



‘Legalists and Moralists’ in the Historic Portrayal of the Constitution of the Church of England

NORMAN DOE

Professor of Law, Cardiff University;

Chancellor of the Diocese of Bangor;

Academic Bencher, Honourable Society of the Inner Temple;

Visiting Fellow, Clare Hall, Cambridge

The Enabling Act 1919 provided for a new National Church Assembly able to make Measures with the same force and effect as an Act of Parliament. The 1919 Act was without question a constitutional moment with far-reaching effects; and it was about law, not morals: legalists triumphed over moralists. However, it was just one stage in a much longer trajectory of thinking about the constitution of the Church of England. This article, which started life as a lecture to the Ecclesiastical Law Society’s day conference on 2 April 2022, takes the story further back – and widens it. It presents the key elements of thinking about the constitution – accidents, continuity, change – in the works of English ecclesiastical lawyers – civilians, common lawyers and clerical jurists – from the Reformation to the Act of 1919. To what extent, if at all, in their understandings of the church constitution, were our historic ecclesiastical lawyers legalists, or moralists, or both? Was the ecclesiastical constitution itself simply a legal category, or did it, and its basics, also have a moral quality? This article explores these questions in relation to: (1) the nature, sources, and purposes of the constitution of the Church of England; (2) legislative, administrative and judicial power; and (3) the rights of the individual enforceable against the decisions of ecclesiastical government. This article is based on a paper delivered to the Ecclesiastical Law Society’s 2022 day conference.

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INTRODUCTION

The five years 1917–1921 inclusive were remarkable for church constitutional history. In 1917, the Roman Catholic Church promulgated its new Code of Canon Law, coming into force in 1918. In 1919, the Church of England Assembly (Powers) Act was passed by Parliament. In 1920, the Church of England in Wales was disestablished (under the Welsh Church Act 1914) and the Church in Wales was founded and created a constitution for itself. A year later, the constitution of the national Scottish Presbyterian Church was enshrined by Parliament in the Church of Scotland Act 1921. All of these constitutional events – both the spiritual and the secular – embraced the liberating principle of ecclesiastical self-government.

The Enabling Act 1919 provided for a new National Church Assembly able to make Measures with the same force and effect as an Act of Parliament. It was the fruit of the ‘Life and Liberty’ campaign for self-government for the Church of England during and just after the First World War. It was led by William Temple, who became Archbishop of Canterbury.¹ However, Temple’s biographer wrote in 1948: ‘it may be said . . . that there was a sharp and fateful struggle between two groups in the National Church Assembly who differed widely in their conception of its policy and purpose and may be called, roughly, the legalists and the moralists’. He continues: ‘The struggle was a brief one. The legalists . . . were soon in control; the voice of the Assembly is now the voice of the administrator, not the prophet’.²

THE ECCLESIASTICAL CONSTITUTION: NATURE, SOURCES AND PURPOSES

Today, ecclesiastical lawyers have a somewhat narrow understanding of the constitution of the Church of England. The two leading works, Halsbury and Hill, both have chapters entitled ‘the constitution of the Church of England’. But in these chapters, both see the constitution of the church purely in terms of institutions, offices and territories; both deal with: the Church Commissioners; Archbishops’ Council; General Synod; the provinces and archbishops; the dioceses, and their bishops, archdeacons and synods; and area deaneries – although Hill also discusses the courts.³ However, they do not call this body of law, applicable to these entities, the ‘constitutional law’ of the Church of England. Nor, in turn, do they set out the nature, sources or purposes of the constitution of the church, or its moral aspects.

In contrast, building on the still influential work of A.V. Dicey in 1880, secular lawyers today say much about these matters in relation to the United Kingdom’s civil constitution. It is a body of laws and other norms which establish, empower and regulate the whole system of government. The constitution is: monarchical and parliamentary; unwritten and flexible; evolutionary, devolutionary and democratic; and key to it are the rule of law, parliamentary sovereignty, and separation of powers. The constitution creates institutions of government. It confers powers on them – legislative, executive and judicial. It sets limits on

- 1 For scholarship on the positions of the various parties in the church, see Edward Day, ‘The autonomy of the Church of England’, LLM in Canon Law Dissertation, Cardiff University, 2021: High Churchmen wanted a system of self-government to reflect the church’s spiritual autonomy; Evangelicals sought renewed and effective mission; Broad Churchmen sought a comprehensive national church; for the Anglo-Catholics and Tractarians the choice was between the authority of Parliament and that of the Church, and some favoured disestablishment.
- 2 F Iremonger, *William Temple, Archbishop of Canterbury: His Life and Letters* (Oxford: 1948).
- 3 Halsbury’s *Laws of England, Ecclesiastical Law* (2011), paras 50–342; M Hill, *Ecclesiastical Law* (Oxford: 2018) 20–46.

the exercise of these powers. It fixes relations between institutions. It protects individuals' rights and provides means for them to challenge government decisions before an independent judiciary. Alongside the law of the constitution is, as Dicey put it, a 'body of constitutional morality' found in 'constitutional conventions', rooted in political practice, which regulate the exercise of legal powers (particularly those vested in the Crown), but are not judicially enforceable.⁴

Until well after the Reformation, English ecclesiastical lawyers did not generally use the word 'constitution' for the whole system of church government. Rather, a 'constitution' was a particular legal instrument made by a designated authority on any ecclesial matter, from government and ministry, through doctrine and worship, to rites of passage and property. For example, papal legates in England before the Reformation made 'legatine constitutions'; and the Canons Ecclesiastical 1603/4 comprised 'canons and constitutions'. As John Ayliffe writes in 1726, 'the word Canon ... is the same thing as an Ecclesiastical Constitution' and 'every Canon or Ecclesiastical Constitution may be called a Law, because a Law is a written Constitution'.⁵ The cleric jurist Lacey echoes this usage in 1903: 'the Ecclesiastical Law consists of Canons and Constitutions enacted by the bishops or pastors of the Church', and: 'Canons are rules of conduct, Constitutions are detailed direction'.⁶ These lawyers also used the word 'constitution' for the structures of specific church bodies, like the Convocations.

The Ecclesiastical Constitution as the whole system of church government

Needless to say, these lawyers accepted that the Church of England, as a national entity, had a system of government – what we call a constitution – which was established by law. Hooker (d. 1600) writes: (1) 'the present form of Church government which the laws of this land have established', 'is such, as no law of God, nor reason of man has hitherto been alleged for sufficient to prove they do ill'; (2) 'ecclesiastical law' is that 'whereby we are governed' and 'guided in the exercise of Christian religion, and the service of God'; (3) this law deals with the 'order of ecclesiastical government'; and (4) by 'the general consent of all' the 'power in Ecclesiastical causes is by the laws of this Realm annexed to the Crown'.⁷ In turn, the Canons of 1603/4 provide that whoever affirmed that 'the government of the Church of England under his Majesty by Archbishops, Bishops, Deans, Archdeacons, and the rest that

4 A Dicey, *The Law of the Constitution* (1880), Ch. XIV.

5 J Ayliffe, *Parergon Iuris Canonici Anglicani* (1726), Historical Introduction, xxxvii.

6 T Lacey, *A Handbook of Church Law* (1903), 9 and 13; customs are also a source.

7 See N Doe, 'Richard Hooker: Priest and Jurist', in M Hill and R Helmholz (eds), *Great Christian Jurists in English History* (Cambridge: 2017), 115–137.

bear office in [it] is unchristian or repugnant to the Word of God' is excommunicated.⁸

These ideas continued over the centuries. There are two examples. Edmund Gibson (1713) writes: 'The Church of England [is] a spiritual society, but also as a national church ... it has the same common head with the State', yet it is of a 'different nature, and governed by different laws'.⁹ For Archibald Stephens (1848), government involves power and its control: 'For the government of the church and the correction of offences, visitations of parishes and dioceses were instituted ... that good order might be preserved'.¹⁰ 'Church government' was obvious.

