

# *The Church of England and same sex marriage: beyond a rights-based analysis*

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# THE CHURCH OF ENGLAND AND SAME SEX MARRIAGE: BEYOND A RIGHTS-BASED ANALYSIS

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## ABSTRACT

Some scholars, faced with the apparent conflict between the Church of England's teaching on marriage and the idea of equal marriage embraced by the Marriage (Same Sex Couples) Act 2013, have focussed on the implications of that Act for the constitutional relationship between church, state and nation. More frequently, academics have, noting the position of the Church of England under that Act, critiqued the legislation as an exercise in balancing competing human rights. This article by contrast, leaving behind a tendency to treat religion as a monolithic 'other', and leaving behind the neat binaries of rights-based analyses, interrogates the internal agonies of the Church of England as it has striven to negotiate an institutional response to the secular legalisation of same sex marriage. It explores the struggles of the Church to do so in a manner which holds in balance a wide array of doctrinal positions and the demands of mission, pastoral care and the continued apostolic identity of the Church of England.

## KEY WORDS

Marriage (Same Sex Couples) Act 2013, Church of England, same sex marriage, church and state

## INTRODUCTION

Since the UK Parliament first legislated for legally recognised civil partnerships for same sex partners,<sup>2</sup> and especially since it legislated for same sex marriage (hereafter SSM),<sup>3</sup> the position of the Church of England on questions of human sexuality has been under the spotlight.<sup>4</sup> This is perhaps inevitable. Its status as the Established church in England arguably makes it more

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<sup>1</sup> I owe a debt of gratitude to Stephen Banks, Piers Bickersteth, Mark Hill, Mark Laynesmith and Mark Wilde for their invaluable feedback and support. Responsibility for any errors and infelicities remains my own.

<sup>2</sup> Civil Partnership Act 2004.

<sup>3</sup> Marriage (Same Sex Couples) Act 2013 s1.

<sup>4</sup> Most recently in respect of services to mark gender transition. See David Pocklington, 'Services to mark gender transition' in *Law & Religion UK*, 24 January 2018 <<http://www.lawandreligionuk.com/2018/01/24/services-to-mark-gender-transition/>> accessed 2 November 2018. The wrangles have been so apparently intractable that Bruce Kaye, a leading Anglican scholar asked, in a journal editorial, 'Is Sex going to Kill the Anglican Communion?'. See (2007) 5(1) *Journal of Anglican Studies* 7-9.

visible in the national life than other religious bodies, and its governmental and legislative processes ensure that its internal agonies are aired in public.<sup>5</sup> Moreover, despite reports of waning church attendance and the idea that society is increasingly secular, there is a sense that:

... a great many people... who are not themselves churchgoers, actually have a large stake in the Church of England and care about it. It matters. In a sense, it is their church—legally, they are entitled to be married,<sup>6</sup> to be buried and to have their children baptised there—but it is also much more than that. In a visceral and emotional sense, it feels like their church.<sup>7</sup>

This sense of having a continuing stake in the Church of England, and of ongoing familiarity with and attachment to it, is fostered not only by the role often played by its clergy in marking life events, but also by the Church of England's historical and on-going role in education. Today about a million children in the UK attend Church of England Schools and there are around 15 million people alive who attended a Church of England school at some point in their life. According to the Church's own statistics, there are 4644 Church of England schools in England. This represents a quarter of all primary schools in England and over two hundred secondary schools.<sup>8</sup> In all of these schools collective worship reflects the traditions of the Church of England, and across the education sector the Church of England makes a major contribution to the dissemination of a broad Christian ethos through policies surrounding the content and delivery of religious education and PSICHE.<sup>9</sup>

Beyond a feeling of vicarious religious attachment to the Church of England there is also a very practical reason for taking an interest in its debates about SSM. The Church of

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<sup>5</sup> Not least because they are not infrequently subjected to parliamentary comment and debate. See eg Statement by the Second Church Estates Commissioner (Tony Baldry) and subsequent comments after the rejection of women bishops in General Synod: HC Deb, vol 553, cols 717-727, 22 November 2012. See also the Westminster Hall debate on women in the Church of England: HC Deb, vol 541, cols 1-22WH, 28 February 2012. On the role of Parliament in relation to the Church of England see S Slack, 'Synodical Government and the Legislative Process' (2012) 14 *Ecc LJ* 43-81; S Trott, 'The Function of the Ecclesiastical Committee of Parliament with Particular Reference to the Priests (Ordination of Women) Measure 1992' (1993) 107(1) *The Churchman* 6-23.

<sup>6</sup> If marrying a member of the opposite sex.

<sup>7</sup> Baroness Sherlock speaking on the Bishops and Priests (Consecration and Ordination of Women) Measure 2014: HL Deb, vol 756, col 182, 14 October 2014. This echoes the idea of what Grace Davie has called 'vicarious religion' among those who would not necessarily self-identify as members of a particular religious group. For a brief overview see G Davie, 'Vicarious Religion: A Response' (2010) 25(2) *Journal of Contemporary Religion* 261-266.

<sup>8</sup> See <<https://www.churchofengland.org/more/education-and-schools/church-schools-and-academies>> accessed 2 November 2018.

<sup>9</sup> Personal, Social Citizenship and Health Education.

England has more than 16,000 churches<sup>10</sup> in which different sex couples can marry, meaning that, while its churches are not available as venues for the blessing or solemnisation of SSM, same sex couples are at a significant disadvantage with regards to their ability to access a religious ceremony in connection with their marriage.<sup>11</sup>

While England has embraced the notion of equal marriage, and while other churches within the Worldwide Anglican Communion have done the same,<sup>12</sup> the Church of England maintains its traditional doctrine on marriage. Its pastoral guidance holds firm to the belief, enshrined in Canon B 30, that marriage consists in a permanent and lifelong union between one man and one woman.<sup>13</sup> In consequence, it prohibits its clergy from entered into a SSM themselves,<sup>14</sup> and from solemnising or offering public services of prayer and dedication in respect of such marriages.<sup>15</sup>

The Marriage (Same Sex Couples) Act 2013 protects the right of the Church of England to maintain its doctrine of marriage without suffering legal penalties. Neither the Church of England nor its clergy can be compelled to perform or participate in the solemnisation of same sex marriages.<sup>16</sup> Further, though the canon law of the Church of England now conflicts with the statutory definition of marriage, the 2013 Act explicitly preserves its validity.<sup>17</sup> The legislation precludes the Church of England from opting into the provision of services for SSM

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<sup>10</sup> Significantly more than any other Christian body – see <<https://www.churchofengland.org/about/churches>> 2 November 2018.

<sup>11</sup> See P Johnson, R Vanderbeck and S Falcetta, *Religious marriage of same-sex couples: A report on places of worship in England and Wales registered for the solemnization of same-sex marriage* (University of York and University of Leeds, 2017). Note, though, that the Law Commission is now to conduct a full review of the law relating to weddings. See <<https://www.lawcom.gov.uk/government-asks-law-commission-to-conduct-a-full-review-of-weddings-law/>> accessed 1 November 2018.

<sup>12</sup> Most recently the Scottish Episcopal Church has facilitated the holding of same sex marriages in its churches – see D Pocklington, ‘SEC approval of same-sex marriage; reaction in Anglican churches’ in *Law & Religion UK*, 8 June 2017 <<http://www.lawandreligionuk.com/2017/06/08/sec-approval-of-same-sex-marriage-reaction-in-anglican-churches/>> accessed 2 November 2018 and the Anglican Church of Canada. On the resulting litigation see M Ogilvie, ‘Judicial Restraint and Neutral Principles in Anglican Church Property Disputes: Bentley v Diocese of New Westminster’ (2011) 13 Ecc LJ 198-215.

<sup>13</sup> See eg *House of Bishops Pastoral Guidance on Same Sex Marriage* (15 February 2014) <<https://www.churchofengland.org/more/media-centre/news/house-bishops-pastoral-guidance-same-sex-marriage>> accessed 2 November 2018.

<sup>14</sup> *Ibid*, paras 26 and 27 and also *Pemberton v Inwood* [2018] EWCA Civ 564.

<sup>15</sup> *Ibid*, paras 19-21. This echoes the approach in respect of registered civil partnerships. It does not preclude an act of private prayer with such couples, though there is an expectation that this ‘should accompanied by pastoral discussion of the church's teaching and their reasons for departing from it.’

<sup>16</sup> Marriage (Same Sex Couples) Act 2013 s1(4) regarding the clergy of the Church of England and the Church in Wales and more generally s2.

