

DISPENSATION AND ECONOMY

**in the law governing
the Church of England**

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SUMMARY

There is general agreement amongst legal scholars and authorities that the law should be obeyed and should apply equally to all those subject to it without favour or discrimination. However, it is possible to see that in any legal system there will be situations when strict application of the law will produce undesirable results, such as injustice or other consequences not intended by the law as framed. In such circumstances the law may be changed but there may be broad policy reasons not to do so. The allied concepts of dispensation and economy grew up in the western and eastern traditions of the Christian church as mechanisms whereby an individual or a class could, by authority, be excused from obligations under a particular law in particular circumstances.

These and similar methods, operating within a general assumption of obedience to the law, allow the strictness of the law to be tempered and obligations remitted with impunity. Besides the specific canonical concepts of dispensation and economy, discretion, custom, desuetude and deliberate inaction by enforcers can all function in the same way. Thus, whilst certainty and equality before the law are rarely if ever held not to be good, those in authority frequently have recourse to action akin to dispensation or economy for the prudent and just management of church and society.

This thesis argues that dispensing power and authority exist within the Church of England as well as in other fields of contemporary law. The thesis is developed by examining the history of the concepts of dispensation and economy and by a series of case studies showing the development of these and other allied concepts.

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ABBREVIATIONS

ARCIC	Anglican-Roman Catholic International Commission
ASB	<i>Alternative Service Book</i> 1980
BCP	<i>Book of Common Prayer</i>
BEM	<i>Baptism, Eucharist and Ministry</i> , World Council of Churches, 1982
c, cc	Canon, Canons (<i>Roman Catholic Codes</i>)
Can	Canon (<i>Church of England</i>)
CCEJM	Care of Churches and Ecclesiastical Jurisdiction Measure 1991
CCM	<i>Called to Common Mission</i> 1999
CDA	Church Discipline Act 1840
CIC	Code of Canon Law of the Roman Catholic Church 1983
CIC 1917	<i>Code of Canon Law of the Roman Catholic Church 1917</i> , Edward N Peters (ed), San Francisco, 2001.
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CLR	<i>Cambridge Law Review</i>
CLSN	<i>Canon Law Society Newsletter</i>
CQR	<i>Church Quarterly Review</i>
Ecc LJ	<i>Ecclesiastical Law Journal</i>
EHR	<i>English Historical Review</i>
ELA	Ecclesiastical Licences Act 1533
ELJ	<i>Ecclesiastical Law Journal</i>
GS	General Synod
Halsbury	<i>Halsbury's Laws of England</i>
Hansard	<i>Hansard's Parliamentary Reports</i>
JEH	<i>Journal of Ecclesiastical History</i>
JTS	<i>Journal of Theological Studies</i>
LPL	Lambeth Palace Library (followed by collection, manuscript and folio references)
LQR	<i>Law Quarterly Review</i>
MS	Manuscript
NPNF	Schaff, Philip (ed) <i>A Select Library of Nicene and Post-Nicene Fathers</i> (followed by series and volume numbers e.g. 2-14)
<i>Palmer Report</i>	<i>Dispensation in Theory and Practice: the report of the Archbishop's Commission on Dispensation, London, 1944.</i>
PP	Parliamentary Papers
Proc GS	Proceedings of the General Synod of the Church of England
PWRA	Public Worship Regulation Act 1874
Qu	Question (subdivisions of St Thomas Aquinas' <i>Summa Theologica</i>)
RCED	Royal Commission on Ecclesiastical Discipline 1906
SP	State Papers
TEC	The Episcopal Church of the United States of America (previously abbreviated as ECUSA or PECUSA)
vol	Volume
WCC	World Council of Churches

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Act of Uniformity Amendment Act 1872
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Charta de Foresta 1215
Church Assembly (Powers) Act 1919
Church Discipline Act 1840
Clergy Marriage Act 1548
Clergy Marriage Act 1551
Clerical Subscriptions Act 1865
Consecration of Bishops Abroad Act 1786
Continuance of Acts Act 1584
Continuance of Acts Act 1592
Continuance of Acts Act 1603
Continuance of Acts Act 1623
Criminal Damage Act 1971
Crown and Parliament Recognition Act 1689
Deceased Wife's Sister's Marriage Act 1907
Ecclesiastical Commissioners Act 1836
Ecclesiastical Licences Act 1533
Fireworks Act 2003
Freedom of Information Act 2000
Gender Recognition Act 2004
Government of India Act (St Helena Act) 1833
Government of India Act 1915
Holy Days and Fasting Days Act 1551
Income Tax (Earnings and Pensions) Act 2003
Indian Church Act 1927
Judicial Committee Act 1833
Law Commissions Act 1965
Magna Carta 1215
Maintenance of the Navy Act 1562
Marriage Act 1949
Marriages (Validity) Act 1905
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Matrimonial Causes Act 1965
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Murders and Felonies Act 1511

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Ordination of Ministers Act 1571
Pluralities Act 1838
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Pluralities Acts Amendment Act 1885
Prayer Book (Table of Lessons) Act 1871
Privy Council Appeals Act 1832
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Care of Churches and Ecclesiastical Jurisdiction Measure 1991
Church of England (Miscellaneous Provisions) Measure 1992
Church of England (Worship and Doctrine) Measure 1974
Clergy (Ordination and Miscellaneous Provisions) Measure 1964
Clergy (Ordination) Measure 1990
Deacons (Ordination of Women) Measure 1986
Dioceses, Pastoral and Mission Measure 2007
Ecclesiastical Jurisdiction Measure 1963
Ecumenical Relations Measure 1989
Extra-Parochial Ministry Measure 1967
Indian Church Measure 1927
Overseas and Other Clergy (Ministry and Ordination) Measure 1967
Pastoral Measure 1968
Pastoral Measure 1983
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<i>Banister v Thompson</i>	[1908] P 362
<i>Bishop of Exeter v Marshall</i>	(1868) LR 3 HL 17
<i>Bishop of Oxford v Henly</i>	[1907] P 88
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<i>Brown v Runcie</i>	Times 20 February 1991 CA
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INTRODUCTION AND DEFINITION OF TERMS

Introduction

*We must not make a scar-crow of the Law,
Setting it up to feare the Birds of prey,
And let it keepe one shape, till custome make it
Their pearch, and not their terror.¹*

It is axiomatic that the law should be fair and should be certain². There is general agreement among commentators that individuals and groups within any legal system are bound to obey the law as it applies to them.³ Additionally, clear procedure should be followed for the law to change either by statute or by evolving judicial precedent. In theory at least it is not possible to change statute law by stealth, neither is it possible for executives of government at any level unilaterally to dispense from the observance of any given law, at least not without opening themselves to the prospect of judicial review or other correction of their action. Such dispensation could be argued to contravene, challenge or wound the rule of law in any particular system.

However, it is notable in the law and practice of the Church of England, and other parts of the Church, that there are times when the law is far from certain and when vagueness, desuetude and variation of the law applying to general and specific cases has crept into the system. Indeed, at times it can be shown that such variation of law is understood as a virtue, rather than a weakness in ecclesiastical and canon law.

The ecclesiastical law of the Roman Catholic Church and of the Orthodox Churches has long recognised concepts of dispensation and economy respectively. The former is a legal process by which an individual is dispensed from the duty of complying with a particular law. The latter is a more mysterious concept and is the action of a bishop or a synod of bishops granting a person leave not to observe a particular law in particular circumstances. Örsy is of the opinion that the concepts of dispensation and economy are not the same. The former, he states, is one of the ‘ordinary tools of law and order’

¹ Shakespeare, William, *Measure for Measure*, Act 2 Scene 1.

² Frank, WF *The General Principles of English Law* 4th Edn., George G Harrap & Co, London, 1969, 22.

³ See below Chapter 12.

whose 'effect is unfailingly predictable'⁴ whereas the latter is an imprecise norm of action by a bishop or bishops.⁵ The two concepts are explored in more detail below.

Mark Hill is of the opinion that such concepts are not part of the law of the Church of England. He describes the appeal of Bishops to an ancient *jus liturgicum* in permitting the use of the proposed 1928 Prayer Book as 'probably unlawful'.⁶ Furthermore he rejects the notion of an 'explicit doctrine of equity'⁷ in the law of the Church of England. He suggests that the relaxation of Canon Law by dispensation, whilst common in the law of the Roman Catholic Church, is not regarded as having a place in the law of the Church of England beyond those places where specific powers are given to individual bishops and ministers.⁸ It will be shown, however, that the Church of England does indeed possess, and rely on, a wide-ranging power of dispensation, exercised largely by bishops but also by others with executive authority. In many cases this power can be seen to be similar to the discretion enjoyed by executive officers outside the church with statutory sanction. However, despite Hill's caution, this discretion, which bears many hallmarks of the Chancellor's equitable jurisdiction prior to the principles of equity becoming fixed, can be seen at least to be implicit in the life and law of the Church of England. From time to time this implicit understanding of the breadth of discretion to dispense exercised by bishops and others is given judicial sanction and, consequently, protection. This wider dispensing power is exercised in relation to individuals, often for a strictly private good, but the same principles can be discerned in the setting aside of a previously inviolable legal or theological principle for a specified time (be it a number of years or until a particular process is completed) in order to ease a process of change in the church. At the end of the specified time the principle that has been set aside comes back into play once more. At both ends of the spectrum there is an assumption that in all cases other than the presenting case the law of the church is to be kept as it is. The law is not changed but, in the circumstances the law is either said not to apply or is set aside in these circumstances only. Otherwise, and when the circumstances end or the law changes, the law applies.

⁴ Örsy, Ladislav, 'In search of the meaning of 'Oikonomia': Report on a Convention', *Theological Studies* 43 (1982), 312 at 318.

⁵ Örsy (1982), 319.

⁶ Hill, Mark *Ecclesiastical Law* 3rd Edn. Oxford 2007 para 1.40.

⁷ Hill (2007), para 1.41.

⁸ Hill (2007), para 1.41.

This setting aside of the law will be explored in a number of areas. First, there is the power of dispensation enjoyed by bishops, particularly by the Archbishop of Canterbury. This power derives from pre-Reformation canon law and was confirmed (and restricted) by the Ecclesiastical Licences Act 1533. The power has developed since that date with many dispensations that were granted no longer being available and new dispensations being added. The pre-Reformation dispensing power itself derives from the authority of bishops, acting alone or collectively, both to legislate and to administer discipline. These powers developed differently in the western and eastern parts of the church and the eastern concept of economy is explored in detail as it not only forms part of the canonical tradition inherited by the Church of England but also because orthodox thinking and ecclesiology can be seen to have been influential in the Church of England and wider Anglican Communion in more recent centuries.

Second, there is the common practice applied by legislators to give to those given power by their legislation discretion in the exercise of that power. This is not limited to the Church in English law. Such discretion, whilst not *contra legem*, does potentially lead to a lack of clarity or even of fairness in the law where discretion is used to the benefit of some but not of others. The use of discretionary power may be subject to an appeal process specified in the empowering legislation and review by the court may also be available in situations where the use of a discretionary power provokes complaint.

Third, and related to the first category, there are examples of individual bishops and others claiming a right of dispensation, economy or discretion by virtue of their office and/or by appeal to higher laws, or to legal or theological principles. These claims have not gone unchallenged and include the appeal of bishops to *jus liturgicum* and to an ancient right as administrators of discipline to administer that discipline with mercy. This claim that has been described as the ‘divine right of bishops’ has similarities with claims of the monarch to inherent powers, claims which have also been made by those exercising powers on the monarch’s behalf.⁹

⁹ E.g. Her Majesty’s Revenue and Customs.

Finally, there are examples of legislative bodies laying aside the requirements of law or theological principle in certain circumstances. It will be shown that on one level of understanding, the fact that the relaxation or exemption from the law is by means of legislation indicates that this relaxation or exemption forms part of the law and is not necessarily therefore a dispensation from it. However, there are examples, particularly in the management of relations between Anglican and other churches, where legislatures have re-affirmed the importance of a law or regulation that they temporarily set aside. Such examples have many of the characteristics of dispensation or economy. Appeal is made, once again, to higher principles.

Review of Literature on Dispensation and Economy

Two books on dispensation were published in the middle of the twentieth century from within the Church of England. The first, in 1935 was *Dispensations* by William J Sparrow-Simpson. Sparrow-Simpson was a theologian rather than a lawyer and this work is a survey, with commentary, on the history of dispensations before the Reformation and in the Church of England. Sparrow-Simpson's work was prompted by a request from the Church Union and is unashamedly written from an anglo-catholic perspective. *Dispensation in Theory and Practice* published in 1944 is the report, with supporting material, of the Archbishop's Commission on Dispensations, chaired by Edwin James Palmer, formerly Bishop of Bombay. This commission met through the Second World War and its work was hampered by the war (causing considerable difficulties in getting members to meetings)¹⁰ and by lack of funding. The Commission considered dispensations from all sides and published a report, which recommended that a system of dispensations should be introduced to the churches of the Anglican Communion. This was never taken up. One member of the Commission, Robert Mortimer, later Bishop of Exeter, acted as secretary to the commission and wrote an historical introduction to the report that is more balanced than the aforementioned work of Sparrow-Simpson (who was also a member of the commission but who dissented from its conclusions). Palmer and Mortimer were the principal drafters of the report.

¹⁰ See the dissenting addendum to the Report by Bishop Kirk of Oxford, *Palmer Report*, 167 and correspondence between Palmer and Canon Wilfred Knox, LPL MS 2994.

The Palmer Commission received a long paper from Prof Hamilcar Alivisatos on the subject of economy. Economy had become a familiar concept in the Church of England in the 1920s. The Palmer Commission did not, however, explore other, contradictory theories of economy to that put forward by Alivisatos. This is unfortunate, particularly as considerable attention and scholarship had been expended on the subject in the early 1920s and published in the periodical *The Christian East*, principally by Canon John Douglas, but also by others (including Sparrow-Simpson).

Significant analysis of dispensations in the modern Roman Catholic Church has been published since the promulgation of the Code of Canon Law in 1983. Little, if anything has been written on the dispensations contained within the law governing the Church of England since the publication of the *Palmer Report*.

Literature on economy that is available in English is fairly scarce. The flurry of work on the subject in the 1920s was prompted by the warming of relations between some Anglican and Orthodox Christians and set against the backdrop of the political upheavals in Turkey at the time. Some attention had been paid to economy by the tractarians of the mid nineteenth century, particularly William Palmer of Magdalen College, Oxford.¹¹ Much of this body of work is taken up with the quest to have the Holy Orders of Anglican Churches recognised as valid by the Orthodox Churches. Reference will be made to the work of Fr John Erickson of the Orthodox Church of America, who has written a number of articles on the subject in more recent times, as well as to a major critical article by Francis J Thompson. The prime source for authority on any subject to do with the Orthodox church remains the Canons of the Councils of the early church and the works of the Church Fathers.

The Structure of the Thesis

The present work sets out to explore whether and how the Church of England has developed a system of dispensation and/or economy. The first part will set out the historical background of the development of systems of dispensation and economy in the early church and the development of dispensation in the Western church up to the

¹¹ Who must be distinguished from another William Palmer of Worcester College, who was active at the same time and from Edwin James Palmer, who chaired the Archbishop's Commission on Dispensation in the twentieth century.

Reformation. There will then be an exploration and analysis of the way in which the concepts have developed in the Orthodox and Roman Catholic Churches up to the present day.

This will then be contrasted in the second part in an exploration of the reforms of the law of dispensation in England in the sixteenth century, with particular reference to the development of the powers of the crown, archbishops and bishops under the terms of the Ecclesiastical Licences Act 1533.

The third, shorter, part points out and analyses numerous examples of similar powers that exist in non-ecclesiastical spheres of English law.

Finally, the thesis that there is a developed (though difficult to define) practice of dispensation and economy discernable in the law governing the Church of England is demonstrated by means of a number of case studies from the seventeenth century to the present day and covering such areas as clergy discipline, liturgical law and ecumenical relations. In each case those in authority in the Church (at whatever level) are faced with a situation in which the greater mission and purpose of the church is potentially threatened or compromised by the strict application of the rigour of the law. Consequently in each case a method is found whereby the strict application of the law can be avoided or temporarily or permanently set aside in order to remove the problem and allow the Church to set about achieving the higher aim or purpose. In each case the law applicable at the time and in the situation will be explored and set out. The problem will be presented and the action of the executive officer (normally a bishop or bishops) or of the synodical or other body will be described and analysed. In each case it will be shown that the law was in some sense broken or set aside, often with judicial protection. Analysis of the characteristics of the executive or synodical action will show that sometimes these actions bear the hallmarks of western dispensation, sometimes of eastern economy and in other cases of something altogether different.

PART I - DISPENSATION AND ECONOMY - DEVELOPMENT IN THE WESTERN AND EASTERN CHURCHES

Chapter 1 - The Development of Dispensation and Economy in the Early Church

Unlike dispensation, economy, from the Greek term *oikonomia*, is not known in the statute law or canons of the Church of England. In the report of the Archbishop's Commission on Dispensation (the *Palmer Report*) an instant link is made between the eastern concept of economy and the western canonical concept of dispensation. 'Dispensation is the English form of the Latin word *dispensatio*, which is the usual translation, in the Latin New Testament, of the Greek word *oikonomia*.'¹² Whilst there are similarities in the Eastern use of economy as a 'suspension of the strict enforcement of Canon Law in cases of urgent need'¹³ and the Western concept of dispensation as 'the relaxation of a merely ecclesiastical law in a particular case'¹⁴ the two have been applied very differently in the Eastern and Western churches over the centuries.

The word economy (*oikonomia*) itself has at its root *oikos*, meaning house. It finds use in the areas of household management, the government and administration of a town or in the arrangement of material for a certain purpose.¹⁵ A survey of instances of the use of the words *oikonomia*, *oikonomos* and *oikonomeo* in the New Testament shows that the *Vulgate* does usually, but not universally, translate this using *dispensatio* and related words. A variety of different terms are used in English, chiefly among them 'steward' but also 'manager' and other related words.¹⁶ *Oikonomia* and its related words are also used in the New Testament to describe the discharging of a trust,¹⁷ the administration of the grace of God,¹⁸ a commission given by God to his servant¹⁹ and the title *oikonomos* is even ascribed to Erastus, whose position in society seems to have

¹² *Palmer Report*, 63.

¹³ Alivisatos, Hamilcar S, 'Economy' from the Orthodox Point of View', in *Palmer Report*, 30.

¹⁴ *CIC* c85.

¹⁵ *Palmer Report*, 30-31.

¹⁶ E.g. the story of the unjust steward in Luke 16. 1ff. The steward is rendered *oikonomos* in Greek and *vilicus* in the Latin of the *Vulgate*. A key phrase is *he oikonomia tou mysteriou* in Ephesians 3.9, translated in the *Vulgate* as *dispensatio sacramenti* and usually in English as administration of the mystery [of God].

¹⁷ 1 Corinthians 9. 17, 1 Corinthians 4, 1-2, Titus 1. 7, Galatians 4. 2.

¹⁸ Ephesians 3. 2.

¹⁹ The writer of the Letter to the Colossians (ascribed to St Paul) describes himself as a servant 'by the commission [*oikonomia*] God gave me' Colossians 1. 25.

been the director of public works in a city.²⁰ The view of John Erickson is that ‘In virtually all great constitutional crises of the Byzantine empire *oikonomia* figures prominently in the primary sources.’²¹ Much use of the term in the Eastern churches over the centuries has taken as its basis the apostolic role of the church as steward (*oikonomos*) of the mysteries, or sacraments of God. The verb *oikonomein* seems to translate most easily as ‘to manage’.

