and only commands for thee'.[4] To go against conscience is to go against God whom conscience serves:

O thou, that only art greater than my Conscience, keep mee[*sic*] from doing ought against my Conscience: I cannot disobey that but that I must offend thee.[5]

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3 *OED*, 3rd edn, available at <http://www.oed.com.ezproxy2.londonlibrary.co.uk/view/Entry/39460?rskey=cF9QPD&result=1&isAdvanced=false#eid> accessed 13 May 2019. The last meaning given above is the third in the *Dictionary*.

4 Joseph Hall, *Susurrium Cum Deo, or Soliloquies or Holy Self-Conferences of the Devout Soul* (London, 1651), Soliloquy LI, 184. Individual responsibility for an erring conscience comes on p 186. Hall was successively Bishop of Exeter and Norwich, deprived of his see during the Interregunum.

5 Joseph Hall, *Susurrium Cum Deo*, 186-87.

Conscience is not infallible, although it is the individual's responsibility if conscience is corrupted

with the Bribes of Hope, with the weake feares of losse, with an undue respect of persons, with powerfull importunities, with false witnesses, with forged evidences, to pass a wrong sentence upon the person or cause.[6]

Nevertheless, conscience exists to discern what is objectively right and it should be followed.

This concept appears in contemporary legal proceedings. In 1594, the Court of Chancery was described as 'an ancient court of conscience'. Conscience was recognisably liable to err. In the Michaelmas terms of 1596 and 1598, it was asserted in Chancery that, 'though the court [will] examine not a judgment [at common law], yet they will examine the corrupt conscience of the party'.[7] In 1615, the Earl of Oxford's case, concerning title to property, claimed parity between conscience, equity and the law of God:

(1) The Law of God speaks for the Plaintiff. Deut 28
(2) And Equity and good Conscience speak wholly for him.[8]

In giving judgment, Ellesmere, C., enunciated the moral principles underlying Chancery. The Chancellor's role

is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law.[9]

He admitted that statute law endeavoured 'to meet with the corrupt Consciences of Men' and that common law had equitable concerns, admitting 'no Contract to be good without *quid pro quo*'. Nevertheless, 'Chancellors have always corrected [...] Consciences'.[10]

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6 Joseph Hall, *Susurrium Cum Deo*, 187.

7 WH Bryson (ed), *Cases Concerning Equity and the Courts of Equity 1550-1660*, 2 vols (Selden Society: London, 2001) i 258. For the description of Chancery as 'an ancient court of conscience', see Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate: Farnham and Burlington, VT, 2001) 80.

8 *The Earl of Oxford's Case in Chancery* (1615) 21 ER 485 (486). It was a curse upon the people to 'plant a vineyard, but not enjoy its fruit', Deuteronomy 28:30.

9 *The Earl of Oxford's Case*, 486.

10 *The Earl of Oxford's Case*, 486.

Ellesmere C. sought to assert the importance of Chancery in English law, but he also underlines the integration of conscience, religious belief and moral principle. Yet, within a decade of the Earl of Oxford's case, legal reasoning would be looking elsewhere for principles on which to base a ruling. In *Mayor of London v Bennet* (1631) the court turned to precedent. The case concerned an injunction against lawsuits by bankers who had lent money to the King. The Defendant offer'd divers Reasons against the Injunction, but this Court liked of none, there being a Precedent where, in the like Case, an Injunction was granted, and this Court ordered an Injunction.[11]

This and like cases do not indicate an instant and complete turning from conscience to precedent. In 1662, Thomas Fuller insisted that the principle employment of the Chancellor 'is to mitigate the rigour of the Common Law with Conscientious qualifications' for 'high justice would be high injustice, if the bitterness thereof were not sometimes seasonably sweetened with a mixture of equity'.[12] Nevertheless, the courts were moving away from a view in which conscience directed right behaviour in accordance with revelation. In its place would come both precedent and equity unconnected with this understanding of conscience. Conscience would come to be seen as a personal guide to moral action which might, or might not, be founded in religious belief. The explicit connection between the concept of conscience and the divine had not, however, been completely abandoned when, in the nineteenth century, Parliament debated divorce reform against the received understanding of marriage.

Section 2: 1857

The historic ideal of Christian marriage was the voluntary union for life of one man and one woman, to the exclusion of all others.[13] This reaches back to the words of Jesus: 'Whoever divorces his wife and marries another commits adultery against her; and if she divorces her husband and marries another, she commits adultery.'[14] Jesus's teaching is surprising, even

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11 *Lord Mayor of London v Bennet*, 21 ER 502; (1631) 1 Reports in Chancery 44.

12 Thomas Fuller, *History of the Worthies of England* (1662) 3 vols (London, 1840), i.23.

13 Lord Penzance, *Hyde v Hyde* [1865-69] LR 1 P & D 130 (133).

14 The Gospel of Mark, Chapter 10, verses 6-12: 6 'from the beginning of creation, "God made them male and female". 7 "For this reason a man shall leave his father and mother and be joined to his wife, 8 and the two shall become one flesh." So they are no longer two, but one flesh. 9 Therefore what God has joined together, let no one separate.' 10 Then in the house the disciples asked him again about this matter. 11 He said to them, 'Whoever divorces his wife and marries another commits adultery against her; 12 and if she divorces her husband and marries another, she commits adultery.' *The Holy Bible*, New Revised Standard Version (Cambridge University Press: Cambridge, 2007; rpt 2011). All biblical quotations are from this version.

in the slightly softened of the Gospel of Matthew: 'whoever divorces his wife, except for unchastity, and marries another commits adultery'.[15] First century Jewish and Roman societies accepted divorce within an already normative expectation of monogamy. Married Christians seem to have separated, divorced and sought remarriage during the lifetime of the divorced spouse from the earliest days of the faith.[16] Seen in the context of Jesus' prioritising of love and generosity, however, his original teaching may intentionally have opposed contemporary male hierarchy, not by affirming indissoluble marriage but by rejecting the arbitrary dismissal of women who were now to be seen as equals in discipleship.[17] The prohibition on divorce, however, became one of the defining marks of the emerging Christian community.

In S Paul's teaching, the rejection of divorce means that married believers should not divorce and, if they separate, should remain unmarried. The rule against divorce carried more weight than differences of belief; Christians were to remain with their non-Christian spouses where the spouse was willing.[18] As Christianity spread and acquired its own marriage rites, the divorce bar remained. Early Western and mediaeval nuptial masses included Matthew 19:1-6 which concludes, 'Therefore what God has joined together, let no one separate.'[19] In Thomas Cranmer's non-eucharistic English liturgy of 1549, the priest joined the couple's hands while reciting Matthew 19:6, a practice retained in the Church

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15 Matthew 19:9. The exception should, however, be read in the light of Jesus' words in Matthew 5:32: 'anyone who divorces his wife, except on the ground of unchastity, causes her to commit adultery; and whoever marries a divorced woman commits adultery'. This reinforces the Marcan stance and arguably strengthens it in favour of the position of women, for the husband's act in divorcing a chaste wife makes her an adulteress, perhaps by reputation if not by necessity if she is to survive without the economic support of a spouse. The reader is reminded of Matthew 1:19-25 in which Joseph, being just, seeks a quiet separation which will not brand Mary an adulteress but is prevented even from this by the angel of the Lord.

16 I Corinthians 7:15 would seem to imply at least the possibility of remarriage.

17 In, for example, Matthew 19:19, 'You shall love your neighbour as yourself' and Matthew 20:1-16, the parable of the workers in the vineyard. See Don S Browning, 'Family Law and Christian Jurisprudence' in *Christianity and Law*, edited by John Witte, Jr, and Frank S Alexander (Cambridge University Press 2008) 170-172.

18 See I Corinthians 7:10-13. See also Wayne A Meeks, *The First Urban Christians* (New Haven and London: Yale University Press, 1983, second edition 2003) 101-102.