<sup>17</sup> *Ibid* ss1(3) and 11(6).

in the same way as other churches and religious bodies, though it remains possible for its General Synod to do so by measure.<sup>18</sup>

Contemplating this state of affairs, and the apparent balance struck between the policy and legal objectives of both promoting equal marriage and safeguarding the liberty of the Church of England determine its own doctrine, scholars have sought to evaluate and critique the law. Some, noting the apparent disunity between the Church's canons and the secular legislation, and taking a different focus to that adopted here, have explored the possible consequences of the 2013 Act for the constitutional relationship between church, state and nation expressed in Establishment.<sup>19</sup> Others have assessed the legislation as an exercise in balancing what are increasingly seen to be competing human rights.<sup>20</sup> Amongst these have been scholars who have sought explicitly to challenge the existing state of the law on the ground that, by its protection of religious liberty and the religious institution of marriage, the law entrenches inequality and 'enables organized religions to powerfully express their hostility towards homosexuality.'<sup>21</sup>

This piece builds on the endeavours of such scholars but takes a different tack. They have largely written external analyses of the Church's position under, and response to, the law on SSM. They make assumptions about what stands behind that response, and often – within the framework of a rights-based analysis which sets up religious liberty and other rights in opposition – they treat religion as a monolithic 'other'. In this article, by contrast, I draw lessons from the work of sociologists such as Clifford Geertz<sup>22</sup> to provide what is in some senses a

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<sup>18</sup> Ibid s4(1) and Marriage Act 1949 s26A(5).

<sup>19</sup> For contrasting analyses see J Garcia Oliva and H Hall, 'Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?' (2014) 3(1) *Oxford Journal of Law and Religion* 3(1) 25-56 and N Sagovsky, 'Hooker, Warburton, Coleridge and the "quadruple lock": state and church in the twenty-first century' (2014) 16 *Ecc LJ* 140-146. For the conflict between the underpinning ideologies of human rights culture and Establishment more generally see C Smith, 'Establishment and Human Rights in the English Constitution: Happy Bedfellows or Uneasy Allies?' in N Doe and R Sandberg (eds), *Law and Religion: New Horizons* (Leuven, 2010) pp 41-56.

<sup>20</sup> See eg R Ahdar, 'Solemnisation of Same-Sex Marriage and Religious Freedom' (2014) 16 *Ecc LJ* 283-305; J Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecc LJ* 24-52; C Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) 29(4) *Oxford Journal of Legal Studies* 729-755; C Stychin, 'Closet Cases: 'Conscientious Objection to Lesbian and Gay Equality' (2009) 18(1) *Griffith Law Review* 17-40; R Wintermute, 'Religion vs. Sexual Orientation: A Clash of Human Rights?' (2002) 1(2) *Journal of Law and Equality* 126-154.

<sup>21</sup> P Johnson and R Vanderbeck, 'Sacred Spaces, Sacred Words: Religion and Same-sex Marriage in England and Wales' (2017) 44(2) *Law and Society* 228-254, p 247.

<sup>22</sup> C Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (New York, 1973) pp 3-30.

‘thick description’<sup>23</sup> of the Church of England and SSM. What follows is avowedly an internal or insider-view analysis, rather than an external one. It is explicitly an attempt to explain the religious ‘other’. It facilitates a deeper and more nuanced understanding of the reactions of, and consequences for, the Church of England in the debate about SSM. It demonstrates that popular and repeated calls, from both within and outside of the Church, for it to commend or authorise liturgies to be used following SSM take the debate far beyond questions of human sexuality and relationships,<sup>24</sup> and in fact raise much wider and arguably more fundamental (for the Church of England) questions about the nature and ideology or political theology of the Church of England.

It leaves behind, then, the assumption that the actions of those who oppose religious recognition of SSM are in all instances motivated, in the first instance, by ‘religious hostility to homosexuality’.<sup>25</sup> Indeed it necessarily discards any neat binary between religious liberty and secular concerns for non-discrimination since, as we will see, the state’s decision to respect the Church of England’s right to determine its own doctrine and liturgy currently impairs the religious liberty of those of the Church’s adherents who conscientiously disagree with its existing doctrine.

## BEYOND THE 2013 ACT: THE CURRENT POSITION OF THE CHURCH OF ENGLAND

There is no legal imperative for the Church of England to engage with the question of SSM. The current legislative regime insulates the Church from the legal implications of equal marriage, and the government, drawing a distinction between civil and religious marriage, has consistently stated its commitment to safeguarding the liberty of religious bodies to determine and uphold their doctrine of marriage in accordance with their conscience.<sup>26</sup>

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<sup>23</sup> Not, admittedly, an entirely unchallenged or unproblematic approach – see eg P Shankman et al, ‘The Thick and the Thin: On the Interpretive Theoretical Program of Clifford Geertz’ (1984) 25(3) *Current Anthropology* 261-280.

<sup>24</sup> Though there is considerable theological debate (and divergence) even within the Church of England, and indeed within its traditional wings, on the substantive question of human sexuality. See, for example, the appendices contributed to Report of the House of Bishops Working Group on Human Sexuality (GS 1929, 2014) by Keith Sinclair, Bishop of Birkenhead, and David Runcorn. See also J John, ‘*Permanent, Faithful, Stable*’: *Christian Same Sex Partnerships* (London, 2000) and S Allberry, *Is God Anti-Gay? And other Questions about Homosexuality, the Bible and Same-Sex Attraction* (Epsom, 2013).

<sup>25</sup> Johnson and Vanderbeck (n 21 above) at 229.

<sup>26</sup> The Church of England, however, refutes the government’s distinction between civil and religious marriage. See *Archbishops’ Submission to the Government Consultation on Same Sex Marriage* (GS Misc 1027) <<https://www.churchofengland.org/sites/default/files/2017-11/GS%20Misc%201027%20government%20consultation%20on%20same%20sex%20marriage.pdf>> accessed 2 November 2018. For the power of religious bodies to opt in to provision of SSM see Marriage (Same Sex

Yet despite this, and despite the continued affirmation of its traditional doctrine of marriage, the Church of England has persistently, and over a considerable period of time, grappled with the issue of human sexuality in general, and SSM in particular.<sup>27</sup> In recent years, it has published the Pilling Report<sup>28</sup> on human sexuality and, in consequence, embarked on a lengthy process of ‘shared conversations’.<sup>29</sup> These led to the House of Bishops’ 2017 report on marriage and same sex relationships,<sup>30</sup> which, echoing the pastoral guidance of 2014, committed the Church of England to continuing:

... to affirm unequivocally the doctrine of marriage set out in Canon B 30, and to be able to expound it with confidence as the Church’s teaching. Given the distinctive relationship between doctrine and public worship in the Church of England, that also requires that what happens in our services consistently reflects that teaching.<sup>31</sup>

It affirmed the doctrine of the Church of England as being the belief that marriage consists in a permanent and lifelong union between one man and one woman, and rejected the possibility of commending or authorising services of prayer and dedication<sup>32</sup> for use following a marriage between individuals of the same sex. Such services would, it was argued, be incompatible with such doctrine, and would therefore be ultra vires the powers granted to General Synod under the Church of England (Worship and Doctrine) Measure 1974 ss1 and 4.<sup>33</sup>

The report also, however, recommended that the existing law and guidance should be interpreted in such a way as ‘to permit maximum freedom within it, without changes to the law, or the doctrine of the Church.’<sup>34</sup> This recommendation was made within the context of reiterated statements<sup>35</sup> that clergy should deal ‘pastorally and sensitively’ with those approaching them for prayer and support or recognition in respect of same sex relationships.

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Couples) Act 2013 ss4 and 5 and Marriage Act 1949 s26A and B. For the government position see Government Equalities Office, *Equal Civil Marriage: A Consultation* (2012) para. 1.9(ii).

<sup>27</sup> For a useful summary see *Civil Partnerships: a Pastoral Statement from the House of Bishops of the Church of England* (2005), paras 6 and 7.

<sup>28</sup> GS 1929.

<sup>29</sup> See *Grace and Disagreement: Shared Conversations on Scripture, Mission and Human Sexuality* (Handbook: Archbishops’ Council, 2015).

<sup>30</sup> *Marriage and Same Sex Relationships after Shared Conversations: Report of the House of Bishops* (GS 2055, January 2017).

<sup>31</sup> *Ibid*, para 61.

<sup>32</sup> Popularly, but erroneously, referred to as services of blessing.

<sup>33</sup> For legal advice to this effect see GS 2055, annex 1.

<sup>34</sup> GS 2055, para 22. It also (at para 34) recommended that the Church should work towards the publication of a new teaching document, which would both reaffirm the Church’s traditional doctrine of marriage, and affirm the place of lesbian and gay people within the life of the Church.

<sup>35</sup> See eg *Civil Partnerships: a Pastoral Statement*; GS 2055, para 38; Lambeth Conference 1998 Resolution 1.10(d).