The New Testament contains within it examples of flexibility in the approach of the primitive Church to the application of norms of behaviour. For instance, St Paul ruled that it was not unlawful or unwise to eat meat that had previously been sacrificed to idols. However, in acknowledgment that some of the community in which this practice had become a dividing issue felt strongly that they should not eat such meat, he counselled that the meat should not be eaten.²² Additionally, in teaching on marriage in the primitive church, Jesus is recorded as stating that divorce is not permitted, with the exception recorded in St Matthew’s gospel in cases where there has been ‘unchastity’.²³ Paul introduces what later became established as the ‘Pauline privilege’ in Canon Law in permitting the re-marriage of a newly converted Christian whose pagan spouse leaves the marriage because of that conversion.²⁴ This is set against a general prohibition of divorce and remarriage in the primitive church.

The concept of economy, stewardship and management was popular in the writings of certain influential bishops of the early church. Among these is St Basil, bishop of Caesarea in Cappadocia, who uses the concept of economy to describe both God²⁵ in his creation and provision for his people and in the work of salvation through Jesus Christ²⁶ but also to describe the Church, as God’s stewards on earth.²⁷ Economy is a theme in patristic theology, denoting the divine purpose and the action of God in Christ

²⁰ Romans 16. 23 – the *Vulgate* translates this as *arcarius civitatis* – treasurer of the City.

²¹ Erickson, John, ‘*Oikonomia* in Byzantine Canon Law’ in Pennington, Kenneth and Somerville, Robert (eds.) *Law, Church, and Society: Essays in Honor of Stephen Kuttner*, University of Pennsylvania Press 1977.

²² 1 Corinthians 8.

²³ The Greek word *porneia* is not easy to translate, it is rendered as ‘unchastity’ in the New Revised Standard Version of the Bible and as ‘fornication’ in the Authorised Version. See Matthew 5. 31-32 and Matthew 19. 9. For the more restrictive versions of this pericope see Mark 10. 2-12 and Luke 16. 18.

²⁴ 1 Corinthians 7. 15.

²⁵ ‘The great Steward of the Universe’ Schaff, Philip (ed) *Basil, Letters and Selected Works*. NPNF 2-08, 112.

²⁶ *Basil, Letters and Selected Works*, 390.

²⁷ *Basil, Letters and Selected Works*, 305. See also Luke 16. 1 ff.

and in the Church.²⁸ The primary aim and purpose of God is the salvation of the world and the Church is entrusted with a share in this work. Thus, economy as understood in its broadest sense by the early Fathers and the Orthodox Churches of the present day, is the action of the church in guiding the flock along the road that leads to salvation.²⁹

It is a significant leap from this broad understanding of economy as the Church's role in the work of God to a legal mechanism akin to the highly developed practice of dispensations in the western Church. However, it is clear that, despite it being very difficult precisely to define the nature and limits of economy as a legal mechanism, the term has been used constantly from the time of the early church, to denote a softening of the strictness of the law.

Francis J Thomson, astutely states that any Orthodox theory of economy 'is based upon the theory that the Orthodox church alone is the true Church of God and as such is the sole steward of Divine Grace.'³⁰ This assertion is of particular significance when economy is applied or debated with regard to the recognition, or otherwise, of sacraments celebrated outside the orthodox church. The Church, in orthodox understanding, retains the New Testament role of 'steward [oikonomos] of divine grace.'³¹ As the orthodox church is the only true church it follows that the orthodox church is the only steward of divine grace. Orthodox ecclesiastical theory and practice sets great store by antiquity and the literature on the concept of economy in the Eastern churches is heavily dependent on definitions and examples from the first centuries of the Church. Consequently, the areas on which the eastern canonical authorities (i.e. the early Fathers) dwell are those which were important at the time in which they were writing. In particular, the reconciliation of schismatics and heretics with the catholic or orthodox Church.

²⁸ *Towards the Great Council; Introductory reports of the Interorthodox Commission in preparation for the next Great and Holy Council of the Orthodox Church*, London, 1972, 40. See also 'Extracts from the Acts of the Seventh Ecumenical Council' in *The Seven Ecumenical Councils*, NPNF 2-14, 541.

²⁹ *Towards the Great Council*, 43.

³⁰ Thomson, Francis J, 'Economy: An examination of the various theories of economy held within the Orthodox Church, with special reference to the economical recognition of the validity of non-orthodox sacraments', in *Journal of Theological Studies* NS vol XVI, Pt.2 October 1965 368 at 369-70.

³¹ Ephesians 3. 9.

Robert Mortimer charts the development of the locus of dispensing authority in his historical introduction to the *Palmer Report*. He points out that during the first three centuries AD the ordinary granter of dispensation or economy was the bishop, the bishop being the sole administrator of discipline in the church at the time. After the third century, with the advent of synods and councils, these assemblies began to make laws for the church and to grant dispensations from the law, taking over from individual bishops. Bishops were sometimes specifically forbidden by a synod or council from dispensing in certain matters and sometimes they were given authority to do so by the same bodies. Bishops acting in synod generally enjoyed greater dispensing authority than bishops acting singly.³²

Patristic examples of the use of economy or dispensation: Reconciliation of heretical and schismatic groups

Whilst the greater part of the church was, strictly speaking, undivided up to the great schism between the Eastern (Orthodox) and Western (Catholic) Churches in 1054, there were numerous schisms and heretical groups that threatened the unity of the church.³³ Prior to 1054 the church can be described both as catholic and also as orthodox in its doctrine and practice. From time to time individual schismatics and heretics or groups of either sought to join or re-join the catholic church. Some of these groups were divided from the church on major doctrinal grounds (e.g. some Gnostic sects) but continued to administer sacraments that claimed to be, or could appear to be, equivalent to the sacraments of the catholic church (e.g. baptism and the ordination of ministers). Other groups were divided from the church not over questions of the doctrine of God or the person of Christ, as were Arians or Apollinarians,³⁴ but over the doctrine and ordering of the church. Those groups that were separated from the mainstream church on doctrinal grounds are defined as heretics, those who maintain orthodox theological doctrine but separated themselves on ecclesiological grounds or rejected the lawful authority of the church are defined as schismatic. Most importantly for this study are the schismatic groups, prevalent in North Africa beginning in the third century, known as Novatianists and Donatists. The origin of the Novatianist schism is in the dispute between Novatian and his followers and the catholic church

³² *Palmer Report*, 1-8.

³³ The family of Churches now known as Oriental Orthodox (e.g. the Coptic, Syrian and Ethiopian Orthodox Churches) were divided from the rest of the Church after 451.

³⁴ Both these groups held heterodox understandings of the nature and person of Christ.

and, in particular, Pope Cornelius. Novatian disapproved of what he considered lax treatment of Christians who had not resisted forced conversion or the handing over to the authorities of sacred texts or objects for destruction during the Decian persecution of the third century, these Christians became known as 'traditors'. Novatian was consecrated as a rival bishop of Rome.³⁵ The Donatist Schism also has its basis in the persecutions levelled against the early Church. The Donatists (named after Donatus, the second bishop of this schismatic movement) refused to accept the ordination of a fourth century bishop whose consecrator had been a traditor, during the later, Diocletian, persecution. The view that the actions of traditors rendered invalid sacramental acts performed by them was in opposition to the mainstream position. During the periods of schism the Novatianist and Donatist sects continued to celebrate and administer the sacraments in a manner similar, if not identical, to the mainstream church. When people who had been part of the Novatianist churches in North Africa sought to be reconciled with the catholic church the influential bishop St Cyprian, bishop of Carthage, ruled that heretics and schismatics returning to the church should be re-baptized and, if clergy, re-ordained.³⁶ His rigorist position, based on the premise that outside of the church there can be no sacraments, was condemned by Pope Stephen³⁷ and the scene was set for an ongoing battle between those who took a generous approach to the reception of heretics and schismatics and those who saw them as equivalent to heathens. The latter took a strict view and the former a more generous view, lessening the strict application of the law to enable the reconciliation of those divided from the church, in other words, economy. Thomson states that the Roman practice of receiving baptized schismatics, who were otherwise doctrinally orthodox, by laying on of hands, became the standard practice in the Roman empire of the fourth century.³⁸

During the later, Donatist, schism the precedents of the Novatianist schism came into play. Councils and synods, principally the Synod of Arles³⁹ found against the Donatists

³⁵ "Novatianism" The Concise Oxford Dictionary of the Christian Church. Ed. E. A. Livingstone. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. Cambridge University. 24 September 2007.

<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t95.e41111>>

³⁶ See J Patout Burns Jr. *Cyprian the Bishop*, Routledge, London, 2002, 9-10.

³⁷ Thomson (1965), 401.

³⁸ Thomson (1965), 401.

³⁹ AD 314.

but the schism remained strong in North Africa, with parallel congregations and jurisdictions.⁴⁰ From time to time Donatists, individually or corporately, sought reconciliation with the mainstream church. The questions arose again, therefore, whether persons baptized in a schismatic sect, should be baptized afresh on joining the church and whether Donatist clergy could minister in the catholic church without reordination.

The mainstream church of the fourth and fifth centuries, challenged by the requests of Donatists for reconciliation, had the rigorism of Cyprian and the moderation of the Roman church as third century models. It seems that individual bishops took different approaches and, when faced with large groups of conciliatory Donatists in the early fifth century a series of Synods at Carthage under St Aurelius, adopted a code of canons that rejected Cyprian's rigorist approach.⁴¹ Donatists, from that point on, were received without re-baptism and Donatist clergy without reordination.⁴² This more moderate position was built on in Africa by St Augustine, who states 'the grace of baptism can be conferred outside the Catholic communion, just as it can be also there retained.'⁴³

In *The Challenge of our Past*, John Erickson sketches the history of the use of economy in the reconciliation of heretics and schismatics, claiming that the rigorism of Cyprian was superseded by the more moderate approach of the fourth century bishop St Basil the Great. He summarises the patristic evidence on the recognition of heretical and schismatic ordination by saying that the practice grew up of not recognising the orders of those groups whose baptism you do not recognise. Whilst this did not mean that recognition of baptism brought with it recognition of ordination, in practice 'as the fathers' treatment of the various heresies indicate, one reordains only those whom one rebaptizes'.⁴⁴

⁴⁰ "Donatism" The Concise Oxford Dictionary of the Christian Church. Ed. E. A. Livingstone. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. Cambridge University. 24 September 2007

<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t95.e1752>>.

⁴¹ *The Canons of the CCXVII Blessed Fathers who assembled at Carthage* in Schaff, Philip, (ed) *The Seven Ecumenical Councils*, NPNF 2-14, 437 – 510.

⁴² Canons lvii and lxvii and xcix of the Synod at Carthage 419 in Schaff, Philip (ed) *The Seven Ecumenical Councils*, NPNF 2-14, 471 and following. See also Thomson (1965), 412.

⁴³ Augustine, *On Baptism; Against the Donatists. Book 1.1*. In Schaff, Philip (ed) NPNF 1-4, 1890.

⁴⁴ Erickson, John H; *The Challenge of our Past*, New York, 1991, 121.

At the beginning of the fourth century, according to Thomson, the eastern practice was not so different from the moderate western position, in that heretics and schismatics were received by chrism (anointing with oil) 'to make baptism fruitful, as opposed to valid' and their clergy by the laying on of hands.⁴⁵ Whilst the concept of economy is used to justify the reconciliation of some heretics and schismatics without re-baptism or re-ordination it is not always thus. Canon VII of the Second Ecumenical Council,⁴⁶ for instance, sets out different ways in which different heretics and schismatics are to be received. Adherents of certain heretical or schismatic groups⁴⁷ are received by anointing with chrism, others who are doctrinally heterodox⁴⁸ or whose baptism rite was somehow deficient⁴⁹ are received by re-baptism. There is no mention of economy in justification of this action.⁵⁰

Other examples

Whilst the principal examples examined so far all involve the reconciliation of heretics and schismatics with the Catholic Church, there are some examples of other areas in which dispensation or economy were applied in the first millennium of the common era. Mortimer begins his historical introduction to the *Palmer Report* with the example of the contra-canonical translation of Bishop Euphronius to the Archiepiscopal see of Nicopolis. This was contrary to Canon 15 of Nicea,⁵¹ which itself built on the rule that 'neither bishop, presbyter, nor deacon shall pass from city to city. But they shall be sent back, should they attempt to do so, to the Churches in which they were ordained.'⁵² The practice had become common by the time of the Council (325) and was to become very common again. St Basil wrote to the people of Euphronius's former diocese of Colonia in Armenia, that the breaking of this canon shows that 'good government [*oikonomia*] has been shewn by those to whom has been committed the

⁴⁵ Thomson (1965), 408.

⁴⁶ The Council of Constantinople, 381.

⁴⁷ Including Arians, who were doctrinally heterodox and Novatianists, who were not.

⁴⁸ E.g. Montanists and others who held a heterodox view of the nature of God.

⁴⁹ E.g. Euonomians, who are baptised with a single rather than a triple immersion in water.

⁵⁰ Schaff, Philip (ed.) *The Seven Ecumenical Councils*, NPNF 2-14, 185.

⁵¹ Sparrow-Simpson, W J *Dispensations*, London 1935, 27.

⁵² *The Seven Ecumenical Councils* NPNF2-14, Canon XV of the Council of Nicaea.

administration of the Church.’⁵³ By 382 St Gregory Nazianzen was able to say that this rule had been abrogated by custom.⁵⁴

Erickson points to an interesting case, known as the *Tetragamy Affair* in which economy was applied in the case of marriage. The affair surrounded the fourth marriage of Emperor Leo VI in the early years of the tenth century. In the canon law in force at the time it was expected that, once widowed, a person would not marry again. Second and third marriages led to excommunication, which could be remitted by penance. In such cases the parties remained both married and communicate. Fourth marriages, on the other hand, were not allowed to stand and the remission of excommunication was dependent on separation. Leo’s fourth wife, Zoë, had borne him his only son and he wished to ensure succession. In the end Leo was readmitted to communion but his marriage was not recognised. The economy in this case was not used to validate a sacrament which was otherwise invalid, but to ease the conditions of penance (which would otherwise have been to cast off the fourth wife) to enable the emperor to return to the church.⁵⁵

Conclusion

Thus, in the early history of the Church, there was a tension between applying the law of the church strictly and exercising a leniency or generosity in its application as the means of bringing about a higher or greater good. The rigorous approach, which posterity has linked to Cyprian of Carthage is contrasted with the approach based on economy, whereby in certain circumstances and for particular reasons strict application of the law may be set aside. In the patristic era many examples of the use of economy revolved around the reconciliation of those separated from the mainstream church by heresy or schism and the recognition or not of the sacraments celebrated by heretical or schismatic groups. In such cases the higher concern of the unity of the church and the salvation of souls was considered by some (but not all) authorities to be of sufficient significance to warrant the setting aside of the law.

⁵³ Basil Ep 227, in NPNF 2 – 08, *Basil: Letters and Selected Works*. Mortimer’s footnote on p 1 of the *Palmer Report* incorrectly cites Ep 237.

⁵⁴ Schaff, P (ed) *The Seven Ecumenical Councils* NPNF2-14, Notes on Canon XV of the Council of Nicaea.

⁵⁵ Erickson (1977), 228-9.

Chapter 2 - The Development of Dispensation in the West

As has been noted above, from fairly early in the life of the Church it was possible to discern differences between east and west. It is a convenient and accurate distinction to categorise the western, catholic, approach to the relaxation of the strictness of the law as 'dispensation' and the eastern approach as 'economy'. This chapter explores the development of dispensation in the west from the time at which it became a method or mechanism distinct from the economy of the east to the Reformation in the sixteenth century.

Various commentators have proffered definitions of dispensation. Rhiddian Jones describes dispensation in the Roman Catholic Church as 'an exemption from Ecclesiastical Law, granted in a particular case and issued by one who enjoys executive power' and in the Church of England as 'the power to relax a law in a particular case where its effect would not be beneficial'.⁵⁶ The *Palmer Report Dispensation in Practice and Theory* considers that, from the thirteenth century onwards, it was agreed in the western church that 'a dispensation is a relaxation of the law in a special case'⁵⁷ and Sparrow-Simpson, a member of the Palmer Commission, states that 'by way of a general idea of the subject it may suffice provisionally to say that Dispensation is a deliberate setting aside of the law in a particular case'.⁵⁸

From this array of similar definitions certain themes emerge. Jones' use of the term 'Ecclesiastical Law' in his definition of dispensations in Roman Catholic Canon Law points to the Roman Catholic distinction between divine law, from which no dispensation is possible, and merely ecclesiastical law, which is dispensable in certain circumstances. The reference to benefit in his definition of dispensation in the Church of England is important. The experience of the Church from earliest times has been that 'it is not always wise or even possible to insist on the full severity of the law on every occasion.'⁵⁹ The benefit of a dispensation will always involve benefit to an individual

⁵⁶ Jones, Rhidian, *The Canon Law of the Roman Catholic Church and the Church of England*, Oxford, 2000, 49.

⁵⁷ *Palmer Report*, 66.

⁵⁸ Sparrow-Simpson (1935), 1.

⁵⁹ Mortimer, Robert, in *Palmer Report*, 1.

or class of persons to whom the dispensation is granted, but it will be shown that the benefit of the church as a whole is considered in the granting of dispensations.

The early history of dispensation is bound up with that of economy, but after the schism between the eastern and western churches culminating in the eleventh century the canonical tradition of the west developed a theory and practice of dispensations that was more formal and regular than will be seen in the east. The law on dispensations inherited by the Church of England was that which developed and was codified during the middle ages in the western (Roman Catholic) Church.

Dispensation and Determination

There is a difference, referred to in the *Palmer Report*, between a dispensation and a determination. 'The latter asserts that a man need not obey the law because the law does not apply to him in this case. A dispensation says that although the law does apply to him in this case, nevertheless the man need not obey it.'⁶⁰ The *Palmer Report* goes on to distinguish the two by pointing out that a determination may be given, or taken, by anyone (subject to the determination being overturned by authority) whereas a dispensation can only be given by someone with authority to dispense. Furthermore, the report claims that a determination sets a precedent – that the law will similarly not apply when such a case appears again – whereas a dispensation is given for a particular case and will not set a precedent.

Dispensation, desuetude and custom

There is also a distinction between dispensation and desuetude similar to the distinction above. That is, desuetude is where a law becomes a dead letter and is no longer applied. This could be through the changing of circumstances, whereby the particular law becomes obsolete, or by implied repeal, whereby other, newer, laws make legal that which was not legal (or vice versa) without the specific repeal of the old law. A key component of a dispensation, however, is that the law is not obsolete, is in force and would be applied but for the grant of the dispensation. Allied to desuetude is custom *contra legem* and the question of whether the law can be disapplied or repealed

⁶⁰ *Palmer Report*, 70.

by custom. This is contested. Custom did provide a basis for dispensation, however, and the Ecclesiastical Licences Act 1533 refers to dispensations customarily granted by the Archbishop of York or other bishops.⁶¹ Such customary dispensations continue today in the form of the issuing of Common Licences for marriage without banns. This is an example of dispensation granted prior to the Reformation, confirmed by the 1533 statute and recognised in subsequent marriage legislation.⁶²

The Authority to Dispense

As the authority of the Bishop of Rome began to increase so did papal claims to be the agent of dispensation over and above local bishops and synods.⁶³ However, the writings of St Ivo of Chartres in the late eleventh and early twelfth centuries, show that Bishops still enjoyed ‘broad dispensing power’ by virtue of their consecration and office.⁶⁴ It is possible that Ivo was reacting to the increasing centralisation of power in the Church brought about by the ‘Gregorian Reforms’ of the same time. Gratian, on the other hand, writing in the mid-twelfth century and after the Gregorian Reforms presents central, papal authority to dispense as the norm. Charles Duggan reports that ‘Gratian summed up the papal rights of law-giving and dispensation in asserting that the *prima sedes* has the right to lay down laws, but is not itself bound by them. As the framer of laws, it has the right to dispense from them’⁶⁵ McIntyre distinguishes Ivo and Gratian when he states that for the former, dispensing power is inherent in the Episcopal office and for the latter dispensing power is delegated by the Roman Pontiff.⁶⁶ This notwithstanding, it is possible to assert that dispensation has, in the history of the church, been seen as an essentially Episcopal function – dispensations are granted by bishops (primarily in the west by the Pope) or by bishops acting together in synods or councils.