19 On this, the early and mediaeval rites, see Paul Bradshaw (ed), *A Companion to Common Worship*, 2 vols, Alcuin Club Collections 81 (SPCK: London, 2008) 180-183. The gospel passage is: 1 When Jesus had finished saying these things, he left Galilee and went to the region of Judea beyond the Jordan. 2 Large crowds followed him, and he cured them there. 3 Some Pharisees came to him, and to test him they asked, 'Is it lawful for a man to divorce his wife for any cause?' 4 He answered, 'Have you not read that the one who made them at the beginning "made them male and female", 5 and said, "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh"? 6 So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.'

of England's *Common Worship* rite (2000).[20] In the *Book of Common Prayer*, the bride and groom are asked whether each takes the other 'as long as ye both shall live', a formula also remaining in the modern rites of both the Roman Catholic Church and the Church of England.[21] Marriage was, and liturgically remains, lifelong.

Traces of the original radicalism of this can be discerned in the homily for marriage provided in the *Book of Common Prayer*. The homily expounds three Biblical passages for bride and groom in a carefully balanced portrayal of mutual responsibility. A wife is to reverence and submit to her husband, but such a husband loves her as Christ loves the Church, giving his life for her, loving her as he loves himself and leaving his birth family for her. He is to honour her. She, by her behaviour, may bring him to the obedience of faith. Such an equipoised reading, however, did not become normative in English legal and social history, in which women's subordination and wifely obedience were the predominant narratives, and the permanence of any particular marriage became paramount.[22] Legally sanctioned separation, *a mensa et throno* (from bed and board) was available, but not divorce *a vinculo* which dissolved the marriage bond and enabled remarriage.[23] Only with wealth and some controversy was it possible to go further than the ecclesiastical courts allowed.

The cuckolded rich husband who sought remarriage could prosecute a third, adulterous, party for 'criminal conversation' (a suit for damages) after securing separation *a mensa et throno*. If successful, this enabled him to procure a private Act of Parliament dissolving his marriage and he could remarry. Yet the intervention of Parliament in a matter which still belonged to the Church and the Church courts was contentious. In 1669, Lord Roos sought a private parliamentary act and Lord Bristow, opposing, said, 'An essentiall right of the Church of England is in danger of being overthrowne by it, which is to determine in matters ecclesiastical'.[24]

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20 The modern rite uses the last sentence of the verse: 'Those whom God has joined together let no one put asunder.' See <https://www.churchofengland.org/prayer-and-worship/worship-texts-and-resources/common-worship/marriage#mm095> accessed 22 January 2021.

21 The modern rites have, 'as long as you both shall live.' See <https://www.churchofengland.org/prayer-and-worship/worship-texts-and-resources/common-worship/marriage#mm095> accessed 17 January 2021, and *The Order of Celebrating Matrimony* 2016) available at https://litpress.org/Products/GetSample/4641/9780814646410 accessed 17 January 2021, 15.

22 See Lawrence Stone, *The Family, Sex and Marriage in England 1500 – 1800* (Weidenfeld & Nicolson: London, 1977) 262 on this at and after the Reformation.

23 See Ann Sumner Holmes, *The Church of England and Divorce in the Twentieth Century: Legalism and Grace* (Routledge: New York and London, 2017) 5-6.

24 An account of the debate can be found in FR Harris, *The Life of Edward Montagu, K.G. First Earl of Sandwich (1625-1672)*, 2 vols (John Murray: London, 1912) ii 327.

This, then, was the position until the passage of the Matrimonial Causes Act in 1857 when 'matters ecclesiastical' became matters for the state. The Act was a watershed for the Church of England. It ended its courts' jurisdiction over marriage and divorce, save for the granting of marriage licences. It made statutory provision for divorce and the remarriage of divorcees. It caused bishops, clergy and laity alike to search their Bibles and their consciences. The changes raise questions, which this article will continue to trace, about the Church of England's relationship with the state and the proper foundation for claims of conscience. They set the scene for subsequent debates over marriage, divorce and partnership. [25]

The 1857 Act provided for husband or wife to sue for divorce, now granted by the new secular Court of Divorce and Matrimonial Causes. Men could divorce on the grounds of a wife's adultery, women on the grounds of a husband's adultery together with, for example, cruelty, incest, bigamy or desertion.[26] Those able to remarry could do so in Church using the *Book of Common Prayer* marriage service. The Act enabled those without the wealth of a Lord Roos to avail themselves of what was previously possible only for the rich.

Many bishops in the House of Lords were persuaded by the Gospel of Matthew's exceptions to Jesus' strict stance on divorce and voted in favour of the legislation.[27] However, the prior existence of parliamentary remarriage also put the bishops in a difficult position. Lord Hardwicke's Marriage Act (1753) required all marriages other than those of Quakers and Jews to be solemnised in Church of England churches using the *Book of Common Prayer*. The Church was therefore already experiencing precisely the conflict of its own doctrine with the practice required of it by the state which the 1857 Act brought to the fore. This may explain why the Bishop of London argued that divorce and remarriage by private parliamentary act 'was likely to do far more harm than good and an

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25 The 1857 Act was one of a number of sweeping legal reforms affecting the Church at a time when the Oxford Movement's attempts to reassert the catholicity and consequent independence of the Church also raised questions about the place of the Church of England in English polity. See Diarmaid McCulloch, *A History of Christianity* (Allen Lane, Penguin Books: London, 2009) 840-41.

26 See Ann Sumner Holmes, *The Church of England and Divorce in the Twentieth Century* (Routledge 2016) 7.

27 The qualification is found not only in Matthew 19:9 but also in Matthew 5:32: 'I say to you that anyone who divorces his wife, except on the ground of unchastity, causes her to commit adultery'. HL Deb 19 May 1857 vol 145 c533, the Duke of Argyll: 'seven right rev. Prelates had now given their opinions on this question, a majority of whom were in favour of the course indicated by this Bill, and among those who opposed it, the right rev. Prelate, the Bishop of Oxford, had changed his position. In the last debate the right rev. Prelate stated his opinion that the words of our Saviour gave express sanction to the dissolubility of marriage.' Available at <http://hansard.millbanksystems.com/lords/1857/may/19/second-reading> accessed 22 January 2021.

opportunity now opened of satisfactorily settling the question upon an intelligible and religious basis'.[28]

Bishops may also have supported the Act because they saw the Church of England as one Protestant church among many others which did permit divorce. Such Christian precedent arguably sanctioned a matter which undoubtedly touched conscience. The Bishop of London, 'in his conscience' was prepared to maintain 'the universal opinion of Protestant Churches that in some grave cases marriages might be dissolved'.[29] The Bishop of Oxford, however, fearing that the dissolubility of marriage could 'change the whole moral aspect of the nation', begged the House to set aside 'those disputed and difficult questions which stirred the consciences of men'.[30] The Bishop of Salisbury, opposing, and preferring the Gospel of Mark over that of Matthew,

believed that the testimony of our Blessed Lord on this subject was, when well considered, distinct and emphatic, and that no sanction was given in the New Testament to divorce.[31]

He hoped the House would remember that the Church considered marriage indissoluble 'and that questions of conscience must arise amongst the clergy, and that they had a just claim upon their Lordships to respect their scruples'.[32]

The 1857 Act respected these conscientious scruples.[33] Ministers of the Church of England and Ireland were not compelled to solemnise the marriage of divorcees, nor were they to 'be liable to any Suit, Penalty, or Censure for solemnizing or refusing to solemnise the Marriage of any such Person'.[34] In an equitable balancing of rights before the law, divorcees could still marry in the parish church as scrupulous clergy were required to permit another cleric 'en-

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28 HL Deb 19 May 1857 vol 145 c553. Available at <http://hansard.millbanksystems.com/lords/1857/may/19/second-reading> accessed 22 January 2021.

29 HL Deb 19 May 1857 vol 145 c534.

30 HL Deb 19 May 1857 vol 145 cc530-31.

31 HL Deb 19 May 1857 vol 145 c517. The Bishop of Salisbury, raising the spectre of Jesus' original radicalism, also objected to the legislation on the grounds of its inequality: 'an indulgence should not be allowed to the man which was denied to the woman' (HL Deb 19 May 1857 vol 145, col 518).

32 HL Deb 19 May 1857 vol 145 c520.

33 See Matrimonial Causes Act 1857 s 2 on the ecclesiastical courts. Once barristers and advocates could appear in the Divorce Court created by the Act, Doctors' Commons, already somewhat disempowered by the 1857 Court of Probate Act, was further weakened. See RB Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts 1500-1860*, Cambridge Studies in English Legal History (Cambridge University Press: Cambridge, 2006).