The Church's commitment to this itself reflects a 'vocation to offer pastoral care and love to all who seek it',<sup>36</sup> and a firm belief that members of the Church who 'experience themselves as having homosexual orientation... are loved by God' and that 'all baptised, believing and faithful persons, regardless of sexual orientation, are full members of the Body of Christ'.<sup>37</sup>

In living out this theology the Church has recognised the need to accept that people have multiple identities (including sexual ones) which cannot be ignored by the Church in its pastoral care for them.<sup>38</sup> At the same time, however, it has repeatedly distanced itself from a popular trend which apparently places sexual identity at the forefront of those multiple identities. Instead it has emphasised that these identities are united by our common and essential identity as being made in God's image.<sup>39</sup> Further, Christians find their 'most fundamental identity in Christ'.<sup>40</sup>

Ultimately the 2017 House of Bishops report failed to win the support of General Synod.<sup>41</sup> The Archbishops, therefore, immediately committed to the creation of a pastoral oversight group 'with the task of supporting and advising Dioceses on pastoral actions with regard to our current pastoral approach to human sexuality', and to the preparation of proposals for 'a large scale teaching document around the subject of human sexuality' and a General Synod debate 'in general terms' on human sexuality and marriage.<sup>42</sup> Once again, these commitments were made against the backdrop of an unequivocal statement that people 'are made in the image of God. All of us, without exception, are loved and called in Christ. There are no 'problems', there are simply people called to redeemed humanity in Christ'.<sup>43</sup>

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<sup>36</sup> GS 2055, para 5

<sup>37</sup> Lambeth Conference 1998 Resolution 1.10(c).

<sup>38</sup> See eg GS 1929, para 76.

<sup>39</sup> See eg Letter from the Archbishops of Canterbury and York following General Synod's failure to take note of GS 2055 < <https://www.churchofengland.org/sites/default/files/2017-11/abc-and-aby-joint-letter.pdf> > accessed 2 November 2018. For the work of the Living in Love and Faith project see <https://www.churchofengland.org/about/leadership-and-governance/general-synod/bishops/living-love-and-faith> accessed 2 November 2018.

<sup>40</sup> GS 1929, para 76.

<sup>41</sup> Following its failure to secure a majority in favour in the House of Clergy, Synod declined to 'take note' of the report. For examples of reporting of this see <<http://www.bbc.co.uk/news/uk-38982013>> and <<https://uk.reuters.com/article/uk-religion-britain-anglicans/church-of-england-stance-on-gay-marriage-in-disarray-after-vote-idUKKBN15U2L9>> accessed 2 November 2018.

<sup>42</sup> Letter to the members of General Synod (n 39 above).

<sup>43</sup> It must be acknowledged that in seeking to live out or respond to these aspirations individuals will often fall lamentably short of the ideal.

Advocates for change are, however, frustrated with the slow pace of change within the Church of England<sup>44</sup> and the refusal to countenance the commendation or authorisation of liturgies of prayer and dedication in connection with SSM. Leading Churchmen, including Alan Wilson (Bishop of Buckingham),<sup>45</sup> together with prominent politicians, including John Bercow (Speaker of the House of Commons) and Justine Greening (then Secretary of State for Education), have publically called on the Church of England to allow its clergy to bless same sex unions.<sup>46</sup> There is also increasing grassroots pressure from within certain sections of the Church for change. To date there have been (at the time of writing) at least two motions concerning the provision of liturgies of prayer and dedication in connection with SSM tabled for debate in the General Synod.<sup>47</sup> It is clear also that, whether deliberately or unwittingly, clergy seeking to respond ‘pastorally and sensitively’ to couples entering same sex marriages and civil partnerships are conducting services which, whatever their intention, are perceived to be services of blessing of such unions.<sup>48</sup>

In this context, and despite a lack of change, those seeking to maintain the status quo have increasingly taken fright,<sup>49</sup> and the bishops’ careful strategy of seeking ‘a way forward together’<sup>50</sup> has been placed under considerable strain. Even setting aside increasing evidence of a breakdown of trust between the opposing factions, the atmosphere is not conducive to a constructive and unified settlement. As one commentator has noted:

When decisions on the future course of the Communion are driven by intense crisis rhetoric and a focus on a single issue, then it is difficult to find room for reasoned theological reflection on the God whom Anglicans seek to follow, or to nurture space

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<sup>44</sup> An archdeacon in the diocese of Guildford apparently once quipped that ‘When the Lord returns, the Church of England will set up a commission to decide (a) whether the trumpet sounded (b) what note it sounded, and to report in a year’s time as to whether it took place’. See B McHenry, ‘The Future of Synodical Government’ (1993) 3 Ecc LJ 86-102, pp 88-89.

<sup>45</sup> A Wilson, *More Perfect Union? Understanding Same-Sex Marriage* (London, 2014).

<sup>46</sup> For reporting of this see eg <<http://www.dailymail.co.uk/news/article-4723494/Justine-Greening-CofE-allow-gay-marriages.html>; <https://www.pinknews.co.uk/2017/07/04/speaker-john-bercow-calls-for-the-church-of-england-to-accept-same-sex-marriages/>> accessed 2 November 2018.

<sup>47</sup> See D Pocklington, ‘CofE service after same sex marriage?’ in *Law & Religion UK*, 20 October 2017 <<http://www.lawandreligionuk.com/2017/10/20/cofe-service-after-same-sex-marriage/>> and <<http://anglicanmainstream.org/can-the-church-change-its-practice-on-marriage-without-changing-its-doctrine/>> accessed 2 November 2018.

<sup>48</sup> See eg some of the posts to <<http://www.gayweddingplanner.org.uk/lesbian-church-wedding/>> accessed 2 November 2018.

<sup>49</sup> See eg M Burkhill and P Sanlon, *Discussion Paper on Broken Fellowship* (ReNew, 2017 – in consultation with AMiE, Church Society and Reform); Church of England Evangelical Council, *Gospel, Church and Marriage: Preserving Apostolic Faith and Life* (CEEC, January 2018) <[http://www.ceec.info/uploads/4/4/2/7/44274161/gospel\\_church\\_marriage\\_-\\_preserving\\_apostolic\\_faith\\_and\\_life.pdf](http://www.ceec.info/uploads/4/4/2/7/44274161/gospel_church_marriage_-_preserving_apostolic_faith_and_life.pdf)> also letter from CEEC to the Chair of *Living Love in Faith* (CEEC, 13 October 2018) <[http://www.ceec.info/uploads/4/4/2/7/44274161/3.letter\\_to\\_llf\\_-\\_16\\_october\\_2018.pdf](http://www.ceec.info/uploads/4/4/2/7/44274161/3.letter_to_llf_-_16_october_2018.pdf)> accessed 2 November 2018.

<sup>50</sup> GS 2055, paras 10 and 59.

for an attentiveness to the Holy Spirit's guidance which might shape a measured response to present disagreements.<sup>51</sup>

The Church of England, then, is in a bind. It apparently feels an inescapable imperative to address itself to the question of its doctrine on human sexuality in general, and its doctrine and liturgy in respect of SSM in particular. Many who claim membership of it are determined that it should reform itself. Yet it has been compelled to acknowledge that the topic 'has proved deeply resistant to any form of compromise' and 'threatens to be a continuing source of division.'<sup>52</sup>

## WHY IS THE QUESTION OF SSM SO PROBLEMATIC WITHIN THE CHURCH OF ENGLAND?

Despite these perplexities it seems that many 'normal' Anglicans, like many 'normal' non-Anglicans, firmly believe in equal marriage.<sup>53</sup> Why, then, has the Church as an institution not simply embraced equal marriage? To understand the answer to this question, or rather to the question of why SSM is so problematic for the Church of England, it is necessary to examine its internal dynamics, history, and political theology.

### **The nature of the institution and its dynamics**

The Church of England has been described as both 'a notoriously enigmatic institution'<sup>54</sup> and a 'strange sort of animal'.<sup>55</sup> Yet, an understanding of its history, and the role of that history in forming its identity, can take us a long way towards understanding its character. As one author recently put it, 'The past is how the church is shaped – and understanding the past is inherently a part of present identity. ... Its rootedness in the past is part of its fabric and value.'<sup>56</sup>

One of the dominating features of the Church's history is its post-reformation identity and mission as a national church. A number of consequences flow from this, one of which is

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<sup>51</sup> C Brittain, 'Confession Obsession? Core Doctrine and the Anxieties of Anglican Theology' (2008) 90(4) *Anglican Theological Review* 777-799, p 791.

<sup>52</sup> GS 1929, para 56.

<sup>53</sup> For statistics on Anglican attitudes to homosexual relationships, though not yet on same sex marriage, see the figures and commentary published by British Religion in Numbers <<http://www.brin.ac.uk/2012/what-anglicans-and-others-think-about-homosexuality-and-disestablishment/>> accessed 2 November 2018.

<sup>54</sup> A Russell, *The Clerical Profession* (London, 1980) p 3.

<sup>55</sup> Bishop of Rochester (James Langstaff) speaking on the Bishops and Priests (Consecration and Ordination of Women) Measure 2014: HL Deb, vol 756, col 178, 14 October 2014.

