LECTURE FOR PUBLIC LAW WALES in association with

THE WELSH LEGAL HISTORY SOCIETY

The Office and Work of the Dean of the Arches and Master of the Faculties

PERSONAL INTRODUCTION

My initial feelings on commencing legal studies at Cambridge in 1980 were far from ecstatic. Coming from a smallish, very friendly and not particularly intellectually driven Methodist girls' boarding school in Colwyn Bay, it took me a while to settle in to the atmosphere of Cambridge, which was still predominantly male and condescending. Although I had wanted to be a barrister from the age of seven, the academic study of Law came as a shock and a real challenge to my sense of ambition and vocation.

The inspirational history teachers at my schools had fostered in me a deep interest in the sixteenth and seventeenth centuries and I spent hours during sixth form working my way through contemporaneous texts recording the constitutional contortions of the 1680s as thinkers, politicians and divines struggled to find an intellectually satisfactory way of reconciling what the British Isles had become (at least in English minds) with legal and theological principle. The conundrum was how to enjoy the stability of hereditary monarchy with the checks and balances of political control, how to avoid at once the extremes of continental religious and monarchical absolutism embodied by the Bourbons in France and the dangers of republicanism experienced during the Commonwealth in England and Wales but, above all, the horrors of civil war, so painfully fresh in the public memory. In my naievety, I had thought that the Part 1 Tripos subject, Constitutional and Administrative Law, would mean continuing those studies in greater depth.

The reality was different and I fear that, by resenting much of the learning process, I squandered time in which I might have been getting interested in the development of British public law at a pivotal moment[1]. I ploughed on, however, graduating in 1983, the year in which the significant House of Lords public law decision in O'Reilly v. Mackman[2] was reported. That great Welsh scholar, Professor Glanville Williams[3], writing in the aptly named William and Mary Law Review in 1986, took

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[1] Order 53 of the Rules of the Supreme Court was issued in 1977.

[2] [1983] 2A.C. 237

[3] William and Mary Law Review, Vol.27 (1985-1986) Issue 4 The Seventh Anglo-American Exchange: Judicial Review of Administrative and Regulatory Action, May 1986, *Administrative Law in England: The Emergence of a New Remedy*.

Wikipedia summarises his extraordinary career: *"Williams was born on 15 February 1911 in Bridgend, Wales. He attended Cowbridge Grammar School ….. from 1923 - 27. He obtained a First in law at University College of Wales. He was called to the Bar and became a member of Middle Temple in 1935. He was a Research Fellow from 1936 to 1942 and completed his Doctor of Philosophy degree in law at St John's College, Cambridge, where he was examined by the Vinerian Professor of English Law at Oxford, Sir William Searle Holdsworth, who was at the time, a Fellow of St John's College, Oxford. Holdsworth famously asked whether it had been submitted for an LLD as opposed to a DPhil, as the quality and rigour of the thesis was so great……..Glanville Williams was a respected and innovative teacher. He was also very supportive throughout their careers to a number of his junior colleagues. Although a kind man, however, he was rather shy, and not a great socialiser outside the circle of his family. He was brought up in a pious Congregationalist family in South Wales, and much of his background stayed with him. Notwithstanding his great eminence, he remained to the end of his days a quiet-spoken, modest, gentle, serious-minded Welshman. Although an agnostic for most of his life he knew his Bible, and the use of biblical phrases was instinctive to him. "He smote him hip and thigh", he once said, describing an article an American had written criticising Sigmund Freud."*

this case as his starting point for a review of the first decade of modern judicial review and concluded:

"One of the most difficult problems in any system of administrative law is drawing a line to indicate how far the courts may go in intervening in administrative decision making. Such decisions implicate issues of judicial restraint, of sensible enumeration of the grounds of review, and of administrative reaction to judicial review."

Williams, writing in the secular context, there articulates a fundamental element of the British understanding of establishment, law and democracy. Scope, jurisdiction, and competence of courts and legislators within the constitutional system of the established Church of England are themes running through this paper.

It took me a couple of years at University to find a subject which really fed my historical curiosity and amateur interest in theology. At that time, it was possible to study Ecclesiastical Law as a Part 2 Tripos subject, with the attraction, for me at least, that the student's efforts were judged by dissertation rather than examination. Several of the lecturers seemed as old as the texts to which we were introduced, but, as well as origins, we studied contemporary English ecclesiastical law. I loved it and enthusiastically penned a dissertation on the relationship between liturgy and doctrine in the law of the Church of England, at that time a topical issue because the final approval of the Alternative Service Book, as a permanent legal alternative to the Book of Common Prayer ("BCP") which had been enjoined upon England and Wales by the Act of Uniformity 1662, had occurred as recently as 1980. Incidentally, the sixteenth and seventeenth century Acts of Uniformity constituted the first statutory recognition of the official use of the Welsh language[4], Elizabeth Tudor's Act of 1563 requiring a Welsh translation of the BCP to be placed in all churches in Wales, alongside the English version, modifying her brother Edward VI's decree in the 1549 Act which required all public worship to be conducted in English. The 1662 Act preserved the Welsh requirement[5]. The Cornish language was not similarly favoured and an uprising against implementation of the Act claimed thousands of lives.