However, occasionally the word 'constitution' denoted the church's whole system of government in the modern sense. Gibson himself writes of the 'Constitution of the Church' and the 'Ecclesiastical Constitution' as 'recognised' by Act of Parliament; and: 'Convocation may make Constitutions', which are part of 'the *Constitution of the Realm*'. Again, on how the 'State' should assist the Church, he writes: 'the Constitution of the Ecclesiastical Body, is not unlike the Constitution of the Body Natural', for when 'nature cannot do the work, then is the time for medicines ... to assist her' – but for the State to do so 'without cause' is 'not the way to preserve, but to destroy, the Constitution'.¹¹ Richard Grey (in 1730) also wrote of the 'Constitution of the Church of England, its Government and Discipline',¹² and Richard Burn (in 1763) that 'it is not possible to exhibit any distinct prospect of the English ecclesiastical constitution' without knowing the Statute, Common, Canon and Civil Laws underlying it.¹³

By the nineteenth century, the word 'constitution' is used more frequently for the whole system of church government and its essentials. For Blunt in 1873: 'the episcopal system is ... essentially a part of the constitution of the Church of England'. Phillimore in 1895 agrees: 'As the Church of England is catholic, the cardinal point of her *constitution* is necessarily her episcopal government' which relates to her 'visible external order'.¹⁴ He also distinguishes 'the civil [and] ecclesiastical part of our *constitution*'.¹⁵ There is a single constitution in the realm and the episcopal constitution of the English Church is a part of it.

By way of contrast, as today, Halsbury in 1910 had a section entitled 'The Constitution of the Church of England'. Five points: (1) 'For the purpose of

8 Canons Ecclesiastical 1603/4, Canon 7.

9 E Gibson, *Codex Iuris Ecclesiastici Anglicani* (1713), Preface, i.

10 A Stephens, *A Practical Treatise of the Laws relating to the Clergy* (1848), II.1376: he cites Godolphin.

11 Gibson (note 9), I., Introductory Discourse, xvii, xxix, xxx; and xxviii: under the Submission Act 1533, papal law 'become part of the Law of England' and 'were adopted to the Constitution of this Church'.

12 R Grey, *A System of English Ecclesiastical Law* (1730), 'extracted' from Gibson (note 9), Preface, 3.

13 R Burn, *Ecclesiastical Law* (1763), Preface i. He cites Gibson.

14 JH Blunt, *The Book of Church Law* (1873) 5; R Phillimore, *Ecclesiastical Law* (1895), I.1 and 4.

15 Phillimore (note 14), II.1532.

setting forth the constitution of the Church of England as by law established', Halsbury defines the church as 'an organised institution' and 'aggregate of individuals'; (2) 'the constitution ... consists of those ordinances, authorities, and provisions on which its operations are based which are judicially recognised by the courts'; (a) the 'ordinances' include 'canons and constitutions ecclesiastical ... allowed by general consent and custom within the realm'; (b) 'authorities' include 'offices' and 'courts'; (c) 'provisions' include those 'Reformation statutes' which brought 'changes' to 'the constitution of the Church'; (4) these statutes are 'a convenient starting point for considering the framework of the constitution of the Church as it at present exists'; and (5) these statutes 'recognised the Church ... as a separate national Church ... subject only to the King (that is, the laws of England), as supreme governor of the realm in all spiritual and ecclesiastical [and] temporal causes'.¹⁶ Then, morals: 'The Sovereign, however, is subject to God and to the law, for the law makes the King [Bracton and Blackstone are cited]; and the royal supremacy is exercised in a constitutional manner according to law. The original contract between King and people [Blackstone again] is contained in the coronation oath, by which the supreme authority of parliamentary statutes is clearly asserted' (5 Ann. c. 8, s. 4).¹⁷ In all this we see some marks of a constitution that Dicey and his successors would recognise.

Next in this same section on the constitution, Halsbury describes the 'territorial constitution of the church into provinces and dioceses'; 'the constitution of convocation'; 'ecclesiastical courts'; 'certain Church officers' (e.g. archbishops, bishops); and 'bodies ... constituted by statute as authorities for the management of the affairs of the Established Church' – the Privy Council, Queen Anne's Bounty, and the Ecclesiastical Commissioners appear as examples.¹⁸

Our ecclesiastical lawyers, then, recognise but do not until the nineteenth century consistently classify the system of church government as its 'constitution'. Indeed, while Halsbury 1910 uses the category 'constitution of the Church of England', the Archbishops' Committee on Church and State (1916), vital in the process which led to the Enabling Act 1919, did not – it simply uses the category 'the system of church government'.¹⁹ However, throughout the period from the Reformation to 1919, our ecclesiastical lawyers

16 Halsbury's Laws of England, vol. XI, *Ecclesiastical Law* (London: 1910), 349–829: Part II, 'The Constitution of the Church of England', at para 707. The Reformation statutes are listed.

17 Halsbury (note 16), para 717: also cited are 1 Eliz. I, c. 12 and 13 Car. 2, stat. 1, c. 12, the latter of which 'restored the ecclesiastical law'.

18 Halsbury (note 16), para 709; paras 714–716: 'The Law of the Church' (the temporal common law, statute law, the *jus commune* of the Roman Church which continues on foot of statute, consent and custom to apply here).

19 *Report* (London: SPCK, 1917), 28–20: 'Working of the Present System of Church Government'.

were generally agreed on the essentials of church government: its establishment by law; royal supremacy; and episcopacy.

The sources of the church constitution: law and morals

They were also agreed that the church 'government' or 'constitution' was found in both law and morals. Today one key function of a constitution is to determine what is valid law. On this point, first, they were legalists – and so they list the constitutional sources, contained in ecclesiastical law, without express reference to morals; and their list is hierarchical, although they differ on the order of the sources. For civilian John Godolphin (1678), ecclesiastical law consists of secular common law, parliamentary statutes, (Roman) civil law, and (Roman) canon law when it continued to apply to the English Church. The cleric Richard Grey (1730) orders them thus: 'Common Law, Canon Law, and Statute Law' – the latter he saw as 'supplemental' to the others. However, Richard Burn (1763) states: 'The Civil law submits to the Canon law; both of these to the Common law; and all three to the Statute law'.²⁰

Second, they were positivists – church law derives not from morals but from the will of the sovereign, as Hobbes said, and/or the people, as William Nelson (1709) explains: 'as the Common Law by which our civil rights are determined, is made up of such Customs which by the general consent of the People, have time out of mind obtained the force of Laws, so the Ecclesiastical Law is made up of such Canons and Constitutions which have been received and approved by the People, and which by immemorial practice have been used in our National Church'; and Burn (1763): 'Courts of law are to enforce the will of the society. Laws manifest that will. And it is the duty of courts ... to carry these laws into execution'.²¹

On the other hand, our jurists also make a constitutional link between church law and morality.²² They use several moral categories: for Godolphin (1678), 'the law of nature' is 'the very ground of the moral law'; indeed, 'whatever was commanded in the Old Testament, and grounded in the law of nature, not being repealed in the New Testament, must yet stand in force, as a duty of the moral law'; for William Watson (d. 1689) the civil law is based on 'the foundations of nature, reason, [and] equity'; and for the cleric John Johnson (1720) church laws should be obeyed 'upon supposition, that they contain nothing contrary to Reason, Scripture, and Good Conscience'.²³ As we shall see, these moral categories continued in use during the nineteenth century. Constitutionally,

20 J Godolphin, *Repertorium Canonicum* (1678), Introduction; Grey (note 12), 1–2, 7–12 – he relies on Gibson (note 9), I., Introductory Discourse, xxvii–xxxii; Burn (note 13), Preface i.

21 W Nelson, *The Rights of the Clergy* (London), 167; R Burn, *Ecclesiastical Law* (1797, 6th edn), II.214.

22 Articles of Religion, Art 7: divine 'Moral Commandments' require 'obedience'.

23 Godolphin (note 20), 350, 475; W Watson, *The Clergyman's Law* (1701), To the Reader, I; Johnson, *A Collection of All the Ecclesiastical Laws* (1720), General Preface, xxxviii–xxxix

the key point is that our lawyers are both legalists and moralists when it comes to the sources of ecclesiastical law.

However, they were not agreed on the separation of powers as an essential of the church constitution. In 1748 Montequieu explored the extent to which this essentially power-limiting doctrine applied in the English civil constitution. Whilst he is still used as a starting point for scholars, today there are many separation models. All of them understand that there are three broad functions in government: legislative, executive or administrative, and judicial; these are divided among different bodies; and one body with one of these functions cannot participate or intervene in the function of another body unless the law provides for a system of checks and balances, so enabling inter-institutional controls. So, two contrasting views.