<sup>56</sup> M Percy, *The Future Shapes of Anglicanism: Currents, Contours and Charts* (Abingdon, 2017) p 165.

an emphasis upon geography or territory rather than theology. Thus the churchmen and women of the Church of England have been described as ‘essentially territorial animals’ who ‘tend to construct their catholicity more through geography than ideology’.<sup>57</sup> On one level its primary identity is found in being the church which, through its system of parishes and associated churches,<sup>58</sup> is the church in respect of which all people living in England, irrespective of faith or creed, have legal rights with regards to its rites and worship.<sup>59</sup> Its identity as a national church, however, goes beyond its role as purveyor of occasional or more regular religious rites and ceremonies to the citizens of England. It carries with it a commitment to, and responsibility for, the spiritual welfare of those citizens – the idea that it should ‘undertake to assist the spiritual progress of the nation and of the individuals of which it is composed, in their various states and stages’.<sup>60</sup> Or, as one prominent contemporary commentator has expressed it:

The idea of a national Church... is of a church that is concerned with a *nationwide mission of the gospel and nationwide service to the community*. A national Church accepts that its mission is to the whole nation, to the whole population considered as a great community (or a community of communities). It is committed to providing its ministry of word, sacrament and pastoral care to every section of the population.<sup>61</sup>

This ‘vocation to be the spiritual home for all the people of England’,<sup>62</sup> and the concomitant focus on nationality or geography as defining the community of the Church, leads to an ideological, if not actual, breadth of membership not encountered in other churches. Indeed, as originally conceived and legally established the Church of England possessed no concept of membership. Before the constitutional reforms of the long nineteenth century, citizenship and Church membership were coextensive and England was, in constitutional theory if not in practice, a confessional state.<sup>63</sup> To be a citizen of England was to be a member of the Church of England, and to possess certain legal rights and obligations in respect of it.

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<sup>57</sup> Ibid, p 4.

<sup>58</sup> For modern comment on the importance of the parochial system to the national mission of the Church see eg *Synodical Government in the Church of England: A Review* (London, 1997) para 3.2.

<sup>59</sup> On this point see N Doe, ‘The Notion of a National Church: A Juridical Framework’ (2002) 149 *Law & Justice* 77-91, p 89; also *Re Perry Almshouses* [1898] 1 ChD 395 and *Taylor v Timson* (1888) 20 QBD 671.

<sup>60</sup> H Wilson, ‘Seances Historiques de Geneve’ in *Essays and Reviews* (12<sup>th</sup> ed) (London: Longmans, 1969) (1<sup>st</sup> edn 1860) p 207.

<sup>61</sup> P Avis, ‘The Church of England as a National Church’ (2002) 149 *Law & Justice* 111, 114 (emphasis in the original).

<sup>62</sup> GS 2055, para 8.

<sup>63</sup> Religious dissenters or non-conformists, falling into the category of schismatics, were denounced and rendered *ipso facto* excommunicate by Canons 9 and 12 of 1603. Excluded from the membership or community of the Church under Canon law dissenters were, prior to the reforms of the nineteenth century, further excluded from the political life of the nation by the action of statutes such as the Test Acts of 1673 and 1678, and the

While the constitutional reforms of the nineteenth century dismantled the last vestiges of the confessional state, the development of synodical government within the Church of England introduced into law, in some respects at least, the apparatus and ideas of a membership body. Yet, despite this, and despite recent initiatives as part of the ‘Fresh Expressions’ movement,<sup>64</sup> the Church of England has escaped a wholesale transformation into a membership organisation, and so to talk of membership of the Church of England remains problematic.<sup>65</sup> Rather, one might more accurately describe the Church of England as attempting to mediate between the national/territorial and membership/denominational models of church by operating a sliding scale of affinity. This turns no lay person away from the pale of the Church, but it defines the extent of their rights in various situations according to their level of conformity to, or affinity with, it. So, anyone resident in a parish legally has the right to be baptised and married at the parish church and buried in its churchyard or burial ground (if one exists), but only those who are confirmed in the Church of England or a church in communion with it, or ready and desirous of being so confirmed, can by law take Holy Communion.<sup>66</sup> Similarly, while all parish residents have legal rights in respect of the services of the parish church, only those residents or habitual worshippers who are baptised and declare themselves to be members of the Church of England or a church in communion with it can be entered on the church electoral roll and are thereby qualified to attend and vote at the Annual Parochial Church Meeting.<sup>67</sup> Only those who are ‘actual communicants’ are eligible to be elected to the parochial church council or deanery synod.<sup>68</sup>

This sense of a geographically defined church community which is further delineated by the operation of a sliding scale of affinity in respect of various functions and rights greatly

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Corporation Act of 1661, though successive Indemnity Acts passed after 1727 mitigated the effects of these statutes.

<sup>64</sup> See <<http://freshexpressions.org.uk/>> accessed 2 November 2018. For a critique of this movement see Martyn Percy (n 56 above), introduction and afterword.

<sup>65</sup> As late as 1953 Vaisey J held that ‘[s]o far as concerns a “member of the Church of England,” I cannot think that those words by themselves are really capable of any definite, certain significance’. See *Faith v Allen* [1953] Ch. 116 at 119. Note also that the mandate of the Ecclesiastical Committee of Parliament is, under the Church of England (Assembly) Powers Act 1919 s3(3), to state ‘the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of *all Her Majesty’s subjects*’. (emphasis added).

<sup>66</sup> Canon B 15A (subject to the application of the provisions of the Admission of baptized children to Holy Communion Regulations 2006). On the worship and liturgy of the Church of England see M Hill QC, *Ecclesiastical Law* (4<sup>th</sup> edn)(Oxford University Press, 2018) ch 5.

<sup>67</sup> Church Representation Rules, rules 1(2)a-c, and 6(2). Note that this is a system of self-declaration and is not policed. On this point see Hill (n 66 above) 3.03 -3.05.

<sup>68</sup> Church Representation Rules, rule 10(1)(b). Rule 54(1) defines an actual communicant as being a person who has received Holy Communion ‘according to the use’ of the Church of England or a church in communion with it at least three times in the twelve months preceding election.

complicates the task of those seeking to determine a path for the Church, whether on the question of SSM or any other. It is, as a consequence of this fluid notion of membership, necessarily difficult to determine the constituency or community for whom its leaders and institutions are speaking. Do they, for example, speak for and represent the non-church-goer who has a nebulous sense of the parish church being in some sense theirs, and who continues to expect the Church of England to uphold certain standards in the life of the nation,<sup>69</sup> the archetypal ‘hatch, match and dispatch’ Anglican, the regular worshipper, or the highly invested and proactive lay person who serves in many ways, and whose efforts underpin the continued survival of an increasingly socially marginalised church?<sup>70</sup> The answer, in a national church, is that they must speak to - and for - all of these groups. There is not, however, at any particular time, or in any given context, a consensus on how the Church’s governance structures should balance or mediate between competing voices and interests.<sup>71</sup> Nor is there an easy correlation between the degree of an individual’s or group’s conformity to the Church and their attitude to what its position should be on any particular social or moral question.<sup>72</sup>

The Church of England’s problems are not, however, limited to the necessity of holding in balance, and navigating, the not always compatible interests of an amorphous membership. As a national church, the Church’s self-proclaimed, or providentially ordained,<sup>73</sup> national mission or cure of souls has had, and continues to have, profound implications for its theological character. The most important of these is a self-conscious breadth in terms of both the traditions and doctrines which it encompasses. Reborn in its current incarnation out of the white heat of the theological controversies of the Reformation, the Church of England in its

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<sup>69</sup> Again, typified in Grace Davie’s idea of ‘vicarious religion’. See S Bruce and D Voas, ‘Vicarious Religion: An Examination and Critique’ (2010) 25(2) *Journal of Contemporary Religion* 243-259 and Davie (n 7 above) for an overview and critique.

<sup>70</sup> As reflected in reports under the Renewal and Reform initiative, including “*Setting God’s People Free*”: *A Report from the Archbishops’ Council* (GS 2056).

<sup>71</sup> Though a repeating motif in debates about synodical government and the continuing role of Parliament in Church government has long been the idea that General Synod is not representative of the Church as a whole, but rather of a particular active minority. See eg Trott (n 5 above) 15; R Morris (ed), *Church and State in 21<sup>st</sup> Century Britain: The Future of Church Establishment* (London: Palgrave MacMillan, 2009) 180; Division debate on the Worship and Doctrine Measure 1974: HC Deb, vol 882, cols 1567-1698, 4 December 1974. Debate on the Priests (Ordination of Women) Measure 1992: HL Deb, vol 549, cols 1001-1080, 2 November 1993.

<sup>72</sup> One response to this is that the Church should be led by the teaching of Scripture, but this rarely leads to simple outcomes – particularly when, as shall be seen below, approaches to the reading of such Scripture are diverse and often divergent. Further, imperatives of mission and comprehension may not always sit easily with the need to motivate and empower the active laity upon whose energy and willingness to act the Church is increasingly reliant. On this point in a historical context see generally M Roberts, *The Role of the Laity in the Church of England c1850 – 1885* (DPhil, Oxford 1974)(unpublished).