Language continues to spark controversy in ecclesiastical law, as we shall see.

After many years spent establishing a practice in planning and local government law in England and Wales, my ecclesiastical law was awoken from dormancy by appointment as Commissary General of the City and Diocese of Canterbury in 2011. I enjoyed having the chance to make use of what might have been seen until then as a rather self-indulgent part of my degree. Following my appointment as Dean of the Arches and Auditor last year, I decided to make time to pursue a long held ambition to return to the academic study of the subject by enrolling on the Cardiff University LLM course in Canon Law. I hesitated a little too long and found that I had missed the boat for the 2020 academic year, such is the demand, but have secured a place for September this year.

I shall say a few words below about this remarkable course and the work of the Cardiff Centre for Law and Religion.

Having set my personal scene, this paper will go on to explain a little of the history surrounding the roles under discussion then give an overview of the work, including some reflections on contemporary issues. Although ecclesiastical law is not conventionally treated as a branch of public

[4] After the suppression of its use for official secular purposes by the Laws in Wales Acts of Henry VIII

[5] Soon after the Act of Supremacy 1558, Elizabeth I ordered that Irish language print be made, *"solely to present the doctrines of the reformed church to the minds of the Irish people"* but the first translation of the Book of Common Prayer into Irish was not made until 1608.

law, at the very least, it has affinities with it and I draw out some points to justify that analysis in the final section of this paper.

HISTORY

In order to understand the roles of Dean of the Arches and Auditor and Master of the Faculty Office, it is necessary to delve into religious, legal and constitutional history for the particular origin and nature of English ecclesiastical law.

Ecclesiastical Law

Before the Reformation, the Western Church, including the English Church, was governed by an emerging body of legal and moral rulings and legislation known as the *ius commune*, modified by local custom and usage. In 1430, William Lyndwood completed his *Provinciale*, which set out in five books the constitutions of the province of Canterbury in line with the papal codes, giving highest regard to the codes, subject to local modifications. Commentators and judges have differed as to whether or not the canon law of Rome was treated as authoritative only if ratified in national or provincial church councils, or as absolutely binding in its own right[6]. Since the Reformation, the approach of common lawyers has been to explain the application of the canon law of papal Rome on the basis of its reception, such that, in order to show that any directive, rule or usage of pre-Reformation canon law is now binding, it must be pleaded and proved to have been recognized, continued and acted upon in England since the Reformation. By s.3 of Henry VIII's Canon Law Act 1543, such of the canon law as applied in England and was not *'repugnant, contrariant or derogatory to the laws or statutes of the realm, nor to the prerogatives of the Crown*' received statutory recognition[7].

The body of ecclesiastical law which forms part of the law of England is not foreign law; as such, it is not proved by the calling of witnesses, but ascertained by argument founded on legal principles and authorities[8]. It is binding upon all people, not just believers, as I once had to explain to an irate builder in a case concerning unlawful works which he had carried out to a Grade 1 listed church in Kent[9]. Some of the ecclesiastical law of England is statutory (Acts of Parliament, Measures of General Synod and Rules and Regulations made under them), some is contained in Canons[10] and some of it is unwritten common law.

> Pausing there, these seemingly academic details about the sources and continuity of ecclesiastical law in England have become highly significant from time to time in relation to liturgical controversies and, even now, do occasionally rear their heads in practice. The liturgical cases of the nineteenth century, debated in the secular Privy Council, dealing with matters such as vestments and ornaments, may now seem remote, but a debate – and potentially litigation - is brewing, in the wake of Covid, about the effect and application of the provisions for administration of Holy Communion in the Sacrament Act 1547.

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[6] See Hill, *Ecclesiastical Law* 4th edn. paras.1.08 – 1.11 and Halsbury's Laws, Vol.34, *Ecclesiastical Law*, para. 8

[7] Halsbury's Laws, paras. 8 – 9

[8] Mackonichie v. Lord Penzance (1881) 6 App Cas 424 at 446, HL.

[9] St Mary the Virgin, Eastry [2012] 22, 39

[10] Formerly made by the Convocation of Canterbury and York, with the Monarch's licence and assent, but now by the General Synod, subject to the same licence and assent: Synodical Government Measure 1969, ss.1 and2

Since the Reformation, both the elements - bread and wine - have been distributed to the laity as well as being consumed by the celebrant priest; the custom and practice of the Church of England has been to administer the wine from a common cup or chalice, which the Bishops have outlawed during the current emergency, on public health grounds. A Joint Opinion by leading and several junior[11] counsel has been published and the Legal Advisory Commission of the General Synod has considered the matter afresh[12]and advised the House of Bishops; much of the debate revolves around the relationship of the historic practice of the Church, before and after the Reformation, to the Tudor statute enshrining a right for the laity to receive Communion in both kinds. A question was asked about the matter in General Synod in November 2020 and it is possible that there will be litigation, although the form it might take is unclear.