It is possible to trace the beginnings of a link in early centuries between the power to make law or to legislate and the power to dispense from that law. A body or person

⁶¹ S 15.

⁶² e.g. Marriage Act 1949 s16. See also Pearce, Augur, ‘The Roles of the Vicar-General and Surrogate in the granting of marriage licences’, (1990) 2 Ecc LJ 28.

⁶³ Mortimer in the *Palmer Report*, 1 – 8.

⁶⁴ McIntyre in Beal, Coriden, *Green New Commentary on the Code of Canon Law* 2000, 126-7.

⁶⁵ Duggan, Charles, *Equity and Compassion in Papal Marriage Decretals to England in Decretals and the Creation of “New Law” in the Twelfth Century*, Aldershot, 1998, part IX, 59-87 at 60.

⁶⁶ McIntyre (2000), 127.

who had made the law had the power to dispense from the observance of that law. An inferior authority could not dispense from observance of laws made by a higher authority unless they were empowered to do so by that authority.⁶⁷ Thus, as the Popes became, over time, the supreme legislator in the western church, so the Popes became the central locus of dispensing authority.

The codification of the law on dispensations

Dispensation and economy were part of the written and codified law governing the church from earliest times. Early canons promulgated by councils and synods contain provision for the relaxation of, for instance, the strict requirements for reconciliation with the church after lapse through heresy or schism, as explored and explained above. St Augustine points to the existence of local customs, which differ from place to place.⁶⁸ The eleventh century saw the publication of the *Decretum* of Ivo of Chartres (c 1090), which contained the first major systematic treatment of the subject after the great schism. The definitions laid down by Ivo formed the basis of the work of Gratian and other later canonists.

Ivo writes:

Some laws are changeable, some are not. Unchangeable laws are those which are sanctioned by eternal law, the observance of which assures salvation....such as "Thou shalt love the lord thy God". Changeable laws are those which are not sanctioned by eternal law, but which have been invented by the wisdom of the elders, not for the procuring of salvation but for its preservation. Unchangeable laws are directed against vices: they lay down the minimum necessary to salvation. Changeable laws do not prohibit things bad in themselves, but are aids and precautions. And so ecclesiastical law should be interpreted charitably provided that nothing is done contrary to the Gospel and the Apostles In those matters on the observance of which salvation depends, no dispensation is possible: such prohibitions or precepts are to be kept absolutely, as being sanctioned by eternal law. But rules made for disciplinary purposes can on occasion be dispensed, for a just cause.⁶⁹

Gratian, following distinctions first laid down by St Isidore of Seville (d. 696), divides laws into three categories for these purposes: natural (or universal) law (*jus naturale*), human-made law common to nearly all people (*jus gentium*), and law particular to a

⁶⁷ Sparrow-Simpson (1935), 18-19.

⁶⁸ *Palmer Report*, 8.

⁶⁹ Quoted by Mortimer, *Palmer Report*, 9, with no reference.

specific people or state (*jus civile*). Mortimer points to a link between Isidore's threefold division and that of the sixth century Roman jurist Ulpian.⁷⁰ There is a clear hierarchy implied in this distinction and Gratian asserts that no dispensation from natural law is possible 'except perhaps when one is compelled to choose between two evils.'⁷¹ However, he qualifies this somewhat with the assertion that one must not commit a crime in order that someone else will not commit a greater crime.⁷²

Cases in which dispensations were granted

As has been shown, in theory at least, certain laws were not dispensable. Mortimer considers that laws contained in scripture, in the canons of the Apostles and the first four general councils of the Church were generally accepted to have been indispensable. However, he concedes that certain Popes can be seen to have transgressed this and granted dispensations from what was considered the 'natural' or universally applicable law⁷³ and Gratian keeps open the possibility of a dispensation from natural law if it is the lesser of two evils. The later medieval canonist Hostiensis states that the Pope 'can dispense in anything provided that it is not against the faith and that it will not clearly give rise to mortal sin.'⁷⁴

It has been noted above that in the early church regulations were, on more than one occasion, relaxed when the lapsed wished to return to the communion of the Church. It is probably not a coincidence that as the volume of laws and the regulation of behaviour in the church increased, dispensations from the rigour of the law also increased. As the church became a more complex entity with more complex structures, so cases in which dispensation was necessary increased.

Dispensations most often affected individuals. They were frequently granted in the general area of sacramental law and, in particular (and this is important) either to enable a person to have or to continue to have access to the sacraments where something would otherwise prevent them from so doing.

⁷⁰ *Palmer Report*, 10.

⁷¹ Gratian *Decretum* D13 pt 1, 1993 translation, 48.

⁷² Gratian, D 14. C 1.

⁷³ Gratian 12-15.

⁷⁴ Quoted in *Palmer Report*, 16.

Whilst dispensations were most usually granted to individuals, questions have arisen as to whether they may have been granted for a wholly private good or whether dispensation may only have been granted for the general advantage of the Church. The *Palmer Report* points to a shift in practice in the Church from the time of Cyprian, when private good or advantage were not sufficient causes for the granting of a dispensation to the time of Gratian, who, following the earlier writer Alger of Liege (d. 1128) asserts that a private good is sufficient cause.⁷⁵ However, it can be argued that the wellbeing of an individual was in itself beneficial to the whole church, particularly where the dispensation resulted in the furthering of the ends of justice. The *Palmer Report* states that ‘the private good of the individual does indirectly promote the common good. In this way it came to be recognized, in practice, that a private good, if it did not actively conflict with the good of the whole, is a sufficient reason for granting a dispensation.’⁷⁶

Dispensations concerning clergy and religious

The examples of dispensation or economy being granted with reference to the translation of bishops from one see to another were noted above. In addition to these early examples, Sparrow-Simpson gives other, medieval, examples of dispensations granted to clergy. He includes dispensation from the requirement to reside in one’s parish or diocese, dispensations allowing religious to live outside the cloister (heavily opposed by St Bernard of Clairvaux) and dispensations given to lay people, abbeys and churches to hold the revenues of a vacant see *in commendam*.⁷⁷ In another chapter he explores dispensations from vows, particularly monastic vows (which at least by the eleventh century, had been reserved to Rome) but also vows taken by lay people who, if they were unable to fulfil the vow could seek to have the vow dispensed or commuted.⁷⁸ To this list Mortimer adds examples of dispensations granted to allow the ordination of one who had been twice married,⁷⁹ was below canonical age or⁸⁰ was of

⁷⁵ *Palmer Report*, 8, 11, 92-94.

⁷⁶ *Palmer Report*, 93.

⁷⁷ Sparrow-Simpson (1935), 28-9.

⁷⁸ Sparrow-Simpson (1935) 31-8. St Edward the Confessor vowed to make a pilgrimage to Rome but was unable to leave England ungoverned. His vow was commuted by Pope Leo IX on the understanding that he would found a monastery – Westminster Abbey.

⁷⁹ *Palmer Report*, 13.

⁸⁰ *Palmer Report*, 20.

illegitimate birth.⁸¹ He also lists dispensations granted by Popes Innocent IV and John XXII to allow those not in major orders to hold benefices and for benefices to be held in plurality.⁸²

Dispensations concerning marriage and divorce

During the middle ages rules concerning marriage and divorce multiplied, in particular concerning who was able to marry whom. This led Joseph Jackson to state that ‘the formation of an unimpeachable marriage [was] something of a matter of chance.’⁸³ The most difficult impediment was in prohibited degrees of kindred or consanguinity (blood relations) and affinity (relations by marriage). The calculation of degrees of consanguinity is confusing, with two systems of calculation in operation at the same time, one used by common and canon lawyers and another by civil lawyers. Thus, first cousins are related in the second degree according to the former system and in the fourth degree according to the latter. This makes interpretation of various rules on the subject difficult. Constitution 50 of the Fourth Lateran Council, 1215, perpetually limited the prohibited degrees to the fourth degree of consanguinity, calculated according to the canonical system; that is it outlawed marriage between men and women as closely related as third cousins.⁸⁴ Prior to this, marriages within the sixth or seventh degree had been prohibited.⁸⁵ The Lateran Council, in relaxing the law, stated that ‘It should not be judged reprehensible if human decrees are sometimes changed according to changing circumstances, especially when urgent necessity or evident advantage demands it.’⁸⁶ Even the relaxed provision caused difficulty, noted especially in dynastic marriages but probably just as problematic in normal small communities in the middle ages. Therefore, dispensations were granted to enable marriages within the prohibited degrees, though never in the first degree (i.e. between brother and sisters) and rarely in the second.⁸⁷ Leviticus chapter 18 (on which the table of kindred and affinity in the *BCP* is based) does not prohibit marriage in the second degree (i.e.

⁸¹ *Palmer Report*, 19.

⁸² *Palmer Report*, 19.

⁸³ Jackson, Joseph *The Formation and Annulment of Marriage* 2nd Edn. London 1969, 20.

⁸⁴ ‘Moreover the prohibition against marriage shall not in future go beyond the fourth degree of consanguinity and of affinity, since the prohibition cannot now generally be observed to further degrees without grave harm.’ Tanner, Norman P, *Decrees of the Ecumenical Councils*, London, vol II, 1990, 257.

⁸⁵ Jackson (1969), 20.

⁸⁶ Constitution 50, Lateran Council 1215.

⁸⁷ Sparrow-Simpson (1935), 73-4.

between first cousins) although St Augustine considers that ‘customary morality’ prevents this, even if the law allows it.⁸⁸

The indissolubility of the bond of marriage was an accepted principle in the church from earliest times.⁸⁹ The New Testament refined and restricted divorce, seeming to outlaw it in all cases with two exceptions – the exceptive clause in Matthew 19.9 where Jesus seems to allow divorce and remarriage on the grounds of a wife’s unchastity⁹⁰ and the ‘Pauline privilege’ founded on St Paul’s instructions on marriage in 1 Corinthians 7. In verse 15 Paul states that if, after a person converts to Christianity and their pagan spouse leaves them then the believer is not bound by the marriage bond.

Marriages contracted within the prohibited degrees were capable of annulment on application.⁹¹ However, such marriages contracted after an enabling dispensation had been granted were not capable of annulment.⁹² There is some evidence that divorces were granted, in the middle ages, but these divorces were generally more akin to the modern concept of judicial separation (divorce ‘*a mensa et thoro*’) than modern divorce as remarriage was generally not permitted.⁹³ Jackson points to some very rare exceptions whereby divorce ‘*a vinculo*’ (i.e. a dissolution of the bond of marriage itself) was permitted, but these were the exception rather than the rule. Annulment, rather than divorce, remained the only method whereby separation could be followed by re-marriage to another party.⁹⁴ Annulment is not, however, a dispensation. It is, rather, a determination that the bond of matrimony does not exist in the ‘marriage’ in question. Divorce, on the other hand, entails the dispensation of a person from the vows that they made at marriage and dissolves the bond thus changing the persons’ status as well as releasing them from obligations.

⁸⁸ Augustine *City of God* Book XV ch 16. NPNF1-02.

⁸⁹ Jackson (1969), 28. Duggan (2000), 85.

⁹⁰ There is considerable debate amongst lawyers (see e.g. Sparrow Simpson (1935), 44-54) and New Testament scholars about the precise meaning of ‘unchastity’ (*porneia*) in this context and the practical outworking of this perceived exception.

⁹¹ Jackson (1969), 22.

⁹² Most significantly in the case of Henry VIII and his marriage to Katherine of Aragón, contracted after a dispensation from Pope Julius II to enable the marriage between Henry and his deceased brother’s widow.

⁹³ Jackson (1969) 28.

⁹⁴ Jackson (1969) 28.

Dispensation as removal of penances

The Church has, historically, had little in the way of coercive power to enforce its discipline. The most consistent sanction imposed through the church's history has been that of excommunication, or removal from the body of the church and from the benefit of the church's fellowship and sacraments. At its most basic level sin separates the believer from communion with God and neighbour but that separation can be remitted by repentance. However, in the western church 'it came to be held that post-baptismal sin must be atoned for in part by the punishment of the sinner.'⁹⁵ Elaborate and systematised manuals of penance were developed to direct particular punishments, private or public, that needed to be undertaken or undergone by the penitent prior to absolution and restoration to the church. However, these penances were often complicated, arduous and of long duration and a system of commuting or dispensing from penances grew up alongside them.⁹⁶ Penance was often commuted by the payment of a fine.⁹⁷ Dispensing or commuting penance has two possible consequences; the first is akin to the modern outworking of the prerogative of mercy – the penitent is relieved of the burden of the penance and is restored to the life of the church and endeavours to sin no more (or at least not to repeat the sin that caused the excommunication). The second logical outworking is more akin to a toleration of sinful, or illegal behaviour, or a turning a blind eye to the same. Such a situation would occur when a penitent is relieved of the burden of penance and restored to communion when the reason for the excommunication still exists. An example of this is the tenth century example of the restoration to communion of Emperor Leo VI after his fourth marriage. The *Palmer Report* suggests a later example of this where, in the Church of England and in certain other unspecified Anglican churches, those whose marriages to their deceased wife's sister are considered unlawful under church law are nevertheless 'admitted to Communion after a period (often a short period) of exclusion from that sacrament.'⁹⁸ However, this is contrary to the ruling in *Banister v Thompson* where the

⁹⁵ "Penance", *The Concise Oxford Dictionary of the Christian Church*. Ed. E. A. Livingstone. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. Cambridge University. 13 November 2007

<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t95.e4428>>

⁹⁶ "Penance", see above. See also the historical survey in the judgment of Sir Lewis Dibdin in *Banister v Thompson* [1908] P 362 at 380.

⁹⁷ *Banister v Thompson* [1908] at 380.

⁹⁸ *Palmer Report* 133.

Court of Arches held that those who had contracted such a marriage had broken no law and might not, for that reason, be excluded from communion.⁹⁹

Conclusion

At the eve of the Reformation, therefore, there was a complex international system of dispensations. The Pope, or his legate exercising his authority, granted dispensations that were proper to him. Archbishops and bishops within England granted dispensations that were proper to them. Fees were levied by the dispenser, as is attested to throughout the *ELA*. The English Reformation centred in no small way on the question of dispensations concerning marriage and the legality or otherwise of the papal dispensation permitting the marriage of the future Henry VIII and Katharine of Aragon. The reform of the law of dispensation in England during and after the Reformation is set out in Part III below.

⁹⁹ *Banister v Thompson* [1908] P 362 at 394.

Chapter 3 - Dispensation in the Contemporary Roman Catholic Church

Prior to the codification of the canon law of the Roman Catholic Church with the publication of the 1917 Code (known as the Pio–Benedictine code after the Popes who set up the process and promulgated the code¹⁰⁰) Roman Catholic canon law continued in all its pre-Reformation complexity.¹⁰¹ The first major source of additional ecclesiastical laws after the Reformation was the Council of Trent in the mid sixteenth century. New law emanating from the Council was added to the published compendium of pre-tridentine law (published in its most accurate form by Pope Gregory XIII in 1582¹⁰²) and supplemented by Papal Bulls and other pronouncements in subsequent centuries. The complexity of the law was such that French bishops at the First Vatican Council (1870) complained that they were ‘weighed down by law.’¹⁰³

The production of CIC 1917 simplified the law of the Roman Catholic Church but also represented and enshrined a greater centralisation of authority within the Church, in particular the power and authority of the Pope. Robert Ombres comments that ‘the 1917 Code took centralisation to an unprecedented degree’ noting too, that codification of the canon law was a ‘totally untraditional’ novelty.¹⁰⁴ In the introductory material there is a section (or title) on dispensations; canons 80 – 85. Canon 80 defines dispensation in familiar terms as ‘the relaxation of the law in a particular case’. Dispensation may be granted by the author of the law, his successor or superior or one who has been given authority to grant the dispensation.

When this canon was revised to become canon 85 of CIC 1983 its scope was partially restricted. The definition of a dispensation became ‘the relaxation of a merely ecclesiastical law in a particular case’. This makes clear that there are some universally applicable, divine laws which are not subject to dispensation.

¹⁰⁰ St Pius X and Benedict XV.

¹⁰¹ Gasparri, P, in the preface to the 1917 Code, *CIC 1917*, 1 – 28.

¹⁰² *CIC 1917*, 6.

¹⁰³ *CIC 1917*, 10.

¹⁰⁴ Ombres, Robert, ‘Canon Law and the Mystery of the Church’, *Irish Theological Quarterly*, vol 62 1996/7, 201.

Canon 81 of CIC 1917 forbids ‘ordinaries below the Roman Pontiff’ from dispensing their subjects from ‘the general laws of the Church’ unless recourse to the Holy See is difficult and there is ‘grave danger of harm in delay’. This proviso acknowledges that there are laws which can only be dispensed by the Pope, but also empowers others with ordinary authority to dispense in a suitable emergency. Whilst in many cases the ordinary will be the local bishop there are many within the Roman Catholic Church who possess ordinary authority or jurisdiction but who are not bishops. Therefore this provision does not make a clear link between Episcopal and dispensing authority. However, in an article published shortly after the promulgation of CIC Francisco Javier Urrutria SJ stated that, in line with the canonical tradition and in particular the Petrine authority to bind and loose, the power to dispense is clearly Episcopal in character. In line with CIC 1917 the supreme legislator and the supreme dispenser are one (the Pope) and the Bishop holds the power to dispense within his competence by virtue of his office rather than his person. Urrutria argues convincingly that when others have delegated power to issue dispensations on certain matters (notably the large numbers of Vicars General and Episcopal Vicars who may be in priest’s or bishop’s orders and who are responsible for issuing dispensations, including dispensations enabling Roman Catholics to marry without observing valid canonical form) this power is not theirs but the bishop’s. He strengthens his argument with reference to examples within the code where the Episcopal nature of dispensation is highlighted, including the restriction in CIC Canon 272 on the dispensing power of a Diocesan Administrator during a vacancy in a bishopric.¹⁰⁵

More specifically, Urrutria examines whether it is possible for the power to dispense to be delegated to a lay person. The questions put include the question of whether the usual delegated dispensing authority of a parish priest may be exercised by a lay member of a religious order or other lay person exercising a pastoral ministry in a parish. The other question specifically put is whether a bishop can appoint a lay member of a religious order as Episcopal Vicar for Religious within his diocese. An Episcopal Vicar is described in CIC as one who possesses that executive power belonging to the bishop in the whole diocese or in a defined area. Episcopal Vicars may be appointed to oversee a certain class of people or institutions (e.g. religious

¹⁰⁵ Urrutria, Francisco Javier, ‘On Delegation of the Executive Power of Governance’, *CLSN* 65 (1985), 16-31. For the basis of the Petrine authority to bind and loose see Matthew 16.19.

orders or church schools) or in a particular geographical area (e.g. Oxfordshire) or for a certain type of business (e.g. Finance). Vicars General, on the other hand, have authority in all areas of diocesan business not reserved to the bishop. In both cases the Vicar exercises the Bishop's authority and, within their competence can issue rescripts and faculties, which opens up the prospect for them to exercise a dispensing power.¹⁰⁶ Urrutria argues that it is not possible for the bishop to delegate dispensing power to a lay person, neither is it possible for a lay member of a religious order to be appointed as an Episcopal Vicar. His argument stems from the general Roman canonical tradition that only clerics may 'obtain power of jurisdiction',¹⁰⁷ and the specific limiting of appointment to the office of Vicar to priests.¹⁰⁸

Canon 335 of CIC 1917 exhorts Bishops to urge observance of ecclesiastical laws; it is intended, of course, that laws be observed. Canon 84 of CIC 1917 in the same vein states that an ecclesiastical law may only be dispensed with for 'just and reasonable cause' and 'taking into consideration the importance of the law from which dispensation [is sought]'.

