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**Sacred Spaces, Sacred Words:  
Religion and Same-Sex Marriage in England and Wales**

PAUL JOHNSON\* AND ROBERT M. VANDERBECK\*\*

*This article provides an analysis of the ways in which the spatial and illocutionary requirements of English marriage law – which regulate the spaces in which marriages may be solemnized and the words the parties being married must speak – have been used to maintain distinctions between same-sex and opposite-sex couples. It shows how religious opponents of same-sex partnership recognition have relied upon historically entrenched differences between the spatial and illocutionary aspects of ‘civil marriage’ and ‘religious marriage’ to argue in favour of the enactment of law that enables organized religions to exclude same-sex couples from religious premises and ceremonies that are open to opposite-sex couples for the purpose of solemnizing marriage. It extends recent international debates about how faith-based discrimination against same-sex couples is accommodated by legislators and legitimized by law. The article concludes with a consideration of how English law could be amended to end discrimination based on sexual orientation.*

**INTRODUCTION**

During the passage of the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act 2013, members of the UK Parliament debated not only whether same-sex couples should be able to have their relationships legally recognized but also the specific means by which these relationships should be registered or solemnized. A recurring theme of these debates concerned the types of *spaces* in which same-sex couples should or should not be legally permitted to register a civil partnership or solemnize a marriage and, when doing so, the nature of the *words* that must or must not be spoken. These spatial and illocutionary aspects of law<sup>1</sup> have been and continue

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<sup>1</sup> We use the term ‘illocutionary’ in respect of those aspects of marriage law that require an individual to perform specific ‘speech acts’ during a marriage ceremony in order to create a contract of marriage.

to be important because they provide the primary means by which differences between same-sex and opposite-sex couples are maintained. Most crucially, these aspects of law enable organized religions to exclude same-sex couples from spaces and practices that are open to opposite-sex couples for the purpose of solemnizing marriage.

This article examines how the spatial and illocutionary aspects of marriage law have been utilized by those with a religious hostility to homosexuality to influence the shape of English statute law relating to same-sex civil partnership and marriage in ways that enable discrimination against same-sex couples to persist.<sup>2</sup> We argue that the primary reason that religious-based arguments have been able to successfully influence the law, within a legislative environment that many argue is characterized by the progressive marginalization of religion,<sup>3</sup> is because such arguments rely upon historically entrenched distinctions between the spatial and illocutionary requirements for solemnizing ‘civil marriage’ and ‘religious marriage’.<sup>4</sup> By invoking these historical distinctions between secular and sacred marriage and presenting them as seemingly incontrovertible and unassailable, religious opponents of same-sex partnership recognition have been able to exercise significant authority during the passage of successive legislation in the UK Parliament. We begin the article therefore with an overview of these historical aspects of English law, before going on to show how they have been systematically deployed in order to maintain inequalities between same-sex and opposite-sex couples. We conclude by arguing that, in light of widespread religious hostility to same-sex marriage, equality on the grounds of sexual

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For a general discussion of illocutionary acts in the context of marriage law see L. H. Schwartzman, *Challenging Liberalism: Feminism as Political Critique* (2006).

<sup>2</sup> We restrict our analysis to statute law extending to England and Wales in order to allow for an in-depth examination of marriage law in one jurisdiction of the UK. For a relevant discussion in respect of Scotland, see K. Mck. Norrie, ‘Civil partnership in Scotland 2004-14, and beyond’ in *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections*, eds. N. Barker and D. Monk (2015).

<sup>3</sup> This form of argument is critically discussed, for example, in P. Johnson and R.M. Vanderbeck, *Law, Religion and Homosexuality* (2014).

<sup>4</sup> As we explain below, the distinction between ‘civil’ and ‘religious’ marriage denotes only a difference in the mode by which a marriage is solemnized rather than a difference in the legal status of the marriage contract itself. The English courts have long held that, ‘[t]o the law there is only one contract of marriage. It may be solemnized in a church by the parish clergyman with the rites of the Church of England, the parties thereto being persons holding the tenets of that Church, or it may be made before a registrar (who is a purely civil official), the parties thereto being of no religious belief whatever. The result is one and the same in every respect known to the law’ (*R v Diddin* [1910] 57, Fletcher Moulton LJ 114). The fact that a marriage solemnized by means of a civil or religious ceremony results in the same legal contract has been used by religious opponents of same-sex marriage to contest proposals to allow same-sex couples access to ‘civil marriage’ (see n. 96).

orientation in respect of the solemnization of marriage may only be achievable by legislative means that would involve significant changes to English law. Overall, the article contributes to wider debates regarding how particular forms of discrimination based on sexual orientation by religious individuals and groups are negotiated, accommodated and legitimized, an issue that is of growing concern in diverse international jurisdictions where same-sex marriage has been legalized or is being debated.<sup>5</sup>

## **SPATIAL AND ILLOCUTIONARY ASPECTS OF ENGLISH MARRIAGE LAW SINCE 1753**

In this section, we examine the historical development of English statute law in respect of the requirements that it places on where marriages can be solemnized and the words that must be spoken by the parties being married. We trace the development of statute law since 1753 (the year that the Parliament of Great Britain passed an Act<sup>6</sup> that ‘put the law of marriage in England and Wales on a statutory basis’<sup>7</sup>) in order to demonstrate how it has been characterized by continual contestation over the spatial and illocutionary requirements for solemnizing marriage. An understanding of this history is important because, as we will show, it has given rise to a legal landscape that provides the foundation for enabling discrimination against same-sex couples to continue in the contemporary period.

When Parliament passed the Act of 1753, its chief aim was to address the ‘great mischiefs and inconveniencies’ that were said to ‘have arisen from clandestine

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<sup>5</sup> See, for example, L. Underkuffler, ‘Odious discrimination and the religious exemption question’ (2010-11) 32 *Cardozo L Rev* 2069-2091; E. Bonthuys, ‘Irrational accommodation: conscience, religion and same-sex marriages in South Africa’ (2008) 125 *S. African LJ* 473-483; D. NeJaime, ‘Marriage inequality: same-sex relationships, religious exemptions, and the production of sexual orientation discrimination’ (2012) 100 *Cal Law Rev* 1169-1238; J. Lindberg, ‘Renegotiating the role of majority churches in Nordic parliamentary debates on same-sex unions’ (2016) 58 *Journal of Church and State* 80-97.

<sup>6</sup> An Act for the better preventing of clandestine Marriages (1753) 26 Geo. 2 c. 33 (hereinafter Clandestine Marriages Act 1753).

<sup>7</sup> R. Probert, ‘The impact of the Marriage Act of 1753: was it really “a most cruel law for the fair sex”?’ (2005) 38 *Eighteenth-Century Studies* 247-262. For a discussion of the history of marriage law prior to 1753 and of the progressive involvement of the state in regulating marriage that led to the enactment of the Clandestine Marriages Act 1753, see R. B. Outhwaite, *Clandestine Marriage in England 1500-1850* (1995).

marriages’<sup>8</sup> and to regulate the ‘many persons’ who ‘solemnize matrimony in prisons and other places without publication of banns, or licence of marriage first had and obtained’.<sup>9</sup> To achieve the ambition of better preventing clandestine marriages, the Act of 1753 introduced a number of requirements relating to the preliminaries for and solemnization of marriage. The most significant of these was the requirement that the solemnization of all marriages, whether preceded by banns or by licence, must take place in a Church of England parish church or chapel.<sup>10</sup> The consequence of this was that the parties to a marriage were required to conform to the form of solemnization of matrimony as specified in the Book of Common Prayer. This necessitated, for instance, both parties making an affirming declaration and repeating a contracting statement (a vow) spoken by a minister.<sup>11</sup> Although the Act of 1753 included important exceptions – most notably it did not apply to any marriage amongst Jews or Quakers (providing both parties to a marriage were Jews or Quakers respectively)<sup>12</sup> or to the Royal Family<sup>13</sup> – it imposed on most couples wishing to marry the requirement that their marriage be solemnized in a space controlled by the Church of England and that they speak a set of words<sup>14</sup> prescribed by the Church of England.<sup>15</sup>

The requirement that marriages be solemnized in a Church of England church or chapel was significantly changed by an Act of 1836.<sup>16</sup> This Act made it possible for a building that was certified as a place of religious worship to be registered for the purpose of solemnizing marriages therein, providing that this was supported by at least twenty householders who had used the building for at least one year as their

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<sup>8</sup> Clandestine Marriages Act 1753, preamble.

<sup>9</sup> *id.*, s. 8.

<sup>10</sup> *id.*, preamble and s. 4 (s. 6 reserved the right of the Archbishop of Canterbury to grant ‘Special Licences to marry at any convenient time or place’, see also n. 40 and 41).

<sup>11</sup> The Book of Common Prayer (1662, Baskerville edition of 1762 consulted).

<sup>12</sup> Clandestine Marriages Act 1753, s. 18.

<sup>13</sup> *id.*, s. 17.