<sup>73</sup> Anglican political theology ascribes it to God’s benevolent agency. For a good beginners guide see A Vidler, *The Church in an Age of Revolution* (London, 1962).

formularies quite deliberately seeks to hold together a range of doctrinal approaches and shades of opinion in a *via media* between the Protestant and Catholic traditions – and between different positions which have evolved since. As a recent handbook explained:

As a church which, since the sixteenth century, has understood itself to be both Catholic and Reformed, it has sought to be a church for all the people of England, even across deep religious differences. Further distinctive theological positions have emerged since the Enlightenment so that Anglicanism now draws together a number of distinctive parties and probably many more points of difference.<sup>74</sup>

To maintain such breadth, and to serve the nation as a whole, its deliberate decision and institutional instinct has long been ‘to tolerate within it as wide a divergence of opinion on points of doctrine, as is compatible with the maintenance of the fundamental truths of Christianity.’<sup>75</sup> For, as one nineteenth century parliamentarian explained, if ‘the object of the National Church be to promote the spiritual good of the largest possible number of the community, then it should be our study to remove, so far as a regard for divine truth will allow, whatever bars the admission of large numbers of people to her fold’.<sup>76</sup> There has been, and continues to be, a persistent focus on the essentials of faith – ‘common faith in the gospel of Jesus Christ’<sup>77</sup> – and a concomitant commitment to the ideal of unity as the best means of serving God’s mission to and in the nation of England.

Some Churchmen and women revel in the breadth and theological heterogeneity of the Church of England which, as a result of its history and attitudes, has been accused of being ‘not one church but practically two or three churches.’<sup>78</sup> They are instinctively and ideologically opposed to the hardening of doctrinal boundaries, and argue that the ‘genius of the Church of England has been to accept and accommodate all of us on our faith journey.’<sup>79</sup> Others, however, are deeply troubled by, or indeed reject, the implication that the Church of England is ‘not a

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<sup>74</sup> *Grace and Disagreement* (n 29 above) 15.

<sup>75</sup> Knatchbull Hugessen at HC Deb, vol 221, col 66, 15 July 1874.

<sup>76</sup> Rickards in *Report of Church Congress* (Reading, 1883) 76.

<sup>77</sup> GS 2055, para 61.

<sup>78</sup> *Saturday Review* 30 (1870) pp 392-3.

<sup>79</sup> Letter to the Editor by Reverend Andrew de Berry, ‘Church Divisions’, *The Times*, 25 February 2005, p 18. There is, in fact, evidence of deep unease about the notion of defining and enforcing doctrinal boundaries. See the general tenor of the Synod debates rejecting the inclusion of doctrinal offences within the scope of the Clergy Discipline Measure 2003. See Synod Report of Proceedings 1996 (November) 27(3) 866-899 and 937-951; Synod Report of Proceedings 2004 (July) 35(2) 79-103. Note also that the secular press almost universally spoke of the attempt to provide for legal discipline in suits using concerning matters of doctrine, ritual and ceremonial using the inflammatory language of ‘heresy trials’. They often included a picture of a heretic being burnt at the stake. See eg ‘Liberal Clergy Facing the Threat of Heresy Trials’, *The Times*, 22 June 2004, p 7; ‘Church aims to put clergy in the dock with new modern trials’, *The Times*, 15 February 2005, p 4.

confessional Church on the pattern of the Reformed Churches on the Continent’.<sup>80</sup> Instead, like Lord Halsbury before them, they feel the compelling force of the argument that ‘the identity of a religious community described as a Church must consist in the unity of its doctrines.’<sup>81</sup>

One way out of current difficulties over SSM would be for the Church to fragment, but instead its leaders and institutions have sought to find a way forward which both recognises and acknowledges profound disagreements and seeks to maintain unity in spite them. In the words of the 2017 House of Bishops’ report:

We want to continue to ‘walk together’, to use the phrase from the Primates’ Meeting a year ago, in a way that is based on a common commitment to biblical truths but recognises our continuing disagreement with one another. We want to maintain and indeed deepen the communion we currently have with one another across our serious disagreements on this issue...<sup>82</sup>

A definitive resolution of the pressing questions about human sexuality would, in the current state of the Church, risk an institutional fragmentation which would be catastrophic to the unity and comprehensiveness which underpins and supports the Church of England’s identity and mission as a national church.<sup>83</sup> Lambasted by some for displaying a lamentable lack of decisiveness, leading Anglicans have recognised that, ‘no one can make the Church of England just what he would like to see it without bringing the existing fabric down about his ears.’<sup>84</sup>

In 2017 the authors of the House of Bishops’ report reminded their readers: ‘We are called to live the gospel and share it with those whose lives we find attractive and those whom we find hard to love; with those who hear willingly and those who reject us – because God alone understands the impact the gospel will have.’<sup>85</sup> They were writing about mission, but their words must surely ring in the ears of many within the Church of England, for those words speak to an uncomfortable, but inevitable, truth about the unity which underpins the Church of England’s existence as a broad and theologically diverse national church. That unity is, in its very essence, contested. Situated in a fallen world, and composed of contrasting theological

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<sup>80</sup> S Brown, *The National Churches of England, Ireland, and Scotland 1801-46* (Oxford University Press, 2001) p 5.

<sup>81</sup> Lord Halsbury in *General Assembly of the Free Church of Scotland v Overtoun* [1904] AC 515, 612.

<sup>82</sup> *Ibid*, para 59. This echoes the approach taken to those within the Church who continue, for a variety of theological reasons, to reject female headship.

<sup>83</sup> *Ibid*, para 10.

<sup>84</sup> *Saturday Review* (n 78 above).

<sup>85</sup> GS 2055, para 9.

and ecclesiological traditions and temperaments, the Church's unity is neither comfortable nor cosy. Rather, it is often painful and has always to acknowledge discord.<sup>86</sup>

In history, and indeed today, the motivation for maintaining unity has been the identity and mission of the Church of England as a national church – a church which aspires to be the 'spiritual home for all the people of England'<sup>87</sup> whatever the stage of their faith journey, and whatever their church tradition. There must, though, now be some cause for anxiety about the security to be found in that ideology as a basis for continuing within the Church of England. While the ideology of a national church serving the nation as a whole remains a visible force in the Church of England, the 'strap line' for which is 'A Christian presence in every community',<sup>88</sup> it is unclear that there is a continuing, necessary and meaningful engagement with the constitutional and political theological phenomenon of Establishment which underpins it. Instead what is often most apparent is a mere commitment to physical presence and visibility. Establishment, as describing the relationship between church and state in England, consists of three elements: the state of the law, the theory used to justify the law, and the web of sentiments and interests surrounding the law.<sup>89</sup> Today it seems that, despite a desire to be 'a Christian presence in every community', there is arguably neither widespread appreciation of the theory underpinning the Church's constitutional position, nor a meaningful attention to the web of sentiments and interests which have historically supported it.<sup>90</sup>

The truth of this is most visible in the language used in recent reports and commentaries regarding the relationship between the Church of England and the people of England - language which has evidenced a shift in emphasis or focus from comprehension to mission. Thus, the top-selling publication of the Church of England is *Mission-Shaped Church*<sup>91</sup> and as long ago as 1997 a review of synodical government spoke of a 'growing awareness of the primacy of mission in the life of the contemporary Church'.<sup>92</sup> More recently, the handbook for 'Shared Conversations' articulated the assumption that it was 'right' that these should be conducted

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<sup>86</sup> For a thoughtful consideration of the outworking of this in synodical government see M Chapman, 'Does the Church of England have a Theology of General Synod?' (2013) 11(1) *Journal of Anglican Studies* 15-31.

<sup>87</sup> GS 2055, para. 8.

<sup>88</sup> <<https://www.churchofengland.org/>> accessed 2 November 2018. See also eg Synodical Government in the Church of England (n 58 above) para 3.2.

<sup>89</sup> For a full discussion of this see P Bell, *Disestablishment in Ireland and Wales* (London, 1969) ch 1.

<sup>90</sup> Though Paul Avis has notably done much to try to change this. See eg P Avis, *The Vocation of Anglicanism* (London, 2016); P Avis, *The Anglican Understanding of the Church: An Introduction* (2<sup>nd</sup> edn)(London, 2013). Note, that as Davie and others have pointed out, 'vicarious religion' offers little long-term security for the status quo.

<sup>91</sup> *Mission-Shaped Church: Church Planting and Fresh Expressions of Church in a Changing Context* (London, 2004).

<sup>92</sup> *Synodical Government* (n 58 above) para 1.7.

within the context of the Church's 'mission'<sup>93</sup> – seeking to understand how the Church of England can 'most effectively be a missionary church in a changing culture around sexuality'.<sup>94</sup> In recent years there has, in fact, been an overwhelming emphasis upon mission<sup>95</sup> – something which is by its very nature done by the Church to those whom it considers to be outside of its pale – and far less overt attention has been given to pastoral care – which is the language most often used by the Church to describe the care which it offers to those within its community.<sup>96</sup>

On many levels this is plainly appropriate for the Church in its contemporary context, since the vast majority of citizens of England would not identify as members of the Church of England and the most fundamental duty and imperative of any church is to bring the Gospel to non-believers.<sup>97</sup> Nor, indeed, does it change the identity of the Church, which has historically drawn a distinction between its temporal identity as a national church (comprehending all who do not take steps to set themselves outside of its community) and its spiritual identity as a part of the Universal Church of Christ (a body of believers).<sup>98</sup> Yet the dominance of the language of mission, together with the often intrinsically individualistic initiatives which follow, are arguably indicative of a disconnect, at the highest levels of Church government, from old ideas of church. They signal a loss of faith in the national ideal, and in the idea of a Church of England whose territorial/parochial 'approach to ministry... casts its mission in the mould of pastoral care, is not troubled by fuzzy edges, and seeks the integration of the committed Christian community with the wider local community through service.'<sup>99</sup>

This not only tends to exacerbate the sense of otherness or alienation between the Church and the nation it serves, but also undermines the rationale which has historically underpinned a commitment to uncomfortable compromise and unity. Further, for many of those

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<sup>93</sup> *Grace and Disagreement* (n 29 above) p 34.