The basic pattern of the introductory canons of 1917 is reproduced in CIC. Both codes contain many references to the practice of dispensation. Both codes rely on the underlying principle that the Pope is the supreme legislator and therefore ultimately the source of dispensation.¹⁰⁹ The Pope usually conducts his business through the Roman Curia.¹¹⁰ However, the role of diocesan bishops, metropolitan archbishops and synods and councils of bishops retains a place within the law and practice of dispensation.¹¹¹ Ultimately dispensation remains a primarily Episcopal act even if the practical execution of the power is delegated by the Pope to various curial bodies¹¹² or by the bishop to Vicars (general or Episcopal) or parish priests.

¹⁰⁶ For definitions of the roles of Vicars general and episcopal see *CIC* cc 475-481.

¹⁰⁷ Urrutria (1985), 18. See also *CIC 1917*, c 118.

¹⁰⁸ Urrutria (1985), 25. *CIC* c 478 §1.

¹⁰⁹ *CIC* c 333§1.

¹¹⁰ *CIC* c 360.

¹¹¹ *CIC* c 381.

¹¹² See discussion in Read, Gordon, 'The statutes regulating the admission to priesthood of married former Anglican clergy in England and Wales', *CLSN* 104 (1995), 5-13 on whether the Congregation for the Discipline of the Sacraments or the Congregation for the Doctrine of the Faith deals with applications for dispensations from the impediment of matrimony for former Anglican priests seeking ordination in the Roman Catholic Church.

Dispensations in the CIC

As noted above, canon 85 of the 1983 code provides the basic description and scope of a dispensation. The canons that follow it define some of the parameters within which dispensations are granted and some of the rules and procedures. Canon 86 states that those laws that define that which constitutes a juridical institute or act are not subject to dispensation. Canon 87 follows on from c 81 of CIC 1917 in granting to the Bishop the power to dispense from universal and particular laws, save those where dispensation is reserved to the Holy See or other authority. It also mirrors its predecessor in making provision for dispensation without recourse to the Holy See in cases of emergency or difficulty of communication with the new proviso that such a dispensation shall be in cases where the Apostolic See 'is wont to grant under the same circumstances'. Canon 88 states that there is no limit on the number of times the ordinary can use his power of dispensation of diocesan law and canon 89 limits the power of dispensation to clergy without ordinary authority to those situations where the authority to dispense has been specifically granted to them. Canon 90, like canon 84 of 1917, maintains that there must be good reason for dispensation to be granted. Dispensations may be sought and granted validly and licitly even if there is doubt about whether the circumstances warrant the grant¹¹³ and may be granted by the proper authority to his subjects even if they are outside his territory.¹¹⁴ Canon 92¹¹⁵ states that the laws surrounding dispensation are to be given a strict interpretation (as opposed to a broad one – a distinction made in c 36).

The previous section of CIC¹¹⁶ deals with the related subject of privileges. These are private laws made for the benefit of individuals, places or groups that are either contrary to or, not being contrary to, absent from the law. In cases in which the privilege involves a departure from or breaking of the law the distinction between that and a dispensation is very subtle. Both privileges and dispensations come to an end if the person, situation or reason comes to an end or if it is revoked by the recipient or the dispensing or granting authority.¹¹⁷ Both dispensations and privileges may be granted

¹¹³ *CIC*, c 90§2.

¹¹⁴ *CIC*, c 91.

¹¹⁵ Echoing *CIC 1917*, c 85.

¹¹⁶ *CIC* cc 76-84.

¹¹⁷ *CIC* c 93.

by means of a rescript, or letter of reply to a request.¹¹⁸ Papal privilege may also enable a lay person, contrary to the discussion above, to issue certain dispensations if these come within the authority delegated to them by the privilege.¹¹⁹

In examining examples of dispensations regulated or referred to within the code the overwhelming majority are to do with dispensations from rules surrounding the celebration and reception of the sacraments. Particularly common are dispensations concerning marriage and holy orders.

Dispensations concerning Marriage

The granting of dispensations from impediments to marriage has a long history stretching back to the middle ages and earlier. The origins and development of these dispensations are noted above in Chapter 2. Canonical impediments remain in CIC as do arrangements for dispensation from them. The number of impediments was drastically reduced and codified in CIC 1917.¹²⁰ Impediments are divided into impeding impediments, which do not invalidate a marriage even if a dispensation was not forthcoming (e.g. being in simple vows or marrying a person ‘belonging to a heretical or schismatic sect’)¹²¹ and diriment impediments, which render any attempt at marriage invalid. CIC does not mention impeding impediments, concentrating solely on diriment impediments.¹²² It is arguable, therefore, that the distinction has been lost. However Canon 1083§2 enables conferences of bishops to raise the minimum age for valid marriages (set in the previous subsection at sixteen for men and fourteen for women). Thus the bishops’ conference can impose an impeding impediment making illicit, but not canonically invalid, a marriage contracted between persons who are under the minimum age set by the conference but over the minimum age set by the code. Diriment impediments can be categorised as based around age, impotence, prior bond and kindred or affinity. Only the Pope can establish other canonical impediments and, specifically, other impediments may not be established by custom.¹²³

¹¹⁸ *CIC*, c 59.

¹¹⁹ Urrutria (1985), 18.

¹²⁰ *CIC 1917*, cc 1035 – 1080.

¹²¹ *CIC 1917*, cc 1058 - 1066

¹²² *CIC*, cc 1073 ff.

¹²³ *CIC*, cc 1075 and 1076.

A frequently granted dispensation, particularly in England, is a dispensation enabling a Roman Catholic to marry a non-Catholic in a marriage ceremony that does not conform to Roman Catholic sacramental form. Without such a dispensation the marriage lacks canonical validity in the Roman Catholic Church, with the dispensation the marriage is considered valid. A question was raised soon after the promulgation of CIC about whether a bishop or his duly appointed vicar could dispense two Roman Catholics from observing canonical form and, if not, what was the canonical validity or invalidity of a marriage celebrated in this way. The question was raised in an article by David-Maria Jaeger in 1986, in which (interestingly for this study) he gave the example of two Roman Catholics seeking a dispensation to marry in a Church of England parish church where, even though a Roman Catholic priest could take some part in the ceremony, the Anglican priest had, by state law and the ecclesiastical law of the Church of England, to preside over the service and receive the bride and groom's consent.¹²⁴ Jaeger's conclusion was that the CIC limited such dispensations to a Roman Catholic marrying either a baptised non-catholic or an unbaptized person and that, as such, any dispensation for two Roman Catholics would not be valid and, following this, the marriage would therefore be canonically invalid.¹²⁵ He based this conclusion on the canonical rules¹²⁶ that oblige all Roman Catholics to observe the proper form in marriage and that a valid marriage without the observation of proper form is only possible where one party is an Eastern Catholic, a baptized non-catholic or in danger of death. In a later article on the same subject, Gordon Read pointed to a rescript from the Holy See published in *Acta Apostolicae Sedis* and dated 1 August 1985 which ruled that such dispensations could not be granted under the power given to the bishop in Canon 87 §1.¹²⁷ However, Read is of the opinion that, as this rescript was not retroactive and as it defined *de novo* limits on the bishop's power under Canon 87§1 that 'from 1 August 1985 any dispensation given by a diocesan bishop to enable two

¹²⁴ The provisions of Can B43.1(1)(e) allow an incumbent to invite a minister of another church to assist at the solemnisation of matrimony but this does not extend to that minister presiding at the service. The use of the verb 'to assist' differs in Anglican and Roman Catholic use. In Roman Catholic marriage law the role of the priest or deacon is always described as 'assisting at' the marriage to make the point that the ministers of the sacrament of marriage are the couple themselves rather than the priest or deacon.

¹²⁵ Jaeger OFM, Br David-Maria, 'Invalid dispensations from canonical form', *CLSN* 64 (1985), 51-58.

¹²⁶ Drawn from cc 1059, 1108 and 1117.

¹²⁷ *CIC*, c 87 §1. A diocesan bishop, whenever he judges that it contributes to their spiritual good, is able to dispense the faithful from universal and particular disciplinary laws issued for his territory or his subjects by the supreme authority of the Church. He is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority.

Catholics to marry without canonical form is invalid. However, dispensations granted between [the promulgation of CIC in 1983].... and 1 August 1985 will be valid, and so, per se, will be marriages contracted by virtue of them.’¹²⁸ A further development in the story of these particular dispensations came in the application of two Roman Catholics from the Diocese of Brentwood for dispensation to be married in the Church of England parish church where the bride’s father was an active worshipper. This dispensation was granted in 1989, but in order to do so the Bishop needed, and was given, a faculty by the Sacred Congregation for the Discipline of the Sacraments (dated 25 February 1989).¹²⁹ The Congregation were clear that this faculty was particular to this case.

Dispensations concerning Ordination

There has, since the Reformation, been a stream of Anglican clergy who have become Roman Catholics and sought to exercise priestly ministry in the Roman Catholic Church. At particular times significant numbers of clergy have made this change, particular mention should be made of Tractarian conversions in the nineteenth century (including Cardinals Newman and Manning) and in the late twentieth century, prompted to no small degree by the ordination of women to the priesthood and episcopate in the churches of the Anglican Communion.

In contemporary situations dispensations are often necessary for the ordination of former Anglican priests to the priesthood in the Roman Catholic Church. Principally there is a dispensation from the impediment of marriage. Canon 1042 1° states that ‘a man who has a wife, unless he is legitimately destined for the permanent diaconate’ is simply impeded from receiving holy orders. Canon 1047§2 3° reserves to the Holy See dispensations from this particular impediment. Thus, whilst the Code lays down the impediment it also envisages that there will be situations in which the impediment will be removed by dispensation.

The Roman Catholic Bishops’ Conference of England and Wales drew up statutes for approval by the Holy See setting out how they were to approach applications for

¹²⁸ Read, Gordon, ‘Invalid Dispensation from Canonical Form: A Defence of the Bond’, *CLSN* 65 (1985), 11-15.

¹²⁹ *CLSN* 78 (1989), 26-28.

ordination made by married former Anglican priests. These statutes were approved in 1995.¹³⁰

The process requires that a candidate be dispensed from the impediment of matrimony, from the need to complete five years of theological and philosophical study,¹³¹ from the necessity to receive the minor orders of lector and acolyte¹³² and, curiously, from the necessity to be ordained to the diaconate if he was in Episcopal orders in an Anglican church. Gordon Read considers this last dispensation ‘strange’ and unprecedented.¹³³

The approved statutes provide a systematic and transparent approach to coming to a decision about whether a particular former Anglican priest may be ordained. The questions to be considered include his suitability, and included in this is the attitude of his wife, his previous studies (Read points out that the normal course of study for such a candidate is two years, taking into account that they are all experienced and theologically trained already) and a consideration of what pastoral duties the candidate might take up (and there is a presumption against them being appointed to the ‘ordinary care of souls’¹³⁴ i.e. to be appointed as a Parish Priest as defined *inter alia* in c 519). Interestingly the question of ‘opportuneness’ is examined, and the needs of the diocese and the availability of a suitable post are considered.¹³⁵ The use of the phrase ‘opportuneness’ is interesting as it is considered by Hamicar Alivisatos to be the key factor in determining whether economy should be applied in a given situation in the Orthodox Churches.¹³⁶ The question of the examination of opportuneness indicates that it is entirely possible that like cases may have been met with different answers given the opportuneness or otherwise of the situation in the receiving diocese. This is a further indication of the discretionary status of dispensations.

¹³⁰ Read, Gordon, ‘The Statutes regulating the admission to priesthood of married former Anglican clergy in England and Wales’, *CLSN* 104 (1995), 5-13 at 5.

¹³¹ Dispensation from the requirement of c 1032 §1.

¹³² Dispensation from the requirement of c 1035 §1.

¹³³ Read (1995), 11.

¹³⁴ Read (1995), 9.

¹³⁵ Read (1995), 8.

¹³⁶ See below chapter 4.

Ordination of former Anglican clergy has always been absolute. That is they are ordained in the same manner as candidates who have not exercised any ordained ministry before (save that they were probably dispensed from the need to be in minor orders, as set out above). There is a single exception to this rule, and that is in the case of the Rt Revd (now Monsignor) Graham Leonard, formerly Bishop of London. Leonard was conditionally ordained to the priesthood by Cardinal Basil Hume in 1994. Whilst this is significant in the discussion of the acceptance or otherwise of the validity of Anglican orders by the Roman Catholic Church it has marginal significance in this discussion as he was still re-ordained rather than having been received in his orders. His case does, however, show that marriage is not an impediment to appointment as a Prelate of Honour in the papal household. The only former Anglican priest to be ordained to the episcopate in the Roman Catholic Church in England and Wales in recent years, the Rt Revd Alan Hopes, is unmarried.¹³⁷ Cardinal Manning was a widower.¹³⁸

The obligation to celibacy enforced on clerics under canon 277 has been interpreted as meaning that married deacons who are widowed may not marry again, as canon 1087 states that 'Persons who are in holy orders invalidly attempt marriage'. The first American commentary states that 'For a deacon who has lost his wife to marry again a dispensation must be sought from the Sacred Congregation for the Discipline of the Sacraments and Divine Worship'. This petition, they say, is presented by the bishop who gives reasons why he believes it should be granted.¹³⁹

The CIC does not list in canons all those areas in which dispensations are granted. The reason for this is that the Apostolic See reserves the right to grant a dispensation from any ecclesiastical law and the ordinary is given the right in the code itself to grant dispensations from all local and universal disciplinary laws, except where forbidden.

The development of the question of dispensations from canonical form for two Roman Catholics seeking to marry as outlined above shows that the pattern of authority to

¹³⁷ Bishop Hopes is an Auxiliary Bishop in the Archdiocese of Westminster.

¹³⁸ David Newsome, 'Manning, Henry Edward (1808–1892)', Oxford Dictionary of National Biography, Oxford University Press, Sept 2004; online edn, Jan 2008
[<http://www.oxforddnb.com/view/article/17970>, accessed 6 Oct 2008]

¹³⁹ Coriden, Green, Heintschel (1985), 211.

dispense from impediments to marriage is hierarchical. The Pope can dispense from all impediments that are dispensable. The local ordinary may dispense from dispensable impediments where dispensation is not reserved to the Holy See.¹⁴⁰ The example given by Jaeger may well have had some basis in reality. At the time the dispensation was granted, according to Read, it fell within the competence of the Bishop to grant such a dispensation under the general terms of Canon 87 (that the Bishop can dispense from universal and particular laws that are not reserved to the Holy See). However, the rescript of 1985 took away the authority of the bishop in this specific case and, therefore, reserved any such dispensations to the Holy See. The Brentwood case demonstrated this reservation in action whereby the Bishop was only able to give the dispensation sought after having been given a faculty so to do. This process demonstrates the hierarchical structure of dispensing authority and throws light generally on the process and practice of dispensation in the contemporary Roman Catholic Church.

Dispensation in the work of Joseph J Koury

Joseph Koury SJ has written a series of articles relating to dispensation in CIC. His work represents a systematic examination of CIC and is useful for the study in hand. In 'Hard and Soft Canons: Canonical vocabulary for legal flexibility and accommodation'¹⁴¹ Koury examines the 1983 Code with the premise that 'the canons themselves "bend" the rules established in the canons so that seemingly fixed rules of law are mitigated by other legal provisions of flexibility.'¹⁴² He points to certain key words in the vocabulary of the canons that indicate his point. E.g. 'nisi' (unless), which occurs 478 times (although not each time in a separate canon), 'dummodo' (as long as, provided that), 49 times in 45 canons and 'exceptio' (exception, except) 59 times in 55 canons. Other examples that he notes are many uses of the terms 'can' or 'may', reference to 'periculum mortis' (danger of death), 'omnia sunt parata' (when all is ready) and 'sanatio in radice' (healing at the root). All of this, Koury believes, adds up to what he terms an 'institutionalized legal flexibility'.¹⁴³ This builds on an earlier article in which he had examined the use in CIC of the concept of necessity.¹⁴⁴ He

¹⁴⁰ *CIC*, c 1078.

¹⁴¹ *The Jurist* 50 (1990), 459.

¹⁴² Koury (1990), 459.

¹⁴³ Koury (1990), 487.

¹⁴⁴ Koury Joseph J, 'Necessity, Utility, Scarcity: Clues to the origins of laws and the process of law making', *The Jurist* 49 (1989), 95-111.

points to a number of instances where the strict rigour of the law is tempered in cases where necessity demands otherwise. Examples include the ability to ask a lay person who is not officially a lector or acolyte to perform these functions (c 230), to invite a lay person to preach, with due regard to the necessity to expound from the sacred text ‘the mysteries of faith and the norms of Christian living’ (cc 766 and 767§1), to receive the sacraments from non-Catholic ministers (provided the Church to which the minister belongs possesses valid sacraments), to minister the sacraments to non-Catholics (c 844 §§ 2 and 4) and to give a general absolution at mass with the approval of the diocesan bishop (c 961). All of these examples allow, in the case of necessity, acts that would, but for the necessity, not be permitted.¹⁴⁵ Necessity in the various canons is variously defined. For instance, the canon permitting lay preachers is very broad – lay preachers may be admitted to preach if it is ‘necessary’ or ‘useful’, which is open to broad interpretation, according to James A Coriden.¹⁴⁶ Canon 844, on the other hand, defines necessity more narrowly by referring to physical or moral inability or danger of death or other grave necessity. Necessity does not, however, provide an excuse to set aside each and every law. Canon 927, for instance, specifically forbids the consecration of only one of the elements of the eucharist even in extreme necessity. Such a celebration would be invalid (*nefas est*).¹⁴⁷

In a follow up article in 1991¹⁴⁸ Koury contrasts what he describes as the ‘first rule’, of law, and the ‘second rule’ of accommodation and legal flexibility.¹⁴⁹ The examples of the second rule that he gives are familiar: ‘the legal institutes of dispensations, privileges, permissions, favors, exceptions and exemptions’.¹⁵⁰ The distinction can be compared with the concepts of *akribeia* and *oikonomia* in orthodox thought. The first, he postulates, has its basis in the common good and can be described as a ‘hard canon’ and the second in the good of the individual, described as a ‘soft canon’. He points out that the Code is ‘replete with instances where the general “hard canon” is mitigated by a specific “soft canon.”’¹⁵¹

¹⁴⁵ Koury (1989), 99-111.

¹⁴⁶ In Coriden, Green, Heintschel (eds) *The Code of Canon Law: a text and commentary*, London, 1985, 552.

¹⁴⁷ Koury (1989), 100.

¹⁴⁸ ‘Hard and Soft Canons Continued: Canonical institutes for legal flexibility and accommodation’, *Studia Canonica*, 25/2 (1991), 335.

¹⁴⁹ Koury (1991), 336.

¹⁵⁰ Koury (1991), 336.

¹⁵¹ Koury (1991), 337.