<sup>14</sup> English law has long recognized that there are certain instances when the words of the marriage service cannot be spoken by one or both parties, such as in respect of marriage involving ‘deaf and dumb (sic) persons’, and where this is the case it does not affect the validity of the contract (*Harrod v Harrod* [1854] 1 K & J 4).

<sup>15</sup> Those requirements were not affected by subsequent reform of marriage law in the early nineteenth century by An Act for amending the Laws respecting the Solemnization of Marriages in England (1823) 4 Geo. 4 c. 76; An Act to amend an Act passed in the last Session of Parliament, intituled An Act for amending the Laws respecting the Solemnization of Marriages in England (1824) 5 Geo. 4 c. 32; An Act to render valid Marriages solemnized in certain Churches and Chapels (1830) 11 Geo. 4 & 1 Will. 4 c. 18; and An Act to render certain Marriages valid, and to alter the Law with respect to certain voidable Marriages (1835) 5 & 6 Will. 4 c. 54.

<sup>16</sup> An Act for Marriages in England (1836) 6 & 7 Will. 4 c. 85.

usual place of public religious worship.<sup>17</sup> If such a registration was granted, a marriage could then be solemnized on the authority of superintendent registrar's certificate in that place of worship 'according to such form and ceremony as they [the parties to be married] may see fit to adopt'.<sup>18</sup> This meant that religious 'dissenters' could marry in the buildings where they gathered for religious worship and by way of a ceremony other than that prescribed by the Church of England. However, the Act of 1836 created the requirement that in some part of any marriage ceremony adopted in a registered building, each of the parties to be married must speak a prescribed set of declaratory and contracting words.<sup>19</sup> The Act of 1836 also made provision for those couples who did not wish to marry in a Church of England church or a registered building to have their marriage solemnized at the office of a superintendent registrar. The introduction of 'civil marriage' came with the requirement that the parties to be married must each speak the same declaratory and contracting words required for the solemnization of marriage in a registered building.<sup>20</sup>

The Act of 1836 therefore established three principal spaces in which couples could marry: Church of England churches or chapels, registered buildings (places of worship other than those of the Church of England) and register offices. It further established two modes of speech that those wishing to contract marriage must engage in: the words required by the Church of England for marriage according to its rites, and the words required by the state for marriage in registered buildings or register offices.<sup>21</sup> At the point that Parliament created this framework for the solemnization of marriage, its most contentious element was the opportunity it afforded individuals to contract a marriage in a register office without any religious ceremony. There was strong opposition in the House of Commons to this on the basis that it 'separated the contract of marriage from what it always had previously in this country, the sanction of a religious ceremony'.<sup>22</sup> One MP argued that,

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<sup>17</sup> *id.*, s. 18.

<sup>18</sup> *id.*, s. 20.

<sup>19</sup> *id.*, s. 20.

<sup>20</sup> *id.*, s. 21.

<sup>21</sup> *id.*, ss. 2 and 45 continued the exceptions in respect of Jews, Quakers and the Royal Family contained in the Clandestine Marriages Act 1753.

<sup>22</sup> John Poulter, 34 *H.C. Debs.*, col. 491 (13 June 1836).

[w]ith the single exception of the time of the great Rebellion, there was no one instance in the history of the country, of marriage having been considered otherwise than as a religious ceremony. This was a solitary attempt to give a civil character to a religious contract.<sup>23</sup>

However, although some parliamentarians argued vigorously that register office marriage represented a ‘gratuitous desecration of the marriage rite’,<sup>24</sup> the House of Commons voted to retain the provision that enabled it.<sup>25</sup>

Debates in the House of Commons during the passage of what became the Act of 1836 showed considerable disagreement among legislators about the extent to which the law should promote both the religious character of marriage and the Church of England’s primary role in solemnizing it. For instance, in response to the proposal that couples who ‘objected to marriage being considered a religious ceremony, should state their objection upon the register’,<sup>26</sup> a clause was added to the Bill that placed a requirement upon those marrying in a register office to make the following verbal declaration: ‘I do solemnly declare, that I have conscientious scruples against marrying in any Church or Chapel, or with any religious ceremony’.<sup>27</sup> However, this approach was criticized by some for having no effect on couples seeking to have a marriage religiously solemnized outside of the rites of the Church of England.<sup>28</sup> When an alternative declaration was proposed and rejected – which would have required parties being married in registered buildings or register offices to verbally state, ‘I do solemnly declare that I have conscientious scruples against the solemnization of marriage according to the rites and ceremonies of the Church of England’<sup>29</sup> – MPs also voted to remove the conscientious objection declaration in respect of register

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<sup>23</sup> Sir Robert Inglis, id. The reference to the great Rebellion refers to the Act passed by Parliament during the Commonwealth of England that enabled marriage to be solemnized before a Justice of the Peace. It would be mistaken, however, to see this as creating entirely civil (or secular) marriage since the prescribed contracting words to be spoken by the parties to be married contained a reference to ‘God the searcher of all hearts’. An Act touching Marriages and the Registering thereof; and also touching Births and Burials (1653) in *Acts and Ordinances of the Interregnum, 1642-1660*, eds. C. H. Firth and R. S. Rait (1911).

<sup>24</sup> Charles Law, 34 *H.C. Debs.*, col. 493 (13 June 1836).

<sup>25</sup> id., col. 494. The House of Commons divided Ayes 58 to Noes 123 on an amendment to remove the clause enabling marriages to be celebrated before the Superintendent Registrar.

<sup>26</sup> Sir Robert Peel, id., col. 493.

<sup>27</sup> A Bill for Marriages in England, version of 17 June 1836, clause 18.

<sup>28</sup> Henry Goulburn, 34 *H.C. Debs.*, col. 1021 (28 June 1836).

<sup>29</sup> id.

office marriage on the grounds that it was ‘contrary to the general principle of the Bill’.<sup>30</sup> Several MPs regarded this as a means by which the law would ‘unchristianize matrimony’<sup>31</sup> and ‘declare that marriage might (sic) be contracted in contempt of every religious ceremony which heretofore had sanctified it’.<sup>32</sup>

The Parliamentary debates of 1836 about the appropriate relationship between religion and marriage, with their emphasis on where couples should be permitted to marry and according to what ceremonies, provide the foundation for all subsequent debates about English marriage law. Since that time, legislators have consistently shown concern to carefully manage the spatial and illocutionary requirements for solemnizing marriage in order to preserve the distinction between the civil and religious ‘routes’ into marriage created by the Act of 1836. Indeed, just twenty years after the Act of 1836, Parliament strengthened that distinction by enacting a statute that created the blanket prohibition ‘that at no marriage solemnized at the registry office of any district shall any religious service be used’.<sup>33</sup> It did so when making provision to enable any parties who had contracted a marriage at a register office to subsequently add a religious ceremony ordained or used by the church or persuasion of which they were members.<sup>34</sup> The prohibition of the use of any religious service in a registry office was added to the Bill when it was examined and amended in Select Committee<sup>35</sup> and its effect was to enforce a clear distinction between the illocutionary aspects of marriage solemnized in civil or religious spaces.

For decade after decade, piecemeal reform of English marriage law maintained the spatial and illocutionary differences between what became generally regarded as ‘religious marriage’ and ‘civil marriage’. However, in doing so, it eventually became accepted that the legal situation was ‘almost unintelligible owing to the number and complexity of the enactments’.<sup>36</sup> Thus, when English law relating to the solemnization and registration of marriage was consolidated in 1949, the chief aim of

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<sup>30</sup> Lord John Russell, *id.*, col. 1032. The House of Commons divided Ayes 67 to Noes 108 that the declaration stand part of the Bill.

<sup>31</sup> Charles Law, *id.*, col. 1026.

<sup>32</sup> Henry Goulburn, *id.*, col. 1032.

<sup>33</sup> An Act to amend the Provisions of the Marriage and Registration Acts (1856) 19 & 20 Vict. c. 119, s. 12.

<sup>34</sup> *id.*

<sup>35</sup> Journals of the House of Lords, vol. 88, 11 July 1856, pp. 413-414.

<sup>36</sup> Sir William Jowitt, 163 *H.L. Debs.*, cols. 350-351 (28 June 1949).



the consolidating Act was to simplify the law. However, what the Marriage Act 1949 actually achieved was to more simply convey the complex distinctions that the law maintained. For instance, Part 2 of the Marriage Act 1949 made provision for marriage to be solemnized according to the rites of the Church of England<sup>37</sup> and set out the four methods of authorizing such marriages: the publication of banns of matrimony; a special licence of marriage; a common licence of marriage; or a certificate issued by a superintendent registrar.<sup>38</sup> Each method of authorizing a marriage according to the rites of the Church of England (except in respect of marriage authorized by special licence) placed restrictions on the space in which the marriage could be solemnized: for example, a marriage solemnized on the authority of a common license was restricted to ‘the parish church of the parish, or an authorised chapel of the ecclesiastical district, in which one of the persons to be married has had his or her usual place of residence for fifteen days immediately before the grant of the licence’ or ‘a parish church or authorised chapel which is the usual place of worship of the persons to be married or of one of them’.<sup>39</sup> Part 3 of the Marriage Act 1949 made similarly clear the spatial and illocutionary distinctions maintained between marriages solemnized on the authority of superintendent registrar’s certificate in registered buildings, in places according to the usages of the Religious Society of Friends (Quakers) or of the Jews, and in register offices.