Firstly, it is improbable that any such case will come before the Dean or Auditor within the ecclesiastical court system because proceedings are likely to turn on a matter of doctrine, ritual or ceremonial and these are dealt with by a different appellate court, for reasons explained in the next section. Secondly, because of the *"judicial restraint"* referred to by Glanville Williams, judicial review may be an unlikely, though possibly arguable route. The general principle in the secular courts is that decisions of religious bodies on moral or religious questions are not justiciable, as stated in Blake v. Associated Newspapers Ltd[13], where Gray J said:

> *" It is well established…….. that* ***the court will not venture into doctrinal disputes or differences****…….In R. v. Chief Rabbi ex parte Wachmann[14]…….. Simon Brown J said at p l042:*
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> > *" ……The Court must inevitably be wary of entering so self-evidently sensitive an area,* ***straying across the well-recognised divide between church and state****. One cannot, therefore, escape the conclusion that if judicial review lies here, then one way or another this secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community".* (Emphasis added)

These statements must now be read subject to the observations of the Supreme Court in Shergill v. Khaira[15] relating to justiciability of private law disputes arising within religious communities or with a religious basis and of disputes engaging civil rights or reviewable questions of public law. Much would therefore depend on how a secular court might treat the statutory provision relating to Communion in both kinds.

The Ecclesiastical Courts and Judges

The origins of ecclesiastical and secular courts in pre-Norman times were shared, with bishops sitting with secular '*ealdermen'*[16]*.* William the Conqueror separated the ecclesiastical from the temporal

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[11] Stephen Hofmeyr QC and others

[12] The LAC first considered and advised on the point in its Opinion of September 2011 : https://www.churchofengland.org/sites/default/files/2017-12/reception%20of%20communion.pdf

[13] [2003] EWHC 1960 (QB)

[14] [1992] 1 WLR 1036

[15] [2014] UKSC 33 at 45 - 59

[16] Makower, Constitutional History of the Church of England 384, quoting and translating the law of Edgar III c 5: *'And let the hundred-germot be attended as it was before, fixed; and thrice in the year let a burgh-germot be held; and twice a shire-germot; and let there be present the bishop of the shire and the ealdermen, and there expound both things, as well law of God as the secular law.'*

courts, an act ascribed by Phillimore[17] to papal aggrandisement, adding that *'in the time of Henry II, the pope claimed exemption of clerks from the secular power'*. This latter move was the backdrop to the martyrdom of St Thomas a Becket in 1170, as brilliantly expounded by Archbishop Rowan Williams in his recent lecture, *Saving our Order*[18]. Wrangles about jurisdiction and relations between the Courts and the Executive were, therefore, not new either in the last quarter of the twentieth century or in the second decade of this, when the first instance judges in Miller v. Secretary of State for Exiting the European Union[19] were branded *'enemies of the people*' by that 21st century aggrandiser, the Daily Mail.

At the Reformation, the ecclesiastical courts in England continued to function with no real break in continuity, though laymen were now eligible for appointment as judges[20]. The study of canon law was suppressed in the Universities of Oxford and Cambridge by Thomas Cromwell, but the college of Doctors' Commons in London continued to train men for practice in the ecclesiastical courts. The long lasting effects of the Royal decree have been traced by Sandberg and Doe of the Centre for Law and Religion, Cardiff Law School[21] and, at last, reversed through the work of their Centre and the Ecclesiastical Law Society[22]. They conclude:

'The recent developments in relation to the Anglican Communion also indicate that the resurgence of interest in church law is more than just a scholastic pursuit. This field deals with issues that affect the lives of believers and non-believers alike. It also facilities the development of religious groups by developing innovative forms of governance and offering new ways of facilitating ecumenical and inter-faith exchange. The study of the law of religious bodies is not a mere legal exercise but is also an example of applied ecclesiology. Thus, the development of the field during the twentieth century is to be welcomed. The long shadow cast by the Reformation ban has been lifted. The prospects for the twenty-first century seem very encouraging.'

After the Reformation, appeals from the ecclesiastical courts ceased to lie to Rome and were, instead, directed to the secular courts. Gradually, the jurisdiction of the ecclesiastical courts over matters which we would now regard as secular, such as defamation, wills and matrimonial causes, was removed, with their power to punish the laity for brawling abolished in 1860[23]. Calls for further reform came in the latter half of the nineteenth century, in the wake of a series of cases argued in the highest secular courts concerning ritual and liturgy, which engaged the kind of points referred to above about the very nature of post Reformation ecclesiastical law in the context of subject matter of a deeply religious nature. There was dissatisfaction and concern about the appropriateness of such proceedings being heard in secular courts under the Public Worship Regulation Act 1874, but it was not until 1963 that the Ecclesiastical Jurisdiction Measure was enacted. Although this Measure

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[17] Sir Robert Phillimore, *The Ecclesiastical Law of the Church of England* 2nd edn. 1895, pp.1108 – 1110. Phillimore was Dean of the Arches from 1867 to 1875 and the last judge of the Court of the Lord High Admiral of England, abolished by the Judicature Act 1873. The book was the first modern text on English ecclesiastical law, *'in the form of a system arranged according to the principles of science'*, as the author explained in his Preface, and was published in 1873. The second edition of the work was produced by his son, Sir Walter Phillimore, also a High Court judge and later created a Baron.