In addition to the instances put forward in his 1989 article Koury examines the various mechanisms whereby the rigours of the law are softened. He points to favours, which allow the person granted a favour ‘non-observance of the first, general rule that binds the community as a whole’; exemptions, which either excuse a person from certain obligations or remove a person from one jurisdiction and place them in another; privileges, which he describes as existing either beside or contrary to the general law; and dispensations.¹⁵²

In addition, in his 1991 article Koury examines the concept of equity as used in CIC, and in particular ‘canonical equity’ to which he finds two references in the code.¹⁵³ The references to general principles of equity are to be found in canons 221 (Christians may vindicate and defend their rights in the church and, in doing so, the law is to be ‘applied with equity’), 686 (when a member of a religious order is forcibly excommunicated ‘equity and charity’ must be observed) and 702 (religious orders must behave with equity and charity towards members who are separated from them). The latter two canons refer to the treatment by religious orders towards those who are either expelled from or who, for some reason, live separately from them. Rose M MacDermot considers that this extends to making sure that such a person is not destitute as a result of separation or excommunication, but is looked after economically, spiritually, morally and socially.¹⁵⁴

After examples where the concept of ‘equity’ is used in CIC without elaboration, Koury points to examples where ‘natural equity’ is used. This term is used in c 271§3, whereby a bishop recalling one of his own priests from service in another particular church must observe natural equity. It is also used in c 1148 §3, which states that when a polygamous convert is baptized he or she may not remain in polygamy and so should separate from all but one of their previous wives or husbands. Natural equity is to be observed, as well as Christian charity, in the treatment of the dismissed former spouses.

¹⁵² Koury (1991), 338-345.

¹⁵³ In cc 19 and 1752.

¹⁵⁴ Coriden, Green, Heintschell (1985), 521.

These examples seem, on examination, to use the term equity as meaning justice and fairness. Former spouses and former members of religious orders are not to be dismissed destitute and the faithful are to be given a fair hearing in church tribunals and legal processes. Koury goes on, however, to point to examples in CIC of ‘canonical equity’. The first of these is in c 19. This canon is based on c 20 of CIC 1917 and refers to the principles to be observed in ruling in cases where law or custom are lacking (*lacunae*). Among these are ‘general principles of law observed with canonical equity’ and Ladislav Örsy includes in his commentary on the canon ‘the doctrine of equity, *epieikeia* or *oikonomia*’.¹⁵⁵ The second instance is in c 1752, the last canon in the code, which, whilst dealing with the transfer of priests from one post to another, provides a very apposite ending to the code, laying down that the bishop’s power is ‘to be applied, with due regard for canonical equity and having before one’s eyes the salvation of souls, which is always the supreme law of the Church’. There is no reference to canonical equity in the equivalent canons of CIC 1917.¹⁵⁶

His exhaustive research on the subject leads Koury to surmise that

Equity means fairness and justice, for which there are rules. Equity derives from both natural and canon law. It is, then, a legal institute which invokes the obligation to do what is fair and just. It is also interesting that at times the canons combine equity with charity, suggesting that in addition to what is fair and just, by natural and/or canon law, one must act out of a love that is Christ-inspired.¹⁵⁷

and, in a later article

In terms of strict justice, it may be appropriate that there is no room for compassion; but in a legal system designed for a Church whose mission is to extend the ministry of Christ in the world, there must be room for mercy and compassion, and for adjusting the law to fit persons and circumstances when there are just or serious reasons to do so or when there is a higher value or good to be favored.¹⁵⁸

¹⁵⁵ Coriden, Green, Heintschel (1985), 37.

¹⁵⁶ CIC 1917 cc 2156§1-2, 2146§3. Koury (1991), 360.

¹⁵⁷ Koury (1991), 360.

¹⁵⁸ Koury, Joseph J, ‘From Prohibited to Permitted: Transition in the Code of Canon Law’, *Studia Canonica* 24 (1990) 147, 154.

He argues that the use of his so-called ‘soft canons’ represent the application of higher values in the ordering of the church. He argues that the weakness of much of the flexibility built into the code is that the one with the power to dispense is not obliged to do so. This, he argues, can lead to inequality, particularly in the area of the granting of favours.¹⁵⁹

Conclusions

In continuity with the practice of the Church from earliest times, outlined in chapter 1 above, the Roman Catholic Church retains the use of dispensation and other mechanisms for the setting aside of strict observance of the law in certain circumstances. Koury’s examination of the *CIC* shows that there are a number of mechanisms and a complex vocabulary surrounding what he describes as ‘legal flexibility and accommodation’. However, such an examination and the conclusions to which Koury comes (i.e. that there is widespread and common setting aside of the law) have to be taken against the backdrop of the general obligation of all people to obey the law and the general obligation of those in authority to encourage and enforce such obedience. The procedures noted above for, for instance, the application for dispensations to enable the ordination of married former Anglican clergy show that such dispensations are not easily granted however much flexibility of canonical vocabulary is included within the code.

The Roman Catholic law of dispensation is hierarchical and primarily Episcopal. At the top of the hierarchy is the Pope, whose dispensing authority is largely exercised through the various offices of the Holy See. The Pope as supreme legislator can dispense from all laws. Bishops and other ordinaries have the authority to dispense from diocesan and universal laws but are subject to the control of higher authority and may not grant dispensations in cases where dispensation is reserved to the Holy See. Under *CIC* 1917 a bishop required a faculty to dispense from general laws, now he has the authority to do so for good reason.¹⁶⁰ Episcopal dispensing authority may also be delegated in certain circumstances to Vicars General or Episcopal or to other clergy. It seems that it is not possible for dispensing authority to be delegated to lay people.

¹⁵⁹ Koury (1991), 363.

¹⁶⁰ *CIC* 1917 c 81, *CIC* c 87.

The theological basis for dispensation in the Roman Catholic Church has been shown consistently to stem from higher Christian values, such as charity and mercy. As with the use of economy in the Orthodox Churches a dispensation, whilst it may set a precedent,¹⁶¹ leaves the substantive law unchanged. As Joseph J Koury succinctly put it ‘Summary – The law is not broken, only bent!’¹⁶²

¹⁶¹ There is reference in c 87§2 to ‘a dispensation which the Holy See is wont to grant under the same circumstances’.

¹⁶² Koury (1991), 361.

Chapter 4 - Economy in the East since 1054

It has been shown that in the early church the principal recorded need for the granting of economy or dispensation was in the reception into the Church of those who had been separated from it by heresy or schism. There were two distinct approaches to this – the rigorous approach characterised by the rulings of Cyprian of Carthege and the more generous approach, which had become the practice in the Roman church in the fourth and fifth centuries and which spread to North Africa (which was ecclesiastically on the border between east and west) in the fifth and sixth centuries, not least through the teaching of St Augustine of Hippo.

In the period after the great schism of 1054, when the eastern and western churches broke communion with one another, it can be seen that in the east a more generous or moderate approach to the reconciliation of heretics and schismatics prevailed. Synods held at Constantinople in 1260 and 1484 condemned the re-baptism of those baptised in the western church, re-iterating that such persons should be received into the Orthodox church by chrismation. A synod in Moscow in 1666 overturned the recent Russian practice of rebaptising ‘latins’ on their entry to the orthodox church.¹⁶³ In a letter to Tsar Peter the Great in 1718, the Ecumenical Patriarch Jeremiah III stated that Lutheran and Calvinist baptism should be recognised.¹⁶⁴ However, in 1755, Patriarch Cyril V, in contravention of a decision by his own synod, issued a decree condemning western baptisms. Thomson sees this action as significant in the study of economy as it was this condemnation, against the prevailing practice of former centuries, which led to conflicting authoritative opinions on the recognition of baptism (and other sacraments) celebrated outside the orthodox church ‘and it was these opinions which led to the numerous theories of the nature of economy in vain attempts to reconcile the contradictory opinions.’¹⁶⁵

Seeking a definition of economy

The lack of a standard definition of economy and concrete rules and precedents for its application makes study of the subject difficult. However, even the most rigorous of

¹⁶³ Thomson, Francis J, ‘Economy’, (1965) JTS xvi pt 2, 368-420, 415.

¹⁶⁴ Thomson, 416.

¹⁶⁵ Thomson, 417.

eastern orthodox commentators, as represented by Nikodemos the Hagiorite,¹⁶⁶ testify that there is, in the canonical system of the church, a power to relax the strict observance of the law when circumstances allow it. There is unanimity amongst orthodox writers on the subject that economy is a legal mechanism employed by the bishops and synods of the Orthodox churches. There is also unanimity in the assertion that behind the use of economy is the principle that the Orthodox church is the one true church. However, there has been considerable disagreement between scholars on what economy actually achieves, particularly in relation to the sacraments of the church. At one extreme there are those who hold that all sacraments performed outside of the orthodox church are invalid *per se* but that economy can be used by the church to make valid that which is invalid.¹⁶⁷ Such views often claim the authority of Cyprian for their more conservative starting point. At the other extreme are those who are critical of the view that economy can make something that is invalid valid, particularly when it is something as fundamental as baptism.¹⁶⁸ Such an approach is closer to that of Augustine, it recognises that the sacraments performed outside of the church, whilst canonically invalid are not necessarily nothing at all and that economy revivifies the sacrament.

The Russian theologian George Florovsky, in reviewing the baptismal disputes of the third century, is of the view that Cyprian's approach cannot be reconciled with economy, but that Cyprian's view that grace is absent from any individual or group outside of the orthodox church by simple dint of their being outside of the orthodox church is the prevailing orthodox view and the basis of all subsequent orthodox thinking. However, he points out that the view has been taken, from time to time, 'that the sacraments can be celebrated outside the strict canonical limits of the church.'¹⁶⁹ He goes on to say that 'canonical rules establish or reveal a certain mystical paradox.'¹⁷⁰ In a train of thought taken up later by Thomson and Alivisatos, but started much earlier by William Palmer,¹⁷¹ Florovsky considers that it is illogical to hold on the one hand that all those outside of the church cannot be properly or validly baptised *per se* and on the other hand that the Church can, by exercise of economy, make real

¹⁶⁶ In his work *Pedalion*, (1880), translated from the Greek Edition of 1908, Chicago, 1957.

¹⁶⁷ E.g. Androustos, discussed in more detail below.

¹⁶⁸ E.g. Alivisatos.

¹⁶⁹ Florovsky, George, 'The Limits of the Church', in *Church Quarterly Review* 117 (1933), 118.

¹⁷⁰ Florovsky (1933), 119.

¹⁷¹ See below, chapter 5.

something that has never been. He considers that this makes the church's sacramental system 'too soft and elastic'.¹⁷² He seeks to harmonise the opposing views with reference to Augustine, who, as an African bishop, is much more well known in the west and is not often seen as authoritative by orthodox authorities. Augustine, says Florovsky, in affirming that sacraments performed outside the church may have validity, does not relax or remove the boundary dividing the sect from the church. According to Thomson, Augustine compares the effects of heresy with the effect of sin. If the sacraments of sinners are valid, then so are those of heretics as the giver of the gift is God. The efficacy of the sacrament, however, is restored by reconciliation with the church.¹⁷³

Thomson, observing the intra-orthodox debate on the subject, points out that there is so little unanimity in historical and contemporary Greek views on economy that it is possible to discern four mutually exclusive views:

- (a) Economy can make what is invalid to be valid and what is valid to be invalid.
- (b) Economy can make what is valid to be invalid but not what is invalid to be valid.
- (c) Economy cannot make what is valid to be invalid but can make what is invalid to be valid.
- (d) Economy can neither make what is valid to be invalid nor what is invalid to be valid¹⁷⁴

Thomson's conclusion is that all modern claims about economy are based on a false and over-strict reading of the patristic authorities. He claims that the African Code of 419 rejected Cyprian's views about 'the invalidity of all non-Catholic sacraments',¹⁷⁵ that there is overwhelming evidence that, up to the eighteenth century, western baptism was not repeated when individuals joined the orthodox church, that both eastern and western churches accepted as valid baptisms administered in other churches with water in the name of the Trinity and that economy, at least when applied in situations where the presenting question is about the validity or operation of non-orthodox sacraments,

¹⁷² Florovsky (1933), 124.

¹⁷³ Thomson, 411-2.

¹⁷⁴ Thomson, 384.

¹⁷⁵ Thomson, 412.

is not necessary.¹⁷⁶ This view contrasts with that of all the orthodox material on the subject which, whilst it does not all agree on a definition of economy does at least agree on its existence, necessity and constant use.

Views of economy in the nineteenth and twentieth centuries

Just as the early definitions and uses of economy were defined in response to the situations of the early centuries of the church, so modern definitions have been dependent on the relevant situations of those times. The most important presenting issue in this period was renewed contact between orthodox churches and other churches and requests from individuals or groups from these other churches for admission to the orthodox church or for intercommunion with the orthodox. A detailed examination of the use of economy in Anglican-Orthodox relations is set out in chapter 5 below.

Writing on economy in this era began with St Nikodemos and his rigorist position was followed by later Greek writers such as Androustos and Dyovouniotis. Androustos did not believe that the Holy Spirit was active outside of the Orthodox Church, but that, as the steward of divine grace, the church 'can by economy recognize the validity of heterodox sacraments'. Once again this begs the question of how the church can validate something that was not, without repeating the sacrament. He offers two possible explanations, both being potential explanations of the function of economy. The first is that reconciliation with the Orthodox Church revivifies a sacrament performed outside the church. This, he believes, is impossible as it relies on the recognition that it is possible for a sacrament to be performed outside the Orthodox Church. The second explanation is that the Orthodox Church, as 'sovereign of the sacraments' can make what is invalid to be valid. This, he believes, is correct.¹⁷⁷ Dyovouniotis, writing in 1913, follows Androustos in his assertion that the church can, by economy, make valid that which is invalid and vice versa.¹⁷⁸ In a later article he

¹⁷⁶ Thomson, 417.

¹⁷⁷ Thomson, 375.

¹⁷⁸ Thomson, 375. The views of John Douglas on the subject of economy are based largely on the work of Dyovouniotis.

reaffirms this view and contrasts the views of Cyprian and Augustine, taking the former (and earlier) authority as guiding the prevailing view in the East.¹⁷⁹

The Archbishop's Commission on Dispensation received a paper from Prof Hamilcar Alivisatos¹⁸⁰ during its deliberations. They only considered this report and did not engage with the wealth of material on the subject produced in the earlier part of the twentieth century.¹⁸¹ An abridgment of this paper is published with the Commission's report.¹⁸² Archbishop Lang is reported in the minutes of the Commission as wanting to see economy discussed in the report 'because the Bishops at the next Lambeth Conference would wish to have before them a trustworthy explanation of the principle of economy, as it is certain to be referred to in their discussions.'¹⁸³

Alivisatos provides a clear and systematic explanation of economy. He explains that 'no canonical or general rule regarding [economy] has ever been promulgated in the Orthodox Church. Despite its wide application no Canon has ever been formulated explaining precisely the measure or the origins of its application, the criteria of its authentic use, its effects and results'¹⁸⁴ but also claims that economy is 'fully applied', makes good 'ecclesiastical sense' and sometimes led 'to solutions formally anticanonical and constituting direct departures from strict ecclesiastical order. But [these solutions] were found to be vital for the good estate of the faithful and of the holy Churches of God.'¹⁸⁵ In another pithy definition of the term, he states:

Oikonomia is the suspension of the strict enforcement of Canon Law in cases of urgent need and in a spirit of prudent stewardship, condescension and leniency, practiced by the Church's leaders, without overstepping the limits of dogma, in order to regularize abnormal conditions, for the salvation of those concerned.¹⁸⁶

In the Church, Alivisatos points to three areas of use of economy; as referring to the divine economy, or God's plan of salvation carrying on through the Church, to the

¹⁷⁹ Dyovouniotis, C 'The Principle of Economy', *Church Quarterly Review* 116 (1933) 93.

¹⁸⁰ The transliteration of Prof Alivisatos' name varies between sources.

¹⁸¹ E.g. the work of Androustos, Dyovouniotis and Douglas.

¹⁸² The full paper can be found in Lambeth Palace Library, one copy is bound with the papers of the Dispensation commission and another contains some margin notes by Archbishop Lang.

¹⁸³ Minutes of the Meeting of 21 December 1935. LPL MS 2994.

¹⁸⁴ Alivisatos, Hamicar; *Economy*, 1939, LPL H340.A5, 4.

¹⁸⁵ Alivisatos (1939), 1. The last quotation was highlighted by Lang in his copy.

¹⁸⁶ *Palmer Report*, 30.

spiritual administration of the Church by the Apostles and their successors the bishops and to the regulation of the conditions of church life.¹⁸⁷ The foundation of the application of ‘condescension and leniency’ are found in the New Testament, in the actions of Jesus and the Apostles.¹⁸⁸ As noted above, the early church’s use of economy was largely concerned with the reconciliation with the Church of those who had, for whatever reason, fallen into schism. Alivisatos’ survey of the major Fathers of the Church produces a more generous conclusion than does that of Nikodemos. He refers to dicta of St Basil the Great¹⁸⁹ on the admission of those baptized by heretics, of St John Chrysostom and of St Cyril of Alexandria who stated that true economy is when ‘we seem to depart from the proper path, in order to avoid loss’¹⁹⁰ and that those examining heretics or schismatics seeking reconciliation should not be too exacting in their enquiries about those who are repenting.¹⁹¹ Alivisatos does not, however, refer to the stricter line taken by St Cyprian of Carthage outlined above.

Alivisatos points to three reasons for which economy might be granted; (a) salvation of the Faithful, and especially keeping in the Church those who, for whatever reason, might be excluded; (b) opportuneness and (c) the prevention and removal of scandal.¹⁹² He states¹⁹³ that ultimately all questions may be reduced to the question of opportuneness. Even Nikodemos admits that opportuneness plays a part, quoting Theophylactus of Bulgaria’s comments on Galatians 5.1¹⁹⁴, ‘He who does anything as a matter of economy, does it, not as simply something good, but as something needed for the time being’.¹⁹⁵

The pamphlet bound up with the *Palmer Report* was also published separately in 1949.¹⁹⁶ In a review of this book¹⁹⁷ Theodore N Thalassinou points to Alivisatos’ definitions of economy, namely that it is ‘deviation from the strict application of the

¹⁸⁷ *Palmer Report*, 31.

¹⁸⁸ *Palmer Report*, 31.

¹⁸⁹ Epistle clxxxviii.

¹⁹⁰ Epistle lxxii.

¹⁹¹ Epistle lvii.

¹⁹² Alivisatos (1939), 39-40.

¹⁹³ Alivisatos (1939), 41.

¹⁹⁴ For freedom Christ has set us free. Stand firm, therefore, and do not submit again to a yoke of slavery.

¹⁹⁵ *Pedalion*, 73-4.

¹⁹⁶ Alivisatos, Hamicar; *Economy according to the Canon law of the Orthodox Church*, Athens, Aster Press, 1949.

¹⁹⁷ In *Journal of Religion* 33.3 (1953), 243.

law', that it 'may be granted to all cases, without rules and legal formalities' and that any such deviation could be a relaxation of the law but could also be 'a departure from its leniency according to the exigencies of the circumstances'. What is most interesting, however, is that in Thalassinos' judgment

The significance of economy is obvious: It enables the church to deal both with her inner complications and with the Christian groups that are not in communion with her, without damage to her fundamental claims and aspirations.¹⁹⁸

Thomson, commenting on the work of Alivisatos, considers that, in his view, non-orthodox sacraments, and especially Anglican and Roman Catholic orders, can be considered as valid *per se* and that economy is used not to validate something that is invalid but to lift a canonical suspension on the recognition of those sacraments.¹⁹⁹ In the 1949 published version of his book Alivisatos states

The invalid sacrament, as it does not exist, can be made to exist only by a new sacramental interventions, while the valid sacrament cannot be removed precisely because the Church is not in that sense steward, but is only the organ of the administration of divine grace.²⁰⁰

Thus, in the view of Alivisatos, it would not be possible, by economy, to make valid something invalid. The use of economy, rather, assumes the validity of the sacrament recognised by economy, if it did not then the sacrament would need to be repeated.