On the one hand, common lawyer Cripps (1845), on vestries: 'if there be any . . . imperfection in their constitution, from which evils . . . flow, the remedy is in . . . the legislature' not the judiciary: 'Courts . . . can only administer the law as it exists, and are not responsible for . . . improvements, however salutary; nor at liberty to depart from the settled maxims of jurisprudence, however beneficial . . . in the particular' case.²⁴ On the other hand, cleric jurist Lacey (1903), on the 'lawful exercise of authority, legislative, judicial or executive', writes: 'The sharp severance of these three functions of government, characteristic of the modern state, has no place in the administration of the Church'. He explains: 'Supreme authority is committed by the Lord to the chief pastors, the bishops, who exercise it personally *in all its functions*', or through others.²⁵ It is to these three functions of government that we now turn.

THE LEGISLATIVE FUNCTION UNDER THE CONSTITUTION

Our ecclesiastical lawyers understood that legislative power within the system of church government, or constitution, was distributed to: Parliament, Convocations, and, at the end of our period under the Enabling Act 1919, National Church Assembly. This was no accident.

The sovereignty of Parliament and ecclesiastical statute law

First, today of course Parliament's law-making power is styled 'parliamentary sovereignty'. Our jurists were familiar with the underlying idea – the royal supremacy in ecclesiastical causes was exercised by the Sovereign in Parliament. Hooker writes: (1) making 'laws . . . are still termed the deeds of the King'; (2) 'Parliament [and] Convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom does

24 H Cripps, *A Practical Treatise on the Law relating to the Church and Clergy* (1845), 714–715.

25 Lacey (note 6), 137–138.

depend'; as such (3) 'to define ... our own Church's regiment ... Parliament ... has [a] competent authority'; also (4) as they legislate in Parliament, there 'is not any man of the Church of England but the same man is also a member of the Commonwealth', *et vice versa*; therefore (5) laws 'take originally their essence from the power of the whole Realm and Church of England'; (6) the monarch's role in 'making laws ... rests principally in the strength of a negative voice'; (7) we 'count any Statute a law which the high Court of Parliament has established about the matter of Church regiment'; and (8) it is not so 'that the Parliament being a mere temporal Court can neither by the law of nature, nor of God have competent power to define of such matters'.²⁶

Later jurists too recognise the role of the Sovereign in Parliament in, as Watson (d. 1689) put it, 'the Constitution of the Church of England as by law established'.²⁷ Nelson (in 1709) proceeds on the basis of 'The Church being reduced to a public polity ... established by the Canons, the Common Law, and the Statutes of the Realm'.²⁸ In the next century, some in the Oxford Movement quipped the English Church was, simply, 'an Act of Parliament Church'.²⁹

However, others questioned this view. For Grey (1730), while the Church of England is not 'a mere creature of the State', this does not make 'the Church independent of the State'; but rather, 'in subordination to the Royal Supremacy'.³⁰ Likewise for Blunt (1873): 'the "establishment" of the Church has been effected ... by its gradual assimilation with our national life *and not by Act of Parliament*'. Moreover: 'The statutory definition of its powers and privileges, and the statutory limitation of them, have no more established the Church of England than similar definitions and acts of limitation ... established the Crown of England'.³¹

Second, the historic use by Parliament of its ecclesiastical legislative power. The Report on Church and State (1916) sums it up: 'The volume of church legislation in Parliament which ... suddenly increased when the breach with the papacy took place, was markedly smaller in the later years of Elizabeth and in the next two reigns. After the Restoration it grew again, until under George III, it became very considerable, and so continued throughout the first three-quarters of the nineteenth century'.³² The Committee did not give the figures, but, for the years 1760–1837, for example, Archibald Stephens, in 1848, lists

26 See Doe (note 7), for *The Laws*, VIII.1 and 6; also VIII.6.11, citing the Institutes: 'What pleases the Prince has the force of law, since ... the people have conceded to him their ... authority to command'.

27 Watson (note 23), Preface, ii.

28 Nelson (note 21), Preface.

29 R Owen, *An Apology for the High Church Movement on Liberal Principles* (1851); N Doe, 'Rediscovering Anglican Priest-Jurists: I – Robert Owen (1820–1902)' (2019) 21 *Ecc LJ* 54–68 at 55.

30 Grey (note 12), 'extracted' from Gibson (note 9).

31 Blunt (note 14), 8–9.

32 *Report* (1916), 24.

about 299 ecclesiastical statutes – namely: 128 statutes under George III; 66 under George IV; and 105 under William IV. That is, about four such statutes were made each year over 77 years.³³

The Archbishops' Committee (1916), however, does give figures for, and comments on, the later nineteenth-century: 'the attitude of the House of Commons towards church legislation is not so much one of hostility as of indifference, and of unwillingness to act, due in part to the realisation of its unfitness to deal with religious affairs', 'lack of time', and 'congestion of secular business' – in 1880–1913, of 217 church Bills, 33 were passed, 183 dropped. This was one reason for the Committee to propose a National Church Assembly (see below).³⁴

Third, what were the scope of, and, if any, the substantive and procedural limits on, the legislative sovereignty of Parliament in ecclesiastical matters? By the nineteenth century, the secular constitutional lawyers (typified by Dicey), consider that Parliament can make any law it pleases, in relation to any subject, person and time (even retroactively); only Parliament itself can repeal its law; and Parliament cannot bind its successors: later statutes repeal earlier statutes; and the courts are under a constitutional duty to enforce a statute and cannot strike it down – the only 'morality' the courts could take cognizance of was that expressed in the statute.³⁵ Did our ecclesiastical lawyers subscribe to this secular outlook in church matters?

On the one hand, some did, initially implicitly, and later explicitly. Godolphin (1678) sets the scene: 'ecclesiastical legislative power was ever in the kings of this realm'.³⁶ Gibson (1713) accepts the State can by statute impose 'temporal penalties' in church law, since 'the Church can go no further than spiritual censures'.³⁷ By 1840, we read in Rogers, as to seating in church: 'neither the parishioners by consent, nor the ordinary, nor any power but the legislature can deprive the inhabitants of a parish of their general right [to seats]; and . . . such acts are contrary to the law of the land'; in turn, also in Rogers, as to 'the duty of the court': 'It cannot refuse its authority to carry into effect the statutes of the land'.³⁸ The unlimited legislative power of Parliament was also recognised by the Archbishops' Committee (1916): the Welsh Church Act 1914 'is probably the greatest interference on the part of the State in the affairs of the Church which our history has seen other than in times of . . . revolution'.³⁹

33 Stephens (note 10), *Statutes Cited*, xviii–xxxv: those he lists may not include of course statutes both enacted and repealed and so were not relevant to his work.

34 *Report* (note 19), 241.

35 Dicey (note 4), Ch. I–III.

36 Godolphin (note 20), 6.

37 Gibson (note 9), *Discourse*, xxx.

38 Rogers, *Ecclesiastical Law* (1840) 1.181 1.304: *per* Lord Stowell, 1 Hag. Con. 318 and 1 Hag. Con. 424.

39 *Report* (note 19), 241.

On the other hand, our jurists recognise that human law was inferior to divine law and moral law. But it seems they did not apply this to parliamentary statute; nor did they consider a parliamentary statute invalid if contrary to divine or moral law. It is rare to find a statement, such as that in Nelson (1709) that: ‘An Act of Parliament may abrogate any Canon, unless it consists in enjoining some Moral Duty’. That they did not habitually say that parliamentary statute was inferior to or void if in conflict with divine law or moral law might be surprising because they said ‘human law’ was. For instance, according to Ayliffe (1726): ‘no Human Law can be made, which is contrary to the Divine Law (and it is only binding in those things which are permitted by the Divine Law)’. Two centuries later, Lacey (1903) contrasts: ‘the Divine Law, consisting of those rules of nature which are common to all societies and of the positive precepts given by the Founder’, with ‘Human Law, consisting of precepts given by those having authority in the Church’ which ‘is distinguished from the positive laws of civic communities by the name of Ecclesiastical Law’. Divine law is ‘fixed and unalterable’; ecclesiastical law, ‘of human institution, subject to growth and change’.⁴⁰ But Lacey does not claim that human parliamentary statute may be struck down if in conflict with divine law.