[18] Sponsored by the Ecclesiastical Law Society, Villanova University, Notre Dame University, and the Dean and Chapter of Canterbury Cathedral : https://ecclawsoc.org.uk/events/rowan-williams/

[19] [2017] UKSC 5. In the Supreme Court, the Counsel General of Wales was 3rd Intervener

[20] Halsbury's Laws para 1022; Ecclesiastical Jurisdiction Act 1545

[21] Diritto e ordinamento delle Chiesa d'Inghilterra e della comunione Anglicana, Order and Canon Law of the Church of England and Anglican Communion, 2010.

[22] Founded in 1987, as explained in the silver anniversary edition of the Journal, Vol.14 (2012) No. 1, Editorial

[23] Ecclesiastical Courts Jurisdiction Act 1860

has been largely replaced, it laid the foundation for the current arrangement of ecclesiastical courts. Many obsolete jurisdictions and processes were abolished, including the power of the Archbishop of Canterbury to proceed against lay people for heresy, but much else was declared to continue.

The jurisdiction, as a result of the 1963 Measure and the Clergy Discipline Measure 2003, with subsequent amendments, now extends to: protecting land consecrated to ecclesiastical purposes and everything on or in such land by the grant or refusal of faculties to authorise works in connection with it and to make orders in respect of unauthorised works; adjudicating on some civil rights in connection with ecclesiastical business and property; and enforcing the discipline of the clergy. The main functions of practical significance are the first and the third – faculties and clergy discipline. The faculty jurisdiction is exercised by diocesan Consistory Courts presided over by Chancellors at first instance and clergy discipline is undertaken by Bishops, sometimes involving Disciplinary Tribunals comprised of clergy and lay members sitting with a legally qualified chair. Courts of the two Provincial Vicars General confirm the election of bishops and archbishops and have original jurisdiction to deal with disciplinary proceedings concerning them, as well as appellate jurisdiction in relation to certain matters concerning cathedrals.

The 1963 Measure provided for there to be an appellate court for each of the two Provinces of the Church of England, and for them to continue to be called the Arches Court of Canterbury and the Chancery Court of York. The judges of these courts are, for the purposes of the faculty jurisdiction: the Dean of the Arches in Canterbury and the Auditor in York and the Chancellors of each diocese in the relevant province; and, for the purposes of the Clergy Discipline jurisdiction, the Dean / Auditor and four non lawyers, two clergy, two lay[24]. Appeals from the Courts of Arches and Chancery lie, in any case not involving a matter of doctrine, ritual or ceremonial, to the Privy Council and, in a doctrinal etc. case, to the Court of Ecclesiastical Causes Reserved. The latter court was created by the 1963 Measure and includes appointees drawn from the ranks of those who hold or have held high judicial office and those who are or have been diocesan bishops. The Court has, so far, sat twice, in the cases of St Michael and All Angels, Great Torrington[25] and St Stephen's Walbrook[26]; interestingly, although the Courts of Arches and Chancery cannot hear any matter involving doctrine, ritual etc., there is no such prohibition in the case of consistory courts, and these decisions were appeals from Consistory Courts. The Court of Ecclesiastical Causes Reserved also has original jurisdiction in clergy discipline complaints concerning matters of doctrine etc. In the event that the Covid - related Holy Communion question comes to be litigated through the ecclesiastical courts, therefore, this tribunal would appear to be the appropriate forum.

The strangely named Court of Arches is so called because of its location in the Church of St Mary le Bow, of bells fame[27]. The current St Mary le Bow was built by Wren after the Great Fire of London, but there is evidence of a church on the site in Saxon times. The origin of the arches is mediaeval, a newly completed arched crypt surviving when the rest of the church was destroyed in the London Tornado of 1091. In the reign of Henry II, the church, which was known as St Mary de Arcubus, from

[24] See now Ecclesiastical Jurisdiction and Care of Churches Measure 2018, ss. 7 – 15.
[25] [1985] Fam 81
[26] [1987] Fam 146; the issue was the lawfulness and appropriateness of introducing a stone altar designed by Sir Henry Moore: see the excellent discussion of the case by Philip Petchey in notes to an Ecclesiastical Law Society lecture: https://ecclawsoc.org.uk/wp-content/uploads/2018/01/Petchey-Jan-2018-1.pdf
[27] The church lies on the eastern side of the City of London. Traditionally, if someone is born within the sound of Bow bells, they are a Cockney. The song "Oranges and lemons", celebrating the bells of London's churches, ends: '"When will you pay me say the bells of Old Bailey?" "I do not know" says the great bell of Bow', neatly referring to the secular Central Criminal Court and the appellate Ecclesiastical Court.

the Latin, *"arcus"* – *"bow"*, was rebuilt and was famed for the arches, or "bows" of curved stone comprising its crypt. The court used to sit in an aisle above the arched crypt; these days, the crypt is used as a café and the Court sits in the nave of the Wren church, while the former court room serves as a vestry. These arrangements were approved in 2000 by the then Chancellor of London, Sheila Cameron QC, who was to become the first woman Dean of the Arches[28] in 2001[29].