Frank Gavin, an Anglican commentator on Orthodox issues, states that economy is only applied where the Church seeks to recognise a sacrament performed irregularly or outside of the Church. This could be baptism 'of necessity' performed by a lay person but may equally apply to the reconciliation of heretics and others with the Church.²⁰¹ The background to the application of economy is that all sacraments performed outside the church are invalid. He quotes Irenaeus, 'ubi Ecclesia, ibi est Spiritus Sanctus' (where the church is, here is the Holy Spirit) and lists Athanasius, Cyril of Jerusalem, Basil the Great, Gregory Nazianzen, Gregory of Nyssa and Cyprian amongst patristic

¹⁹⁸ *Journal of Religion* 33.3 (1953), 243.

¹⁹⁹ Thomson, 382.

²⁰⁰ Quoted by Thomson, 382.

²⁰¹ Gavin *Some Aspects of Contemporary Greek Thought*, London, 1936, 292.

authorities who deny the efficacy of heretical baptism.²⁰² He thinks of economy as an indication that the Church has the power to alter the validity of sacraments previously irregularly performed.²⁰³

Gavin's examination of the history of economic reconciliation of heretics leads him to state that:

In the exercise of this *economy* the church takes into consideration not only in a general way the faith of those heretics and schismatics coming to her, and particularly their view of the sacraments both of Orders and Baptism, and the fact as to the canonicity of the ministration of these sacraments, but also the unbroken succession of the episcopal authority from the times of the apostles.²⁰⁴

Panteleimon Rodopoulos claims that it is not possible precisely to define economy. The need for economy arises 'when there is an apparent conflict between the claim of the law and the call of the Christian spirit.'²⁰⁵ Economy is granted by bishops in their dioceses or in synod; 'Biblical, patristic and synodal sources do not leave any doubt either about the presence of this power in the church or about the capacity of the bishops and synods to use it'. There are limits, however, to the use of economy. It must not contravene dogma, use means that are wrong or induce scandal. It must always serve a positive purpose, for instance, peace in the community or the salvation of souls. Each act of economy is unique; 'It cannot and must not serve as a precedent for future actions'.²⁰⁶

According to Erickson, economy is not the same as an unlimited generosity, and it is possible to follow guidelines and precedents for the granting of economy with strict exactness and not to stray beyond them.²⁰⁷ He does not believe that economy is equivalent to dispensation as found in the west. This he defines as 'a temporary derogation from the law, a license (to put it crudely) to do something otherwise

²⁰² Gavin (1936), 293.

²⁰³ Gavin (1936), 295.

²⁰⁴ Gavin (1936), 298.

²⁰⁵ Örsy, Ladislav, 'In search of the meaning of 'Oikonomia': Report on a Convention', Theological Studies 43 (1982), 313.

²⁰⁶ Örsy (1982), 313.

²⁰⁷ Erickson (1977), 227.

prohibited'²⁰⁸. However, it is difficult to see from the examples he gives that economy is any different.

Erickson is very clear that economy must be seen in the context of a general non-recognition by the Orthodox Churches of any non-Orthodox sacraments. He describes the language of the Fathers as never flattering of 'heretical' sacraments but goes on to state that:

The heretics' sacraments are ineffectual, but they are not necessarily non-existent, *nichtig*, invalid in an absolute sense, as the secondary literature so often has supposed. In certain circumstances they could be ratified, confirmed, just as various other ministrations that we today would call irregular were. Needed was not reiteration of the sacrament in question but rather reconciliation: usually anointing with chrism in the case of baptism and blessing by imposition of hands in the case of ordination.²⁰⁹

However, Erickson points out that economy is not 'a limitless power to make what otherwise is invalid to be valid should that be expedient'. Rather, he claims, it is 'prudent pastoral administration' and carried out on the basis of the canons and the patristic example and precedent. 'By definition [economy] was expected to operate within certain universally recognised limits and according to certain well-defined patterns.'²¹⁰ Within the bounds of sound doctrine it can be used to make a temporary concession in the practice of the church, to tolerate differences of church terminology and to ignore certain technical barriers to communion for the peace of the church.²¹¹ However, it is 'not just sin or apostasy by another name'.²¹²

Who may grant economy?²¹³

According to Alivisatos, economy is most naturally granted by the decision of a synod. It is not possible for a priest to grant economy, save in the practice of applying a certain amount of leniency when hearing confessions. The right of an individual bishop in this regard is not wide. Whilst a bishop is able to grant economy, he may not

²⁰⁸ Erickson (1977), 229.

²⁰⁹ Erickson (1991), 121, n.22.

²¹⁰ Erickson (1991), 126.

²¹¹ Erickson (1977), 231.

²¹² Erickson (1977), 234.

²¹³ A question posed by Alivisatos (1939), 41-44.

overstep the mark. Interestingly, no single bishop has any greater right in economy than another. A synod of bishops must consult the local bishop but ‘the weakness of a single bishop is covered by the authority of his many colleagues.’²¹⁴ A General Council has greater power still and can modify or annul the decision of a lower synodical body in order to maintain a rigorist position.

Other cases in which economy is granted

Alivisatos points to four general classes of cases in which economy is granted. These are the sacraments, dogmatic teaching, rites and services and church government. He also points out that some cases might fall into more than one of these categories. In the category of sacraments he suggests that an economy can be anticipatory, thus allowing in advance some change to normal sacramental practice, or it can be granted *post factum*, thus validating something that would otherwise be invalid. He gives an example of the law of ordination. A bishop has the right to ordain in his own diocese or to issue letters to allow another to ordain. A bishop ordaining in contravention of this ordains invalidly and economy needs to be applied for any such ordination to be recognised.²¹⁵

Marriage is an area in which economy is frequently dispensed.²¹⁶ In a lecture in London in 1948, Alivisatos gives an example of the reconciliation of a couple who had been divorced according to Greek state law. At their reconciliation ‘the renewal of the former marriage takes place without the repetition of the performance of the marriage service. Sacraments in the Orthodox Church are not repeated but the effects of the original sacrament are recognised by economy as valid’.²¹⁷ The so-called *Tetragamy Affair*, discussed by Erickson and dealt with above is an early example of economy being granted to enable a marriage that, but for the granting of economy, would have been impossible.²¹⁸

²¹⁴ Alivisatos (1939), 43.

²¹⁵ Alivisatos (1939), 47.

²¹⁶ Alivisatos (1939), 59.

²¹⁷ Alivisatos, Hamilcar S; *Marriage and Divorce in accordance with the Canon Law of the Orthodox Church*, London, 1948.

²¹⁸ Erickson (1977), 228-9.

Economy has also been applied to liturgy. Alivisatos points to the practice of allowing, by economy, various minor variations to the Divine Liturgy. The examples given are the shortening of the Liturgy, differing customs in the practice of the antidoron (blessed bread distributed at the end of the Eucharist), the use of grape juice in the Eucharist if wine is not available and variations in the vesture of the ministers.²¹⁹

The Consequences of Economy

Not to grant economy in a situation maintains Church order. Alivisatos sees this as a good and points out that to refuse to obey the orders of those in authority in the church results in a penalty.²²⁰ When economy is granted, if it is granted prior to the occurrence of the event in question then the action that would have been anti-canonical becomes regular. If the economy is granted after the event, then it becomes regular not from the point at which it occurred but from the point at which the economy was granted.²²¹ Other things that flow from an irregular action made regular are not necessarily recognised as regular themselves and each act of economy applies only to the situation for which the economy was granted. It does not necessarily set a precedent.²²²

Conclusions

The Canon Law of the Orthodox Churches is not codified. It is based almost entirely on the scriptures, decisions of synods and on the writings of the early fathers of the church. Consequently, when questions are asked about the application of law in the Orthodox church the authorities that are cited tend to be from the early centuries of the church and the principles on which the canons of the Ecumenical Councils and of the Fathers are based are re-interpreted and applied to contemporary situations. For that reason, when examining, for instance, questions of whether economy can be used as a tool in bringing about reunion or intercommunion between Anglican and Orthodox Christians, the principles on which decisions were made about the reconciliation of heretics with the catholic church in the patristic era are examined and applied.

²¹⁹ *Palmer Report*, 34.

²²⁰ *Palmer Report*, 40.

²²¹ *Palmer Report*, 41.

²²² *Palmer Report*, 43.

The survey of Orthodox teaching on economy above leads to the following conclusions:

1) Economy is an elastic term and one which is potentially capable of wide interpretation. At its most basic it is a power in the Church exercised by Bishops or by Synods of Bishops, by which the strict application of an ecclesiastical law may be set aside for a greater purpose – normally categorised as the salvation of souls.²²³

2) Whilst economy is granted in individual cases and does not necessarily set precedents, precedents have nevertheless emerged in the areas and cases in which economy is granted. At its most general it is granted in the area of sacramental validity and most normally in the recognition of marriage, baptism and ordination. These sacraments affect the status of a person within the church. They have legal effect in the church and, often, outside it. Consequently, where a church has a strong doctrine of sacramental validity²²⁴ it is important to be able to recognise whether a person has received these sacraments validly. Sacraments performed outside of the Orthodox Church are all considered to be invalid. It is only by economy that they can be considered to be valid. If they are considered valid by economy then they need not be repeated for the person concerned to enjoy the legal, sacramental or salvific status conferred by the sacrament.

3) The recognition by economy of the sacraments of baptism and orders conferred outside the Orthodox Church is dependent on the prior wish of the person or persons concerned to be part of the Orthodox Church.²²⁵ For that reason, any statement by Orthodox Churches on the recognition of the baptism or orders of a non Orthodox Church is conditional. Such recognition does not lead to intercommunion but is merely an indication that such people would not be re-baptised or re-ordained if they individually join an Orthodox Church or if the whole church is reconciled with the Orthodox Church.

²²³ Dyovouniotis (1933), 96.

²²⁴ And it is argued elsewhere that the Church of England does not profess such a doctrine. See Adam, William, *The Reception, Recognition and Reconciliation of Holy Orders*, Unpublished Cardiff LLM dissertation, Cardiff, 2003, 76-7.

²²⁵ Erickson (1991), 117.

Chapter 5 - The Use of Economy in Anglican-Orthodox relations

Nineteenth Century Dialogue

Contact between the post-Reformation Church of England and Eastern Orthodox churches can be traced back to the seventeenth century. In the mid nineteenth century, however, William Palmer, a deacon in the Church of England, a fellow of Magdalen College, Oxford, and a keen tractarian, explored the possibility of conversion to orthodoxy following a series of visits to Greece and Russia. Palmer approached both the Greek and Russian Churches about the mechanism whereby he might convert. The Greek Orthodox Church's response was that he would need to be baptized, the Russian that he would need to be received by laying on of hands, but not by re-baptism.²²⁶ These contradictory responses led Palmer to make a study of the issue, published in Greek in 1852 and English in 1853, which in turn led Greek and Russian scholars and hierarchs to examine the issue. The Greek response to Palmer about the more generous Russian response was that the Russian church was willing to apply economy which, in this instance, the Greek church was not willing to do.²²⁷ Palmer elicited a letter from the Ecumenical Patriarch, Anthimos IV stating 'There is only one Baptism. If the Russians allow any other, we know nothing of that and do not recognize it. Our church knows only one Baptism, and that without any detraction, addition or *change* whatever.'²²⁸ A Russian counter response by Metropolitan Philaret of Moscow assumed a clearly Augustinian position when he stated that 'Surely the efficacy of Baptism is in the name of the Trinity and in the sacramental grace given to it by the action of its founder, Christ the Lord'.²²⁹

Palmer is critical of a definition of economy that allows on the one hand a Cyprianic understanding of there being no possibility of a valid sacrament administered outside the church and yet, on the other hand, ascribing to the Church authority by economy to recognise those sacraments as valid by economy, although he acknowledges that such a

²²⁶ Thomson, 370.

²²⁷ Investigation into Palmer's *Dissertations* by Konstantinos o ex Ikonomon, dated 30 December 1852 and quoted in Thomson, 371.

²²⁸ Letter dated 8 October 1851. Quoted in Thomson, 371. The italicised reference to change probably refers to the form of Anglican baptism – i.e. by affusion (pouring of water) rather than by triple immersion.

²²⁹ Quoted in Thomson, 372.

view exists and has a considerable pedigree.²³⁰ In response, he states that ‘neither for necessity, nor for economy, nor under any conceivable circumstances can the Church make the man who has not been regenerated to have been regenerated; or the man who has been regenerated to have not been regenerated.’²³¹

The Crimean War stopped the correspondence between the Church of Greece and the Ecumenical Patriarchate on the one hand and the Russian Orthodox Church on the other, and by the end of the War Palmer had himself obviated the need for further discussion on his particular case by converting to Roman Catholicism.²³²

John Douglas, *The Christian East and Orthodox Politics* 1900-1948

In the early part of the twentieth century relations between the Church of England and various Eastern Orthodox Churches were particularly warm. This warmth was, at the very least in part politically prompted and motivated. ‘The War Alliance with Great Britain created a favourable disposition towards the English Church among the Greeks, Russians, Serbs and Roumans [Romanians],’²³³ and British policy towards the Turkish secular state at the time was supported by the struggling Ecumenical Patriarchate of Constantinople.²³⁴ This warmth of relationship culminated in the controversial recognition by the Ecumenical Patriarch Melitios IV Metaxakis of Anglican orders in 1922. The decision used economy as the justification and mechanism for the recognition of orders and is a clear modern example of the use, not without controversy, of economy by bishops and synods of the Eastern churches.

A key figure from the Church of England in Anglican/Orthodox relations at this time was the Revd John A Douglas, who was Vicar of St Luke’s Camberwell ‘when not off trotting about the Balkans.’²³⁵ Douglas was passionate about the Eastern churches. In 1920 he founded a periodical *The Christian East*, which is a major source of

²³⁰ Palmer, William, *Dissertations on subjects relating to the “Orthodox” or “Eastern-Catholic” Communion* London 1853, 163-174.

²³¹ Palmer, W (1853), 180.

²³² Leon Litvack, ‘Palmer, William (1811–1879)’, Oxford Dictionary of National Biography, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/21224>, accessed 26 Sept 2007]

²³³ *The ECU Declaration in The Christian East* III, 49.

²³⁴ Geffert, Bryn, ‘Anglican Orders and Orthodox Politics’, in *Journal of Ecclesiastical History*, vol 57, no 2, 2006, 273.

²³⁵ Geffert, 270.

information about the detailed explorations at the time of the possibility of the reunion of Eastern Orthodoxy and Anglicanism by means of the application of economy.

In his book *The Relations of the Anglican Churches with the Eastern-Orthodox*²³⁶ Douglas outlines careful arguments for the acceptance of Anglican Orders by Orthodox Churches. He states that it is the 'duty of the Church to exercise *Economy*'²³⁷ and claims to be able to point to numerous examples of 'economic' acceptance of baptism, confirmation and orders conferred outside the Orthodox church. In support of his thesis he relies on the work of Dyovouniotis and that of Androustos who, he claims, examined Anglican ordinations and found them 'unimpeachable of the historic-canonical side'²³⁸. Androustos, according to Douglas, is of the opinion that those who break away from the church lose the apostolic succession in doctrine and priesthood but, by economy, may rejoin the church. He is of the opinion that it is not possible to 'trace out entirely the underlying common principle which governs strictness to the letter and Economy' but is unsympathetic to the prospects of 'herisarchs', 'originators of schism' and those who have 'mutilated the outward acts of the sacraments'.²³⁹

Douglas relies heavily on the work of Dyovouniotos who, in 1913 stated that 'The church is able both to recognize the Priesthood and the Sacraments in general of schismatics and heretics among whom they are not accomplished canonically or the Apostolic Succession has been broken' and that the Church 'being the ruler of the sacraments, has the power to transform the validity of the Sacraments by establishing the invalid as valid and the valid as invalid'.²⁴⁰ This latter statement is in direct contrast to Erickson's view outlined above that economy is not 'a limitless power to make what otherwise is invalid to be valid should that be expedient'.²⁴¹

A further article by the Greek Professor Comnenos published in English in 1921, states that the correct attitude of the Orthodox Church to Anglican ordinations would be to treat them as valid in the same way as Roman Catholic ordinations are treated as valid; that is by 'condecension and economy'. This is not to say, however, that

²³⁶ London, 1921.

²³⁷ Douglas (1921), 55.

²³⁸ Douglas (1921), 59.

²³⁹ Douglas (1921), 58.

²⁴⁰ Douglas (1921), 60.

²⁴¹ Erickson (1977), 229.

intercommunion is envisaged as a result.²⁴² In this assertion he concurs with the Russian émigré theologian, Prof Nicholas Gloubokovsky, who in *Eastern Orthodoxy and Anglicanism* points out that John Douglas' keenness on the concept of economy was largely driven by a desire for intercommunion but that 'there cannot be any Church intercommunion without a uniting of the Churches'.²⁴³

Douglas gives a significant practical example of economy in action in the twentieth century. A key question in the first half of the century, and one that comes up again and again in the primary sources,²⁴⁴ is whether members of one church when away from home or separated from the worship and ministers of that church, could receive the ministrations of a minister of another church. This was of particular significance in the so called New World. Despite the reservations of such theologians as Comnenos and Gloubokovsky, pointed out above, Douglas claims that in correspondence with the Anglican Archbishop of Brisbane, the Greek Orthodox Archimandrite Daniel Maravelis (based in Melbourne) had claimed that 'The Holy Synod in Athens' had authorised Greek Orthodox believers to accept the ministry of Anglican clergy in North Queensland (one suspects that there were few of either category present there at the time). Furthermore, Maravelis encouraged Anglican Clergy 'to invite them to the ministrations and Communion of your Church. They will be acting with my freely and gladly-given sanction, as I recognize that they will be doing a service both to our people and our church.'²⁴⁵ Maravelis himself was not competent to grant such an economy (an Archimandrite is a monk in priest's orders) but Douglas clearly interpreted this authorisation of intercommunion to be an economy granted by the Holy Synod of the Greek Orthodox Church, which, in the light of the evidence outlined above, was competent to dispense economy. Douglas admits that this authorisation is 'provisional and for particular cases' and that it could be withdrawn.²⁴⁶ Copies of this correspondence are preserved in Bishop Headlam's papers in a memorandum prepared by him for the Lambeth Conference Committee on Relations with the Eastern

²⁴² P Comnenos *Anglican Ordinations* in *The Christian East* II (1921), 107.

²⁴³ In *The Christian East* III (1922), 26-7.

²⁴⁴ E.g. Randall Davidson *Allocution on the Relations of the Anglican and Eastern-Orthodox Churches* given at the Convocation of Canterbury, 16 February 1923. Published in London, 1923.

²⁴⁵ Douglas (1921), 46-7.

²⁴⁶ Douglas (1921), 49-50.

Churches in July 1920.²⁴⁷ Original evidence of the letter from Maravelis and of the supposed decision of the Holy Synod is not available.