However, an example of a procedural limit on Parliament’s use of its legislative power was noted by the Archbishop’s Committee on Church and State 1916; today we might classify it an ecclesial constitutional convention – a rule based on usage which is morally but not legally binding: ‘From the sixteenth century onwards legislation affecting the doctrine and worship of the Church has been effected in some cases, though not in all, with the concurrence of the Convocations’.⁴¹ However in law, as conventions bind only ethically, Cripps notes in 1845, a bishop’s attendance in parliament is ‘Not necessary for the validity of an act of parliament’.⁴²

In all this on the legislative power of Parliament, the dominant view of our jurists is positivist or legalist – nowhere do they assert that an immoral parliamentary statute is void or invalid.

The legislative power of the Convocations of Canterbury and York

The Convocations of bishops and clergy (but not laity) had a more limited legislative competence.⁴³ The post-Reformation history of Convocation is complex.⁴⁴ There are expositions of it in the works of our jurists.⁴⁵ However,

40 Nelson (note 21), 131; Ayliffe (note 5), Historical Introduction, xxxiv: i.e. under the statute 25 Hen. 8, c. 19; Lacey (note 6), 3–4, 28–41.

41 *Report* (note 19), 24.

42 Cripps (note 24), 78.

43 For Ayliffe (note 5), Historical Introduction, xxxix.

44 See for example S Hughes-Carew, ‘The Convocations of Canterbury and York’ (2019) 21 *Ecc LJ* 19–47.

45 See for example Cripps (note 24), 28–29; and Stephens (note 10), 1, 376.

we shall use Phillimore who sums it up in 1895. The Act of Submission 1533 provided that Convocation could assemble, and confer on, conclude and execute canons – but each of these only with the consent of the Crown and subject to ‘four limitations’, namely, that canons were not against the royal prerogative, common law, statute law, and the custom of the realm.⁴⁶ The Canons of 1603/4 required excommunication for anyone who affirmed: that Convocation was ‘not the true Church of England by representation’; that no-one was ‘subject to [its] decrees’; that it conspired ‘against godly and religious professors of the Gospel’; and that those present in the ‘making of canons . . . by the king’s authority . . . ought to be despised and contemned’.⁴⁷ Also, 1663 was the last time that Convocation clergy put a tax on themselves, it seems under a ‘verbal agreement’ made between Archbishop Sheldon and Lord Chancellor Clarendon.⁴⁸

Next, in 1689, Convocation was commissioned by the Crown ‘to treat of alterations, and form canons and constitutions’ on rites, ceremonies and church courts – it met in November but produced no canons, and so in January 1690, William III dissolved it. In 1717, under Anne, to prevent the Lower House of Convocation censuring Hoadley, Bishop of Bangor, Convocation was prorogued. Under the four Georges and William IV (except in 1741–1742), as Phillimore puts it, Convocation ‘was never allowed to transact business’ but this ‘manifest injustice’ was cured when ‘a relaxation of the practice of immediately proroguing convocation’ occurred in 1840; after this, it discussed various subjects and issued several reports made by committees, such as on the reform of Convocation (1867) and ritual (1872) – but it made few canons: one on clerical oaths and subscriptions (1865), one allowing parents to be godparents to their children (1865), and one on the lawful hours of marriage (1888).⁴⁹

Phillimore also writes a lot about the procedures on opening, proroguing, and dissolving Convocation and transacting its business,⁵⁰ as well as the Canterbury Convocation Upper House minutes of 28 February 1888 setting out in detail the form and making of canons. At the very end of the process: ‘being seated in the tribunal, or seat of judgment, [the] prelates seated on the right side of his Grace, and the prolocutor and clergy of the Lower House standing on the left’, the president ‘read, promulged, and published . . . the new canons . . . his Grace and the prolocutor holding the parchment . . . severally with their right hands’.

46 Phillimore (note 14), II.1535, citing *The Case of Convocations*, 12 Co. Rep. p. 72. Some considered this declaratory of pre-Reformation common law: see for example Cripps (note 24), 6–7.

47 Canons 139–141.

48 Phillimore (note 14), II.1538–41.

49 Phillimore (note 14), II.1541–42. See also Cripps (1921, 7th edn), 27, for the House of Laymen in the Canterbury province, 1885, and for that in York, 1892.

50 Phillimore (note 14), II.1542–61 at 1544; he cites and criticises Blackstone on this.

The document was then signed by the archbishop, bishops, prolocutors, and clergy.⁵¹ Note that the making of canons is conceived in a judicial nature – convocation is sitting as a tribunal. All this, one might think, illustrates how the ‘legalists’ were dominant well before Temple.

What of any substantive limits on Convocation’s making of canons in terms of their content and effect, in addition to those imposed by the 1533 Act? First, there was divine law: the Articles of Religion provided that ‘it is not lawful for the Church to ordain anything that is contrary to God’s Word written’.⁵² Second, canons were made by clergy and received royal assent under a parliamentary statutory scheme. So did they bind the laity too? Hooker seems to have thought yes – as the king assented to them on behalf of the laity.⁵³ Also, common lawyer Nelson (in 1709) writes of the Canons 1603: ‘as to the Matter of those canons, that which tends to promote the Honour of God and Service of Religion, *must necessarily bind our Consciences*’.⁵⁴ And Gibson (1713), when discussing Convocation, writes that, on the basis of reception and long usage, ‘every Canon . . . made by them, has the consent of the laity virtually’ because ‘an express statute [25 H 8 c. 19] . . . was made by the laity themselves, and with reference to which . . . the Canons of 1603 are warranted by Act of Parliament’.⁵⁵ Indeed, moreover, the common understanding was that both pre-Reformation Roman canon law and Convocation canons bound the laity (if they were not repugnant to royal prerogative, statute, common law, and custom) because they had been approved by Parliament in the 1533 Act.⁵⁶

However, at common law, it was held in *Middleton v Crofts* (1736) that the post-Reformation Convocation canons did not bind the laity, because they were not approved by Parliament (although the convocation power to make canons with royal assent had been approved by Parliament in that 1533 statute). The court decided that the Canons of 1603/4 bound the clergy in matters ecclesiastical, but those canons did not of their own force (*proprio vigore*) bind the laity unless those canons were declaratory of either statute law or the common law.⁵⁷

51 Phillimore (note 14), II.1547. See also Halsbury (note 16), 724–743.

52 Article 20. Divine law, natural law, and the law of reason, play a central role in Hooker: see Doe (note 7); for example, he wrote: ‘no human laws should be suffered to contradict these’.

53 Doe (note 7), at 129. R Helmholz, ‘The Canons of 1603: The Contemporary Understanding’, in N Doe, M Hill and R Ombres (eds), *English Canon Law* (Cardiff, 1998), 23.

54 Nelson (note 21), 131–132; he discusses Canon 75.

55 Gibson (note 9), Discourse, xxix; II.993–996: they bind laity, since royal Letters Patent approve them.

56 Gibson (note 9), Discourse, xxviii: ‘foreign laws become part of the Law of England, by long use and custom’ – ‘and so were *proper* rules, and not contradicted by the laws of the land, and so were *legal* rules . . . *Evans and Ascuiith*, 3 Car. 1 . . . no foreign canons bind here, but such as have been received’, and so ‘are become part of our laws’; and I.998; Lacey (note 6), 40: the 1533 Act gave ‘statutory force to ecclesiastical laws which had formerly stood only on spiritual authority and common custom’.

57 *Middleton v Crofts*, 2 Atkyns, 650. See also Rogers (note 38), 253: ‘Coke says, a convocation may make constitutions, by which those of the spirituality shall be bound, for this, that they all, either by representation or in person, are present; but not the temporality. 12 Rep. 73’.

Be that as it may, by 1903 Lacey considered as 'correct' the proposition 'that laymen are no longer bound to observe such canons *as laws of this realm*'; but if it means 'that laymen are not bound to observe them *as laws of the Church*', this is incorrect – 'all members of the Church alike are *bound in conscience* by the spiritual obligation to hear the Church, and to obey all rules made by the ruling authority in the Church'. Lacey's reason for this is simple: 'To deny this obligation on the part of the laity is to deny their membership in the Church'.⁵⁸ However, Halsbury 1910 rests the non-binding effect of convocation canons on statute.⁵⁹ In law, then, Convocation canons do not bind the laity – but as a matter of morals, they might.