34 The Irish Church was not disestablished until 1869, so the provisions of the 1857 Act also applied in Ireland.

titled to officiate within the Diocese in which such Church or Chapel is situate, to perform such Marriage Service in such Church or Chapel'.[35]

These debates assumed an understanding of conscience as a moral faculty belonging to individual persons ('questions of conscience must arise amongst the clergy') yet concerned with the common good ('the whole moral aspect of the nation') and founded upon divine teaching (what was, or was not, 'given in the New Testament'). They point to a common moral norm on which decisions of conscience were to be based and on which the law of the Christian commonwealth was founded. This understanding was at the heart of post-Reformation England: the sacred and the secular community were one and the same, governed by the same earthly law which gave expression to divine law and made by the Sovereign in Parliament, itself a body of laymen and ecclesiastics. The divine law was also to be found written on the conscience of an individual who could thus assess the conformity of state law to the precepts of the divine. In this polity, to go against the law of the state was to go against divine law which was also to go against one's own conscience. In the sixteenth century Church of England, little weight was given to private judgments of conscience as opposed to the public conscience as expressed in law.[36] But by the nineteenth century, this consensus was fracturing. Individual bishops differed publicly about the interpretation of the divine word on which the law was to be based. The debates prior to the 1857 Act concerned not only the remarriage of divorcees, but also the potential unravelling of the Elizabethan Settlement.[37] A pluriform understanding of divine law was an insecure footing for congruence in the law of Church and state. When these laws differed, obedience to both would become increasingly difficult.

In such a context, conscience often spoke with a conservative voice, defending ideological uniformity. The forthcoming distinction between state and church law on marriage and divorce was noted in both Houses of Parliament. The Bishop of Salisbury thought it would be

impossible to reconcile what would then be the municipal law on this subject with the law of the Church. He (the Bishop of Salisbury) besought their Lordships well to weigh this, and not to place men like himself and the clergy, who were bound to set an example of loyal obedience to the laws of their country,

35 Matrimonial Causes Act 1857 ss 57 and 58.

36 See Ethan H Shagan, *The Rule of Moderation: Violence, Religion and the Politics of Restraint in Early Modern England* (Cambridge University Press: Cambridge and New York, 2011) 142-143.

37 See Benjamin J Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (The Belknap Press of Harvard University Press: Cambridge, MA and London, England, 2007) especially pages 27, 50, and 103.

in a position where it would, he feared, be most difficult to reconcile the conflicting claims the law of God and the law of man would have upon their consciences.[38]

In the House of Commons, Mr Gladstone, also opposing the legislation, alleged much the same but for the laity:

we of the laity have consciences and belong to the Church, as do the clergy. We look to the law of that Church as founded upon something else than the dicta of the House of Commons or the House of Lords.[39]

Gladstone's presumption that the claims of conscience rested upon allegiance to a higher authority above that of Parliament is as explicit as his concern that conscience would be differently governed for all those, clergy and laity, obeying 'the law of the Church' as against those who followed only 'municipal law'. Equally revealing, however, is Mr Walpole's assertion against Gladstone, that, were the Act not to contain specific protection for the clergy, it would

put them in a position in which no man ought to be put,—viz., that of finding himself bound to violate the law of the land, or to violate what he believes to be the law of God.[40]

Conscientious choice, for Walpole, was a matter for the individual who, possessed of an independent conscience as a guide to right and wrong, should be able freely to choose how to act. For Gladstone, however, the individual is impossibly compromised once law no longer embodies the transcendent basis which is the only proper foundation on which conscience can base moral decision.

The legislative changes of 1857 did not raise the same dilemma for clergy and laity of denominations other than the Church of England, because their identity was not coterminous with that of the state. Speaking as a Roman Catholic, the Duke of Norfolk found the proposed legislation 'so objectionable that, in whatever stage it should be opposed, he should be ready to lend his humble assistance in order to throw it out'. He stated unabashedly that 'it was the universal feeling of the Roman Catholic Church that marriage was indisso-

38 The Bishop of Salisbury, HL Deb 19 May 1857 vol 145 c520-21.

39 HC Deb 31 July 1857 vol 147 c851, available at <http://hansard.millbanksystems.com/commons/1857/jul/31/adjourned-debate#S3V0147P0_18570731_HOC_100> accessed 16 January 2021.

40 HC Deb 31 July 1857 vol 147 c882.

luble.'[41] The clarity of Roman Catholic teaching left conscience without doubt as to what was right; whether conscience could abandon that teaching does not feature in the parliamentary debates. It was alleged in debate that the Act, if passed, would be detrimental to Roman Catholics, but the same issues of clerical conscience did not arise: the new law did not entitle divorced persons to Roman Catholic marriage. Similarly, 'religious dissenters' who also opposed the legislation on the grounds of the indissolubility of marriage, would not find their marriage rites available to previously ineligible persons.[42] Only for the Church of England was the coincidence of law and conscience so acute, only for that Church did the clarity of the 1857 Act emphasise the ambiguity of its earlier situation, and only for professing Anglicans was conscience so obviously individualised and privatised: privatised, because the precepts of the public law were no longer equated with the public religion; individualised, because particular ministers could claim conscientious exemption.[43]

The reforms of 1857 raised issues of doctrine, law and polity for the established Church. Clergy solemnising marriages as required by the 1753 Act did so in accordance with a unified law of Church and state. Parliamentary divorce notwithstanding, the public marriage law of the realm was in accordance with the doctrine of the Church. After 1857, Church and state were no longer aligned. The Canons of 1604 provided for such matters as the necessary preliminaries to marriage, its time and registration, but contained no statement of what marriage was.[44] The teaching of the Bible and the doctrine of the *Book of Common Prayer* were challenged by the legislation at stake. The prayer book certainly, and the translation of the Bible arguably, were also themselves of statutory authority. Where, then, should the Church look to find a foil against which to set parliamentary law in the determination of doctrine and practice? Until 1857, this tension remained largely hidden. Further changes to marriage law would

41 HL Deb 19 May 1857 vol 145 c511.

42 Mr Gladstone's speech at HC Deb 31 July 1857 vol 147 c828, available at <http://hansard.millbanksystems.com/commons/1857/jul/31/adjourned-debate#S3V0147P0_18570731_HOC_100> accessed 22 January 2021.

43 The Act for Marriages 1836 removed causes of disaffection to both Roman Catholics and dissenters by allowing legally recognised marriages solemnised by one of their clergy and according to their rites. It also permitted civil marriage before a registrar for those who did not wish any form of religious ceremony and continued the permission for the marriages of Quakers and Jews according to their own rites. Civil marriage had previously been made lawful by parliament in 1653 although the original provision that only civil marriage was to be valid was later retracted. See Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press: Cambridge, 2009) 169, 37-38

44 Canon LXX stipulated the registration of baptisms, marriages and burials in a parchment book once a week in the presence of the Churchwardens. The Act of 1753 required registration at the time of the event.

demonstrate how the distinction between Church and state would lead to increased legal incompatibility.

Section 3: 1907

The next major marriage reform, the Deceased Wife's Sister's Act 1907, concerned not the remarriage of divorcees but the marriage of widowers. Before 1835, marriage with the sister of a late wife was legal, but voidable if challenged.[45] Following the passage of Lord Lyndhurst's Marriage Act in 1835, such a marriage was illegal if it was contracted after the date on which the Act came into force. The parliamentary debates preliminary to the 1907 Act raised issues similar to those discussed above: concerns about the effect on the conscience of the clergy, a change in doctrine and the potential conflict between statue and canon law. As in 1857, the bishops did not speak with one voice on the proposed legislation and their differences made clear their lack not only of authoritatively interpreted doctrine but also of enforceable canon law.