Strictly speaking, the title Dean of the Arches is obsolete and the true nature of the role is that of Official Principal of the Archbishop in the Province of Canterbury. Originally, the Dean had jurisdiction over 13 peculiars in the City of London, including St Mary le Bow, while the Official Principal dealt with appeals to the Archbishop's Court from the Province[30].

The other role which has, for many years, gone with the office of Dean is that of Master of the Faculty Office of the Archbishop of Canterbury. The word *"faculty"* simply means permission or licence. Before the Reformation, the functions of granting many faculties, including Special Marriage Licences and appointments of notaries public, were undertaken either by the Pope or his legate in England. By the Ecclesiastical Licences Act 1533, these legatine powers were passed to the Archbishop of Canterbury, who received authority to grant *"all manner licences, dispensacions, faculties, composicions, delegacies, rescripts, instruments or wrytynges have byn accustomed to be had at the see of Rome".* The Act provided for a new court, the Court of Faculties, and for a judge, or *"commisarye"* to preside over it. In modern terms, these powers are more of a constitutional than ecclesiastical nature, so much of the Faculty Office's work is, properly speaking, public. Its role in relation to notaries was recognized and put on a modern footing by the Legal Services Act 2007, a comprehensive statute providing for the regulation of those who engage in *"reserved legal activities"* and *"legal activities"*. The Act applies to Wales as well as England. Reserved legal activities include notarial activities, reserved instrument activities, probate activities and the administration of oaths, all of which are types of work undertaken by some or all notaries, in respect of which Schedule 4 of the Act designates the Master of the Faculties as the approved regulator. Notaries in other parts of the world are also regulated by the Master, on a variety of bases, these being the Channel Islands, Gibraltar, New Zealand, Queensland and Papua New Guinea.

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[28] The first recorded Dean was John de Ufford, who held the office sometime before 1273 when his successor William de Middleton, was appointed

[29] Re St Mary le Bow (2001) 1 WLR 1507. The Chancellor said: *"The primary purpose of any church is use for the purpose of worship. Ancillary rooms used as vestries, parish offices, creches, children's rooms etc are all used in connection with the primary purpose. Where there is additional space…..it is understandable and responsible for a minister with his/her churchwardens and PCC to contemplate permitting an outside body or bodies to use that space on commercial terms….."* This judgment anticipated the general approach which the church has now taken in subsequent legislation and policy: see 23rd Report by the Ecclesiastical Committee on the Pastoral (Amendment) Measure (HL Paper 132; HC 930) and the Pastoral (Amendment) Measure 2006, re-enacted in the Mission and Pastoral Measure 2011.

[30] Report of Commissioners inquiring into Courts of Justice, 1823; Bowman v. Lax [1910] P.300

OVERVIEW OF THE WORK AND CURRENT ISSUES – PUBLIC LAW?

Dean of the Arches and Auditor

The judicial part of the Dean and Auditor's workload takes up relatively little time, although at the moment there are two outstanding appeals to the Court of Arches. One is a clergy discipline case, where permission has been granted on penalty alone. The other is a faculty case, St Giles Exhall, which raises interesting legal and practical questions about language, has caused considerable excitement in the Press and even prompted questions in Parliament[31]. As both cases are yet to be heard, I cannot make any comments on them, but the issue in Exhall may be of interest to Welsh lawyers, so I shall summarise it in neutral terms.

Exhall is a parish on the outskirts of Coventry. A faculty was sought for a memorial for the grave of Margaret Keane, who was Irish but had emigrated and raised a family in Coventry. Mr and Mrs Keane were part of the Irish community there and prominent in the Gaelic Athletic Association. The only controversial part of the petition concerned an inscription in Irish, *"ar gcroithe go deo".* The phrase translates as *"in our hearts forever"*. The Chancellor held that all aspects of the memorial were acceptable save for the proposal to include the Irish words without an English translation. He distinguished an earlier case[32] which I had decided as Deputy Chancellor of Southwark, in which I had permitted the Welsh word *"Tangnefedd"* to appear on a memorial without an English translation. In a Leeds Consistory Court case decided last year, Hill QC Ch. granted a faculty permitting the inclusion of the deceased's name in Chinese characters. He made the following general observations:

" As Ellis Dep Ch QC (as she then was) observed in Re St Peter & St Paul, Nutfield [2018] ECC Swk 1: 'those who want to find out the meaning can, these days, easily look it up online'. That case concerned a Welsh term, tangnefedd (meaning 'peace') whose inclusion on a headstone was approved. Celtic Christianity has a long association with these Islands and the wish to remember a loved one using a language with such a fine tradition seems entirely understandable.