The National Church Assembly

In 1903 the first national clerical-lay body was created, the Representative Church Council. It brought together Convocation and a new 'House of Laymen'. But it had no law-making power, so in 1913 it asked the archbishops for a committee which was appointed and as seen already, found Parliament 'unfit' to legislate for the church. Therefore, the power to make church legislation should be passed to the church so that it may 'claim the liberty of self-expression and self-maintenance which . . . fulfilment of its essential functions demands'. But constitutionalism involves both power and its control; so any new church legislature would have the 'power to legislate on ecclesiastical affairs, subject to constitutional safeguards'.⁶⁰

The result, of course, was the Church of England Assembly (Powers) Act 1919 on the constitution of the National Church Assembly. Two measures it was soon to enact were: the Convocations of the Clergy Measure 1920 (canons were made under it in 1922) and the Parochial Church Councils (Powers) Measure 1921 with constitutions for those bodies.⁶¹

The Church Assembly (Powers) Act 1919 is a complex of power-conferring and power-limiting provisions. They are well known: the tricameral National Church Assembly was given power to make Measures touching matters concerning the Church of England. A Measure has to be approved by Parliament whose Ecclesiastical Committee must in reporting on a draft measure have regard to its effect on the constitutional rights of individuals. Once a Measure receives royal assent, it acquires the force and effect of an Act of Parliament. As a result, all the effects of Acts apply to Measures, *mutatis mutandis*: they bind

⁵⁸ Lacey (note 6), 52–54.

⁵⁹ Halsbury (note 16), para 717: 13 Car. 2, stat. 1, c. 12 'restored' ecclesiastical law; by s. 5: nothing in the Act confirms 'the canons of 1640, nor any other ecclesiastical laws or canons not formerly confirmed, allowed or enacted by Parliament, or by established laws of the land as they stood in 1639'; *R. v Tristram* [1902] 1 KB 816.

⁶⁰ *Report* (note 19), 29–32, 40.

⁶¹ Cripps, *Church and Clergy* (1937, 8th edn), 5–20.

clergy and laity; they are invulnerable from judicial challenge; and they may repeal statutes. In all this, for me, Parliament by statute empowered the Church Assembly to share in its sovereignty.⁶²

How did our ecclesiastical lawyers see this development? One of the most interesting views is that in Cripps (1937): ‘The [Enabling] Act 1919, neither constitutes as a statutory body, nor gives any express powers, statutory or otherwise, to the National Assembly of the Church; it recognises, however, that body, as constituted in accordance with the constitution set forth in the Appendix to the Addresses of the Convocations, as the only body whose measures are entitled to be considered under and treated in accordance with the provisions of the Act’.⁶³

THE ADMINISTRATIVE FUNCTION AND THE RULE OF LAW

The ecclesiastical constitution also made provision for executive or administrative functions within the church. Once more, these were carried out under the royal supremacy and it was the Sovereign in Parliament which empowered and controlled church administration through a battery of statutory provisions – although Convocation canons too played their part. A key theme in the historic evolution of the church constitution across the centuries was that church administration was subject to the rule of law – it must be discharged ‘according to law’: but our ecclesiastical lawyers also recognised a moral aspect to the working of the rule of law.

This is not surprising. By the late nineteenth century, it was commonplace. There was even an implicit moral element in Dicey’s well-known and influential threefold exposition of the rule of law as ‘government according to law’: namely: (1) the supremacy of regular law, the absence of arbitrary powers, and the decisions of government must be authorised by law; (2) equality before the law – the equal subjection of governor and governed to the law; and (3) the rights of individuals arise predominantly through the decisions of the courts (see below).⁶⁴

First, the royal supremacy and the subjection of the monarch to the rule of law. We begin, again, with Hooker on the basic executive task: the sovereign must ‘keep all Ecclesiastical persons within . . . their duties and constrain them to observe the Canons’ and in exercising this power must act ‘according to the laws’, so that ‘the law itself is a rule’.⁶⁵ That all executive power in the Crown

62 N Doe, *The Legal Framework of the Church of England* (Oxford: 1996) 58–60.

63 Cripps (note 61), 10: ‘Neither [its] Legislative Committee . . . nor the Assembly . . . is a body to which a writ of certiorari or of prohibition will issue, as neither of them is a body which is under a duty to act in a judicial capacity’: he cites *R. v Church Assembly Legislative Committee, ex p. Haynes* [1928] 1 KB 411; see also Cripps (note 49), 28: the addresses of Convocation to the Crown 10 May 1919.

64 Dicey (note 4), Ch. IV–XIII.

65 *The Laws*, VIII.1. and 6.11; VIII.3.

must be exercised according to law was repeated time and again by later ecclesiastical lawyers. But there was also a moral limit on royal power; as Richard Burn explained in 1763, monarchs must 'to the utmost of their power maintain the laws of God'.⁶⁶

Second, it was commonplace that: 'For administrative purposes ... the organisation of the Church proceeds on the lines of these three institutions, the Province, the Diocese, and the Parish'.⁶⁷ At provincial level, sometimes the positive law forbade administrative acts which offended divine law; for instance, by statute 'the Archbishop cannot license a Marriage within the Degrees prohibited, as being against the Law of God' (Cockburn, 1792); nor could the archbishop grant dispensations which are 'repugnant to the law of God' (Rogers, 1840).⁶⁸

In the diocese, too, the rule of law meant that, for example, as Halsbury 1910 explains, visitation was 'the act of the bishop ... with a full power of inquiring into such matters as relate to the government and discipline of the Church'. It implies some 'coercive authority' (Ayliffe (1726) is cited), and is one of the principal duties of a bishop who may visit 'at pleasure every part of his diocese' (Blackstone (1758) is cited). But the power is limited: 'Though the ordinary once had [a summary] power of correction of a parson [Godolphin (1678) is cited] his power over the clergy and of correcting them is now established and exercised by proceedings in the ecclesiastical courts' (by the Church Discipline Act 1840).⁶⁹

Next, Halsbury states: 'An archdeaconry is a legal division of a diocese for administrative purposes'; and: 'An archdeacon is a minister of the Word, having statutory jurisdiction under the Crown and next after the bishop over a portion of a diocese, called an archdeaconry in matters ecclesiastical' – Halsbury here cites the Ecclesiastical Commissioners Act 1836.⁷⁰

The parish too was an administrative unit. It was the focus of communal life, spiritual and civil, governed by its vestry, elected by householders, ministered to by the parish priest, assisted by elected lay officers, and supervised in church matters by the bishop and his officers and in temporal administrative matters by magistrates. Parish vestry officers include overseers of the poor, surveyors of highways, and those levying local rates to fund these.⁷¹

Third, administration at these levels had to be 'according law'. For instance, the principal parish administrators were the churchwardens. The late

66 R Burn, *Ecclesiastical Law* (1775 edition) 1.368: i.e. at the coronation.

67 Lacey (note 6), 67–68.

68 W Cockburn, *The Clerk's Assistant in the Practice of the Ecclesiastical Courts* (2nd edn, 1756), Appendix II; Rogers (note 38), 319–320: Ecclesiastical Licences Act 1533.

69 Halsbury (note 16), paras 783–785.

70 Halsbury (note 16), para 853.

71 See Halsbury, *Ecclesiastical Law* (1975), para 568; Halsbury's Statutes, *Ecclesiastical Law* (1986), 220–242.

Hanoverian period saw some notable judicial decisions on them. For example: they must not interfere with divine service for any impropriety by the minister, unless the conduct was riotous or indecent – rather, due process required them to complain to the ordinary, but in exceptional cases they or even private persons could intervene to preserve the decorum of worship (1792); and churchwardens' administrative authority extended only to the church, churchyard and its curtilage (1828).⁷²

The administrative acts of clergy also had to be 'according to law'. The courts held, for example: no cleric could conduct divine service publicly in any benefice without the consent of its incumbent (1814); and clerics were in neglect of duty if they failed to administer services in the Book of Common Prayer 1662, unless the failure was for example occasional (1828).⁷³ And a minister could make no public notices at divine service which were forbidden by the Parish Notices Act 1837 – like decrees, citations, or proceedings in an ecclesiastical court.⁷⁴

THE JUDICIAL FUNCTION: POSITIVISM AND MORALITY

The church courts were also creatures of the church constitution. For our jurists, the royal supremacy, parliamentary sovereignty, and the rule of law all play a part in their analysis of the church courts. The constitution of church courts, their jurisdiction and limits on it, were in the keeping of the Sovereign in Parliament. As Coke says: 'The ecclesiastical judges derive their jurisdiction . . . by parliament, and the custom of the realm'.⁷⁵ However, it is with the work of the courts that we most often see our jurists as legalists and moralists. They use moral categories in the judicial context much more than in the legislative or executive fields.