The Bishops of St David's and Ripon were both in favour of the Act. Neither could find Scriptural prohibition for marriage with a deceased wife's sister and the Bishop of Ripon argued that, on the basis of the scholarly interpretation of the Bible as well as on social grounds, it was positively to be encouraged.[46] The Bishop of Peterborough, on the other hand, considered that the Act would

> oblige a clergyman to hurt his conscience, by his not being able to refuse the rites of the Church to those who wish to contract a marriage that in his opinion is not lawful.[47]

The Archbishop of Canterbury was also opposed, but Parliament was not unequivocally sympathetic to such views and alleged that neither were the clergy. In the House of Commons, Sir Henry Fowler drew attention to the support of 'clergymen in manufacturing towns' for a change in the law.[48] In the House of Lords, and indicating the superiority of statute to canon law, Earl Granville insisted,

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45 Marriage with a wife's sister was prohibited by the Tables of Kindred and Affinity prefaced to the *Book of Common Prayer*. Logic suggests that the Tables presume 'deceased wife'.

46 HL Deb 19 May 1870 vol 201, c921, available at <http://hansard.millbanksystems.com/lords/1870/may/19/second-reading> accessed 7 January 2021.

47 HL Deb 19 May 1870 vol 201 c961.

48 HC Deb 22 February 1907 vol 169 c1193, available at <https://api.parliament.uk/historic-hansard/commons/1907/feb/22/marriage-with-a-deceased-wifes-sister-1> accessed 16 January 2021.

you must not legislate in a large way merely to avoid scruples which may be exaggerated, and I must consider that the conscience of a clergyman is not really hurt if he carries out that which is the law of the land.[49]

Following pressure from the Church, the legislation afforded clergy greater protection than had been given in 1857, granting them conscientious exemption not only from solemnising a widower's marriage with his late wife's sister but also from allowing their churches to be used for the marriage.[50] Despite the Archbishop's efforts to maintain their unity, however, state sand church marriage law had diverged more profoundly than in 1857. 'For the first time in the history of the Church of England' lamented the Archbishop, statute was in 'direct, open contrast with, and contradiction of, the specific and divine law laid down in the authoritative regulations of the national church'.[51]

The 1907 Act caused genuine legal conflict. Canon XCIX of the 1604 Canons forbade marriage within prohibited degrees in accordance with the table of kindred and affinity drawn up in 1563.[52] Neither the statute nor Convocation amended the canon. Between 1865 and 1907, the ban on marriage with a deceased wife's sister was canonical and statutory. [53] After 1907, the Church prohibited by canon what the state permitted by statute. In a move which Mr Gladstone would have deplored, the Bishop of London conceded that the canons on marriage 'do not bind the laity' whose actions, whether or not they were communicant members of the Church of England, were no longer governed by the

49 HL Deb 19 May 1870 vol 201 c961, available at <http://hansard.millbanksystems.com/lords/1870/may/19/second-reading> accessed 7 January 2021.

50 Deceased Wife's Sister's Marriage Act 1907, s 1. On the pressure brought to bear by the Church of England, see Ann Summer Holmes, *The Church of England and Divorce*, 10.

51 Bell, GKA, *Randall Davidson Archbishop of Canterbury* (3rd edn, Oxford University Press: London, New York and Toronto, 1952) 552. Bell comments, 'This was a strong statement, when we remember the passing of the Divorce Act exactly 50 years before'. Presumably, Davidson meant canon law, as the law of the church, by the phrase 'divine law'. Holmes also cites this passage.

52 See Constitutions and Canons Ecclesiastical; Treated upon by the Bishop of London, President of the Convocation for the Province of Canterbury; and the rest of the Bishops and Clergie of the said Province; And agreed upon with the Kings Majesties license in their Synod begun at London, Anno Dom. 1603 [...] (London, 1662), Canon XCIX, available at <https://www.anglican.net/doctrines/1604-canon-law/ > accessed 23 January 2021.

53 Marriage within prohibited degrees had a long pedigree prior to the Canons of 1604; see for example 'The Excerptions of Egbriht', 740, No 135, and Hubert Walter's *Canons* at Westminster, 1200, No 11 'Let not a Man contract with a Relation of his former Wife'. Both are included in John Johnson, *A Collection of all the Ecclesiastical Laws, Canons, Answers, or Rescripts, with Other Memorials concerning the Government, Discipline and Worship of the Church of England From its First Foundation to the Conquest [...] that have hitherto been publish'd in the Latin Tongue*, 2 vols (London, 1720), vols 1 and 2 respectively.

Church's marriage law but only by parliamentary law.[54] Clergy, as described by Mr Walpole in 1857, were caught between 'the law of the land' and 'the law of God', and opposition of laws soon became opposition of consciences.[55]

The Earl of Harrowby had foreseen this, when, with quite prophetic insight, he posited the case of a man who

> wanted to marry his deceased wife's sister, and he went to the clergyman, who told him not to do so, and, perhaps, might, if he solemnized the marriage, refuse to administer the Sacrament to him.[56]

Such a situation gave rise to *Banister v Thompson*. Mr Banister was a parishioner of Mr Thompson, a regular communicant, given to parish work and on friendly terms with the vicar.[57] He lawfully married Emily, his late wife's sister, in Canada on 12th August 1907, their marriage being valid under the Colonial Marriages (Deceased Wife's Sister) Act 1906. The Deceased Wife's Sister's Marriage Act 1907, which made their marriage lawful in England, came into force on 21st August 1907 and the couple returned home in September.[58] Mr Thompson was unwilling to admit them to Holy Communion because, as he had told Mr Banister in advance, they had 'knowingly and wilfully contracted a union which', at the time of the marriage, 'was declared unlawful "both by the Church and the law of the land"'.[59] Mr Thompson's defence ostensibly lay on the face of the Act which absolved a cleric from discipline as a consequence of action taken or not taken due to the Act.[60] The vicar contended that marriage with a deceased wife's sister was 'forbidden by God's law' as the Act recognised marriage with a late wife's sister in terms of 'a civil contract,' but did not change the canonical understanding with which clergy were concerned.[61] The Dean of the Arches, Sir Lewis Dibdin, disagreed. Thompson's assumption

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54 HL Deb 20 August 1907 vol 181, c389, available at <https://hansard.parliament.uk/Lords/1907-08-20/debates/197b66de-4a72-473d-93fd-253cb9e888a9/SecondReading> accessed 16 January 2021.

55 HC Deb 31 July 1857 vol 147 c882, available at <http://hansard.millbanksystems.com/commons/1857/jul/31/adjourned-debate#S3V0147P0_18570731_HOC_100> accessed 16 January 2021.

56 HL Deb 19 May 1870 vol 201, c921, cc949-950, available at <http://hansard.millbanksystems.com/lords/1870/may/19/second-reading> accessed 27 January 2021.

57 *Banister v Thompson* [1908] P. 362 (363).

58 *Banister v Thompson* [1908] P. 362 (364).

59 *Banister v Thompson* [1908] P. 362 (364).

60 Deceased Wife's Sister's Marriage Act 1907, s1, which read in full, 'No clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed'.

61 *Banister v Thompson* [1908] P. 362 (367).

that a marriage legalized by Act of Parliament as a civil contract necessarily remains a nullity for ecclesiastical purposes, is not justified by history and cannot be sustained.[62]

Sir Lewis considered whether those intending to come for Communion might offend their own and the public conscience.[63] He decided that a legitimate marriage could not constitute a ground for lawful refusal.[64] He did not consider the conscience of the vicar. He found no ground on which Mr Thompson could legitimately refuse to administer the sacrament.

The Court of Appeal did discuss the vicar's conscience. Lawrence J had sympathy. If, he asked, a cleric is protected

if he refuses to solemnize the marriage, why is he not also to be protected if he repels them from the Holy Communion? Is the first likely to offend his conscience and the second not?[65]

However, while the 1907 Act clearly allowed a cleric to refuse to solemnise the marriage of a man and his deceased wife's sister, the law governing Holy Communion did not so clearly permit him to refuse the sacrament. The Sacrament Act 1547 gives clergy a duty of exhortation before people come to communion:

after a godlie exhortacion by the Minister made, [...], to thende [*sic*] that everie man maye trye and examynn his owne conscience before he shall receive the same, the saide minister shall not withowt laufull cawse denye the same to any parsone that wool devoutelie and humblie desire it.[66]

The rubric of the *Book of Common Prayer* indicated that a cleric would have lawful cause to refuse the sacrament to one who was 'an open and notorious evil liver, so that the congregation by him is offended' if, after the exhortation, the person did not repent.[67] The weight of both Prayer Book and Act is towards

62 *Banister v Thompson* [1908] P. 362 (390).