It should also be noted that the legal right to be buried in a Church of England churchyard is not restricted to English-speaking Anglicans. On the contrary, every parishioner and every person dying in the parish is entitled by law to be buried in the parish churchyard or burial ground if there is one, regardless of whether they are a member of the Church of England or even Christian. This right is the corollary of the minister's duty to bury under Canon B 38 para 2. It extends to those whose names are entered on the church electoral roll of a parish at the time of their death: Church of England (Miscellaneous Provisions) Measure 1976, s 6(1). See M Hill, Ecclesiastical Law (Fourth edition, Oxford University Press, 2018) at para 5.53. One of the features of a Church by law established is that its civic functions are not confined to its members (howsoever defined) but extend to the population as a whole. This is particularly the case in relation to marriage and burial. It is unsurprising that with a mixed economy of burials, there are likely to be legitimate demands for an inclusive approach to what is written on headstones, and in what language. I incline to the view that the Church of England should lean towards generosity and expansiveness, provided that proposed inscriptions are not contrary to Christian teaching and doctrine." [33]

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[31] https://hansard.parliament.uk/Commons/2020-11-26/debates/7B0381DF-F9F3-4E89-8C7D-6A5280E709C9/ConsistoryCourtsAppealsProcess#contribution-64FDF723-BA7B-4177-830F-B7E64953B53E

[32] St Peter & St Paul, Nutfield [2018] Ecc Swk 1

[33] St Mary Woodkirk [2020] ECC Lee 3

Arguments based on Arts.8, 10 and 14 of the European Convention have also been raised in Exhall in relation to burial choices.

Whilst the case is still to be heard, the points raised are of some significance and one of the grounds on which I gave permission to appeal was the wider interest in consideration of these matters by the appellate court; accordingly, permission has been given to the London branch of Conradh na Gaelige to intervene and an Amicus Curiae has been appointed. The hearing will make procedural history as the first Court of Arches hearing to be broadcast online.

This case gives some indication of the nature of the faculty jurisdiction and, I suggest, supports my thesis that ecclesiastical law can be regarded as a species of public law. In private faculty cases of this type – another frequent subject for petitions is exhumation – the Church, in the course of exercising its protective jurisdiction over consecrated buildings, land and remains interred within them, is also exercising a measure of control over the citizen who, as Hill QC Ch. points out in Woodkirk, has certain rights, owing to the established nature of the Church of England. It is the role of the ecclesiastical courts to decide how to exercise that control lawfully and proportionately.

Most faculty cases, however, concern the proposals and actions of churches themselves. When, as in the Christ Church Spitalfields litigation,[34] the Court is adjudicating on the relationship of Church and Parliamentary legislation in the context of an important national heritage asset, the parallels with secular public law become even more apparent. In that decision, the Court of Arches also considered the question of the standing of an incorporated campaign group, deciding that it had locus on principles akin to those applied in secular judicial review,[35] although they declined to hold that the group fell within the definition in article 2(5) of the Aarhus Convention of *"nongovernmental organisations promoting environmental protection"*.

The Court of Arches has also considered the constitutional position of the faculty jurisdiction in the context of the exemption which the Church enjoys from secular listed building control. In Duffield, St Alkmund,[36] Charles George QC, my predecessor as Dean and an eminent planning lawyer, referred to the secular statutory requirement for listed building consent, saying:

"…….. pursuant to article 5 of The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010: 'The ecclesiastical exemption is retained for church buildings within the faculty jurisdiction of the Church of England'. Mr McGregor, for whose submissions as amicus curiae the Court is extremely grateful, reminded us that the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it only has the ecclesiastical exemption because the Government's understanding is that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in guidance issued by the relevant department of state in relation to the ecclesiastical exemption. That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy."

A further interesting aspect of the relationship to secular planning control is a convention known as the Skelmersdale Agreement, dating from the 1970s whereby, in exchange for excluding demolition of closed Church of England churches from listed building control, the arrangement is that where there are objections from statutory bodies to a proposed demolition, the Secretary of State may

[34] Spitalfields Open Space Ltd v. The Governing Body of Christ Church Primary School, the London Diocesan Board for Schools, the London Borough of Tower Hamlets and another [2019] Fam.343
[35] Paras 39 - 51
[36] [2013] Fam 158, para.37

hold a non statutory public inquiry and take the decision himself. This process has been triggered a handful of times and there is one outstanding case, St Peter's Church, Birch in which I was instructed by the Church Commissioners. This typically British arrangement neatly avoids a head on constitutional clash of jurisdictions by means of dignified consent. As the Church of England embarks on a thorough review of many aspects of its mission[37] and in the wake of Covid, many believe that there will be more church closures and it may be that the convention model will struggle to meet the necessity.

Similarly, there are those – inside and outside the Church - who are concerned that the faculty system is inadequate to the task of balancing heritage and missional needs. The important issue of contested heritage, which has already produced some consistory court cases, raises complex questions of this nature; the Ecclesiastical Judges Association recently submitted comments on a paper which the Church Buildings Council have prepared on this topic. An important part of the Dean's role is informally to monitor the temperature of the constitutional balance by liaison with many of the ecclesiastical and secular bodies concerned with the use of church buildings, a task which the last Dean took very seriously and performed outstandingly well, as his decisions in Duffield and Spitalfields, as well as his final public lecture, demonstrated[38]. Keeping abreast of such matters helps to inform the work of the Dean in the wider life of the Church, in particular, General Synod.