The Marriage Act 1949 can be seen as a taxonomy of the spatial and illocutionary differences between the modes of solemnizing civil and religious marriages that had developed in the previous century and, moreover, a means by which to ensure the maintenance of those differences. At the time the Marriage Act 1949 was enacted, the solemnization of religious marriage was largely confined to specific places of worship – churches and chapels of the Church of England and registered buildings of other faiths – save for those marriages between Quakers and Jews. However, this containment of religious marriages in places of worship was relaxed in 1970 to enable so-called ‘deathbed marriages’ to be solemnized elsewhere than in a registered building ‘according to such form or ceremony, not being the rites or ceremonies of the

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<sup>37</sup> By virtue of the Marriage Act 1949, s. 78(2) any reference in that Act to the Church of England is (unless the context otherwise requires) to be construed as including a reference to the Church in Wales. We similarly refer to the Church of England to include a reference to the Church in Wales unless a distinction is necessary.

<sup>38</sup> Marriage Act 1949, s. 5 (as enacted).

<sup>39</sup> *id.*, s. 15 (as enacted).

Church of England or the Church in Wales, as the persons to be married shall see fit to adopt'.<sup>40</sup> Similarly, in 1983 provision was made to enable marriage to be solemnized according to religious rites in respect of persons who were housebound or detained.<sup>41</sup> The spaces in which marriage could be solemnized by civil ceremony were also significantly expanded in 1994 when legislation enabled marriage to be solemnized on premises approved by local authorities.<sup>42</sup> A marriage solemnized on an approved premises is subject to the prohibition that '[n]o religious service shall be used'<sup>43</sup> and the parties to be married must speak the same declaratory and contracting words that are required in the context of marriage solemnized in registered buildings or register offices.<sup>44</sup> In 1996, Parliament provided couples to be married other than according to the rites of the Church of England with alternative declaratory and contracting words<sup>45</sup> on the basis that the 'style, vocabulary and grammatical construction' of the existing words was 'discordant with the rest of the rites now used in the Roman Catholic and Free Churches' and 'alien to the natural mode of expression of the couple'.<sup>46</sup>

### **SAME-SEX CIVIL PARTNERSHIP: RELIGIOUS OPPOSITION AND THE SACRED/SECULAR DISTINCTION**

Having traced the origins of the spatial and illocutionary aspects of English marriage law and the sacred/secular distinctions they produce and maintain, this section examines how these aspects of marriage law were crucial to the development and enactment of the Civil Partnership Act 2004, which enabled same-sex couples in the UK to register a civil partnership. The illocutionary aspects of marriage law underpinned the inclusion of provisions in the Civil Partnership Act 2004 that make the signing of a civil partnership document in England and Wales the formal means

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<sup>40</sup> Marriage (Registrar General's Licence) Act 1970, s. 10(1) (as enacted). This Act also made provision for deathbed marriage by civil ceremony. Deathbed marriage solemnized according to the rites of the Church of England was already possible by authority of Special Licence, granted by the Archbishop of Canterbury under An Acte for the exonaracion frome exaccions payde to the See of Rome (1533) 25 Hen. 8 c. 21.

<sup>41</sup> Marriage Act 1983. This Act also made provision for marriage in such circumstances by civil ceremony. Marriage for housebound and detained persons solemnized according to the rites of the Church of England was already possible by authority of Special Licence (see n. 40).

<sup>42</sup> Marriage Act 1994.

<sup>43</sup> Marriage Act 1949, s. 46B(4).

<sup>44</sup> *id.*, s. 46B(3).

<sup>45</sup> Marriage Ceremony (Prescribed Words) Act 1996.

<sup>46</sup> Bishop of Southwark (Robert Williamson), 572 *H.L. Debs.*, col. 842 (21 May 1996).

by which a civil partnership is registered<sup>47</sup> (in contrast to the verbal declaration and contract made in the solemnization of marriage) and prohibit any ‘religious service [being] used while the civil partnership registrar is officiating at the signing of a civil partnership document’.<sup>48</sup> The spatial aspects of marriage law underpinned the inclusion of the prohibition that the place that two people may register as civil partners of each other ‘must not be in religious premises’<sup>49</sup> (defined as those premises which ‘are used solely or mainly for religious purposes’ or ‘have been so used and have not subsequently been used solely or mainly for other purposes’<sup>50</sup>). As we demonstrate below, these provisions were included in order to imbue the process of civil partnership registration with spatial and illocutionary characteristics that were different to those associated with the solemnization of marriage.

The basis for the prohibitions in the Civil Partnership Act 2004 relating to religious premises and religious services can be found in the government’s response to the public consultation on civil partnership that took place in 2003.<sup>51</sup> This consultation generated considerable opposition from churches and other religious organisations. The government’s own analysis showed that it received responses from 17 nationally based religious groups and that 47 per cent of these (eight responses) did not support the principle of a same-sex civil partnership scheme.<sup>52</sup> The analysis further showed that the government received 20 responses from a number of organizations representing individual religious groups and congregations and of these 85 per cent (17 responses) were not supportive.<sup>53</sup> The government’s response to this opposition was to state that it would not ‘interfere in matters that are clearly for religious groups to decide for themselves’ and that the ‘registration of a civil partnership would be a purely civil process and involves no religious element’.<sup>54</sup>

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<sup>47</sup> Civil Partnership Act 2004, s. 2 (in respect of England and Wales).

<sup>48</sup> *id.*, s. 2(5) (in respect of England and Wales).

<sup>49</sup> *id.*, s. 6(1)(b) (as enacted, in respect of England and Wales).

<sup>50</sup> *id.*, s. 6(2) (as enacted, in respect of England and Wales).

<sup>51</sup> Women and Equality Unit, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (2003).

<sup>52</sup> Women and Equality Unit, *Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (2003) para. 2.13.

<sup>53</sup> *id.*, para. 2.14.

<sup>54</sup> *id.*, para. 3.12.

In order to achieve its commitment not to ‘interfere’ with religion, the government looked to the pre-existing legal framework regulating the solemnization of civil marriage as a model for creating civil partnership. As noted previously, since the commencement of the Act of 1836 it has been possible to solemnize marriage on the authority of superintendent registrar’s certificate<sup>55</sup> in a register office, and subsequently approved premises, in a manner that must not involve any religious service. When marriage is solemnized in this way, the only aspect of the ceremony which directly corresponds with marriage that is solemnized according to a religious ceremony is in respect of the verbal declaration and contract made by the parties to be married in a registered building (places of religious worship other than those of the Church of England). In order to construct civil partnership in a way that divested the registration process of any religious quality, the government used the model of civil marriage and omitted the element of the declaratory and contracting words. This can be seen as an attempt to appease hostile religious groups by ensuring that the civil partnership registration process had no spatial or illocutionary similitude with religious marriage.

When the Civil Partnership Bill was debated in Parliament, the government stated that its ‘strength [was] that it offers a *secular solution* to the disadvantages which same-sex couples face in the way they are treated by our laws’.<sup>56</sup> The Bishop of Peterborough (Ian Cundy) welcomed the government’s commitment to ‘a secular solution’ which he stated was ‘honoured’ by the creation of ‘a distinctive procedure with no specific wording; a document signed before a civil partnership registrar; without religious, or indeed any, defined ceremony’.<sup>57</sup> However, this emphasis on the secular quality of civil partnership failed to mollify some of those religious organisations and individuals who remained hostile. Continued antagonism stemmed from what the Bishop of Oxford (Richard Harries) described as ‘a concern to some in the Churches that the legislation [. . .] parallels that for marriage at almost every point’.<sup>58</sup> This point was reiterated by a range of parliamentarians who asserted that civil partnership was ‘driven too much by an attempt to shadow the provisions for

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<sup>55</sup> Immigration and Asylum Act 1999, s. 161(3) made the requirement ‘two certificates’.

<sup>56</sup> Baroness Scotland of Asthal, 660 *H.L. Debs.*, col. 388 (22 April 2004). Our emphasis.

<sup>57</sup> *id.*, cols. 421-422.