63 He relied for these purposes on the rubrics of the Prayer Book; *Banister v Thompson* [1908] P. 362 (382, 383).

64 Sacrament Act 1547, sviii, available at < https://www.legislation.gov.uk/aep/Edw6/1/1/section/VIII > accessed 27 January 2020. This section is still in force.

65 *R v Dibdin* [1910] P.57 (92).

66 The Sacrament Act 1547 s viii, < https://www.legislation.gov.uk/aep/Edw6/1/1/section/VIII> accessed 8 January 2021.

67 The rubric to the Order of the Administration of the Lord's Supper, or Holy Communion, in The Book of Common Prayer (Oxford, 19--) 165, available at <https://archive.org/details/compray00chur/page/n7/mode/2up?q=liver> accessed 8 January 2021. This is the rubric which was in force at the time of this case.

the conscience, not of the cleric administering Holy Communion but of the receiving communicant. Lawrence J's question, on the other hand, weights the issue at stake towards the protection of the vicar's conscience, a suggestion which the Court declined to follow. The judgment upheld the Arches decision. A lawfully married man could not, for that reason, be regarded as a 'open and notorious evil liver' and an offence to the congregation meriting repulsion from the sacrament.[68] The Court held that Parliament's intent had been to afford protection of conscience only in relation to the solemnization of matrimony.

This judgment was upheld on appeal before the House of Lords. The Banisters were 'lawful spouses' and 'must in law be so regarded'.[69] Mr Thompson had been 'solely animated by conscientious considerations' and Loreburn LJ conceded, 'it is easy to give needless offence to deep and sincere convictions upon matters which affect private conscience'.[70] Nevertheless, the statute may contain words which 'relieve the clergy from the obligation of performing or aiding the marriage, but they cannot make duality in marriage'.[71]

Banister v Thompson and its associated proceedings are indicative of the diminution at law for the protection of conscience on doctrinal grounds as opposed to grounds based on the integrity of the individual person, 'subject only to such limitations as are prescribed by law'. [72] Yet the provisions of the Sacrament Act indicated the existence of an idea of conscience as primarily a faculty of the individual without necessary reference to ecclesiastical doctrine even at a time when neither Church nor Parliament contested that dogmatic foundation. This was the understanding upheld at law and which Loreburn LJ invoked in speaking of 'private conscience'. Coincidentally, the marriage reforms of 1857 and 1907 established a distinction between religious law and religion law on marriage, if religious law is a mechanism whereby a faith or denomination makes rules to govern its own life, and religion law is state-made to recognise and regulate 'certain religious relationships'.[73] This showed the relative powerlessness of Church of England religious law (the canons) and demonstrated that the unified religion law and religious law by which the Church had been historically governed was increasingly moving towards religion law modified by Church of England concerns.

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68 *R v Dibdin* [1910] P.57 (107).
69 *R v Dibdin* [1910] P.57 (543).
70 *R v Dibdin* [1910] P.57 (542, 541).
71 *Thompson v Dibdin* [1912] AC 533 (543).
72 ECHR, 9.2, available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 8 January 2021.
73 Russell Sandberg, *Law and Religion* (Cambridge University Press: Cambridge and New York, 2011), p.11.

Further reform came slowly. The grounds for divorce after the 1857 Act remained unchanged until the Matrimonial Causes Act 1937. The Act provided parity between spouses for adultery, and added grounds of desertion and incurable mental illness. Its provisions troubled parliamentary consciences less than the 1857 Act.[74] The clergy, however, reacted vehemently, perhaps motivated by the consequences of 1907, insecurity about the nature and place of the Church, and the fact that the Canons of 1604 remained unrevised. They resolved in Convocation that remarriage while a former spouse still lived was always 'a departure from the true principle of marriage as declared by our Lord'. They sought to prohibit the use of the marriage service in such cases and desired regulations concerning the admission of remarried divorcees to the sacraments.[75] They did not cite Mr Thompson's cases, but they were clear that the protection of individual conscience they had received was inadequate for them and for their defence of Church teaching.

However, none of the reforms discussed above, nor the continued discrepancy between clerical and secular views of marriage, prevented the Church of England from engaging with further reform. This was in part because later episcopal leadership reacted more positively to the divergence of the Church's views from those of the state, choosing to interpret the difference as liberating the Church to comment on the social context. This led to very different ecclesiastical involvement when, in the 1960s, in the aftermath of soaring divorce rates in the post-war period, divorce law was next substantially revised.

Section 4: 1969

In the early 1960s, the Archbishop of Canterbury convened a group to discuss 'a divorce law for contemporary society'.[76] The resulting report emphasised the distinction between the country at large and the Church implied by the Convocations but with none of the dismay sounded by an earlier Archbishop in 1907:

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74 HC Deb 20 November 1936 vol 317 cc2115, available at <http://hansard.millbanksystems.com/commons/1936/nov/20/marriage-bill#S5CV0317P0_19361120_HOC_36> accessed 28 January 2021.

75 See Riley, H and Graham, RJ, *Acts of the Convocations of Canterbury and York (originally edited for the years 1921-1947 by AF Smethurst and HR Wilson extended to cover the years 1921 to 1970* (SPCK: London 1971) 117-18.

76 *Putting Asunder: A Divorce Law for Contemporary Society*, The Report of a Group appointed by the Archbishop of Canterbury in January 1964 (SPCK: London, 1966).

how the doctrine of Christ concerning marriage should be interpreted and applied within the Christian Church is one question: what the Church ought to say and do about secular laws of marriage and divorce is another question altogether. This can hardly be repeated too often.[77]

The report was cited with approbation in both Houses of Parliament. The Commons heard how the Archbishop's group was 'far from being convinced that the present provisions of the law witness to the sanctity of marriage or uphold its public repute in any observable way'.[78] In the Lords, the Divorce Reform Bill was asserted to be 'based on the recommendations of the Archbishop's Group', as well as on analysis from the Law Commission.[79] In fact, the Divorce Reform Act 1969 did not reflect the report as closely as this implies, nor did the Church of England capitulate completely to parliamentary enthusiasm for reform.[80] Nevertheless, the very clarity with which the Church spoke arguably increased the equivocality of its relation to the state. If 'the doctrine of Christ concerning marriage' is quite separate from 'what the Church ought to say and do about secular laws of marriage and divorce', it is by no means clear on what basis the Church remains, as the Church of England undoubtedly wished to remain, a constituent part of the state at all.[81] Perhaps unsurprisingly, a concern for clerical conscience did not feature in parliamentary debate. Governments of any day refrained from sponsoring divorce reform legislation

77 *Putting Asunder*, 3-4.

78 Mr Alec Jones, moving that the Bill be read a second time, and quoting *Putting Asunder*. The words, he said, 'are not my words but the words of "Putting Asunder"'. See HC Deb 06 December 1968 vol 774 cc2036, available at <http://hansard.millbanksystems.com/commons/1968/dec/06/divorce-reform-bill#S5CV0774P0_19681206_HOC_143> accessed 27 January 2021.

79 HL Deb 30 June 1969 vol 303 c296, available at <http://hansard.millbanksystems.com/lords/1969/jun/30/divorce-reform-bill> accessed 27 January 2021. The Law Commission analysis can be found in *The Field of Choice: Reform of the Grounds of Divorce* (HMSO: London, 1966, rpt 1970).

80 Divorce Reform Act 1969 s 2(1) (a)-(e). The Act introduced irretrievable marital breakdown as the grounds for divorce, which previous offences would evidence. Where, however, the Archbishop's report recommended that irretrievable breakdown be examined at law, the Divorce Reform Act 1969 required the petitioner to demonstrate this. See Holmes, *The Church of England and Divorce*, 116-121. See also, The Law Commission, *The Field of Choice: Reform of the Grounds of Divorce* (HMSO: London, 1966, rpt 1970) 16, where the report argued that 'as the Archbishop' Group recognised, [fault] must retain an important element in the court's decisions about financial matters and continue to be the basis upon which a spouse can obtain immediate protection by applying for a decree of judicial separation or a magistrate's order. But this does not destroy the advantages of diminishing its role in the decision whether a marriage should be dissolved.' The extent of the agreement between *Putting Asunder* and *The Field of Choice* is notable throughout the Law Commission's report.