More convincing evidence of economic intercommunion was found in the decision of the Serbian Patriarch Dimitri who celebrated the Eucharist for a group of Anglicans in Belgrade. In a memo on the subject, Douglas stated that the Patriarch 'administered the Communion to members of the British and American colonies here in the Cathedral in the presence of a large congregation.'²⁴⁸ This was interpreted by one of those present, Frank Steel of the British Legation in Belgrade, as an act of hospitality from the Patriarch himself, whilst other orthodox clergy disapproved.²⁴⁹ Douglas interpreted the act initially as 'simply an act of economy on the Patriarch's part'²⁵⁰ but later conceded that there was no indication that the Patriarch had acted with the approval of his Synod²⁵¹ and that 'economy cannot be rightly exercised by individual bishops or priests, except in an emergency.'²⁵²

Other occasions of ad hoc intercommunion between Anglicans and Orthodox are noted in Douglas' papers. These include a report of the Greek Orthodox Archbishop of Ouzan Kupin receiving communion at an Anglican eucharist celebrated for the British Army, with the Archbishop's permission, in a Greek Orthodox Church.²⁵³ In 1923 Douglas collected reports²⁵⁴ that the Anglican Bishop of Southern Rhodesia had celebrated Holy Communion for the resident Greek Orthodox community in Salisbury (Harare) Cathedral at Easter 1923. In the same period Bishop Winnington-Ingram of London arranged with the Russian Orthodox Bishop of Vladivostok that Mrs Lily Napier might be admitted to Communion in the Orthodox Church there. The Orthodox Bishop gave 'a general permission for any English Catholic [a designation popular amongst Anglo-Catholics at that time] to receive Communion in any Orthodox church in his Province, not only on the one special occasion'²⁵⁵

²⁴⁷ LPL MS 2627.f.49-50.

²⁴⁸ LPL Douglas 50.f.276.

²⁴⁹ LPL Douglas 50.f.295.

²⁵⁰ LPL Douglas 50.f.278 28 December 1927, LPL Douglas 50.f.290 Letter in Church Times 18 January 1928.

²⁵¹ Memo to the Archbishop's Eastern Churches Committee 13 February 1928. LPL Douglas 50.f.328.

²⁵² Memo 13 February 1928. LPL Douglas 50.f.334.

²⁵³ Church Times 1 December 1922. LPL Douglas 24.f.10.

²⁵⁴ An unattributed and undated press cutting in the Douglas Papers. LPL Douglas 24.f.12.

²⁵⁵ LPL Douglas 24.f.18-20.

In 1922 there was an election to fill the vacant Patriarchate of Constantinople. This particular election was dogged by political controversy and the two rival candidates, Melitios Metaxakis, Archbishop of Athens and Metropolitan Chrysanthos of Trebizond, both visited the Archbishop of Canterbury during their election campaigns. Melitios (who won the election, despite opposition from both the Greek and Turkish governments) had a great interest in Anglicanism, but there is some suggestion that the courting of the Church of England was as much to do with attempting to secure the support of the British government for the status and place of the Ecumenical Patriarchate in the Turkish secular state as it was with ecumenical progress. However, despite neither Archbishop Davidson nor Lloyd George (the Prime Minister at the time) becoming involved with the complicated Greek and Turkish politics that surrounded Melitios' election, the new Ecumenical Patriarch²⁵⁶ continued in his promotion of closer ties with Anglicanism.²⁵⁷ On 22 July 1922 the Patriarch and his Synod at Constantinople issued a declaration that Anglican orders were to be considered to have the 'same validity' as Roman Catholic, Old Catholic and Armenian orders.²⁵⁸ Such a statement needs to be taken with caution, as, firstly, it is possible to trace in the primary and secondary authorities on the subject, that the Orthodox Churches do not recognise the validity of Roman Catholic, Old Catholic and Armenian orders, or even their baptisms.²⁵⁹ Secondly, as only two other autocephalous Eastern Orthodox Churches²⁶⁰ ratified this declaration it did not lead to a major *rapprochement* or union between the two communions.²⁶¹ Indeed, Archbishop Davidson 'was careful not to play up Melitios' recognition, or even to act as if he welcomed the announcement' and emphasised to Convocation in 1923 'that recognition would not lead to intercommunion.'²⁶² Melitios did not last long as Ecumenical Patriarch (he was deposed in 1923) but became Greek Orthodox Patriarch of Alexandria in 1926.²⁶³

²⁵⁶ Patriarch of Constantinople and *primus inter pares* of the Eastern Orthodox patriarchs. Previously Melitios had been Archbishop of Athens and leader of the autocephalous Church of Greece.

²⁵⁷ See generally Geffert (2006), and Bell *Randall Davidson*, 1102.

²⁵⁸ Letter of Melitios to Archbishop Davidson, printed in *The Christian East* III no 3, 112-3.

²⁵⁹ E.g. the pronouncement against the validity of western baptism by Ecumenical Patriarch Cyril V.

²⁶⁰ The Greek Orthodox Patriarchate of Jerusalem (dated 27 February and 12 March 1923) and the Church of Cyprus (in a letter to the Ecumenical Patriarch in March 1923), in addition to the Synod of Constantinople itself. See Geffert, 298 and *The Christian East*, vol IV, no 3, 121-2.

²⁶¹ Geffert, 286-7.

²⁶² Geffert, 299.

²⁶³ *The Christian East*, VII no 3, 1926, 100.

That the 'recognition' of Anglican orders would not lead to a general permission for intercommunion granted by a general economy was explicitly stated by the Church of Cyprus in 1923. The interpretation by the Holy Synod of that Church was that the significance of ascribing validity to Anglican orders was that Anglican clergy 'entering the bosom of the Orthodox Church' would be received without re-ordination, but that intercommunion must wait until church unity had been achieved.²⁶⁴ That intercommunion was dependent on dogmatic and ecclesial unity has been re-iterated consistently, and in opposition to the hopes of Douglas.²⁶⁵

The Romanian Orthodox Church did not ratify Melitios' recognition of Anglican orders but there was discussion on the subject in the mid-twentieth century within the Romanian Church. In 1936 the Holy Synod pronounced a 'circumstantial recognition, which was in fact categorically conditioned, and as such without any effect.'²⁶⁶ The conditions were described thus:

So long as the Church of England does not find itself in full dogmatic unity with the Orthodox Church, any official recognition in principle, be it general or absolute, of its ordinations is excluded.²⁶⁷

However, the same report gives a clear indication that the recognition of Holy Orders, for the purpose of Church unity, is an area in which economy might rightly be applied. The reasoning behind this was that the approach by Anglicans seeking recognition was akin to 'hands stretched for help' and 'a shipwrecked calling out for salvation'.²⁶⁸ As such 'an elementary duty of Christian charity urges us [the Romanian Orthodox Church] to do what we can in order to help them: The salvation of man is the very reason of the mission of the Church in this world.'²⁶⁹ The presupposition behind this is that Anglicans are potentially, if not actually, outside of salvation as a result of their not being part of the Orthodox Church. The report goes on to point to the First Canon

²⁶⁴ *The Christian East*, vol iv, no 3, 122.

²⁶⁵ e.g. Archbishop Germanos in *Report of the joint doctrinal commission appointed by the Oecumenical Patriarch and the Archbishop of Canterbury for consultation on the points of agreement and difference between the Anglican and the Eastern Orthodox Churches*, London, 1921, 24.

²⁶⁶ *The Orthodox Church and Anglican Orders: Possibilities for recognising their validity* prepared by the Romanian Delegation to the Inter-Orthodox Conference, Moscow, 1946. Reprinted in English in *The Romanian Orthodox Church and the Church of England*, Bucharest, Biblical and Orthodox Missionary Institute, 1976, 68.

²⁶⁷ *The Orthodox Church and Anglican Orders*, 78.

²⁶⁸ *The Orthodox Church and Anglican Orders*, 79.

²⁶⁹ *The Orthodox Church and Anglican Orders*, 79.

of St Basil the Great, which talks of the methods for reconciling heretics with the church and, in the light of this, suggests that reconciliation with Anglicans through an economic recognition of Anglican orders and sacraments would be of moral benefit. The report states that Anglican orders can be considered as a special case and that the issue ‘meets the preliminary conditions for becoming the object of the economy of the Church’²⁷⁰ ‘The application of the principle of *oikonomia* from case to case, in as far as the recognition of the validity of the Anglican Orders is concerned, represents a unique solution compatible with the spirit, doctrine and tradition of the Orthodox church.’²⁷¹

The 1948 Conference of Orthodox Churches for which the Romanian report was prepared passed a three part resolution which stated that whilst the Thirty Nine Articles of Religion were contrary to Orthodox faith, that if unity in faith and witness between Anglicans and the Orthodox could be established then the recognition of the validity of Anglican orders ‘could be realized according to the principle of economy’²⁷²

Conclusion

Despite the lack of unanimity in a definition of economy or a canonical procedure for its application, a constant thread of thought or practice can be discerned from the theoretical and practical examples given above.

Set against the basic agreed assertion that the Orthodox Church is the only true church there is disagreement over whether this means that sacraments celebrated outside of that church are invalid *per se* but can be made valid by economy after investigation of the circumstances of those sacraments and in situations where prudent pastoral stewardship makes this advisable or whether sacraments, whilst considered canonically ineffective due to their being outside of the true church, can be considered to have some validity. In these cases economy is applied either to revivify or complete those sacraments or to remove a penitential sanction imposed by the illicit celebration or reception of the sacrament. In any of these cases economy is the method employed – by synodical, conciliar or episcopal decision, published in a manner appropriate to the situation.

²⁷⁰ *The Orthodox Church and Anglican Orders*, 80.

²⁷¹ *The Orthodox Church and Anglican Orders*, 83.

²⁷² *The Orthodox Church and Anglican Orders*, 84-5.

PART II – DISCRETION AND DISPENSATION IN ENGLISH LAW

Chapter 6 - Discretion and Dispensation in English Law

Introduction

Dispensation was widely applied in the ecclesiastical sphere before the Reformation and, in a different way, in the post-Reformation Church of England.²⁷³ However, it is possible to trace the use of concepts similar to dispensation or economy in English law outside strictly ecclesiastical matters. This chapter explores whether and where such legal flexibility may be found.

Equity

It is important, at this point, to make mention of the topic of equity and to note the similarities and differences between the development and use of equity, the development of equitable rights and the exercise of equitable jurisdiction and the development and exercise of dispensation and economy. Equity is an integral part of the justice system in England and Wales. Equitable rights, obligations and defences are applied by all divisions of the court.²⁷⁴ The origins of equity as applied in England and Wales lie in the jurisdiction of the Chancellor who, whilst originally acting as a delegate to hear appeals to the King or to the King in Council, by the late fifteenth century had begun to issue decrees and judgments in his own name and on his own authority.²⁷⁵

Equity developed hand in hand with the Common Law. The former becoming the means whereby justice could be had if it was not forthcoming from the latter. The theory behind this was that the residuum of justice rested in King and that appeal could be made to the King when his own justices either failed to or were unable to give a just remedy under the increasingly rigid and unadaptable common law.²⁷⁶

In the middle ages Chancellors were almost always clerics and frequently bishops. They were also well versed in civil and canon law. Pettit states that the Chancellor ‘dispensed an extraordinary justice remedying the defects of the common law on

²⁷³ See Chapter 7 below.

²⁷⁴ Since the Supreme Court of Judicature Acts 1873 and 1875. Prior to this equity was enforced exclusively in the Court of Chancery.

²⁷⁵ Pettit, Philip H, *Equity and the Law of Trusts* 6th Edn, London, 1989, 2.

²⁷⁶ Pettit (1989), 2.

grounds of conscience and natural justice'.²⁷⁷ They would also, if they were students of canon law, have been familiar with the principles laid down by such canonists as Ivo of Chartres and Gratian, and, therefore, the concept of dispensation. Before the principles of equity became fixed, decisions rested on the views of right or wrong of a particular chancellor, leading to the famous criticism that equitable decisions were determined according to the length of the Chancellor's foot. Conflicts arose between the courts of equity and of the common law, resulting in an order of James I in 1616 that equity held legal supremacy over law.²⁷⁸ This supremacy was continued by s 25 of the Judicature Act 1873 in the case of any conflict between equity and law. Whilst originally equity had been flexible and based on 'common sense and natural justice',²⁷⁹ the principles of equity applied in the Court of Chancery became fixed. Reporting of judgments from the mid seventeenth century combined with the exclusive appointment of lawyers to the post of Chancellor from later in that century, combined to bring the processes of the equity jurisdiction closer to that of the common law. Precedent began to be rigidly applied. In 1903 Buckley J stated that 'this court is not a court of conscience',²⁸⁰ and in an extra-judicial comment in 1952 Denning remarked that 'the courts of chancery are no longer the courts of equity... they are as fixed and immutable as the courts of law ever were'.²⁸¹

Thus, whilst equitable remedies exist and are applied by the courts, it is unlikely that the court is able to bring about new equitable remedies or principles. In *Cowcher v Cowcher* Bagnall J sounded the death knell of the use of equity to overturn positive law, stating that 'in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legitimate – by precedent out of principle'.²⁸² In *re Diplock* the Court of Appeal held that it 'is not sufficient that because we may think that the "justice" of the present case requires it, we should invent such a jurisdiction for the first time'.²⁸³ The place for the correction of injustice and change in

²⁷⁷ Pettit (1989), 4.

²⁷⁸ Pettit (1989), 3. See speech of James I to the judges in Star Chamber, June 1616 in Kenyon (1986), 84-6.

²⁷⁹ Kenyon, J P, *The Stuart Constitution 1603-88* (2nd Edn), Cambridge, 1986, 75.

²⁸⁰ *In re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at 195-6.

²⁸¹ (1952) 5 CLP 8.

²⁸² [1972] 1 All ER 943 at 948.

²⁸³ [1948] Ch 465 CA at 482, per Lord Greene MR, Wrottesley and Evershed LJJ.

the law is now emphatically Parliament²⁸⁴ and it is the job of the Law Commission to discover and recommend the amendment or repeal of laws that are considered to be unjust or obsolete.²⁸⁵

Thus, in its modern English form, equity cannot be seen to be a parallel with dispensation or economy. However, it is important to note that whilst equity has developed in the way that it has, its history is necessarily bound up with the canon and civil laws of earlier ages. Canon law, as has been demonstrated, was familiar with the principles of dispensation and economy and saw that there could be higher principles of natural justice, which could be used as arguments for not applying the law in all its strictness. Örsy points to the ancient classical concept of 'epieikeia', which he considers to be different to equity in civil law but similar to the early equitable jurisdiction of the Chancellor in England. 'Epieikeia' stems from the work of Aristotle and can be seen as one basis of the principle that in Canon Law:

Whoever is in charge of the issue, whoever it is who must give speedy justice, that person is entitled to invoke higher principles of morality and state that the law must cease to operate, and, through necessary accommodations, must become a servant of the value that must be safeguarded.²⁸⁶

Civil law had in its classical background the appointment of a special magistrate (*praetor peregrinus*) in Rome from 242 BC, whose jurisdiction, looking after the needs of strangers and aliens who were not strictly covered by the civil law,²⁸⁷ was not limited to the standard twelve tables of Roman Law but was based on ethical principles and concepts of natural justice.²⁸⁸ The *praetor peregrinus* also needed to develop procedures and make rulings in cases where the civil law was silent, for instance in mercantile disputes between citizens and foreigners.²⁸⁹ Thus an approach to law which is more flexible than would be admitted by certain advocates of legal positivism can be

²⁸⁴ See *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 CA at 218.

²⁸⁵ The Law Commissions Act 1965 s 3 states 'It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law,'

²⁸⁶ Örsy, L, in Coriden, Green, Heintschel *The Code of Canon Law: A text and commentary* London, 1st edn. 1985, 43.

²⁸⁷ Thomas, J A C, *Textbook of Roman Law*, Amsterdam, 1976, 63.

²⁸⁸ Örsy (1985), 43.

²⁸⁹ Thomas (1976), 83.

seen in the history of canon and civil law and, through that, to the equity jurisdiction of the Chancellor.

The Stuart Kings and the Bill of Rights

The Bill of Rights 1688 specifically declared to be illegal the crown's power of dispensation 'as it hath been assumed and exercised of late'.²⁹⁰ The issue at stake at this time was James II's assumption of authority to dispense with the obligation to observe statute law, specifically the Test Acts, which sought to safeguard the protestant character of the land by preventing Roman Catholics from holding certain offices.

Earlier, Charles II had occasionally sought 'to dispense occasional individuals from compliance with certain statutes' and had relaxed or remitted penalties against certain people. In 1669 he ordered that the Elizabethan penal laws equating conversion to Catholicism with treason be not enforced, an order that was repealed in 1671. In 1662 Charles had considered suspending the new Act of Uniformity but had been persuaded not to by judges who 'queried the legality of the suspending power'.²⁹¹ J P Kenyon believes that the King's right of dispensation on occasion 'was not seriously questioned',²⁹² but that his use of it to issue a Declaration of Indulgence in 1672 prompted a clash with Parliament, culminating in Charles' acceptance of the Test Act 1672.²⁹³

James put Catholic army officers in charge of forces putting down the Argyle rebellion in Scotland in 1685. Parliament 'objected to his use of the dispensing power to give them immunity from prosecution, claiming that it was illegal.'²⁹⁴ A test case brought in the King's Bench against Colonel Hales, a Roman Catholic soldier, found for the King, who had, by letters issued under seal, formally dispensed with the requirement of the Test Act for Hale to have taken Communion in the Church of England within three months of taking up his commission. The Lord Chief Justice, Sir Edward Herbert, delivered the verdict of the court that 'the Kings of England were absolute Sovereigns;

²⁹⁰ Bill of Rights 1688 (1 Will & Mary Sess 2 c.1). The Bill of Rights was declared to have the force and effect of an Act of Parliament by the Crown and Parliament Recognition Act, 1689 (2 Will & Mary c.1).

²⁹¹ Kenyon, J P *The Stuart Constitution 1603-88* 2nd edn, Cambridge, 1986, 375.

²⁹² Kenyon (1986), 375.

²⁹³ 25 Chas II c 2. Also known as the Popish Recusants Act.

²⁹⁴ W. A. Speck, 'James II and VII (1633-1701)', Oxford Dictionary of National Biography, Oxford University Press, Sept 2004; online edn, May 2006 [<http://www.oxforddnb.com/view/article/14593>, accessed 5 Nov 2007].

that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was the sole judge of that necessity; that no Act of Parliament could take away that power'²⁹⁵ The Lord Chief Justice also stated that whilst laws of God could be dispensed with only by God himself, 'the law of Man may be dispensed with by the legislator, for a law may either be too wide or too narrow, and there may be many cases which may be out of the conveniences which did induce the law to be made; for it is impossible for the wisest law-maker to foresee all the cases that may be or are to be remedied, and therefore there must be a power somewhere, able to dispense with these laws'.²⁹⁶ The court held that this power was the power of the King. This judgment, confirming the King's right to dispense, led to him using the power more and more, in particular to tolerate freedom of religious practice for protestant non-conformists as well as for Roman Catholics. Among these were 'Declarations of Indulgence' and other such declarations lifting penalties imposed on non-conformists in England and Wales (1687).²⁹⁷ The latter Declaration of Indulgence was followed by an Order in Council in May 1688 compelling clergy to read it out in their churches and bishops to distribute it in their dioceses.²⁹⁸ Seven bishops, led by Archbishop Sancroft of Canterbury objected to this course of action by petition, in which they declared that

.....that declaration is founded upon such a dispensing power as hath often been declared illegal in parliament, and particularly in the years 1662, 1672, and in the beginning of your Majesty's reign, and is a matter of so great moment and consequence to the whole nation, both in Church and State, that your petitioners cannot in prudence, honour or conscience so far make themselves parties to it as the distribution of it all over the nations, and the solemn publication of it once and again even in God's house and in the time of His divine service.

The bishops were prosecuted for seditious libel, but acquitted.²⁹⁹

The use and perceived abuse of dispensing power by James II in direct opposition to the declared will of Parliament was a direct cause of the crisis of 1688 known as the

²⁹⁵ *Godden v Hales* 2 Show KB 475 at 478, (1686) 89 ER 1050 at 1051.

²⁹⁶ Kenyon (1986), 403-4.

²⁹⁷ Speck (2004).

²⁹⁸ *The London Gazette* 2344, May 3 - 7, 1688.

²⁹⁹ R. A. P. J. Beddard, 'Sancroft, William (1617–1693)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Oct 2005 [http://www.oxforddnb.com/view/article/24610, accessed 5 Nov 2007].