It is often said that the Church of England is *"episcopally led and synodically governed."* The General Synod – a three chamber legislature and assembly comprising Houses of Bishops, Clergy and Laity - came into existence in 1970, the Church Assembly having legislated to transfer its powers to the new body. But the role of Parliament, which had been preserved under the Church of England Assembly (Powers) Act 1919 ("the Enabling Act") in the first overhaul of church government since the Reformation, continued. Unlike the Church in Wales, which became disestablished in 1920 pursuant to the Welsh Church Act 1914, the Church of England remained an established church. General Synod is a democratically elected body and a very lively one, even though it is currently meeting remotely under the snappily entitled General Synod (Remote Meetings) (Temporary Standing Orders) Measure 2020. The Dean is, ex officio, a member of General Synod, its Rule Committee and Legal Advisory Commission, as well as sitting on various other legislative committees.

General Synod passes legislation – Measures – which, subject to Parliamentary approval and Royal Assent, *"shall have the force and effect of an Act of Parliament"*.[39] The procedure and its scope are laid down in the Enabling Act, S.3(6) as follows:

> *"A measure may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including this Act:*
>
> *provided that a measure shall not make any alteration in the composition or powers or duties of the Ecclesiastical Committee, or in the procedure in Parliament prescribed by section four of this Act."*

Occasionally, the Dean attends the Ecclesiastical Committee in Parliament to assist a Measure's passage. The Committee is required, under the Enabling Act, to consider and state its views on the

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[37] Presidential Address to General Synod, 7.11.2020: https://www.churchofengland.org/sites/default/fp9*-9/8ioiles/2020-07/Presidential%20Address%20-%20General%20Synod%20July%202020%20.pdfio

[38] "Do we need the Faculty System?" Ecclesiastical Law Journal , Volume 22 , Issue 3 , September 2020 , pp. 281 - 299

[39] Church of England Assembly (Powers) Act 1919, S.4

expediency of a Measure *"especially with relation to the constitutional rights of all His Majesty's subjects,"* before it receives consideration by both Houses. Parliamentary scrutiny is real and, occasionally, Measures are extremely controversial; famously, the 1928 Prayer Book, the first attempt at authorising an alternative to the BCP, was rejected by Parliament, as was the first Measure designed to relieve the absolute bar to ordination of those who are both divorced and remarried.

The resolution of the Ecclesiastical Committee to approve the draft Priests (Ordination of Women) Measure was the subject of a claim for judicial review in R v. Ecclesiastical Committee of the Houses of Parliament, ex parte The Church Society[40]. Taking care to launch their challenge after the Committee's resolution but before consideration on the floors of the two Houses, the Society argued that it was ultra vires the Enabling Act to change one of the fundamental doctrines of the Church of England, namely that only a man could be ordained priest. The interesting jurisdictional and constitutional question as to whether or not a Measure which has, at once, characteristics of primary and secondary legislation, could be the subject of judicial review was not decided because the three man Divisional Court found against the Society on the merits. They held that the wide and sweeping language of S.3 of the Enabling Act meant exactly what it said. Interestingly, the challengers had resorted to the judgment in Viscountess Rhondda's Claim[41], in which that famous secular campaigner for women's rights had been defeated in her challenge to the refusal by the Committee of Privileges of the House of Lords to admit her, even though she was a hereditary peeress. Lord Riddell, construing the Sex Disqualification Removal Act, also of 1919, had held that it was *"inconceivable that Parliament should have made such a wide and far reaching constitutional change by general words of vague and doubtful import."* In 1993, McCowan LJ was not attracted by the approach of the 1920s House of Lords, holding that the words in the Enabling Act of the same date could not have been clearer and declaring the Measure lawful. The constitutional point was subsequently settled by the Court of Appeal in Williamson v Archbishop of Canterbury[42] where arguments were raised, not only on the Enabling Act, but also under the Coronation Oaths Act 1688 and the Act of Union with Scotland Act 1706. Morritt LJ said:

"The Church of England is and at all material times has been an established church. As such its doctrines and government are susceptible to change by the due processes of law….The references in the Coronation Oath to 'the Protestant Reformed Religion established by law' and 'the settlement of the Church of England and the doctrine, worship, discipline, and government thereof, as by law established in England' evidently refer to such religion, church, doctrine, worship, discipline and government as so established from time to time, thereby admitting of change in accordance with the law by which it is established. It is not disputed that the Measure in question received the Royal Assent and that the resolutions of both houses of Parliament as required by section 4 of the 1919 Act were duly obtained. The supremacy of the Queen in Parliament is a fundamental principle of English law. It is a necessary corollary of such supremacy that the regularity of the consents necessary for the enactment of a statute is not justiciable in these courts."

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[40] (1994) C Admin LR 670

[41] (1922) 2 AC 339 at 405; S.1 of the Act provided: *"A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation……"* Margaret Haig Thomas, Viscountess Rhondda was nicknamed "the Welsh Boadicea" and George Bernard Shaw dubbed her "the terror of the House of Lords".