81 On the persistence of this desire see, for example, *Marriage, Divorce and the Church: The Report of a Commission appointed by the Archbishop of Canterbury to prepare a statement on the Christian Doctrine of Marriage* (SPCK: London, 1971) 69: 'to withdraw needlessly would have wide and regrettable consequences'.

because there were Catholics 'in the Government and, of course, in the Party'.[82] The conscience of the Church of England seemingly no longer pricked.

Nevertheless, the protection of clerical conscience in relation to marriage persists. The 1939 Matrimonial Causes Act relieved clergy from solemnising the marriages of divorced persons whose former spouse lived, and from the requirement allow another minister to solemnise such marriages in their churches or chapels. The Marriage Act of 1949 permits clergy to use the marriage service for persons divorced and with a former partner still living after civil marriage, although any such service has no legal significance.[83] The Matrimonial Causes Act 1965 repeated what was granted in 1937, that clergy need neither solemnise the marriages of divorced persons with a former partner still living, nor permit use of their churches for such marriages.[84] Clergy are not obliged to make their churches available for marriages between previously disqualified kin with whom the Marriage (Prohibited Degrees of Relationship) Act 1986 permitted marriage, nor need they solemnise them.[85] In 2002, the Convocations rescinded the resolutions made after the 1937 Act, General Synod being told that not to rescind would contradict the 'conscientious right of clergy under the civil law themselves to decide whether or not to solemnize' marriages of divorced persons. The extant legal assurances were repeated: 'no clergy will be obliged against their conscience to marry a divorced person with a former spouse still living'.[86] This remains the case in the Church of England, in keeping with a norm common throughout the Anglican Communion and has not been altered by any further reform of divorce law.[87] Since 2004, no clergy have been required

82 In 1969, there were also 'one or more Catholics in the Cabinet'. HL Deb 30 June 1969 vol 303 c314-315, available at <http://hansard.millbanksystems.com/lords/1969/jun/30/divorce-reform-bill> accessed 27 January 2021.

83 Marriage Act 1949, s 46. This is not analogous to the Roman Catholic situation, in which a civil marriage is valid in accordance with civil law and a canonical marriage in accordance with canon law.

84 Divorce reforms since the 1960s include reducing the minimum time between a marriage being contracted and divorce proceedings commencing from 3 years to 1 year (1984). 'No fault' divorce is likely to be available in autumn 2021 after the passage of the Divorce, Dissolution and Separation Act 2020. Church of England unwilling to remarry divorced persons may offer an authorised Service of Prayer and Dedication following a civil marriage. Such a liturgy points to the continued unclarity concerned the Church's doctrine of divorce and remarriages.

85 These provisions amend the Marriage Act 1949; see s 5A. They affect inter-generational marriage and are subject to certain caveats.

86 See *The Chronicle of Convocation, being a record of the proceedings of the Convocation of Canterbury* (July, 2002) 13-14; Holmes, *The Church of England and Divorce*, 178-181.

87 See *The Principles of Canon Law Common to the Churches of the Anglican Communion* (Anglican Communion Office: London, 2008), Principle 75.6, available at <http://www.anglicancommunion.org/media/124862/AC-Principles-of-Canon-Law.pdf> accessed 9 January 2021].

to solemnise the marriages of those whom they believe to be of acquired gender, of whose previous marriages, if any, they are unsure.[88]

During the reforms discussed above, the Church of England navigated the difficult strait between stated doctrine and actual practice, its own canon law and the civil law, and objective doctrinal or subjective personal foundations for moral decision making. The notion of conscience as a faculty necessarily aligned with the Church's doctrine diminished while the idea of conscience as an independent judging capacity of the individual, without explicit doctrinal basis, gained strength. None of this was new. The roots of the increasingly dominant meaning of conscience were present in both the Prayer Book and the Sacrament Act. The Church's insistence on indissoluble marriage became less tenable after Lord Roos' and others' parliamentary divorces. In the 1960s, the Archbishop of Canterbury turned the weak position of being unable to enforce canon law into the stronger one of making recommendations for civil law. By the end of the twentieth century, the conscientious exemptions granted to clergy were becoming more obviously rights of an individual than concessions to Church teaching. Further legal reform in the twenty-first century would exacerbate these trends even as it highlighted concerns and differences of opinion in the bishops of the Church of England similar to those previously traced in this article.

Section 5: 2004 and 2013

The reforms of the twenty-first century created legal relationships between couples of the same sex. The Civil Partnership Act 2004 enabled the registration of same-sex partnerships. The Marriage (Same Sex Couples) Act 2013 permitted same sex couples to marry. Civil partnerships did not present the Church with as many difficulties as same-sex marriage, for reasons explored below. Same-sex marriage, however, made the Church's place in English polity a contested matter once again.

Civil partnerships are not, and were not intended to be, marriage. The government insisted that marriage was 'an ancient institution with special religious significance' entered into by 'verbal affirmation', whereas civil partnership

88 See also the Gender Recognition Act 2004, schedule 4 (1)(3), amending the Marriage Act 1949 s5; available at <https://www.legislation.gov.uk/ukpga/2004/7/schedule/4/paragraph/3> accessed 24 January 2021.

was a 'secular legal arrangement' sealed by signature.[89] Marriage was 'regarded primarily as a religious or religiously blessed institution'; civil partnership was secular arrangement.[90] Civil partnerships attracted rights like those accruing to married couples in regard to taxation and other financial matters.[91] They were dissoluble on the same grounds as divorce, excluding adultery.[92] Theologically, however, clear distinctions arose from the presumptions in marriage of opposite gender and sexual fidelity.[93] Yet the Church of England no more spoke univocally about civil partnership than it had done about divorce reform. The Bishop of Oxford admitted that 'it is a concern to some in the Churches that the legislation enshrined in the Bill parallels that for marriage at almost every point.[94] But he did not share the concern. He wanted a clear understanding that civil partnerships were long term commitments, and quoted the *Book of Common Prayer* to illustrate his meaning.[95] The Bishop of Peterborough, on the other hand, commended the lack of specific wording or ceremony for the contracting of a civil partnership as emphasising its distinction from marriage.[96] There was, however, no inherent disagreement between the government bringing forward the legislation and the Church's upholding of marriage. Civil partnerships might touch 'on matters of conscience', but neither the bishops nor any other speaker raised questions of conscience in debate.[97]

More surprisingly, bishops did not argue against same-sex marriage on grounds of conscience either. Only the Bishop of Exeter's speech cast its shadow, from Chancery's long-ago days as the 'ancient court of conscience', when he

89 HC Deb 12 October 2004 vol 425 c184, available at <https://publications.parliament.uk/pa/cm200304/cmhansrd/vo041012/debtext/41012-14.htm> accessed 23 January 2021. For other differences, see Humphreys, 2005, 8(38) Ecc LJ 289-306.

90 HC Deb 12 October 2004 vol 425 c185.

91 See, for example, the Civil Partnership Act 2004, s 15, for amendments to inheritance legislation in England and Wales.

92 As stated in the Divorce Reform Act 1969 as amended by the Matrimonial and Family Proceedings Act 1984, which reduced the three-year period prior to which divorce proceedings could not be initiated to one year. Civil Partnership Act 2004, s 44.

93 The distinctions were reduced when, in 2019, civil partnership was made available to opposite sex couples. The grounds for separation remained as in 2004. A Pastoral Statement from the House of Bishops observed that, although civil partnership implies fidelity it is not predicated on a sexual relationship. See 'Civil Partnerships – for same sex and opposite sex couples. A pastoral statement from the House of Bishops of the Church of England, available at <https://www.churchofengland.org/sites/default/files/2020-01/Civil%20Partnerships%20-%20Pastoral%20Guidance%202019%20%282%29.pdf> accessed 17 January 2021.