<sup>58</sup> *id.*, col. 399.

marriage’,<sup>59</sup> was ‘a parody on marriage’<sup>60</sup> and ‘introduces homosexual marriage by any other name’.<sup>61</sup>

This opposition to civil partnership was recognized to come from ‘those who feel that it is an attack on Christian marriage or, indeed, on civil marriage, *which has its roots in a Christian tradition*’.<sup>62</sup> Imbuing all marriage with a sacred quality and origins, these opponents did not accept that the government’s proposals for the civil partnership registration process significantly distinguished civil partnership from marriage. By depicting marriage, regardless of where or how it was solemnized, as ‘a solemn and holy thing’<sup>63</sup> and a ‘unique and holy’ institution,<sup>64</sup> it was argued that the introduction of civil partnership would ‘further undermine the institution of marriage – the holiest state of matrimony. At the same time, it will be an affront to Christians and other faith communities.’<sup>65</sup> Civil partnership would do this, it was argued, because, for instance, a civil partnership ‘must be solemnised in front of a registrar in the presence of two witnesses, exactly like marriage’.<sup>66</sup> Such views were in sympathy with the Church of England’s argument that marriage ‘warrants a special position within the social and legislative framework of our society’ and its doubt that ‘there will in practice be a sufficient distinction in law between marriage and registered same-sex partnerships’.<sup>67</sup>

In response to these arguments, key supporters of the introduction of civil partnership rarely contested assertions regarding the ostensibly sacred quality of all marriage. Rather, supporters sought to appease objectors by acceding to the claim that marriage retained a religious significance that made it distinct from purely secular civil partnership. For example, Alan Duncan MP asserted that ‘[w]hile marriage is an ancient institution with special religious significance, civil partnership is a secular legal arrangement’, and because a ‘religious service is specifically banned during the

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<sup>59</sup> Bishop of Chester (Peter Forster), 661 *H.L. Debs.*, col. GC208 (13 May 2004).

<sup>60</sup> Lord Tebbit, 662 *H.L. Debs.*, col. 1367 (24 June 2004).

<sup>61</sup> Edward Leigh, 426 *H.C. Debs.*, col. 731 (9 November 2004).

<sup>62</sup> Lord St John of Fawsley, 662 *H.L. Debs.*, col. 1357 (24 June 2004). Our emphasis.

<sup>63</sup> Ian Paisley, 425 *H.C. Debs.*, col. 223 (12 October 2004).

<sup>64</sup> Edward Leigh, 426 *H.C. Debs.*, col. 731 (9 November 2004).

<sup>65</sup> Christopher Chope, 425 *H.C. Debs.*, col. 213 (12 October 2004).

<sup>66</sup> Baroness O’Cathain, 660 *H.L. Debs.*, col. 404 (22 April 2004).

<sup>67</sup> Church of England, ‘Civil Partnership: Church of England response to DTI consultation document’ (30 September 2003) paras. 3 and 11.

signing of the register', the 'clear distinction between a civil secular partnership and the institution of marriage [is] preserved'.<sup>68</sup> Similarly, Chris Bryant MP argued that 'marriage is an institution that is ordained of God and should be celebrated between a man and a woman' and that 'we should have in law separate institutions that reflect that reality'.<sup>69</sup> These arguments, similar to those made by many parliamentarians in 1836 about the religious quality of marriage, sought to sacralize all marriage (to imbue all marriage with a sacred quality) in order to distinguish it from secular civil partnership. In this sense, the historical affinities of civil and religious marriage were stressed in order to make marriage *per se* appear distinct from civil partnership. As Jacqui Smith MP argued:

[W]e have used civil marriage as the template for creating a completely new legal relationship, that of the civil partnership [. . .] The whole point, however, is that civil partnership is not civil marriage, for a variety of reasons, such as the traditions and history – religious and otherwise – that accompany marriage. It is not marriage, but it is, in many ways – dare I say it? – akin to marriage. We make no apology for that.<sup>70</sup>

Edward Leigh MP described this argument as 'pure sophistry' designed to avoid affronting 'religious sentiment'.<sup>71</sup> However, whilst stressing the similarities between civil and religious marriage could be seen as a dubious way to distinguish marriage from civil partnership – particularly since, as discussed previously, marriage has long been solemnized in civil contexts by way of a purely secular ceremony – it was the omission of that shared aspect of civil and religious marriage (the verbal declaration and contract) from the civil partnership registration process that made it distinctive. This omission provided the government with a significant means of assuaging 'people's deeply held views, particularly about religious marriage'.<sup>72</sup> As such, the enactment of the Civil Partnership Act 2004 was aided by the government's engineering of the spatial and illocutionary dimensions of the civil partnership

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<sup>68</sup> 425 *H.C. Debs.*, cols. 184-185 (12 October 2004).

<sup>69</sup> *H.C. Committee*, col. 70 (21 October 2004).

<sup>70</sup> 426 *H.C. Debs.*, col. 776 (9 November 2004).

<sup>71</sup> *id.*, col. 780.

<sup>72</sup> Angela Eagle, *id.*, col. 776.

registration process in a way that resisted the persistent faith-based objection that civil partnership was ‘gay marriage in all but name’.<sup>73</sup>

### **‘BLUR’ AND ‘MUDDLE’? CIVIL PARTNERSHIP REGISTRATION IN PLACES OF WORSHIP**

The government’s specification of the spatial and illocutionary aspects of the civil partnership registration process to ensure that civil partnership would be regarded as strictly ‘secular’ was not welcomed by all supporters of same-sex partnership recognition. Indeed, during the passage of the Civil Partnership Act 2004, some parliamentarians actively objected to the prohibition of registering a civil partnership in religious premises or by way of a religious service. For example, Baroness Rendell argued that ‘[b]eing gay does not turn someone into an atheist’ and ‘[m]any homosexual and lesbian people are deeply religious [...] and would like to feel their commitment to each other was made in the sight of God as well as man’.<sup>74</sup> Similarly, the Bishop of Oxford (Richard Harries) argued that preventing ‘registration taking place in any premises designed or mainly used for religious purposes’ was ‘unsatisfactory for two reasons’:

First, it infringes the proper freedom of religious authorities to control such premises. As a matter of principle, it is for those authorities and not for the state to decide whether or not their premises should be available to be used for registration purposes [...] Secondly, the ban would deny some couples the possibility of a religious celebration in close proximity to a civil registration, which they may see as a commitment with a religious dimension. For example, they may want to have a civil registration in a church hall and then to move on afterwards to a religious ceremony in a church. Of course, that is not allowed in the Church of England and some other Christian denominations. But there may very well be religious bodies which would not only permit but welcome such a development, and it would be quite wrong to

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<sup>73</sup> Gerald Howarth, 425 *H.C. Debs.*, col. 239 (12 October 2004).

<sup>74</sup> 660 *H.L. Debs.*, col. 415 (22 April 2004).

preclude them from having such a ceremony in proximity to a church hall, for example.<sup>75</sup>

Although the Bishop of Oxford did not explicitly advocate that same-sex couples should be able to register a civil partnership by means of a religious ceremony inside a church – he made the distinction between a registration taking place in a church hall and a religious ceremony following later inside a church – he did directly contest the prohibition on registering a civil partnership in a religious premises. When an amendment was tabled that sought to omit this prohibition from the Bill, it was met with significant hostility on the grounds that, for example,

[it] would legalise civil partnership registration in a church, a mosque, a synagogue or temple [...] But a great many clergy would regard it as totally unacceptable for a Government Bill to permit civil partnerships to be registered in a place of worship [...] This amendment directly concerns matters of religious belief. It is not about civil rights, since [...] a civil ceremony is freely available. It is, however, about theology and the views that religious people hold on homosexual practice. The amendment directly affects the internal affairs of religious bodies.<sup>76</sup>

The amendment was withdrawn and, as we detailed above, the prohibition of civil partnership registration in religious premises was enacted. Five years later, however, during the passage of what became the Equality Act 2010, Lord Alli announced his intention to attempt ‘to reverse the current ban on civil partnerships taking place on religious premises’.<sup>77</sup> His argument for doing so was that ‘[i]t is wrong to ban civil partnerships from churches and religious institutions’ and removing the prohibition would be within the ‘tradition of standing up for religious freedoms’.<sup>78</sup> This view found wide support, even amongst some Peers with records of voting on faith-based grounds against law reform aimed at extending gay and lesbian legal equality. For example, Baroness Butler-Sloss, who had opposed the introduction of the Equality Act (Sexual Orientation) Regulations 2007 (which prohibited discrimination on the

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<sup>75</sup> *id.*, cols. 399-400.

<sup>76</sup> Baroness O’Cathain, 661 *H.L. Debs.*, col. GC135 (12 May 2004).

<sup>77</sup> 715 *H.L. Debs.*, col. 1444 (15 December 2009).