Hooker sets the scene – in doing so he mingles legalist and moralist elements in a set of basic constitutional principles: (1) ecclesiastical judges are 'necessary for decision of Controversies [and] correction of faults committed in the affairs of God'; (2) they are appointed 'under the King's commission'; (3) with them 'nothing but singular integrity and Justice should prevail'; (4) if they do not act 'according to the law of reason and of God; we must . . . endeavour to have them reformed'; (5) they cannot 'entertain causes' assigned to temporal courts; (6) their functions cannot be interfered with by the king; and (7) they must act according to law – e.g. no 'Ecclesiastical Judges . . . have authority to call their . . . Sovereign to appear before them'.⁷⁶

72 *Hutchins v Denziloe and Loveland* (1792) 1 Hag Con 170; *Mosey v Hillcoat* (1828) 2 Hag Ecc 30.

73 *Carr v Marsh* (1814) 2 Phillim 198; *Bennett v Bonaker* (1828) 2 Hag Ecc 25.

74 Halsbury, *Ecclesiastical Law* (1975), para 948.

75 Rogers (note 38), 711 citing 2 Inst. 486.

76 Doe (note 7), at 130–131.

First, the constitution of the courts. Our jurists consider that before the Reformation the church courts were papal in establishment, but exercised jurisdiction by royal grant. There were archdeaconry, diocesan and provincial courts, with final appeal to Rome. After it, as Gibson (1713) writes: 'the Ecclesiastical Courts are the King's Courts',⁷⁷ their powers and limits on these defined by statute. The archbishops' provincial courts heard appeals from the diocesan courts, and the final court of appeal was the new statutory Court of Delegates; it was administered in the name of the crown by lay people, not clergy.⁷⁸ As Godolphin says (1678): 'This Court of Delegates is the highest court for civil affairs that concern the Church' to which there was a right of appeal for 'any subject of England, in case of defect of justice in the courts of the Archbishop of Canterbury'.⁷⁹ But for Gibson (1713), in taking power from the clergy, the court was against 'natural reason' and 'the general tenor of our Constitution'.⁸⁰

Second, these courts had jurisdiction over clergy and laity in a wide range of matters, from discipline and defamation through to testamentary and matrimonial causes. Their business ebbed and flowed, particularly during the eighteenth century.⁸¹ As a result, the Royal Commission on the Ecclesiastical Courts in 1830 reported that their criminal work had virtually gone, and defamation, testamentary and matrimonial cases had declined. The Privy Council Appeals Act 1832 abolished the Court of Delegates passing its powers to the Privy Council,⁸² and the Church Discipline Act 1840 gave a role to this secular Privy Council. The key constitutional point is that the jurisdiction of the church courts was in the keeping of Parliament, and if they exceeded their jurisdiction, prohibition lay in the common law courts.

Third, reform was in the air. In 1845 Cripps wrote: 'the constitution of these courts will probably soon undergo a considerable change, and . . . many of them will be abolished'; also: 'proceedings in [them for] the correction of persons ecclesiastical was tedious and unsatisfactory'.⁸³ He was correct. Parliament abolished their jurisdiction over defamation (1855), probate and matrimonial causes (1857, and give it to new secular courts), church rates (1868) and tithes. Driven largely by the ritualist controversies, further changes came with the Clergy Discipline Act 1892; under it, appeal now lay from dioceses to the Arches Court or the Privy Council. The Arches' remit shrank to cases of faculties and clergy discipline.⁸⁴

77 Gibson (note 9), I, Discourse, xxvii–xxviii.

78 25 Hen. 8, c. 19.

79 Godolphin (note 20), 117–118.

80 Gibson (note 9), I, Discourse, xxi–xxii.

81 R Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge: 2006), 83–84, 91, 96, 98, 119–128, 138 (including the statute of 1787, 27 Geo. 3, c. 44).

82 Outhwaite (note 81), 90–94, 131–144.

83 Cripps (note 24), 31.

84 Halsbury's Laws, vol. 14, *Ecclesiastical Law* (London: 4th edn, 1975), para 1285, n. 1.

Fourth, our jurists understood that the principal culture of the courts was legalist or positivist—their function was simply to apply the law: to act ‘according to law’. The civilian Thomas Oughton (1728) writes: ‘Ecclesiastical courts are seats of judicature founded and established by law for the . . . determination of all ecclesiastical causes’ decided ‘according to the canon law and the ecclesiastical laws of this realm’.⁸⁵ The ecclesiastical law was a self-contained system of binding rules which was to be applied consistently—another rule of law value. Oughton again (and here is a possible exception to the separation of powers): ‘when any practice or custom in relation to judicial matters is introduced by the judge, who has a power of doing so, that is to say, of making rules and orders of court’, then this ‘is properly the practice observed by any court in its way of proceeding, and is not a law unto causes and persons, but a mode of proceeding’, and ‘we ought not easily to depart from . . . that which has commonly been observed for law’.⁸⁶ And we read in Burn (1763): ‘The principles by which this and other like cases must be governed, are settled by analogy to established rules . . . And no conjecture of a private imagination can shake a rule of law’; again, ‘the rule of this court is always to follow the law of that other court; for if this court did not pursue that rule, there would be different remedies in different courts, which would create great inconvenience’.⁸⁷

Legal positivism and formalism are also evident, then, in the use of precedent—broadly, that earlier judicial decisions must be followed in later similar cases because they state the law and so have binding legal (not moral) authority. As Burn (1763) states ‘concerning the common law’, and here he uses the separation of powers: ‘Judicial decisions . . . by virtue of the laws of this realm . . . bind as law between the parties thereto’, yet ‘do not make a law properly so called (for that only the king and parliament can do): yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is’—and this applies to ecclesiastical law.⁸⁸ Reports of cases in the church courts abound with the use of precedents.⁸⁹ Yet at the same time, the moral ‘ought’—Burn cites Lord Mansfield: ‘Courts of justice ought . . . to lean rather against, than in support of, any too rigid formalities’.⁹⁰

85 Oughton, *Ordo Judiciorum* (1728), in J Law (ed), *Forms of Ecclesiastical Law, A Translation of the First Part of Oughton's Ordo Judiciorum* (London, 1831), Title I, taken from Ayliffe.

86 Oughton (note 85), Title II and LXXV.XII (Law ed. 5–6, 163).

87 Burn (note 21), IV.143, 169, 177: cited from cases. See also W Bryson (ed), *Miscellaneous Reports of Cases in the Court of Delegates: From 1670 to 1750* (Richmond, VA: 2016), 231 (Case 83).

88 Burn (note 13), Preface, xviii; however, he laments that ‘no collection has been published’ of ecclesiastical reports, ‘one cause why the law and practice of those courts is not so generally understood’.