<sup>94</sup> *Shared Conversations on Sexuality, Scripture and Mission* (GS Misc 1083) para 3.

<sup>95</sup> The 1988 Lambeth Conference declared that the 1990s should be a decade of evangelism and this emphasis on mission has persisted into the new millennium. See eg the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 35 of which (reproducing the duty originally found in Care of Churches and Ecclesiastical Jurisdiction Measure 1991 s 1) creates a statutory duty to have regard to the parish church as a local centre for worship and mission.

<sup>96</sup> This distinction is not absolute – nor should the point be overstated. GS 2055 explicitly, at paras 58 and 62, adverts to the need to have reference to pastoral theology (among other things) alongside missiology. Yet, particularly in the context of human sexuality the language used is overwhelmingly that of mission. See especially GS 2029.

<sup>97</sup> See Mark 16:15; Matthew 28: 19-12; Acts 1:7-8.

<sup>98</sup> On this see most famously Richard Hooker, *Of Laws of Ecclesiastical Polity* (first published in 1594) and Samuel Taylor Coleridge, *On the Constitution of Church and State According to the Idea of Each* (first published in 1830). Though note the distinction is not universally made – see most famously William Warburton, *The Alliance between Church and State* (first published in 1736) and Thomas Arnold, *Principles of Church Reform* (first published in 1833).

<sup>99</sup> Avis, *The Anglican Understanding of the Church* (n 90 above) 44.

who are most challenged by the question of SSM, the reason to remain together in an often painful union is increasingly unclear. In an ever more atomised Church of England there is, without a working understanding and meaningful commitment to the ideology and political theology of a national church, only a weakened sense of common enterprise or ‘partnership in the Gospel’,<sup>100</sup> and only a diluted sense of the true ideological extent of the community and mission of the Church of England.

This strikes at the heart of the continuing commitment to unity right at the grass roots of the Church. So, for example, at a meeting of representatives of Evangelical churches held at St Ebbes in Oxford in January 2018, a layman from a thriving Evangelical congregation opposed to liturgical provision in connection with SSM asked the Bishop of Maidstone why his congregation should stay within a Church of England, which he understood to be contemplating a departure from biblical truth. There was in the question, though not in the Bishop’s response, which emphasised each congregation’s responsibility to others within the wider Church, little sense of allegiance to, or understanding of, the wider Church of England, the Anglican tradition and the distinctive form of its mission.<sup>101</sup> The layman’s question highlighted, too, not only the significance of the issues at stake, but also the growing acceptance – at least within certain sections of the Church – that there exist viable (and perhaps preferable) alternatives to remaining within the Church of England.

To take the first of these points, the question of liturgical provision in connection with SSM, as distinct from that of female ordination and headship, raises (in the eyes of those who oppose it) a fundamental question of doctrine. While the question of the ordination and consecration of women was widely treated as a question of church ordering or ecclesiology,<sup>102</sup> about which Christians could legitimately agree to disagree,<sup>103</sup> the Church’s response to SSM concerns the Church’s fidelity to the Gospel and its claims to be an apostolic church. This is not something about which conscientious Churchmen and women can agree to disagree.<sup>104</sup> It

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<sup>100</sup> Philippians 1:4-5.

<sup>101</sup> This is a criticism long levelled at Evangelicals within the Church of England, and more recently articulated in relation to some of the ‘fresh expressions of church’ which have flowed from *A Mission-Shaped Church*. See generally Andrew Davison and Alison Milbank, *For the Parish: A Critique of Fresh Expressions* (London, 2010).

<sup>102</sup> See eg the treatment of the question by the Ecclesiastical Committee of Parliament: Ecclesiastical Committee 192nd report. Report by the Ecclesiastical Committee upon the Deacons (ordination of women) Measure (HC 446, 1985); Ecclesiastical Committee 203<sup>rd</sup> Report. Report by the Ecclesiastical Committee upon the Priests (ordination of Women) Measure 1992 (HC 894, 1992); Ecclesiastical Committee 233<sup>rd</sup> Report. Report by the Ecclesiastical Committee on the Bishops and Priests (Consecration and Ordination of Women) Measure (HC 622, 2014).

<sup>103</sup> The technical term for this is *adiaphora*.

<sup>104</sup> See eg CEEC, *Gospel, Church and Marriage* and Burkhill and Sanlon (n 49 above).

challenges, for those opposed to religious provision in respect of SSM, the continuing reality of a shared ‘common faith in the gospel of Jesus Christ’.<sup>105</sup>

Turning to the second point, this debate about what is perceived as being a fundamental question of doctrine is taking place at a time when those who most keenly perceive the threat of doctrinal heterodoxy have available to them viable structures for oversight and mission. On the Evangelical side there are increasing possibilities for alternative oversight, albeit outside of the Church of England, as a result of the activities of the Anglican Mission in England<sup>106</sup> and the consecration of bishops providing alternative episcopal oversight under the aegis of GAFCON.<sup>107</sup> For Anglo-Catholics there is, since January 2011, the option to join the Personal Ordinariate established by the Pope.<sup>108</sup> Without a significant and continuing commitment to the ideology of a national church and mission, and where the matter is perceived to be one of fidelity to the Gospel, the threat (and indeed the attraction) of schism is real.

### **Authority in doctrine and liturgy: legal and theological frameworks**

What we see above is an institution which is impelled by the imperatives of pastoral need, mission and the force of its history, both to ‘find a way forward together’ and to find a right and faithful response to the desire of some who enter into same sex marriages to mark that occasion with some form of religious ceremony. It is an institution which, though on one level characterised by a profound and all-encompassing commitment to unity, to comprehension, and to its historical continuity, is in reality typified by profound ambiguity, uncertainty and discord concerning its identity, its purpose, its relationship to the society within which it is situated, and the balance to be struck between its history and its modern existence. The current controversy over SSM merely serves to highlight this.

If the preeminent concern of the last section was to illustrate why the Church finds it so difficult to address the question of SSM, then this section is concerned to analyse the legal, constitutional and theological frameworks through which any response must necessarily be made. It moves us from a consideration of why the Church finds it so painful to determine a

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<sup>105</sup> GS 2055, para 61.

<sup>106</sup> For the Anglican Mission in England see <<https://anglicanmissioninengland.org/>> accessed 23 January 2019.

<sup>107</sup> Andy Lines was consecrated by a bishop of the Anglican Church in North America, a church outside of the Anglican Communion, as GAFCON’s Missionary Bishop to Europe on 30 June 2017. On this and subsequent ordinations see David Pocklington, ‘AMiE ordinations’ in *Law & Religion UK*, 7 December 2017, <<https://www.lawandreligionuk.com/2017/12/07/amie-ordinations/>> accessed 23 January 2019.

<sup>108</sup> The equivalent of a diocese to accommodate former Anglicans wishing to come into full communion with the Church of Rome. See C Hill, ‘What is the Personal Ordinariate? Canonical and Liturgical Observations’ (2010) 12 *Ecc LJ* 202-208.

course of action, to a consideration of the complexities and pitfalls of carrying any course of action to fruition.

The 2017 House of Bishops' report rejected calls, repeated since in a number of synod motions, for the provision of an authorised or a commended liturgy of prayer and dedication of SSM.<sup>109</sup> Such calls for the House of Bishops to provide for authorised or commended liturgies reflect the fact that the clergy of the Church of England are constrained legally in their performance of divine worship, even after the Church of England (Worship and Doctrine) Measure 1974 granted to the Church substantial autonomy in matters of liturgy and doctrine.<sup>110</sup> Under Canon B 12 the clergy undertake not to use forms of service other than those contained in the *Book of Common Prayer*, or those which have been authorised by General Synod under s1 of the 1974 measure. They have a limited discretion, under Canon B 5, to use alternative forms of service where no authorised service is available, but such services must not depart, 'in any essential matter', from the doctrine of the Church of England.<sup>111</sup>

While the discretion under Canon B 5, to use alternative forms of service, might *prima facie* be invoked, since there is no authorised liturgy in connection with SSM, the almost inescapable likelihood of conflict between the content of such a liturgy and the doctrine of the Church encapsulated in Canon B 30 renders its use legally impermissible.<sup>112</sup> Further, under the Church of England (Worship and Doctrine) Measure 1974 s4, the General Synod is only empowered to authorise forms of service which are consistent with the doctrine of the Church of England, meaning that if it did determine to provide for an authorised liturgy then it must first amend Canon B 30. If, instead, it adopts the option of commending a form of service then this leaves clergy open to prosecution for use of a liturgy contrary to the doctrines of the Church of England, since the fact that a liturgy has been commended is not conclusive proof that a cleric has complied with their duty, under Canon B 5, to use only services which are consistent with the doctrine of the Church of England.<sup>113</sup>

The legal safeguards against unfettered liturgical innovation reflect an intimate connection between doctrine, liturgy and ceremony. It is arguably impossible to provide for a liturgy of prayer and dedication in respect of SSM without that being seen as reflecting, or

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<sup>109</sup> GS 2055, para 43.