<sup>78</sup> *id.*.



grounds of sexual orientation in respect of, inter alia, the provision of goods, facilities and services and the disposal and management of premises),<sup>79</sup> argued:

I am utterly persuaded by it [the removal of the prohibition of registering a civil partnership in a religious premises]. I would be totally opposed to it being a requirement, because many churches would find this utterly abhorrent; but in so far as there are churches and synagogues and other faith places that would like this to happen, it is entirely appropriate and I support [it].<sup>80</sup>

Many others, however, remained unpersuaded by this argument. For example, Baroness Royall argued that allowing the registration of civil partnerships in religious premises ‘blurs the line between what is a civil partnership and something that has elements of a religious partnership’.<sup>81</sup> The Bishop of Bradford (David James) argued that ‘when Parliament introduced civil partnerships just a few years ago, it drew a clear distinction between the new legal status and marriage’ and that changing this would create a ‘muddle’ in the area of ‘civil rights and religious freedoms’.<sup>82</sup> And Lord Tebbit argued that allowing civil partnerships to be registered in religious premises would ‘equate civil partnership with marriage’ because, as he problematically asserted, marriage is something that takes place in a religious space:

[C]ivil partnership is not a marriage, cannot be a marriage, never will be a marriage and should be treated entirely separately from marriage. Marriage is celebrated within a church. That is absolutely clear. Other forms of union between two persons are not celebrated within a church and I do not think that they should be.<sup>83</sup>

These opponents asserted that the restriction on registering a civil partnership in religious premises was pivotal to maintaining the distinction between same-sex civil partnerships and opposite-sex marriage. ‘Christians and others’, the Bishop of Chichester (John Hind) argued, ‘will continue to resist any blurring of the distinction

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<sup>79</sup> 690 *H.L. Debs.*, Division No.1 (21 March 2007).

<sup>80</sup> 716 *H.L. Debs.*, col. 1200 (25 January 2010).

<sup>81</sup> 717 *H.L. Debs.*, col. 1437 (2 March 2010).

<sup>82</sup> *id.*, col. 1430.

<sup>83</sup> *id.*, col. 1436.

between marriage and civil partnership’.<sup>84</sup> However, a central reason why a number of parliamentarians supported the repeal of the prohibition of registering civil partnerships on religious premises was that they were persuaded that it enhanced religious freedom rather than furthered sexual orientation equality. In other words, it was accepted that the issue, as Baroness Royall put it, was primarily concerned with ‘fundamental religious conscience’ rather than ‘civil rights for lesbians and gay men.’<sup>85</sup> Much of the support for the repeal of the prohibition, therefore, can be seen to stem from the belief that it provided a mechanism to strengthen the capacity of religious organisations to exercise autonomy – which, importantly, included autonomy to refuse to register civil partnerships.

The Equality Act 2010 repealed the prohibition of registering a civil partnership in religious premises in England and Wales<sup>86</sup> and, following a consultation process, Regulations were made to enable the approval of religious premises as places where the formation of civil partnerships could happen.<sup>87</sup> This did not affect the interdiction that ‘[n]o religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership document’.<sup>88</sup> As a consequence, although a civil partnership may be registered in religious premises, the ‘proceedings [...] may not be religious in nature’.<sup>89</sup> This means that the proceedings must not include extracts from an authorized religious marriage service or from sacred religious texts, a religious ritual or series of rituals, hymns or other religious chants, or any form of worship<sup>90</sup> – although ‘readings, songs, or music containing an incidental reference to a god or deity in an essentially non-religious context’ are permitted.<sup>91</sup> These restrictions largely mirror the restrictions placed on proceedings in respect of the solemnization of marriage and the registration of civil partnerships in non-religious approved premises. However, they differ in one crucial respect, insofar as the proceedings conducted on religious premises, unlike proceedings conducted on non-religious premises, do not include ‘any material used by way of introduction to,

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<sup>84</sup> 718 *H.L. Debs.*, col. 866 (23 March 2010).

<sup>85</sup> 717 *H.L. Debs.*, col. 1439 (2 March 2010).

<sup>86</sup> Equality Act 2010, s. 202(2) repealed Civil Partnership Act 2004, ss. 6(1)(b) and 6(2).

<sup>87</sup> Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011, amending Marriages and Civil Partnerships (Approved Premises) Regulations 2005.

<sup>88</sup> Civil Partnership Act 2004, s. 2(5).

<sup>89</sup> Marriages and Civil Partnerships (Approved Premises) Regulations 2005, sch. 2A para. 15(1).

<sup>90</sup> *id.*, sch. 2A para. 15(2).

<sup>91</sup> *id.*, sch. 2A para. 15(3).

in any interval between parts of, or by way of conclusion'.<sup>92</sup> This makes it permissible, therefore, to include religious speech in an introduction, interval or conclusion to the formation of a civil partnership in approved religious premises and, although such speech does not form part of the proceedings by which the civil partnership is legally formed, this can be seen to blur the hitherto clear distinction between the secular and the sacred that civil partnership maintained.

Despite claims that permitting the registration of a civil partnership in religious premises would 'threaten religious freedom',<sup>93</sup> most organized religions continue to refuse to register civil partnerships in their premises. The Church of England, for example, has stated that 'the position under the new arrangements is that no Church of England religious premises may become "approved premises" for the registration of civil partnerships without there having been a formal decision by the General Synod to that effect'.<sup>94</sup> The General Synod has made no such decision and the Church of England maintains a prohibition of the registration of civil partnerships in all of their religious premises. The same is true of most other organized religions, save for in respect of a small number of religious premises owned by the Quakers, Unitarians, United Reformed Church and other 'free' Christian denominations. In this sense, the removal of the prohibition of registering a civil partnership on religious premises has effectively enabled organized religions to affirm a hierarchical distinction between same-sex and opposite-sex couples through the enforcement of a 'geography of exclusion'.<sup>95</sup> As we examine in the next section, the same hierarchical distinction is maintained by organized religions through the exclusion of same-sex couples from the spatial and illocutionary aspects of religious marriage.

## **LOCKING SAME-SEX COUPLES OUT OF RELIGIOUS MARRIAGE**

In 2012, when the UK government announced its intention to make 'civil marriage' lawful for same-sex couples in England and Wales, it stated that 'marriages solemnized through a religious ceremony and on religious premises would still only

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<sup>92</sup> *id.*, sch. 2 para. 11(4).

<sup>93</sup> Baroness O'Cathain, 733 *H.L. Debs.*, col. 1409 (15 December 2011).

<sup>94</sup> Church of England, 'Civil partnerships in religious premises: note from the Secretary General' (1 December 2011) para. 8.

<sup>95</sup> D. Sibley, *Geographies of Exclusion* (1995).

be legally possible between a man and a woman'.<sup>96</sup> It did so in response to the 'religious organisations that raised concerns about the redefinition of religious marriage' and to reassure them that there were 'no proposals to change the way that religious marriages are solemnized'.<sup>97</sup> However, following public consultation, the government subsequently announced that 'there is strength in the argument that, once marriage is made available to same-sex couples, religious organisations should be permitted to conduct such ceremonies if they wish to'.<sup>98</sup> The reason for this change was that a small number of organized religions had argued that prohibiting the solemnization of same-sex marriage on religious premises and according to religious rites curtailed religious freedom. The Quakers, for example, argued for 'a permissive law which allows religious freedom'.<sup>99</sup> However, in light of the strong opposition by the Church of England, Catholic Church, Muslim Council of Britain and other mainstream organized religions to same-sex marriage, the Government stated that 'it will remain unlawful for a religious organisation to marry same-sex couples unless it expressly consents and opts in according to a formal process put in place by legislation'.<sup>100</sup> As a consequence of this, when the Marriage (Same Sex Couples) Bill was introduced in Parliament it contained a suite of provisions to 'protect' religious organisations that did not want to solemnize the marriages of same-sex couples.

The government's branding of the religious protections in the Marriage (Same Sex Couples) Act 2013 as the 'quadruple lock' was unintentionally apt because the protections essentially allow religious organizations to debar same-sex couples from premises and ceremonies that they make available to opposite-sex couples for the purpose of solemnizing marriage. The four 'locks' provide that: solemnizing same-sex marriage in places of worship or in another place according to religious rites or

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<sup>96</sup> Government Equalities Office, *Equal Civil Marriage: A Consultation* (2012) para. 1.9(ii). The Church of England, when opposing the proposal to introduce same-sex marriage, responded by disputing the distinction between 'civil' and 'religious' marriage, arguing that in English 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.' Church of England, 'A response to the Government Equalities Office consultation – "Equal Civil Marriage" – from the Church of England' (June 2012) para. 18.

<sup>97</sup> Government Equalities Office, *op.cit.*, n.96, para. 1.7.

<sup>98</sup> H.M. Government, *Equal Marriage: The Government's Response* (2012) para. 4.18.

<sup>99</sup> Religious Society of Friends (Quakers), 'Equal civil marriage: a consultation, Britain Yearly Meeting response' (17 May 2012).

<sup>100</sup> H.M. Government, *op.cit.*, n. 98, para. 4.19.

usages requires a religious organization to ‘opt in’;<sup>101</sup> no person or religious organization can be compelled to opt in and, consequently, no person or religious organization can be compelled to conduct, be present at, carry out, otherwise participate in, or consent to a religious marriage ceremony of a same-sex couple;<sup>102</sup> any person or religious organization that does not conduct, is not present at, does not carry out, does not otherwise participate in, or does not consent to a religious marriage ceremony, for the reason that the marriage is the marriage of a same-sex couple, does not contravene anti-discrimination law relating to the provision of services and the exercise of public functions;<sup>103</sup> and the Church of England is unable to opt in to solemnizing same-sex marriage in the same way as other religious organisations.