94 HL Deb 22 April 2004 vol 660 c399, available at <http://hansard.millbanksystems.com/lords/2004/apr/22/civil-partnership-bill-hl> accessed 17 January 2021.

95 HL Deb 22 April 2004 vol 660 c399

96 HL Deb 22 April 2004 vol 660 c422.

97 HL Deb 22 April 2004 vol 660 c393.

reminded the House that 'Equity is a very much better principle than equality'.[98] Equality, however, prevailed, and, although the Church did secure conscientious exemption, it did so in private, on the basis of earlier concessions and, in the end, with arguably reduced rights for the individual.

The Secretary General of the General Synod told the Public Bill Committee that it was

> already the case that clergy are not required to conduct the marriages of people who can already marry under existing law following a change of gender; there is a conscience clause, so that clergy are not required to marry people.[99]

The Bishop of Norwich, on the other hand, offered a radically different approach in the same meeting, conceding the need for legislation expressing a dual interpretation of marriage:

> clearly there has been a need for the sort of legislation before us which acknowledges two understandings of marriage, one which will be gender neutral and one which will be more traditional.[100]

The existence of two, incompatible, legal definitions of marriage caused archiepiscopal outrage in 1907. In 2013, the unique definition which past generations defended so robustly almost merited an episcopal apology. Again, in words unthinkable in 1857 or 1907, the Bishop told the Committee:

> one of the glories of the Church of England is that we recognise conscientious dissent. There is a right of conscience, and we welcome couples who have registered a civil partnership [...] to the Eucharist and to be part—full part—of the body of Christ.[101]

His understanding of conscience as an independent faculty of moral discernment which the Church respects might be seen as the logical conclusion of *Banister v Thompson*. Without remarking the fact, the Church of England had

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98 HL Deb 3 June 2013 vol 745 c1040, available at https://hansard.parliament.uk/Lords/2013-06-03/debates/13060321000162/Marriage(SameSexCouples)Bill> accessed 18 January 2021. Other voices in the House did raise concerns about the protection of conscience but they did not prevail.

99 HL Deb 3 June 2013 vol 745 c1040.

100 <https://churchinparliament.org/2013/02/12/marriage-same-sex-couples-bill-church-gives-evidence-to-mps-on-public-bill-committee/>, Q38, accessed 29 January 2021. The Bishop cited the Church's Canon B30 for its teaching on marriage.

101 'Marriage (Same Sex Couples) Bill – Church gives evidence to MPs on Public Bill Committee', 12 February 2013, Q46.

seemingly adopted the concept of conscience as an independent faculty of judgment long implicit in both law and doctrine.[102]

Human rights law had increasingly embraced such a concept. In 1974, *Hynds v Spillers Bakery* held that

that 'grounds of conscience' involved a belief or conviction based on religion in the broadest sense or on intellectual creed as contrasted with personal feeling.[103]

Nearly forty years later, however, the need for an objective foundation for conscience had all but vanished. *Eweida v United Kingdom*, heard before the European Court of Human Rights, held that

the right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance.[104]> accessed 28 January 2021.}

Conscience, like religion and even like thought, must be coherent and significant but the axiomatic assumption of *Hynds* that it requires external grounds, seems no longer to pertain. Finally, *Sahin v Turkey* explicitly based freedom of conscience on the subjective person:

freedom of thought, conscience and religion is [...] one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.[105]> accessed 28 January 2021.}

Sahin, like *Eweida*, concerned Article 9 of the European Convention on Human Rights. *Sahin*'s emphasis on the individual is therefore to be expected, since Article 9 freedoms are essentially individual. Nevertheless, it also risks a certain circularity as human rights are justified by the rights of humans.[106] Furthermore, issues of conscience cannot always be separated from those of religion and, even if rights are individual, an individual's actions may have

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102 That is, the Sacrament Act and the Book of Common Prayer.

103 *Hynds v Spillers Bakery* [1974] SLT 191 (191); see above n 7.

104 *Eweida v United Kingdom* (2013), final judgment, 1.iii.B.81, <https://hudoc.echr.coe.int/fre#{"itemid":["001-115881"]

105 *Eweida v United Kingdom* (2013), final judgment, 1.iii.B.79, <https://hudoc.echr.coe.int/fre#{"itemid":["001-115881"]

106 See, for example, *Ewidav United Kingdom*, 244, where it is stated in judgment on merits that 'regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.'

consequence in the public domain. The liberation of the concept of conscience from a doctrinal basis which this article has noted, may, therefore, be not entirely unproblematic. A dimension of the understanding of conscience seen in Joseph Hall and seventeenth century English legal cases is lost if, while rights might be infringed, conscience can no longer err in relation to an objective standard. Arguments based on individual human rights may both need and imply 'a conceptual framework with which to address questions fundamental to human well-being'.[107] Same-sex marriage debates in England demonstrated this when a right of conscientious exemption was sought for those who had previously not enjoyed one.

Before the Act was passed, Baroness Cumberlege moved an amendment allowing civil registrars not to conduct same-sex marriages. The amendment was lost:

> when someone performs a function on behalf of the state we should not put into legislation something which allows them to act in a discriminating manner.[108]

Civil registrars attracted no protection as a group in part because theirs was not a religious organisation, but the defeat of the amendment strikes a very different note from that of 1857. It was, made clear from the outset, when the Church of England as a whole, was not enabled to conduct same-sex marriages by the Act, that there would be no right of conscientious exemption from the institutional exemption for clergy who wanted to solemnise them. The situation which might arise 'where an institution determines that it will not conduct same-sex marriages but a minister of that institution decides that, in conscience, he wishes to do so' was one not for the state but for the institution.[109] As was stated in debate, and in contrast to the earlier exemptions granted to clergy, 'the law, not the registrar, determines who is eligible to marry'.[110] This is a far cry from the situation in which the institution of the Church is barely distinct from that of the state and in which the law of the one is the law of the other. However, it is arguable that neither an institutional doctrinal basis nor a grounding in the rights of the individual has proved conclusive as an approach to questions of conscience and religion.

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107 Norman Doe (ed), *Christianity and Natural Law: An Introduction* (Cambridge University Press: Cambridge, 2017), Preface, xiii.

108 HL Deb 8 July 2013 vol 747 c61, available at <https://hansard.parliament.uk/Lords/2013-07-08/debates/13070811000878/Marriage(SameSexCouples)Bill> accessed 21 July 2019.

109 HL Deb 4 June 2013 vol 745 c1093, available at <https://hansard.parliament.uk/Lords/2013-06-04/debates/13060477001047/Marriage(SameSexCouples)Bill> accessed 29 January 2021.

110 HL Deb 8 July 2013 vol 747 c44, available at <https://hansard.parliament.uk/Lords/2013-07-08/debates/13070811000878/Marriage(SameSexCouples)Bill> accessed 29 January 2021.

This is apparent in *Pemberton v Inwood*. Canon Pemberton, a cleric who married his same-sex partner, was refused the bishop's licence on those grounds, and could therefore not minister as a hospital chaplain. Canon Pemberton alleged direct discrimination and harassment on the grounds of his sexual orientation and marital status under the Equality Act 2010.[111] However,

> discriminating against someone because they believe, or express the view, that marriage should be between a man and a woman only is unlawful under the Equality Act 2010. Article 9 of the European Convention on Human Rights also guarantees the right to freedom of thought, conscience and religion.[112]

In keeping with this, the court found for the respondent.[113] It was not for the court to determine the legitimacy of religious belief and it was incontrovertibly the doctrine of the Church of England that marriage was between one man and one woman. The *Pemberton* judge noted that the Canon's bishop 'had written to the claimant on 17 March 2014, making clear his understanding of the Church's position in respect of same sex marriage'. The Bishop asked Canon Pemberton to abide by this but 'the claimant had declined to do so'.[114] *Fernandez v Spain*, cited in judgment, had noted 'the importance of the rights of religious organisations to freedom of thought, conscience and religion', but, supporting the view taken in Parliament, demonstrated that Article 9 does not 'enshrine a right of dissent within religious communities'.[115] The courts took no view on either the truth of Christian doctrine, or the right of Canon Pemberton to act as he did. They did, however, deny that he could so act without experiencing the known consequences.[116]

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111 Equality Act 2010 sections 13(1), 26, 53 and 54 are relevant.