89 See for example *Thwaites v Smith* (Del. 1696) Bryson 80 (Case 39); 24 E.R. 274.

90 Burn (note 21), IV.97 citing *Wyndham and Chetwynd*, M. 31 G. 2, Lord Mansfield.

Fifth, on the other hand, our jurists also see morality as fundamental to judicial practice. All the moral categories we have already met are used. *Natural law*: the civilian Ayliffe (1726) writes: 'if you take away this [Canon] Law, we have no *just* method and form of proceedings in judicial causes of an ecclesiastical cognisance', especially as elements of it are 'taken from the Laws of Nature'.⁹¹ Natural law was also invoked in both temporal and spiritual courts.⁹²

Justice is one foundation of the *professional ethics* of advocates in church courts; we read in Burn: 'advocates who undertake the defence of causes are directed to be sworn on the holy evangelists in each individual cause' that 'they will endeavour to procure for their client a just and true decision of the suit'. In turn, all causes 'are either manifestly just, notoriously unjust, or of a doubtful nature'. Thus: 'The rule with regard to those of the first class, is to defend them by just and fair means'. As to the second class: 'it is culpable in the parties to prosecute them, it is of course more so in the advocate to support them'. However: 'Causes of a doubtful nature, whether the doubt arise from an uncertainty of the fact or law, may be conscientiously defended by the means which are proper for the defence of a just cause'.⁹³

In one case from 1696, justice was invoked to justify the supremacy of parliamentary statute over convocation canon. Under Canon 98 (1603) on factious appellants, one judge held for the appellant 'as I was bound to do *ex debito justitiae*', 'chiefly, because the Canon in this point is void, for [under] the Statute of [1534] ... it is not in the power of the Convocation by any canons they can make to lessen or weaken this remedy or to obstruct it by superinducing any new conditions or qualifications upon it which the Act of Parliament does not require'; he ends: 'And, therefore, the Canon which bars all such appeals until conformity is void'.⁹⁴

Equity: Oughton (1728) explains: (1) 'a judge ought always to have a *supreme equity* before his eyes', but must not 'depart from written laws on the account of *unwritten equity* ... Unless it be through the authority of him to whom this alone belongs, in order to limit and restrain a severe written law'; (2) 'though a judge may not extend a punishment beyond *the letter of the law*, yet he may mitigate the same according to the equity of the case; and if he cannot ... he is to report the same to the prince for his mercy'; (3) 'Every judge in pronouncing sentence ought to have a principal regard to *truth and equity*, always adhering thereunto, and despising the quirks and subtilties of the law';

91 Ayliffe (note 5), Historical Introduction, iv, xxxvi iv.

92 R Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: 2015), 94–126.

93 Burn (note 21), I.1: a note of the editor Simon Fraser.

94 *Hurst's Case* (Del. 1682), Bryson 43 (Case 19) *per* Lord Nottingham; i.e. statute 25 Hen. VIII, c. 19, ss. 4, 6.

and (4) 'In cases not expressly specified by law, a judge ought always in ... punishments, to be inclined to the more humane and *equitable* part'.⁹⁵

Conscience was used in a host of contexts. Two examples. William Cockburn explains (1756), in relation to a bill of costs, the judge 'taxes it to what sum he in prudence and *conscience* thinks fit'; proctors must not swear to the truth of a claim to promote an appeal when 'such oath is against the *conscience* of proctors'; and a litigant must say 'what he thinks ... in his *Conscience* to be true'.⁹⁶ And Cripps (1845) explains how 'churchwardens [are] obliged, not only by law (Dr. Gibson says), but also in *conscience*' to ensure that presentments are supported by the evidence; 'because, to deny the court those evidences which induced them to present upon oath, is to desert their presentment, as is little better, in point of *conscience*, than not to present at all'; otherwise, by their default, the presentment is rendered ineffectual, 'as to all purposes of removing the scandal, or reforming the offender'.⁹⁷

Reason: like the common lawyers, our ecclesiastical lawyers invoke 'reason' and its associates, 'the law of reason', 'natural reason', 'common reason', 'right reason', 'grounds of reason' and 'reasonable'. Some examples. Watson (d. 1689) states: 'every one that is presented to a church, ought to be duly qualified to perform the duties of the incumbent thereof, and this the *Law of Reason* does render sufficiently evident, therefore he ought to be ordained, or made a minister, according to the directions of the Laws'.⁹⁸ Ayliffe (1726) explains how custom is 'a kind of immemorial right, introduced by the tacit Consent of the People, and established by a long course of practice ... when a law is deficient' and 'upon *the Principles and Foundation of Reason*'; then 'it has the Authority of Law in that State'.⁹⁹ In other words, reason is used here as a criterion to test the validity of a custom; the idea is common – sometimes a custom is 'declared to be against *law and reason*',¹⁰⁰ or it is said that 'no ecclesiastical custom or canon would be allowed, if the temporal courts considered it *unreasonable* in itself, or inconsistent with the temporal law'.¹⁰¹ It is often asserted that a rule is 'founded upon reason',¹⁰² or a court practice originates in 'good reason',¹⁰³ or 'Custom prevails against the standing Canons of the Church, and it is *reasonable* it should be so'.¹⁰⁴

95 Oughton (note 85), Title VI.VII (Law Ed. 14-15), citing Ayliffe.

96 Cockburn (note 68); see, respectively, Appendix I, 16; 281 (XL.26-27); and Appendix II, 19.

97 Cripps (note 24), 138.

98 Watson (note 23), 146; on admission to a benefice; he cites Mich. 12 & 13 Eliz. Dyer 292.

99 Ayliffe (note 5), 194-196; he cites pre-Reformation canon law.

100 Burn (note 21), III.63, citing 'Gibs. 213. 2 Roll's Rep. 259. 2 Lev. 163. 3 Keb. 609'.

101 Rogers (note 38), 737.

102 P Floyer, *The Proctor's Practice in the Ecclesiastical Courts* (1746), Introduction, xxxi-xxxii.

103 Rogers (note 38), 399: 'The practice in both courts, however different at first sight, produces the same result, and originates in the same *good reason and sound principle*'.

104 Nelson (note 21), 131.

Finally, therefore, it was commonplace for the church courts themselves to invoke all these moral ideas; for example: 'a statute is never expounded in an improper sense but *ad evitandum absurdum* or to prevent injustice' so 'the intent of the statute is observed, if not the letter' (1679); no civil law is 'to be observed among us but what is required by the law of nature' (1696); no judge is obliged to act if 'no law' requires this, or if it is 'inconvenient' or 'unreasonable' (1714); a judge may hold for a party as 'law and equity were for them'; and a will may be upheld if it is 'reasonable' (1728); and 'the rule of the civil law [on a point] is founded upon very good reason' (1737); 'This suit is to rectify the conscience of the parties. And, therefore, these suits are most favoured at law in the means to come at the truth *and that even against the general principles and practices of courts in other causes*'; and: 'The court would, therefore, have a very infirm jurisdiction in a matter of conscience if bound by its positive rules to reject the only evidence in some cases of this and the best cases in all'; so, an ecclesiastical court may examine a lunatic under oath during periods of sanity (1746).¹⁰⁵

In all this this, then, our jurists are both legalists and moralists in their understanding of the church courts – and morals may vitiate judicial practices and so become what Dicey might see as a form of 'constitutional morality' applicable to the exercise of the judicial function. One example from a judgment of Lord Scott in a marriage case: 'The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice'; Scott also invoked 'the moral order of civil society', but 'the happiness of some individuals must be sacrificed to the greater and more general good'.¹⁰⁶

THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS

The Enabling Act 1919 requires the Ecclesiastical Committee of both houses of Parliament to examine draft Measures in light of the 'constitutional rights' of the subjects of the Crown. In 1880, Dicey saw the constitutional rights of individuals as issuing primarily from decisions of the courts not, unlike today, parliamentary statute. In the field of ecclesiastical law, our jurists present a range of ideas about constitutional rights, sometimes with a moral twist.

First, though, they start with duties rather than rights. Throughout our period, they assert that individuals, like governors, are subject to the rule of law. The people must obey the law. Once more, morality plays its part. For several of our jurists, this duty of obedience rests on divine law as communicated to the conscience of the individual. Robert Sanderson (d. 1663) was typical: every

105 Bryson (note 87) 33, 80, 107, 223, 258 and 284.

106 *Evans v Evans*, 1 Consist. 35, per Sir William Scott: Stephens (note 10), 786–788.

subject has an obligation in conscience to obey the law of the church.¹⁰⁷ As seen already, even as our period closes, Lacey (1903) is still using the same idea: the laity owe a duty in conscience to obey Convocation canons; but State law imposes no such duty.¹⁰⁸

Second, church courts were active in the recognition, definition and enforcement of the rights of individuals within the Church of England. Some examples from the Court of Arches: in 1628 it held that an ecclesiastical judge ‘cannot compel an executor to produce an inventory and render account before a will has been proved’. In 1758 it held a parishioner has a right to be married in the parish church. In 1809 it held that any lay person could administer baptism. In 1824 it held no parishioner may interrupt a service to call a vestry meeting after the churchwardens had failed to do so; in 1830 that the incumbent is custodian of the keys of the church; and in 1837 that a temporal conviction is not required before the deprivation of a cleric. In 1876 it recognised the loss of church courts’ jurisdiction over the laity: ‘the punishment of the laity for the good of their souls by [church] courts would not be in harmony with modern ideas’. In 1908, it held that parishioners who were ‘lawfully married’ under civil law cannot be denied Holy Communion on the basis that church law and teaching forbade their marriage.¹⁰⁹ The decisions of church courts too, therefore, were a source of the constitutional rights of individuals as well as the delimitation of these rights.