The protections relating to the Church of England in the Marriage (Same Sex Couples) Act 2013 are extensive,<sup>104</sup> but of particular note is the provision that:

No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue

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<sup>101</sup> The Marriage (Same Sex Couples) Act 2013 contains provisions that permit a marriage of a same-sex couple to be solemnized according to religious rites and usages when a religious organization has followed the relevant ‘opt in’ procedures. These provisions are found in: ss. 4-5, amending pt. 3 Marriage Act 1949, in respect of marriage solemnized on the authority of superintendent registrar’s certificates in places of worship or in another place according to religious rites or usages; s. 6, amending pt. 5 Marriage Act 1949, in respect of marriage solemnized in naval, military and air force chapels; s. 7, amending Marriage (Registrar General’s Licence) Act 1970, in respect of marriage solemnized on the authority of a Registrar General’s Licence (‘deathbed marriage’); and sch. 6 in respect of religious services at forces marriages of same-sex couples solemnized overseas.

<sup>102</sup> Marriage (Same Sex Couples) Act 2013, s. 2(1)-(2).

<sup>103</sup> *id.*, s. 2(6) creating Equality Act 2010, sch. 3 pt. 6A.

<sup>104</sup> There is a history of the UK Parliament enacting legislative provisions designed to protect the doctrine and practice of the Church of England from changes made to English marriage law. For example, the Marriage Act 1949, s. 5A provides that no clergyman of the Church of England shall be obliged to solemnize a marriage, or to permit a marriage to be solemnized in the church or chapel of which he is the minister, that would have been void by reason of the relationship of the persons to be married prior to changes to the prohibited degrees of affinity introduced by the Marriage (Prohibited Degrees of Relationship) Act 1986 (which removed the absolute prohibition of marriage between certain persons related by affinity) and the Marriage Act 1949 (Remedial) Order 2007 (which repealed provisions restricting marriage between a person and parent of former spouse or person and former spouse of child). Furthermore, the Matrimonial Causes Act 1965, s. 8 provides that no clergyman of the Church of England shall be compelled to solemnize the marriage, or to permit the solemnization of a marriage in the church or chapel of which he is the minister, of divorced persons. These provisions exempt Church of England clergy from any obligation to solemnize a marriage between certain persons who are otherwise legally permitted to marry.

of its making provision about marriage being the union of one man with one woman.<sup>105</sup>

This provision allows the definition of marriage as the union of ‘one man with one woman’ contained in Church of England Canon law<sup>106</sup> to exist in parallel with the general marriage law. As a result of this, English law now contains two conflicting definitions of marriage because ‘[i]n the law of England and Wales, marriage has the same effect in relation to same sex couples as it has in relation to opposite sex couples’ but this does not have any effect in relation to ‘Measures and Canons of the Church of England’, ‘subordinate legislation (whenever made) made under a Measure or Canon of the Church of England’, or ‘other ecclesiastical law’.<sup>107</sup> Allowing this difference between Canon and statute law is without direct equivalence in the time since the Submission of the Clergy Act 1533 was enacted, and the provision to allow Canon law relating to marriage to be contrary to statute law therefore represents an important legislative (and constitutional) event.<sup>108</sup> The practical effect of this provision is that it ensures that the Church of England can lock same-sex couples out of their churches and rites in respect of the solemnization of marriage.

The religious protections in the Marriage (Same Sex Couples) Act 2013 exist because of the acquiescence of legislators to religious intolerance of homosexuality. The government described these provisions as ‘promoting religious freedom’<sup>109</sup> but their practical effect is to give religious organizations the freedom to discriminate against same-sex couples. This is problematic because if it is accepted that the solemnization of all religious marriage in English and Wales is state-sanctioned – insofar as marriage solemnized according to religious rites and usages can happen only by virtue of the statute law that regulates it – then the Marriage (Same Sex Couples) Act 2013

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<sup>105</sup> Marriage (Same Sex Couples) Act 2013, s. 1(3).

<sup>106</sup> Canon B 30 ‘Of Holy Matrimony’ in Church of England, *The Canons of the Church of England*, 7th Edition (2011).

<sup>107</sup> Marriage (Same Sex Couples) Act 2013, s. 11.

<sup>108</sup> An Acte for the submission of the Clergie to the Kynges Majestie (1533) 25 Hen. 8 c. 19, s. 3 ‘[p]rovided alway that no canons [. . .] shalbe contrariaunt or repugnant to the [. . .] customes lawes or statutes of this Realme’. This was re-expressed and applied by Synodical Government Measure 1969, s. 1(3)(b). Although there have been previous exemptions of Canon law from the 1533 Act – for example, in the Church of England (Worship and Doctrine) Measure 1974 (No.3) and the Church of England (Miscellaneous Provisions) Measure 1976 – the Marriage (Same Sex Couples) Act 2013 represents arguably the most significant de-coupling of statute and Canon law. The Bishop of Chester (Peter Forster) called it ‘unprecedented in statute law’ (745 *H.L. Debs.*, col. 995 (3 June 2013)).

<sup>109</sup> Baroness Stowell, 745 *H.L. Debs.*, col. 938 (3 June 2013).

can be seen to give the state's imprimatur to discrimination based on sexual orientation. In short, the state has enabled organized religions to offer opposite-sex couples access to their premises and to their ceremonies for the purpose of solemnizing marriage whilst explicitly permitting them to deny this access to same-sex couples. Furthermore, it has shielded religious organizations from any legal claim of discrimination on the grounds of sexual orientation by providing them with a bespoke exception from law prohibiting discrimination in the provision of services to the public and the exercise of public functions.<sup>110</sup>

The exclusion of same-sex couples from religious marriage operates through the prohibition of solemnizing same-sex marriage in a vast number of religious premises. These premises include the almost 16,000 churches of the Church of England in which 46,740 marriages of opposite-sex couples were solemnized in 2014,<sup>111</sup> as well as the approximately 1350 churches of the Church in Wales. They also include more than 99.5 per cent (22,849 out of 22,957) of the places of worship in England and Wales that are registered for the solemnization of opposite-sex marriage.<sup>112</sup> Taken together, these religious premises comprise approximately 40,200 sites in which same-sex couples are excluded from having a marriage solemnized. Such spatial exclusion serves to almost completely shut same-sex couples out of marriage solemnized according to religious rites or usages, save for in respect of those small number of places of worship that are registered to solemnize same-sex marriage or in circumstances where same-sex marriage is permitted according to the usages of the Quakers or of the Jews. As a consequence, same-sex couples are almost completely denied access to a mainstream social and cultural practice – a religious marriage ceremony – that is accessed by 30% of all those opposite-sex couples who marry each

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<sup>110</sup> Equality Act 2010, sch. 3 pt. 6A as applicable to Equality Act 2010, s. 29. Prior to the enactment of the Marriage (Same Sex Couples) Act 2013, Equality Act 2010, sch. 3 pt. 6 already contained exceptions from the general prohibition of discrimination in the provision of services to the public and the exercise of public functions in respect of the religious solemnization of marriage and gender reassignment. This provision, which shields organized religions from any claim of discrimination if they refuse to solemnize a marriage on the basis that one of the parties has an acquired gender, is based on the same principle as the protections relating to same-sex marriage: it is designed to ensure the freedom of organized religions to refuse to solemnize the marriages of those couples who, in their view, do not comprise a man and a woman.

<sup>111</sup> Church of England, *Statistics for Mission 2014*. This is the last year for which data are available. The Church of England also carried out 2,790 services of prayer and dedication after civil marriages in 2014.

<sup>112</sup> HM Passport Office, 'Places of worship registered for marriage' (list last updated 19 January 2016).

year.<sup>113</sup> In respect of marriage solemnized according to the rites of the Church of England, access to this mainstream social and cultural practice is the effective legal right of opposite-sex couples.<sup>114</sup> By empowering organized religions including the established Church to refuse to give same-sex couples access to religious marriage, the state enables organized religions to powerfully express their hostility towards homosexuality.

## **MORE ‘BLURRING’: THE CONVERSION OF CIVIL PARTNERSHIP TO MARRIAGE**

We examined above how spatial and illocutionary distinctions within English marriage law enable organized religions to debar same-sex couples from having a marriage solemnized in a place of worship and by way of a religious ceremony. This is the outcome, as we have demonstrated, of Parliament enacting legislation that gives same-sex couples an effective right to access civil marriage but leaves to religious organizations the question of whether or not to permit same-sex couples to have access to religious marriage. This approach will be regarded as appropriate by those who believe that in a liberal democratic society the state should be ‘neutral’ in matters relating to religion<sup>115</sup> (although the constitutional relationship between the Church of England, the UK Parliament and the Head of State makes neutrality a particularly problematic concept in this respect) and exercise its authority only in the civil (secular) sphere. This has generally been the approach of successive governments which, when legislating in relation to sexual orientation equality, have decided not to interfere with the practices of faith-based organizations where such practices do not touch on aspect of civil society.<sup>116</sup>

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<sup>113</sup> There were 77,910 religious marriage ceremonies in 2012, which is the last year for which data are available. Office for National Statistics, *Statistical Bulletin: Marriages in England and Wales (Provisional): 2012* (11 June 2014).