<sup>110</sup> It is s1 of this measure which grants to General Synod the power to make provision for liturgies in addition to those contained in the *Book of Common Prayer*.

<sup>111</sup> Clergy must affirm their commitment to this at ordination/consecration and again when they are licensed in any particular post. See Canon C 15.

<sup>112</sup> For a summary of the law see GS 2055, annex 1.

<sup>113</sup> See Hill (n 66 above) 5.01-5.08 and also GS 2055, paras 40-42.

normalising, a change to the Church's doctrine of marriage.<sup>114</sup> In the words of the 2017 House of Bishops' report, 'the distinctive relationship between doctrine and public worship in the Church of England... requires that what happens in our services consistently reflects... [our] teaching.'<sup>115</sup> In a broad Church, which historically at least has identified itself as a national church, and which has as a result sought to avoid the hardening of its doctrinal boundaries, this link between doctrine and liturgy can no longer justify absolute uniformity of liturgy or the complete removal of discretion. Instead the House of Bishops has sought to 'maintain an unambiguous position on doctrine... while enabling a generous freedom for pastoral practice that does not directly and publicly undermine it'.<sup>116</sup>

At the same time, however, in such a Church there is also a special sensitivity attaching to its liturgies, as providing a physical location for the expression of unity and fellowship in the Gospel within an often divided institution. In the words of one celebrated Victorian Churchman there is a sense that the 'strength of the Church depends not only upon her members sharing the same faith, but on their being able heartily to unite in the celebration of Divine Worship in any of her consecrated buildings'.<sup>117</sup> This carries with it the assumption that such services should be doctrinally acceptable to churchmen and women of all shades. Unsurprisingly, then, the path to doctrinal and liturgical change (even if it is accepted to be desirable) is neither a constitutionally nor a politically easy one.<sup>118</sup> As one commentator has remarked, the 'task of revising the forms of public worship is slow and difficult because, in some measure at least, it is the task of resolving theological differences within the Church and of determining the limits of toleration for such different views as a single Church can permit without losing all force and direction.'<sup>119</sup>

The Anglican model of authority in doctrine might in fact have been designed with the express aim of rendering decisive doctrinal and liturgical change arduous in the extreme.

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<sup>114</sup> It is sometimes argued that the bishops could, without being seen to confound existing doctrine, commend a service of prayer and dedication as they did in respect of civil marriage after divorce. However, in the course of that service the couple are required to reaffirm their commitment to the Church's teaching on marriage. It is difficult to see how any service in connection with SSM could at present do the same. See <<https://www.fulcrum-anglican.org.uk/articles/liturgies-for-same-sex-couples-thoughts-on-a-new-private-members-motion-for-general-synod/>> accessed 2 November 2018.

<sup>115</sup> GS 2055, para 65.

<sup>116</sup> Ibid.

<sup>117</sup> John Gellibrand Hubbard's letter to the editor, *Buckingham Express* 16<sup>th</sup> August 1871. It is this concept which underpins the Church of England's long legal commitment to uniformity of worship, which was only finally decisively abandoned after the passage into law of the Church of England (Worship and Doctrine) Measure 1974.

<sup>118</sup> On this point see eg Sagovsky (n 19 above).

<sup>119</sup> T Briden, *Moore's Introduction to English Canon Law* (4<sup>th</sup> edn)(London: Bloomsbury, 2013) 82-83.

Indeed it is often difficult, though not impossible, to determine precisely what the doctrine of the Church of England is on any particular issue since, as seen above, there is a long tradition of both a focus on essentials and respect for a spectrum of opinion.<sup>120</sup> This position is underpinned by a deliberately diffuse concept of authority, which founds the doctrine of the Church upon Scripture, tradition and reason. This is articulated in Canon A 5, which states:

The doctrine of the Church of England is grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures.

In particular such doctrine is to be found in the Thirty-nine Articles of Religion, *The Book of Common Prayer*, and the Ordinal.

It is further elucidated in the preface to the declaration of assent made by clergy at ordination, consecration, licensing and enthronement. This states:

The Church of England... professes the faith uniquely revealed in the Holy Scriptures and set forth in the catholic creeds, which faith the Church is called upon to proclaim afresh in each generation. Led by the Holy Spirit, it has borne witness to Christian truth in its historic formularies, the Thirty-nine Articles of Religion, The Book of Common Prayer and the Ordering of Bishops, Priests and Deacons. In the declaration you are about to make will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making him known to those in your care?<sup>121</sup>

In a self-consciously broad and comprehensive Church of England, negotiating the interaction between these three sources of authority is necessarily a complex and contested task. In simple terms, there is no consensus within the Church regarding how the Bible should, or should not, be read. Nor is there agreement upon the precise weight to be accorded to tradition and reason. There is a broad recognition that the Church's understanding of right doctrine is not fixed, and that the duty to 'proclaim [the Gospel] afresh in each generation' carries with it the idea that changing social and cultural contexts necessitate changes in the language or expression of doctrine which is itself immutable.<sup>122</sup> Yet even this poses a conundrum as the Church seeks, in a changing world, to balance fidelity to the Gospel at the

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<sup>120</sup> For recent articulations of this see eg GS 2055, para. 65; Avis, *The Anglican Understanding of the Church* (n 90 above), p 95.

<sup>121</sup> Canon C 15 paras 1 and 2. See R Bursell, 'The Clerical Declaration of Assent' (2016) 18 Ecc LJ 165-187.

<sup>122</sup> For an introduction to these arguments see GS 2055, paras 58-59; G Rowell, 'An Historical Perspective on Doctrine and Discipline in the Church of England' (2005) 8 Ecc LJ 41-59. For examples of the very different conclusions which can be reached see especially GS 1929, paras 220-253, 280-319, appendices 3 and 4.

heart of its inherited faith and calling and its ‘pastoral and a missional duty to articulate its doctrine... in the light of changing circumstances and in the light of fresh insights about truth, goodness and justice.’<sup>123</sup>

Precisely what this means is inescapably contested. Moreover, as it seeks to negotiate the relationship between Scripture, tradition and reason, and as it strikes a balance between stasis and change, the Church lacks a ‘strong central magisterium’<sup>124</sup> which could make definitive determinations. Instead, its constitution provides for government through a complex amalgam of episcopal oversight, synodical government, and the lingering role of Parliament.<sup>125</sup> To this might be added the complexity and diversity engendered by a system of church government which, despite recent centralising initiatives, maintains a strong tradition of autonomy and subsidiarity at the diocesan and parochial levels.<sup>126</sup>

The legal mechanics of this constitutional arrangement, though they give the leading role in matters of doctrine and liturgy to the House of Bishops, deliberately reflect the principle that ‘all Christians [the laity as well as the clergy] are equally members of the body of Christ, and entitled to be represented in its government.’<sup>127</sup> So, though provisions concerning the doctrine and liturgy of the Church must be referred to the House of Bishops and can only be presented to General Synod in the form approved by that house, both the House of Laity of General Synod and the Convocations of York and Canterbury (together or separately) may request that such provision is referred to each Convocation sitting separately. Each house of each Convocation and the House of Laity must then approve the provision before it can be presented to General Synod.<sup>128</sup> Once they are so presented then canons and measures which change the doctrine and liturgy of the Church of England can only be carried upon a division

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<sup>123</sup> GS 2055, para 62.

<sup>124</sup> Avis, *The Anglican Understanding of Church* (n 90 above) 43.

<sup>125</sup> See Hill (n 66 above) chs 1 and 2. Parliament does not assent to Canons, which are the primary means of securing doctrinal and liturgical innovation, though it can legally – though not by convention – amend such matters by legislation. On the recent history of parliamentary activism in Church affairs see J Maiden, ‘English Evangelicals, Protestant National Identity, and Anglican Prayer Book Revision, 1927–1928’ (2010) 34(4) *Journal of Religious History* 430-445 and J Maiden and P Webster, ‘Parliament, the Church of England and the Last Gasp of Political Protestantism, 1963–4’ (2013) 32(2) *Parliamentary History* 361-377. For recent assertions of the reality of Parliament’s continuing role see eg Ben Bradshaw MP at HC Deb, vol 586, col 716, 20 October 2014; Baroness Sherlock at HL Deb, vol 756, col 182, 14 October 2014. For the contrary position see eg Lord MacKay at HL Deb, vol 756, col 180, 14 October 2014 and Peter Bone at HC Deb, vol 586, col 721, 20 October 2014. For commentary on Parliament’s role in Church legislation see Slack (n 5 above) and S Slack, ‘Church Autonomy and the Civil Partnership Act: A Rejoinder’ (2007) 9 *Ecc LJ* 206-7.

<sup>126</sup> See eg *Synodical Government* (n 58 above) ch 1.