Third, a moral understanding of constitutional rights develops the further we move away from the restrictive laws against Roman Catholics and Dissenters. What is important is that our jurists saw religious freedom as an aspect of ecclesiastical law. And there was a moral basis. Burn (1763) explains: ‘There is nothing . . . more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution’, which ‘is against natural religion, revealed religion, and sound policy’.¹¹⁰ For the civilian cleric Halifax (1779), natural law generates constitutional rights; he writes: in cases of the ‘infringement of a man’s rights, the Law of Nature and of each particular Society entitles the injured man to Redress’ by means of ‘actions, in a Court of Justice’.¹¹¹ In similar vein, we read in Rogers (1840): ‘courts of justice would wander very much from their proper office of giving protection

107 See N Doe, ‘Rediscovering Anglican priest-jurists IV: Robert Sanderson (1587–1663)’ (2022) 24 *Ecc LJ* 68–86.

108 Lacey (note 6), 52–54.

109 See N Doe, ‘The Court of Arches: Jurisdiction to Jurisprudence – “Entirely Settled”?’ (2022) 23 *Ecc LJ* 322–341 at 337–338.

110 Burn (note 21), IV.173–174; IV.431–434; II.218.

111 Halifax, *Analysis* (1779) 85; see also 4–5.

to the *rights of mankind*, if they let themselves loose to subtleties . . . and artificial reasonings'.¹¹²

Finally, there were those constitutional rights which Parliament conferred on the individual. Their development, but in limited form, dates principally from years after the Restoration. They are well-known.¹¹³ Initially, there was a restrictive approach. The Corporation Act 1661 required all offices-holders in municipal corporations to receive the sacrament in the Church of England. The Conventicle Act 1664 criminalised attendance at any meeting for alternative religious worship where five persons were present in addition to a household. The Five Mile Act 1665 made it unlawful for a non-conformist minister to come within that distance of a corporate town or to teach in any public or private school. The Test Act 1673 required all in an office of trust to meet the sacrament test. The Parliamentary Test Act 1678 imposed the declaration against transubstantiation on members of Parliament and for the first time excluded Catholics from the Lords.¹¹⁴ The Toleration Act 1689 added further freedoms.

However, things changed under the Hanoverians. For example, the Papists Act 1778 was the first to allow Roman Catholics, if they took an oath of allegiance to the Crown, to e.g. join the army, purchase lands freely, and not be penalised for running schools.¹¹⁵ An Act of 1791 enabled Roman Catholics to practise law and to register their schools and places of worship—but it prohibited assemblies behind locked doors, church steeples and bells, priests wearing vestments, open-air services, children of Protestants being admitted to Roman Catholic schools, monastic orders, and the endowment of schools.¹¹⁶ The Roman Catholic Relief Act 1829 completed Catholic emancipation; then came the Roman Catholic Charities Act 1832.¹¹⁷

The Nonconformist Relief Act 1779 allowed Dissenters to preach and teach if they declared they were Christian and Protestant, took the oaths of allegiance and supremacy, and used the Scriptures as their rule of faith and practice.¹¹⁸ The Places of Religious Worship Act 1812 revised the Toleration Act 1689 on registering places of worship used by Dissenters (but not Quakers); it repealed the Five Mile Act and Conventicle Act; and it allowed dissenting ministers to preach and teach in these registered places of worship if they made the 1779 Act declaration before a justice of the peace; no-one was required to travel more than five miles to make the declaration, but it was an offence to preach,

112 Rogers (note 38), 327, citing *Loveden v Loveden*, 2 Hag. Con. 2, 3, per Lord Stowell.

113 F Maitland, *The Constitutional History of England* (Cambridge: 1941 [1908]) 515.

114 A Lyon, *Constitutional History of the United Kingdom* (Abingdon: 2016), 256.

115 18 Geo. 3, c. 60. Discord over the Act prompted the anti-Catholic Gordon Riots in 1780.

116 31 Geo. 3, c. 32.

117 10 Geo. 4, c. 7.

118 19 Geo. 3, c. 44.

etc. without making it.¹¹⁹ In turn, the Doctrine of the Trinity Act 1813 (or Unitarian Relief Act) relieved Unitarians from various disabilities under the Toleration Act 1689 and Blasphemy Act 1697; it was repealed in 1873.¹²⁰ An Act of 1833 allowed Quakers and Moravians to make an affirmation instead of the prescribed oath in legal proceedings.¹²¹ The Marriage Act 1836 legalised civil marriages – and therefore relieved for instance Roman Catholics and Dissenters (Quakers and Jews were already exempt) from marriage in the parish church, and allowed marriages to be registered in buildings belonging to other religious groups; these groups could apply to register their buildings with the Registrar General and so could conduct weddings if a Registrar and two witnesses were present.¹²² All of these parliamentary statutes on religious freedom helped to develop a concept of ecclesiastical law as a source of the constitutional rights of subjects.

CONCLUSION

Ecclesiastical lawyers from the Reformation to 1920 all agree that the Church of England has a constitution – its whole system of government, as distinct from ‘constitutions’, that is, individual instruments dealing (like canons) with particular topics or carrying structures of particular institutions. Moreover, all these jurists, to greater or lesser extents, are both legalists and moralists in their understandings and expositions of that constitution. The constitution of *England* has two parts: civil and ecclesiastical. The ecclesiastical constitution was established by law – and is found in parliamentary statutes, convocation canons, judge-made law, and ecclesial constitutional morality. Whilst usually our jurists do not spell it out, the purpose of the constitution is to establish, empower, and limit the exercise of powers by ecclesiastical institutions and persons. The jurists articulate the constitution in the form of fundamental principles, the chief being the royal supremacy, and do so (at least implicitly) on the basis of the separation of powers. All branches of church government are, ultimately, subject to the royal supremacy exercised by the Sovereign in Parliament. Supreme legislative power over the church vests in the Sovereign in Parliament – morality could not be invoked by the courts to strike down statutes which bound both clergy and laity. Limited legislative authority vests in Convocation – but from 1736 its canons bind only the clergy not the laity – because they had not been approved by Parliament – although they might bind morally. Parliament’s ‘unfitness’ to legislate for the church led to the Enabling

119 52 Geo. 3, c. 155.

120 53 Geo. 3, c. 160. The Dissenters (Ireland) Act 1817 (57 Geo. 3, c. 70) extended the 1813 Act to Ireland.

121 Halsbury, *Ecclesiastical Law* (1975), para 1419; see also Quaker and Moravian Act 1838.

122 6 & 7 Wm 4, c. 85. See also the Marriage Act 1823 (4 Geo. 4, c. 76).

Act 1919 and the creation of a new cleric-lay church legislature competent to make Measures equal in authority to Statutes. Church administration is often understood to be at the heart of the ecclesiastical constitution – also subject to the royal supremacy and the rule of law – but there is little morality in our jurists on this topic. By way of contrast, their treatment of the church courts is an active site of interaction between law and morals. Their constitution and jurisdiction are in the keeping of the Sovereign in Parliament, and their function is to decide cases ‘according to law’ – this generated a certain formalism, most evident in the use of precedent. At the same time, however, they have a moral jurisprudence – invoking a range of moral categories, including divine law and natural law, justice and equity, and conscience and reason. The articulation of ecclesial constitutional rights of the individual was slow – but by the end of the eighteenth century they emerge under the umbrella of ecclesiastical law, in the courts (often explicitly using morality as a basis) and in a whole series of parliamentary statutes. All of these ideas evolved and emphases changed – but by and large there was continuity in constitutional thinking – and no accidents. Things had not really changed, in fundamentals, since Hooker. It is essential to begin with him to understand the evolving thought of the ecclesiastical lawyers – civil lawyers, common lawyers, clerical lawyers – as they expound the constitution of the Church of England. It was both a legal and a moral constitution.