<sup>114</sup> Marriage (Same Sex Couples) Act 2013, s. 1(4) provides that ‘[a]ny duty of a member of the clergy [a clerk in Holy Orders of the Church of England or the Church in Wales] to solemnize marriages (and any corresponding right of persons to have their marriages solemnized by members of the clergy) is not extended by this Act to marriages of same sex couples’.

<sup>115</sup> For a discussion, see, for example, L. Zucca, ‘Lautsi: a commentary on a decision by the ECtHR Grand Chamber’ (2013) 11 *Int’l. J. Constit. L.* 218-229; I. Leigh and R. Ahdar, ‘Post-Secularism and the European Court of Human Rights: or how God never really went away’ (2012) 75 *Modern Law Review* 1064–1098.

<sup>116</sup> For example, religious organizations have been provided with a bespoke exception in respect of anti-discrimination law relating to services and public functions, premises, and associations, which permits them to impose restrictions based on sexual orientation (see Equality Act 2010, sch. 23 para.



The government's legislative approach to same-sex marriage appears logical within the historical context of marriage law that we described above, because it seems to maintain the long-standing distinction between civil and religious marriage that emerged in the nineteenth century. However, in this final section we suggest that one aspect of the legal framework regulating the solemnization of same-sex marriage significantly blurs the distinction between civil and religious marriage. This concerns the process by which same-sex couples may convert civil partnership into marriage. This process is prescribed by Regulations<sup>117</sup> made under the Marriage (Same Sex Couples) Act 2013<sup>118</sup> and has been in operation since December 2014. Between that time and June 2015, 7,732 couples chose to convert a civil partnership into a marriage.<sup>119</sup> When the government first issued the draft of the Regulations that enables the conversion process, the draft contained a 'standard procedure' which required that a conversion 'must take place at a register office' and that the two people converting their civil partnership into a marriage must 'attend together in person before the superintendent registrar of a registration district'<sup>120</sup> (although provision was also made for the superintendent registrar to conduct the conversion elsewhere in respect of persons who were housebound, detained or seriously-ill and not expected to recover). The draft Regulations stated that civil partners would be deemed to have converted their civil partnership into a marriage when each of them had signed a 'conversion declaration' that contained, inter alia, a declaration in the following terms:

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2). This means that a church, for instance, can restrict membership or participation in its activities on the basis of sexual orientation, providing the restriction is imposed because it is necessary to comply with the doctrine of the organization or to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers. However, if a religious organization contracts with a public body to carry out the provision of a service on that body's behalf then it cannot discriminate on the grounds of sexual orientation in the delivery of that service. This means, for example, that a faith-based voluntary adoption or fostering agency cannot restrict its service based on sexual orientation (but see D. Morris, A. Morris and J. Sigafos, 'Adopting (in)equality in the UK: the Equality Act 2010 and its impact on charities' (2016) 38 *Journal of Social Welfare & Family Law* 14-35).

<sup>117</sup> Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014.

<sup>118</sup> Marriage (Same Sex Couples) Act 2013, ss. 9 and 18.

<sup>119</sup> Office for National Statistics, 'Civil Partnerships in England and Wales: 2014' (20 October 2015). Between the time civil partnership became available to same-sex couples and the end of 2014, the total number of civil partnerships formed in England and Wales was 62,621.

<sup>120</sup> Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014, regs. 8(1)-(2) (draft 07/2014).

I solemnly and sincerely declare that we are in a civil partnership with each other and I know of no legal reason why we may not convert our civil partnership into a marriage. I understand that on signing this document we will be converting our civil partnership into a marriage and you will thereby become my lawful wife [*or husband*].<sup>121</sup>

The draft Regulations imposed the blanket prohibition that '[n]o religious service is to be used at a conversion'.<sup>122</sup> It is clear, then, that at the time the government issued the draft Regulations it imagined that the conversion of a civil partnership into a marriage would be done wholly by civil (secular) means: the conversion would take place in a register officer (save for in those cases where the parties were unable to attend) and would be completed without any illocutionary procedure.<sup>123</sup>

Following the issuing of the draft Regulations, Jakki Livesey-van Dorst and her partner, Sheila, a same-sex couple who had been together for 22 years and had been in a civil partnership for 8 years, launched an online petition complaining about the conversion process. The couple, who wished to convert their civil partnership to marriage, protested that they would not be 'allowed all the things that make a marriage special', such as 'choosing a venue of meaning, having a ceremony' and being 'able to say the marriage vows'.<sup>124</sup> The petition attracted 42,176 supporters and, alongside criticism of the draft Regulations by some members of the House of Lords, this encouraged the government to withdraw and significantly revise the Regulations.<sup>125</sup> When the revised draft Regulations were laid before Parliament, Baroness Garden explained:

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<sup>121</sup> *id.*, reg. 4(2)(c).

<sup>122</sup> *id.*, reg. 3(2).

<sup>123</sup> The absence of any illocutionary aspect to the conversion process remains. Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014, reg. 3(3) does provide that '[a]s well as signing the conversion declaration [...] the parties may, if they wish, say the words of the declaration [...] to each other in the presence of the superintendent registrar' but they are not required to do so and, as such, it is the signing of the conversion declaration that converts a civil partnership to a marriage.

<sup>124</sup> Petition on Change.org. <https://www.change.org/p/paul-pugh-change-the-regulations-for-civil-partnership-conversion-to-marriage-so-civil-partners-wanting-to-convert-can-have-a-wedding-a-marriage-certificate>

<sup>125</sup> N. Duffy, 'Government to revise civil partnership conversion process after criticism', <http://www.pinknews.co.uk/2014/07/24/uk-government-to-revise-civil-partnership-conversion-process-after-criticism/>

There has been a lot of discussion about these proposals since we first laid instruments [...] People felt that these were too restrictive and did not allow sufficient flexibility for the celebration of their marriage for couples who had chosen to enter civil partnerships at a time when marriage was not available. As a result, we agreed to see what we could do to provide greater choice for couples. We have done that, and these instruments offer more flexibility, allowing conversions to be completed in the same range of venues where same-sex couples can currently marry.<sup>126</sup>

As a consequence, the enacted Regulations contain – alongside the standard procedure for conversion in a register or local registration office<sup>127</sup> – a ‘two stage procedure’<sup>128</sup> that allows for a conversion to take place in either ‘secular premises’<sup>129</sup> or ‘religious premises’.<sup>130</sup> When a couple convert a civil partnership in religious premises they must engage in a three-step process: first, both parties to a civil partnership attend together in person before the superintendent registrar to provide certain required information;<sup>131</sup> second, the parties to the civil partnership along with the superintendent registrar attend the religious premises in which the conversion takes place to sign the conversion declaration (which must, *inter alia*, be a building or place wherein the relevant governing authority of the religion concerned has given written consent to the reading or celebration of a marriage service in the case of a same-sex marriage<sup>132</sup>); third, a religious ceremony is ‘held in respect of the marriage immediately following the conversion’.<sup>133</sup> In essence, then, the conversion of a civil partnership to a marriage in this way, although it takes place in religious premises, is an entirely civil process since the conversion is deemed complete once the parties to the civil partnership and the superintendent registrar have signed the conversion declaration. Although a religious ceremony (a blessing) may immediately follow the signing of the conversion declaration, the marriage is deemed to already exist at that point. Therefore, the conversion of a civil partnership to a marriage in religious

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<sup>126</sup> 757 *H.L. Debs.*, col. 422 (18 November 2014).

<sup>127</sup> Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014, reg. 6.

<sup>128</sup> *id.*, reg. 10.

<sup>129</sup> *id.*, reg. 11.

<sup>130</sup> *id.*, reg. 12.

<sup>131</sup> *id.*, reg. 10.

<sup>132</sup> Marriage Act 1949, s. 46(1C).