112 HL Deb 3 June 2013 vol 745 c940, available at <https://hansard.parliament.uk/Lords/2013-06-03/debates/1306031200036 4/Marriage(SameSexCouples)Bill> accessed 29 January 2021.

113 Equality Act 2010 schedule 9, 2(1)(a).

114 *Pemberton v Inwood* [2017] ICR 929 (963). The Bishop referred Canon Pemberton to the House of Bishop's Pastoral Guidance which stated that the House 'considers that it would not be appropriate conduct for someone in holy orders to enter into a same sex marriage, given the need for clergy to model the Church's teaching in their lives.' The Guidance is available at <https://www.churchofengland.org/news-and-media/news-and-statements/house-bishops-pastoral-guidance-same-sex-marriage> accessed 18 January 2021.

115 *Fernandez v Spain* (2015) 60 EHRR 3 (68).

116 The Pemberton case differed from *Preddy v Bull* or *Asher's Bakery*. In *Asher's*, the Northern Irish 'gay cake' case, the respondents, who believed that same sex marriage was wrong, argued that their Article 9 rights were engaged. The case was argued rather on the basis of discrimination than of conscience, and on appeal it was clear that characteristics protected under the 2010 Equality Act were to be weighed equally with those claimed under Article 9. The claimant had suffered direct discrimination: 'the essence of the complaint under the [...] article is the requirement to provide a message with which the appellants disagreed because of their deeply held religious beliefs. In the commercial sphere that is what the absence of direct discrimination can require, depending upon the offer'. See *Lee v McArthur* [2016] NICA 55, [71]. *Preddy v Bull* also turned in part on the balancing of rights. Mr and Mrs Bull, hoteliers, refused Mr Preddy

This article has not explored the idea of collective rights as recognised in *Fernandez v Spain*. It is, however, possible to see decades of Church of England thinking on same-sex relationships as balancing the collective right of a Church and its theology of marriage as an exclusive relationship between a man and a woman, against the rights of individuals 'conscientiously convinced' that

they have more hope of growing in love for God and neighbour with the help of a loving and faithful homophile partnership, in intention lifelong, where mutual self-giving includes the physical expression of their attachment.[117]

Nevertheless, Church teaching remains unchanged. In 1991, the House of Bishops affirmed 'lifelong, monogamous, heterosexual union as the setting intended by God for the proper development of men and women'.[118] In 1999, the House stated that 'sexual intercourse, as an expression of faithful intimacy, properly belongs within marriage exclusively'.[119] In 2003, a discussion document cited the 1991 and 1999 publications as the current consensus.[120] Increasingly, however, and in a manner reminiscent of application of canon law to the clergy in 1907, this teaching was confined to clergy. In 1991, it was the bishops' 'considered judgement' that neither those discerning a call to ordination, nor the ordained clergy could 'claim the liberty to enter into sexually active homophile relationships'.[121] As Canon Pemberton had found, the clergy could not do that which the Church forbade them to do.

Even before *Pemberton v Inwood*, however, there were possible indications of change as the Church of England continued to chart a difficult course between, on the one hand, its own traditional teaching and the voice of conscience which would defend that teaching ('there is a conscience clause, so that clergy are not required to marry people') and, on the other, societal and legal developments which accepted changes to historic views. Even in 2003, the discussion document referred to above acknowledged that the Church's position on divorce

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and Mr Hall, civil partners, a double room. The supreme court found for Msrs Preddy and Hall but noted that 'fair balance should be struck between [Mr and Mrs Bull's] right to manifest their faith and the right of Msrs Preddy and Hall to obtain goods, facilities and services without discrimination on grounds of their sexual orientation'. *Preddy v Bull* [2013] UKSC 73, [34].

117 *Issues in Human Sexuality: A statement by the House of Bishops of the General Synod of the Church of England, December 1991* (Church House Publishing: London, 1991) 41.

118 *Issues in Human Sexuality*, 18.

119 *Marriage: A Teaching Document from the House of Bishops of the Church of England* (Church House Publishing: London, 1999) 8.

120 *Some Issues in Human Sexuality: A Guide to the Debate* (Church House Publishing: London. 2003) 15.

121 *Issues*, 45.

and remarriage had changed over time. In 2012, opposing the possibility of same-sex marriage in response to a government consultation, the Church had silently repeated Sir Lewis Dibdin's refusal of duality in marriage:

> in law, there is one social institution called marriage, which can be entered into through either a religious or a civil ceremony. To suggest that this involves two kinds of marriage is to make the category error of mistaking the ceremony for the institution itself.[122]

In 2013, however, another report from the House of Bishops recommended that

> whilst abiding by the Church's traditional teaching on human sexuality, we encourage the Church to engage openly and honestly and to reflect theologically on the circumstances in which we now find ourselves to discern the mind of Christ and what the Spirit is saying to the Church now.[123]

In November of the same year, the Archbishop of Canterbury identified a cultural chasm which he believed separated the Church of England from wider society. He told the General Synod that the 'majority of the population rightly detests homophobic behaviour [...] and sometimes they look at us and see what they do not like'.[124] He spoke of the 'overwhelming change of cultural hinterland' apparent in the Same Sex Marriage Bill Second Reading Debate in the House of Lords, during which

> predictable attitudes were no longer there. The opposition to the Bill, which included me and many other bishops, was utterly overwhelmed [...]. There was noticeable hostility to the view of the churches.[125]

Duality in marriage might indeed be rejected but it began to seem only a matter of time before the Church's own definition of marriage might be widened.

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122 'Government consultation on same sex marriage', GS 1027, available at <https://www.churchofengland.org/sites/default/files/2017-11/GS%20Misc%201027%20government%20consultation%20on%20same%20sex%20marriage.pdf> accessed 24 January 2021, 5.

123 *Report of the House of Bishops Working Group on human sexuality,* 'the Pilling report' (Church House Publishing: London, 2013) 150.

124 General Synod, *Reports of Proceedings November Group of Sessions 2013* vol 44 No 2, 19, available at, available at <https://www.churchofengland.org/sites/default/files/2017-10/July%202013.pdf> accessed 23 January 2021.

125 ibid.

The General Synod entered into an extensive discernment process through conversations over two years following 2013. But the possibility of change apparent of receded. In 2015, the absence of the 'predictable attitudes' among the clergy on General Synod meant that their vote caused a refusal to take note of the House of Bishops' report 'Marriage and Same Sex Relationships' (GS 2055). The Archbishops responded by recognising the need for 'a radical new Christian inclusion' and set up a further process, 'Living in Love and Faith', to address the situation in which the Church found itself. In 2020, a book of the same name and many online resources were released from this process and the Church as a whole may now reflect on this and respond.

Section 6. Conclusion

In 1857, the clergy were granted exemption on grounds of conscience from solemnising the marriage of divorcees. The exemption was for individual ministers on the grounds of religious dissent from the state. The concession to clergy, however, meant, and still means, that a cleric's conscience inhibits parishioners' right to marriage. As the case of registrars wishing not to conduct same-sex marriage shows, the protection of conscience has stepped away from exemptions inhibiting others during the period considered in this article. That change has been accompanied by changes in social attitudes and in the relationship between the Church of England and the state.

Living in Love and Faith offers no easy answers to the questions of how, and whether, to protect conscience or how the institutions of Church and state cooperate. The book does not explicitly reflect on the changing relationship between Church and state discussed here but it charts societal changes in attitudes to marriage, including same-sex marriage, and acknowledges these as personal matters.[126] It does not offer a new concept of conscience but it does recognise the role of conscience, asking whether Christians can find 'ways to respect and include those Christians who, in good conscience, we disagree with?'[127] As such, the book suggests that conscience might be not a faculty enabling the discernment of absolute moral right, nor one whereby one person's beliefs limit another's freedoms, but rather one governing right relationship and brokering coexistence. Such an approach might serve the Church of England well as it continues to work out its place as a Church both catholic and reformed, the child both of law and of grace.

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126 *Living in Love and Faith: Christian Teaching and Learning about identity, sexuality, relationships and marriage* (Church House Publishing: London, 2020) 101.

127 ibid, 359.