[42] (1994) Times 9 March and M Hill Ecclesiastical Law (1st edn.) ; [1996] EWCA Civ 600. See also (2012) 14 Ecc LJ 20, The Ecclesiastical Common Law by Charles George, my immediate predecessor as Dean of the Arches and Auditor

There is a considerable legislative workload at present, as the Church of England looks to modernise and, importantly, to respond to the Reports of the Independent Inquiry into Child Sexual Abuse in England and Wales. Amongst other things, I introduced the Safeguarding (Code of Practice) Measure to Synod in November 2020. The object of this amending legislation is to clarify and strengthen the role of the House of Bishops' safeguarding guidance in response to a recommendation of IICSA. Whilst this sounds simple – and the Measure is very short – it raises some difficult questions about the scope and enforceability of ecclesiastical law. Not only are the clergy to be bound by requirements of the Code of Practice, but also a wide range of lay people, including churchwardens, various lay workers, parochial church council members and lay diocesan members of staff. As noted above, the jurisdiction of the ecclesiastical courts to discipline lay people as such had completely disappeared by the middle of the nineteenth century and the Archbishop's powers over lay people in relation to heresy were abolished in 1963. At its preliminary consideration in Synod in November, the principle of this Measure was strongly supported, but practical questions concerning its scope and enforcement in relation to the laity were raised which we are considering in Steering Committee. Another safeguarding-related piece of current work is the review of the Clergy Discipline Rules 2005 by the Rule Committee, pending a wider review of primary legislation.

In collaboration with various groups within the Church and Historic England, I am also embarking on a review of the Faculty Jurisdiction Rules to ensure that the system does all it can to support the February 2020 resolution of General Synod that the Church of England will be Carbon neutral by 2030; although any resulting legislation will not have *"Future Generations"* in the title, this exercise is in sympathy with the broader environmental agenda with which Welsh public lawyers are familiar.

Master of the Faculties

Turning now to the Faculty Office, the main functions of interest to public lawyers are Special Marriage Licences and the regulation of notaries. Both functions extend to Wales, despite the disestablishment of the Welsh Church.

Special Marriage Licences are granted by the Archbishop of Canterbury and provide flexibility within the general system of Anglican marriage preliminaries by means of banns or Common Licences. During the first national lockdown, when registry offices were closed, they offered the only solution for people who were terminally ill[43] or for service personnel about to be deployed abroad to marry, because civil preliminaries had ceased to be available. This fact has been pointed out in the Faculty Office's response to the current Law Commission consultation on the law relating to weddings[44]. The Commission's current proposals would involve a radical shift from the current system of licensing buildings to the licensing of celebrants.

As I have said, the combined effect of two Acts of Parliament separated by around 450 years is to make me statutorily responsible for a group of lawyers, none of whom I had ever met before taking up the post. I have now met quite a few of them, in England and as far away as Brisbane, all by zoom, of course. The Office is responsible for the qualification requirements, admission and, where necessary, removal of notaries. Authorisation to practice is by way of "Faculty", a document which is still produced on vellum, sealed with the Faculty Office seal. There are disciplinary Regulations and processes administered by a judge styled Commissary. In Britain, the notarial profession is less well known than in the civil law jurisdictions of Europe, but their work is important, especially in the

[43] 104 Special Licences were issued between 23rd March and 4th July 2020, as against an annual average of 40

[44] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf / Priodi: Crynodeb o'r papur ymgynghori cyfraith priodasau

commercial world. Lord Thomas' report on the Justice System in Wales, however, had little to say about notaries:

" In addition to solicitors and barristers, Chartered Legal Executives and six other professions are regulated in the legal services sector. They are: Licenced Conveyancers; Patent Attorneys; Trade Mark Attorneys; Costs Lawyers; Notaries; and Chartered Accountants……..For other regulated legal professionals, the total number of professionals who are registered as working in Wales is very small. ……In terms of their impact on the Welsh economy, these niche regulated professions do not rank highly. "

The Faculty Office data reveal that there are 19 notaries in Wales, based in Cardiff, Llantwit Major, Tonypandy, Neath, Swansea, Crickhowell, Chepstow, Llandeilo, Ystrad Meurig, Llanidloes, Montgomery, St Asaph, Wrexham, Colwyn Bay and Bangor. This spread of locations gives some idea of the breadth of the services offered by this undersung profession.

The question arises as to what should happen in the event that the Commission's recommendations for devolution of justice in Wales come to fruition. Apparently, no thought has yet been given to this issue, but the profession will require regulation and the numbers involved would suggest that setting up a bespoke Welsh regulator would be disproportionately expensive. Whatever happens, the matter will have to be addressed to avoid uncertainty and the need to legislate again later; this is the situation at present in the Channel Islands, which has been compounded by Covid delays, although work is now underway with a view to preparing legislation for the Islands' Estates.

CONCLUSION

The preparation of this paper, for an audience of lawyers and historians, has given me a welcome opportunity to reflect on my new roles in their legal and historical context. Although the vast majority of the work described is not of immediate relevance to Wales, it does prompt reflection, in this 101st year of disestablishment, about the historical links of the Church in Wales and the Church of England and the relationships between the two nations and churches within the UK and the Anglican Communion.

MORAG ELLIS QC

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