<sup>133</sup> Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014, reg. 12.

premises is the same as a civil marriage in a register office that is followed by a religious ceremony in religious premises insofar as '[n]othing in the reading or celebration of a marriage service [...] shall supersede or invalidate the [...] marriage'.<sup>134</sup>

Although the staged process whereby a civil partnership is converted to a marriage in religious premises is designed to conform to the historical logic that 'civil' and 'religious' marriage are entirely distinct, it nevertheless uniquely and significantly 'blurs' this distinction. This is because the conversion process for the first time enables a civil marriage to come into existence in a place of worship. The marriage is 'civil' insofar as it is the consequence of a procedure carried out by a state official (the superintendent registrar) who, at the request of the parties who are converting the civil partnership, executes the procedure in religious premises. This can be seen to collapse the previous strong spatial distinction between the register office and places of worship, because it effectively means that a marriage 'arises'<sup>135</sup> from a wholly civil process carried out within a sacred space. Hitherto this was not possible because although a registrar (albeit not a superintendent registrar) may have been present at a marriage solemnized in a registered building, such a marriage has always been solemnized 'according to such form and [religious] ceremony as those persons [to be married] may see fit to adopt'.<sup>136</sup>

## CONCLUSION

We have demonstrated that the spatial and illocutionary requirements for the solemnization of marriage in England and Wales, which are organized according to the long-standing distinction between civil and religious marriage, provide the basis on which discrimination against same-sex couples persists. Same-sex couples who wish to solemnize a marriage are currently excluded from all but the tiniest number of places of worship in England and Wales and, as a consequence, cannot participate in many of the religious rites and usages available to opposite-sex couples. Given that the Marriage (Same Sex Couples) Act 2013 provides the means for organized

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<sup>134</sup> Marriage Act 1949, s. 46(2).

<sup>135</sup> *id.*, s. 46(1A).

<sup>136</sup> *id.*, s. 44(1).

religions – other than the Church of England – to opt-in to solemnizing same-sex marriage, it is possible that same-sex couples will gain wider access to religious marriage in the future. In this respect, discrimination against same-sex couples may diminish as a result of socio-religious change (although, of course, it could also intensify). Aside from waiting to see if more organized religions are prepared to offer same-sex couples access to the spaces in and ceremonies by which they solemnize the marriages of opposite-sex couples, it is open to Parliament to legislate to address discrimination against same-sex couples in respect of the solemnization of marriage. Short of abolishing marriage as a legal institution,<sup>137</sup> there are two principal legislative options available.

The first option available to Parliament to end discrimination against same-sex couples in respect of the solemnization of marriage is to repeal all of the current legal provisions that protect organized religions that solemnize opposite-sex marriage but refuse to solemnize same-sex marriage. For example, Parliament could repeal the provision in the Marriage (Same Sex Couples) Act 2013 that disapplies the Submission of the Clergy Act 1533 to the Church of England's Canon law on marriage.<sup>138</sup> This would have the immediate effect of making the Church of England's Canon law concept of marriage as being the union of one man with one woman contrary to the 'lawes or statutes of this Realme' and, as a consequence, require it to change.<sup>139</sup> The effect of repealing this and the other provisions that make up the so-called 'quadruple lock' would be the creation of a legal environment in which organized religions that currently solemnize opposite-sex marriage could be compelled by legal means (including, for example, 'by the enforcement of a contract or a statutory or other legal requirement'<sup>140</sup>) to offer the same 'service' to same-sex couples. Such compulsion would undoubtedly produce significant resistance from some organized religions and the individuals attached to them, who would complain that requiring them to solemnize the marriages of same-sex couples violated their rights guaranteed by Article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion). It is currently unclear how the

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<sup>137</sup> For a discussion, see N. Cobb, 'The Church of England's hold over marriage: the queer case for disestablishment' in *The Social Equality of Religion or Belief: A New View of Religion's Place in Society*, ed. A. Carling (2016).

<sup>138</sup> Marriage (Same Sex Couples) Act 2013, s. 1(3).

<sup>139</sup> An Acte for the submission of the Clergie to the Kynges Majestie (1533) 25 Hen.8 c. 19, s. 3.

<sup>140</sup> Marriage (Same Sex Couples) Act 2013, ss. 2(1) and 2(2).

European Court of Human Rights would adjudicate such a complaint but its established jurisprudence – which stresses that the state must strive to ‘maintain true religious pluralism, which is inherent in the concept of a democratic society’<sup>141</sup> and that the state’s role, as the ‘neutral and impartial organiser of the exercise of various religions, faiths and beliefs’, is not ‘to remove the cause of [any] tension by eliminating pluralism’<sup>142</sup> – suggests that a failure to adequately protect a religious organization or individual from being compelled to solemnize a same-sex marriage by way of a religious ceremony would be regarded as amounting to a violation of Article 9 of the European Convention on Human Rights.<sup>143</sup>

The second option available to Parliament to end discrimination against same-sex couples in respect of the solemnization of marriage would be to legislate to end the capacity of organized religions to solemnize marriage and instead to vest the power to authorize and solemnize marriage solely in the office of the superintendent registrar. This would abolish religious marriage, but the existing two-stage process of civil marriage followed by religious ceremony could be retained.<sup>144</sup> Organized religions would maintain the capacity to refuse to provide same-sex couples with a religious ceremony following a civil marriage, but since any such ceremony would not ‘supersede or invalidate’ the marriage<sup>145</sup> the refusal to provide it could not be deemed to be discrimination in respect of the solemnization of marriage. Depriving organized religions of the capacity to solemnize marriage would no doubt produce the claim that this amounted to a human rights violation. However, the European Court of Human Rights has been clear that the provisions of Article 9 of the European Convention on Human Rights ‘do not purport to regulate marriage in any religious sense’.<sup>146</sup> In addition, the right to marry enshrined in Article 12 of the European Convention on Human Rights is guaranteed ‘according to the national laws governing the exercise of this right’ and the European Court of Human Rights has accepted that ‘limitations on the right to marry laid down in the national laws may comprise formal rules

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<sup>141</sup> *Metropolitan Church of Bessarabia and Others v Moldova*, App. no. 45701/99, 13 December 2001, § 119.

<sup>142</sup> *Leyla Şahin v Turkey* [GC], App. no. 44774/98, 10 November 2005, § 107.

<sup>143</sup> For a discussion see C. McCrudden, ‘Human rights implications of the Marriage (Same Sex Couples) Bill: advice to the Catholic Bishops’ Conference of England and Wales’, 15 April 2013.

<sup>144</sup> Marriage Act 1949, s. 46.

<sup>145</sup> *id.*, s. 46(2).

<sup>146</sup> *Parry v the United Kingdom* (dec.), App. no. 42971/05, 28 November 2006.

concerning [...] the solemnisation of marriage’ providing that these do not ‘deprive a person or a category of persons of full legal capacity of the right to marry with the partners of their choice’.<sup>147</sup> Therefore, ending the capacity of the Church of England to authorize and solemnize marriage and the capacity of other organized religions to solemnize marriage on the authority of superintendent registrar’s certificates may not present significant problems in respect of potential human rights litigation. It is pertinent, however, that a recent scoping paper issued by the Law Commission in relation to their government-requested review of English marriage law stated that ‘considering universal civil marriage as an option’ was out of the question because this ‘would go against the whole genesis of this project, which was about extending the right to solemnize marriages, not taking it away’.<sup>148</sup> The Law Commission has also made clear that the question of ‘whether or not religious groups should be obliged to solemnize marriages of same sex couples’ falls outside the scope of its review.<sup>149</sup>

Given the long-standing legal organization of marriage in England and Wales, whereby organized religions retain significant autonomy to solemnize marriage, it is unlikely that the UK Parliament will pursue either of the legislative options outlined above. This is not least because of the ‘long and complex intertwining of the monarchy, the Church of England, [and] Parliament’ and the ways in which ‘[o]ther Christian denominations and leading representatives of Hindu, Jewish, Muslim, and Sikh faith communities have also gained admission in various ways to this pragmatic “settlement”’.<sup>150</sup> In other words, in order to make either of the legislative changes proposed above Parliament would need to significantly dismantle a religious settlement that is at the heart of British society. It is regrettable, in our view, that the current legislative framework regulating the solemnization of marriage will likely endure for a considerable period of time and, as a consequence, will perpetuate discrimination against same-sex couples. However, as we argued above, we also think it highly significant that Parliament has on two occasions been prepared to legislate in ways that blur otherwise clear legal boundaries between the secular and the sacred (in

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<sup>147</sup> *O’Donoghue and Others v the United Kingdom*, App. no. 34848/07, 14 December 2010, para. 83.

<sup>148</sup> For a discussion, see Law Commission, *Getting Married: A Scoping Paper* (2015) para. 3.31.

<sup>149</sup> <http://www.lawcom.gov.uk/project/marriage-law/>

<sup>150</sup> J.A. Beckford, ‘Public religions and the postsecular: critical reflections’ (2012) 51 *Journal for the Scientific Study of Religion* 1–19 at 13.

respect of the registration of civil partnership, and the conversion of civil partnership to marriage) in order to enable wholly civil functions to be carried out in religious spaces. In doing so, legislators have pragmatically massaged the established division between the civil and the religious spheres in order to address aspects of discrimination against same-sex couples. Nevertheless, since the current legislative settlement makes the access of same-sex couples to religious marriage dependent upon the consent of organized religions, it is almost certain that discrimination on the grounds of sexual orientation in respect of the solemnization of marriage will endure.