<sup>127</sup> *Ibid*, 1.3.

<sup>128</sup> The Synodical Government Measure 1969 sch 2, arts 6 and 7; Hill (n 66 above) 2.25-2.26.

of the houses of General Synod – clergy, laity, and bishops – and only then if a motion for final approval is carried by a majority of two thirds of those present and voting in each house.<sup>129</sup>

Not only, then, are the sources of doctrinal authority diffuse and their precise interaction open to debate, but the mechanisms for rearticulating doctrine and reforming liturgy are self-evidently arduous, and in a divided Church almost impossible to negotiate. Further, despite their constitutional pre-eminence in questions of doctrine, the bishops are not able to dictate how and when those mechanisms are navigated, nor the pace and direction of change. The unpredictable intervention of diocesan synod and private members' motions, ensures this.<sup>130</sup> While it is legally and constitutionally true that the House of Bishops has primacy in matters of doctrine and liturgy, such motions create movement and an impetus for reform in ways which may cut across or contradict the preferred strategy of the House of Bishops.

### **The wider Context: the Worldwide Anglican Communion**

So far, so complicated, and yet what has been explored above is, in fact, at best half of the answer to the question of why the Church of England finds responding to the questions posed by SSM so challenging. The other half of the answer to that question, is found in the place of the Church of England within the Worldwide Anglican Communion. That Communion reflects the full scope of Great Britain's past imperial endeavours, and the intensely messy, heterogeneous, and piecemeal nature of British empire-building.<sup>131</sup> It reflects too, in all the variety of ways in which the churches articulate and define their relationship to the Church of England, the fragmentation of that Empire and renegotiation and reformulation of old relationships over the course of the twentieth and twenty-first centuries. The internal dynamics and politics of what has always, in consequence, represented 'a constellation of diverse theological and ecclesial positions, held together by complex interweaving bonds of language, empire, culture, history, and other shared allegiances'<sup>132</sup> are complicated, not only by theological and ecclesiological diversity, but also by economic and social heterogeneity, and by differences in the pace and direction of social and political change across the Communion.

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<sup>129</sup> Church of England (Worship and Doctrine) Measure 1974 s3.

<sup>130</sup> Chapman (n 86 above); McHenry (n 44 above); *Synodical Government* (n 58 above).

<sup>131</sup> See M Banton, *Administering the Empire, 1801 – 1968: a Guide to the Records of the Colonial Office in the National Archives of the UK* (London, 2008); W Cornish, 'Empire's Law' in W Cornish et al, *The Oxford History of the Laws of England*, vol XI (Oxford, 2010) pp 234–54; Charlotte Smith, 'Bishop of Natal v Gladstone (1866)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Oxford, 2012) pp 305-328; R Strong, *Anglicanism and the British Empire c1700-1850* (Oxford, 2007).

<sup>132</sup> Brittain (n 51 above) 779. See also generally N Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (Oxford, 1998).

Just as in the Church of England, the great diversity of the Worldwide Anglican Communion has historically been combined with an enduring and pervasive commitment to unity – expressed most famously, in the aftermath of the Great War, as ‘fellowship’,<sup>133</sup> and again in 2004 as ‘mutual relationships... expressed by community, equality, common life, sharing, interdependence, and mutual affection and respect.’<sup>134</sup> Like the Church of England, the Communion lacks a strong centralised magisterium. Rather, while explicitly recognising the autonomy of its individual churches, it insists on ‘loyalty to the fellowship’, and the ‘restraints of truth and love’ which this imposes.<sup>135</sup> As the authors of the Windsor Report explained it: ‘The key idea is autonomy-in-communion, that is, freedom held within interdependence. The autonomy of each Anglican province therefore implies that the church lives in relation to, and exercises its autonomy most fully in the context of, the global Communion.’<sup>136</sup> So each church within the Communion is obliged to promote the common good of the Communion, and to maintain relationships and thereby avoid endangering the Communion. Each church is able to follow its conscience and depart from the standards of the community, but only where such a ‘departure is neither critical to the maintenance of communion nor likely to harm the common good of the Anglican Communion and of the Church universal’.<sup>137</sup>

Plainly the ‘Instruments of Unity’ of the Worldwide Anglican Communion<sup>138</sup> are, at the very least, under considerable strain. A number of churches within the Communion have sanctioned the use of public liturgy in respect of SSM, despite the warning that, in a Communion in which a majority of churches follow the traditional doctrine of marriage, and in which there is no resolution to the difficult questions surrounding human sexuality, this would endanger the Communion and breach the principle of interdependence.<sup>139</sup> It is clear, however, that the Church of England’s House of Bishops has, thus far at least, set its face against any unilateral move in respect of SSM.<sup>140</sup> It has instead reiterated a firm commitment to the self-denying principles which underpin the Communion, and it has explicitly recognised

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<sup>133</sup> *Conference of Bishops of the Anglican Communion Holden at Lambeth Palace July 5 to August 7, 1920* (London, 1920) 9, 11, 13-14.

<sup>134</sup> *The Lambeth Commission on Communion: Windsor Report 2004* (London, 2004) para 49.

<sup>135</sup> *Conference of Bishops* (n 133 above) 13-14.

<sup>136</sup> *Windsor Report* (n 134 above) para 76.

<sup>137</sup> *Ibid*, para 82.

<sup>138</sup> The means by which the Communion fosters bonds and communication between its churches – the Archbishop of Canterbury, the Lambeth Conference, The Anglican Consultative Council and the Primates’ Meeting.

<sup>139</sup> *Windsor Report* (n 134 above) para 143.

<sup>140</sup> *Grace and Disagreement* (n 29 above) paras 85-98; GS 2055, para 60.

the unique position of the Church of England within that Communion. The Church of England, as the mother church, is even less free than other churches to kick over the traces since membership of the Worldwide Anglican Communion is defined by being in communion with the See of Canterbury.<sup>141</sup> Seemingly, then, ‘finding a way forward together’ means finding a way forward together which holds together (and indeed restores) the Worldwide Anglican Communion.

## CONCLUSION

This article makes a distinctive contribution to the socio-legal analysis of responses to SSM by advancing the debate beyond a human rights perspective, which often treats religion as a monolithic and troubling ‘other’ and makes assumptions about why religious institutions react the way they do. Instead it has interrogated the internal agonies of one church, the Church of England, as it has striven to negotiate an institutional response to the secular legalisation of SSM in a manner which holds in balance a wide array of doctrinal positions and the demands of mission, pastoral care and the continued apostolic identity of the Church.

The Church of England was chosen for a number of reasons, not the least of which were its familiarity to the author, the public visibility of its internal struggles, and the sheer extent of its physical plant in the form of its numerous churches and cathedrals. The resulting analysis has revealed a Church which, though it is compelled to witness and mission to the nation in which it is situated, is caught between stasis and change, and between tradition and innovation, in the ways in which it sees itself and its task. Intentionally broad in theology and tradition, socially and geographically diverse, and governed by a heterogeneous combination of the episcopal and the synodical, the local and the central, it is ill-suited and temperamentally disinclined to make an absolutist determination of what the Church’s response should be. And yet this sits uncomfortably in a society, and indeed in a Church, in which significant sections of the community crave the absolute.

Ultimately, what is at stake for the Church of England far transcends the question of a right response to calls for a liturgy in connection with SSM. It concerns the future shape and identity of the Church of England and the Worldwide Anglican Communion. It concerns the balance struck between increasingly vociferous demands for doctrinal clarity, and the comprehension, breadth, forbearance and restraint which have historically characterised Anglican doctrine and

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<sup>141</sup> Hill (n 66 above) 2.01-2.02.

identity.<sup>142</sup> Above all, the issue of SSM calls into question the fundamental nature of the mission of the Church of England as part of God's Church, and what fidelity to the Gospel, a right relationship to church tradition, and a right relationship to contemporary culture, and to 'changing approaches to human knowledge and reason', look like in that context.<sup>143</sup>

For those within the Church of England who most passionately advocate for the provision of public liturgy in connection with SSM, it raises the real and pressing question of whether the Church, as it stands, authentically reflects and meets the demands of contextually appropriate mission. For those individual churchmen and women most opposed to religious recognition of SSM on doctrinal grounds, the painful and essential question is when or for how long, like Paul remonstrating with Peter,<sup>144</sup> they stay within the communion of the Church of England and contend for its traditional doctrine, and when they are justified in committing the sin of schism which, as Canon A 8 warns, has in the past 'grievously hindered' the witness of the Church. On all sides, then, the stakes are high, not least because the assumption of Anglicanism has enduringly been that the 'real challenge of the gospel is whether we live deeply enough in the love of Christ, and care sufficiently for our joint work to bring that love to the world, that we will "make every effort to maintain the unity of the Spirit in the bond of peace".'<sup>145</sup>

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<sup>142</sup> Brittain (n 51 above) 788.

<sup>143</sup> GS 2055, paras 1 and 57.

<sup>144</sup> Galatians 2:11-21.

<sup>145</sup> *Windsor Report* (n 134 above) para 157, quoting Ephesians 4:3.