‘Glorious Revolution’ which saw James going into exile in France and his daughter and son-in-law taking over as Mary II and William III in London. The Bill of Rights re-affirmed the inability of the sovereign to act contrary to Parliamentary law and placed new restrictions on the royal prerogative. The preamble to the Bill of Rights 1688 recited that

Whereas the late King James the Second by the assistance of diverse evill counsellors judges and ministers employed by him did endeavour to subvert and extirpate the Protestant religion and the lawes and liberties of this kingdome

the first example of this subversion being

By assumeing and exerciseing a power of dispensing with and suspending of lawes and the execution of lawes without consent of Parlyament.

Section 1 further declared

Suspending power - That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall.

Late dispensing power - That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegall.

Thus the power of the monarch acting alone to suspend laws or to dispense with the observation or execution of laws was declared not to exist. The abolition was, however, qualified as the monarch in Parliament retained the right to suspend or change laws, and certain dispensing powers (e.g. in the ecclesiastical field, as confirmed in the preamble to the *ELA*) had been approved by Parliament.

Since that time there have been a number of areas in which it is possible to discern something akin to a power of dispensation or economy exercised by the crown, ministers or others with executive authority in the law of England.

Royal Prerogative after 1688

The first group of powers are those grouped under the Royal Prerogative. The prerogative power of mercy remains as a method by which pardons can be granted by

the crown. The power is exercised by the Secretary of State³⁰⁰ and is currently the responsibility of the Secretary of State for Justice, ‘as the minister responsible for those in detention.’³⁰¹ In *R v Foster* the Court of Appeal (per Watkins LJ) stated that ‘the beneficiary of the pardon is pardoned in respect of all pains, penalties and punishments ensuing from the conviction, but not pardoned in respect of the conviction itself’, something that can only be done by the court.³⁰² In this judgment the court followed an Australian decision in *R v Cosgrove*,³⁰³ ‘in which it was held that the pardon granted was not the equivalent of an acquittal.’ The court further held that the crown no longer exercises prerogative powers in administering justice, that being the function of the court, but only in administering mercy. In *Lewis v AG of Jamaica*³⁰⁴ the Privy Council further stated that whilst the merits of the decision of the Governor General (exercising the prerogative power in Jamaica on behalf of the crown and on the advice of the Jamaican privy council) on the exercise of the prerogative of mercy were not subject to review by the court, that prerogative should, in the light of Jamaica’s international obligations, be exercised by procedures which were fair and proper and amenable to judicial review. Those exercising this prerogative power consequently enjoy ‘an exceptional breadth of discretion’.³⁰⁵ In *R v Secretary of State for the Home Department ex parte Bentley*³⁰⁶ Watkins LJ held that the prerogative of mercy is a constitutional safeguard against mistakes.³⁰⁷ Pardon may be recommended by a trial judge³⁰⁸ or may be petitioned for by the criminal or his friends.³⁰⁹ A distinction is drawn in *Foster* between pardon and acquittal. Pardon cannot waive responsibility for future offences.³¹⁰ Pardon can also be granted to those convicted of crimes overseas but who have been transferred to serve prison sentences in the UK, even if they have not been acquitted by the convicting jurisdiction.³¹¹ Interestingly for this study, the prerogative of pardon extends to convictions under the Ecclesiastical Jurisdiction

³⁰⁰ Hood Phillips, O, Jackson, P, Leopold, P, *O Hood Phillips and Jackson: Constitutional and Administrative Law*, 8th Edn, 2001, para 2-020.

³⁰¹ *R (Shields) v Secretary of State for Justice* [2008] All ER (D) 182 (Dec).

³⁰² *R v Foster* [1984] 2 All ER 679 CA.

³⁰³ [1949] Tas SR 99.

³⁰⁴ [2000] 3 WLR 1785, [2001] 2 AC 50.

³⁰⁵ [2000] 3 WLR 1785, [2001] 2 AC 50.

³⁰⁶ [1994] QB 349 at 365.

³⁰⁷ See *Halsbury* vol 8(2) 1996 para 824.

³⁰⁸ *R v Oxford County Inhabitants* (1811) 13 East 411 at 416 note (b). Cited in *Halsbury* vol 8(2) para 825 n 2.

³⁰⁹ The right to petition for pardon is enshrined in the Bill of Rights s.1. See *Halsbury* vol 8(2) para 825 n 3.

³¹⁰ *Halsbury* vol 8(2) para 825.

³¹¹ *R (Shields) v Secretary of State for Justice* [2008] All ER (D) 182 (Dec).

Measure 1963. Section 83 (2)(a) of this measure provides that nothing in the measure shall affect any royal prerogative. Pardon can also be granted by Act of Parliament.³¹²

A related exercise of prerogative power is the entering by the Attorney General on behalf of the crown of an order *nolle prosequi* to stop criminal proceedings. Such an order has the effect of stopping a trial on indictment after the indictment has been signed. It is not the same as an acquittal and does not prevent the defendant from standing trial on the same charges again. The power has most usually been used when a defendant is unfit to stand trial, but John Edwards, writing in 1984, states that in previous times it had been used either to stop technically imperfect proceedings that had been instituted by the Crown or to stop technically perfect but oppressive private prosecutions.³¹³ The power is rarely used, particularly as the Director of Public Prosecutions now enjoys the statutory power under s 3 of the Prosecution of Offences Act 1985 to take over the conduct of any prosecution and, in practice, to stop an inappropriate trial by offering no evidence and securing an acquittal.³¹⁴

Discretion

Reference was made in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*³¹⁵, to lawful exercise of discretion. According to Wade and Forsyth all legal power, as opposed to duty, is in some sense discretionary but must be exercised properly and lawfully 'in accordance with the presumed intentions of the legislature that conferred [the power]'.³¹⁶ They go on to state, citing AV Dicey, that wide discretionary power was incompatible with the rule of law but that actually what is important in preserving the rule of law is not the absence of discretionary power but the ability of the law to control its use and misuse.³¹⁷ Leading

³¹² *Halsbury*, vol 11(2), para 1449. During 2008 draft proposals were issued under the title of the Constitutional Renewal Bill. The proposals included a consultation on the possibility of the Queen formally relinquishing the Royal Prerogative of Mercy. (See Constitutional Renewal Bill <http://www.commonslaw.gov.uk/output/page2171.asp> accessed 28 November 2008. See also UCL Constitution Unit Commentary on Constitutional Renewal Bill).

³¹³ Edwards, John L J, *The Attorney General, Politics and the Public Interest*, London, 1984, 445.

³¹⁴ The power of the Attorney General in this matter is subject to abolition according to s 11 of the Constitutional Renewal Bill 2008. (See also UCL Commentary, as above.)

³¹⁵ [1981] STC 260.

³¹⁶ Wade, HWR and Forsyth CF, *Administrative Law* 9th edn., Oxford, 2000, 311.

³¹⁷ Wade and Forsyth, 343-4.

cases such as *Associated Provincial Picture Houses v Wednesbury Corporation*³¹⁸ and *Ridge v Baldwin*³¹⁹ show that the court will consider that an authority exercising discretion will be acting *ultra vires* where, in exercising its *intra vires* discretion it acts improperly or unreasonably in various ways: these ways include ‘disregard of the rules of natural justice, unfairness, taking into account irrelevant considerations, ignoring relevant considerations, bad faith, fettering discretion, attempting to raise taxation, interfering with the free exercise of individual liberties, and so on.’³²⁰ That said, however, there are areas where discretion has been exercised which has had the effect of allowing or causing behaviour that is against the strict letter of the law. Two examples follow of where such discretion has been challenged but upheld by the court.

The first is the discretion of the police not to prosecute. In *R v Commissioner of the Metropolitan Police ex parte Blackburn*³²¹ the court was asked to review a decision by the Metropolitan Police not to prosecute those involved in illegal gambling. The court held *inter alia* that ‘it was the duty of the Commissioner, as also of chief constables, to enforce the law, and though chief officers of police had discretions (eg, whether to prosecute in a particular case, or over administrative matters), yet the court would interfere in respect of a policy decision amounting to a failure of duty to enforce the law of the land; the present instance was one in which the court would have interfered in appropriate proceedings’.³²² Thus, whilst in this case the Commissioner was wrong in failing to prosecute (and he undertook during the hearing to reverse his previous policy decision) and the court reserved the right to interfere by means of mandamus if and when necessary yet ‘it is for the ... chief constable ...to decide ... on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter.’³²³

³¹⁸ [1948] 1 KB 223.

³¹⁹ [1964] AC 40.

³²⁰ Oliver, Dawn ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ in Forsyth, Christopher (ed) *Judicial Review and the Constitution*, Oxford, 2000, 4.

³²¹ [1968] 2 QB 118.

³²² [1968] 2 QB 118.

³²³ Per Lord Denning MR at 136. Affirmed in the judgment of Lord Hoffmann in *R v Chief Constable of Sussex ex parte International Trader’s Ferry Ltd* [1999] 2 AC 418 HL at 441.

Therefore, the allocation of scarce police resources is a justifiable reason for chief police officers not to prosecute offences. This can be seen to have the same effect as permitting illegality, especially if such a decision is made public.³²⁴

The second example again involves Lord Denning and the emergency services. In *Buckoke v Greater London Council*³²⁵ the Fire Brigades' Union sought a judicial determination on whether it was lawful for the driver of a fire appliance to cross a red traffic light in an emergency. The letter of the law stated, at the time, that, whilst drivers of emergency vehicles were permitted not to observe the speed limit³²⁶ there was no statutory discretion given to them to cross a red light. The Chief Officer of the London Fire Brigade had, conversely, issued a brigade order permitting drivers to ignore red lights if there was no risk. In practice this was what normally happened but by so doing a driver would be committing an offence under the Road Traffic Act 1960 (as amended).

Lord Denning noted that, since the Bill of Rights, no one (not even the crown) has had 'power of dispensing with laws or the execution of laws'. He contended, however, that where law had become 'dead letter' the police need not prosecute nor justices punish offences against that law. Citing Blackburn's case he stated that chief police officers were able to make policy decisions about not prosecuting certain offences and that in this case, a policy of not prosecuting fire engine drivers for crossing red lights 'would be a justifiable policy decision so as to mitigate the strict rigour of the law'. He was confident that if such a prosecution did come to court that the justices would give an absolute discharge (but he did not suggest an acquittal, thus not maintaining that the action was anything other than strictly illegal). 'Thus by administrative action, backed by judicial decision, an exemption is grafted on to the law'. He held that the Chief Officer's brigade order was legal. In the end the discretion or dispensation granted by the Chief Officer was temporary, like so many, in that the obligation to stop at red

³²⁴ See also discussion, for example, of the establishment of toleration zones for prostitution. E.g. the Prostitution Toleration Zones (Scotland) Bill unsuccessfully introduced in the Scottish Parliament in 2003 and a 2004 Home Office Green Paper www.timesonline.co.uk/tol/news/uk/article457955.ece. See also the Lambeth Cannabis Warning Pilot Scheme. Report to Metropolitan Police Authority by the Commissioner dated 26 September 2002 www.mpa.gov.uk/committees/mpa/2002/020926/17.htm

³²⁵ [1971] 2 All ER 254 CA.

³²⁶ By s 79 of the Road Traffic Regulations Act 1967.

lights in all cases was removed by subsequent legislation in 1975.³²⁷ This judgment builds on Blackburn's case in that it not only permits the police effectively to tolerate illegal behaviour by taking decisions not to prosecute³²⁸ but also allows others in authority to direct their subordinates to disobey laws which they consider either to be dead letter or to be inopportune in some way.³²⁹

Ministerial Dispensations

Ministers of the Crown possess and exercise a variety of dispensing powers granted to them under legislation. These powers are delegated but are clearly dispensatory. Examples include the ability of the Secretary of State to grant a dispensation on the advice of the local authority exempting a small zoo from all or part of the Zoo Licensing Act 1981³³⁰ and dispensations from Fireworks Regulations under the Fireworks Act 2003.³³¹ Ministers are accountable to Parliament, as always, for the exercise of their powers. The following are some more detailed examples of this type of dispensation.

Marriage Validity Orders

The Lord Chancellor has the power to issue a declaration of validity of a marriage in cases where validity is doubtful. These powers were conferred on the Home Secretary by the Marriages Validity (Provisional Orders) Acts 1905³³² and 1924³³³ and transferred to the Lord Chancellor by Order in Council in 2001.³³⁴ The 1905 Act enabled the minister 'in the case of marriages solemnised in England which appear to him to be invalid or of doubtful validity by reason of some informality, [to] make [an order] for the purpose of removing the invalidity or doubt.' Section 1 of the 1924 Act added the provision that, in making such an order, the minister 'may include such supplemental, incidental and consequential provisions, including provisions for relieving from liability ministers who may have solemnized the marriages to which the

³²⁷ Amended rule reproduced in Twining, William and Miers, David, *How To Do Things With Rules* 4th edn. London 1999.

³²⁸ See *Julius v Bishop of Oxford* discussed in Chapter 9 below.

³²⁹ See evidence of toleration of illegal ritual practices, particularly by Bishops Creighton and Winnington-Ingram in the late 19th and early 20th centuries in the Diocese of London, e.g. RCED PP 1906 vol xxxiv paras 20738 and 20839.

³³⁰ *Halsbury* vol 2(1) para 750.

³³¹ *Halsbury* vol 17(2) para 1015.

³³² 5 Edw 7 c 23.

³³³ 1924 c 20.

³³⁴ Transfer of Functions (Miscellaneous) Order 2001 (SI 2001 / 3500 Art 8 Sch 2).

order relates, as appear to him to be necessary or expedient.’ The minister must publish notice of the making of such an order and take into account any objections raised.³³⁵

Few orders have been made under this provision. A request under s 1 of the Freedom of Information Act 2000³³⁶ produced details from the Department of Constitutional Affairs about three such orders. All were made after errors in the preliminaries to marriage. The most recent was the Marriages Validity (Harrogate District Hospital) Order 2003³³⁷ in which an order was made to remove any doubt as to the validity of a marriage solemnised just before the death of the groom, where there had been no time to obtain an Archbishop’s Special Licence. The order stated that the marriage ‘shall be deemed to have been as valid as if it had been solemnized on the authority of a special licence of marriage granted by the Archbishop of Canterbury and shall be registered accordingly.’

The exercise by the Lord Chancellor of this retroactive validation of marriage has many of the hallmarks of economy and appears to be making valid something which otherwise would not be valid. However, the power to make such an order is not inherent in the office of the minister (whichever minister of the crown holds the power) but delegated by Parliament.

Tax Concessions

Her Majesty’s Revenue and Customs has hitherto frequently granted concessions in the calculation and collection of tax revenue. Such concessions have been extra-statutory and have resulted in individuals or classes of tax payer paying less tax than they might otherwise have done had the statute been rigidly applied.³³⁸

The practice has been criticised in the courts and has been judicially likened to a dispensation. In *Vestey and Others v Inland Revenue Commissioners (No 2)* ³³⁹ in the High Court, Walton J questioned the very basis of the Commissioners of Inland Revenue’s powers to make extra-statutory concessions, suggesting that changes in tax

³³⁵ S 2.

³³⁶ 2000 c 36.

³³⁷ SI 2003/1237.

³³⁸ *Halsbury* vol 23(1) reissue para 28.

³³⁹ [1979] Ch 198.

law should be made by Parliament and applied by the Commissioners. He cited³⁴⁰ a Canadian judgment wherein the Court of Appeal in Manitoba held that ‘the Crown may not, by executive action, dispense with laws. The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.’³⁴¹ Lord Edmund-Davies, in *Vestey*’s case in the House of Lords, quoted Mr Justice Walton favourably and even referred to the Bill of Rights, thereby agreeing with Walton in his likening of such concessions to the sort of dispensations meted out by James II and stamped out in 1688. However, he also referred to other authorities, for example, Donovan LJ, who observed³⁴² ‘This is a difficult code to administer, and practical considerations no doubt justify at times some departure from strict law for the common convenience of the revenue and the taxpayer.’³⁴³

Latterly such concessions have been considered as proper exercises of managerial discretion.³⁴⁴ Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd*³⁴⁵ stated that ‘no court considering this evidence could avoid reaching the conclusion that the Board and their inspector were acting solely for “good management” reasons and in the lawful exercise of the discretion which the statutes confer on them’.³⁴⁶ However, the possibility of unfairness was brought up by the courts on a number of occasions³⁴⁷ and the necessity for retaining such a discretion when Parliament had the option of renewing or amending tax law in every year was questioned by Viscount Radcliffe³⁴⁸ and Lord Wilberforce, who observed that ‘... administrative moderation ... is ... no real substitute for legislative clarity and precision.’³⁴⁹

³⁴⁰ At 204.

³⁴¹ *R v Catagas* [1978] 1 WWR 282 at 287.

³⁴² In *F.S. Securities Ltd. v. Inland Revenue Commissioners* [1963] 1 W.L.R. 1223, 1233.

³⁴³ [1980] AC 1148 at 1195.

³⁴⁴ *Halsbury*, vol 23(1) para 28. *R v Inland Revenue Commissioners ex parte Fulford-Dobson* [1987] STC 344.

³⁴⁵ [1981] STC 260.

³⁴⁶ At 269.

³⁴⁷ E.g. Lord Scarman in *Preston v IRC* [1985] STC 2 282 at 298 and Lord Edmund-Davies in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 at 1196.

³⁴⁸ *Inland Revenue Commissioners v. Frere* [1965] A.C. 402 at 429. Quotation cited by Lord Edmund-Davies in *Vestey*, at 1195.

³⁴⁹ *Inland Revenue Commissioners v. Bates* [1968] A.C. 483 at 521.

Extra statutory concessions are published from time to time.³⁵⁰ John Tiley considers them to be ‘almost legislative in form’.³⁵¹ However, they differ from statutory provisions in that ‘the Revenue can withhold the benefit of the concession if it is so minded without direct legal – as distinct from political or administrative – consequences.’³⁵² The Revenue itself states that ‘Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.’³⁵³

Tax concessions, therefore, bear many of the hallmarks of dispensations or exercises of economy – the Revenue’s claim to be exercising ‘good management’ being a direct claim to the same principle that undergirds the ecclesiastical exercise of economy. That claim is that sometimes the rigid application of the law is not in the best interests of the parties involved, or of justice or, in the case of the economy of the church, of salvation. However, the controversy surrounding extra-statutory concessions shows a tension in the administration of the law. On the one hand the law must be clear and applied fairly and impartially and on the other hand those exercising executive authority find, in the case of revenue collection as in other cases, that a certain flexibility in application of the law is necessary for the law to achieve its ultimate aim. In addition, some extra-statutory concessions are temporary and are either absorbed into positive law through statutory revision, are time limited or become obsolete as the relevant circumstances change.³⁵⁴

Conclusion

Lord Mansfield stated that ‘The great object in every branch of the law... is certainty’.³⁵⁵ It is certain that if all judges had the power in any case to overturn or not apply statute law then the law would not be certain, judgment could rely on judicial whim or the subjective moral judgment of a particular judge. Such a situation could

³⁵⁰ E.g. HMRC booklet IR1.

³⁵¹ Tiley, John *Revenue Law*, 5th Edn, Oxford, 2005, 58.

³⁵² Tiley (2005), 59. Cases referred to are *R (Wilkinson) v IRC* [2003] EWCA Civ 814; [2003] STC 1113 and *Al Fayed v Adv General for Scotland* [2004] STC 1703.

³⁵³ HMRC booklet IR1, 31 August 2005, 2.

³⁵⁴ E.g. Concession A2 regarding Meal Vouchers became statutory under s 89 of the Income Tax (Earnings and Pensions) Act 2003.

³⁵⁵ *Milles v Fletcher* (1779) 99 ER 151 at 152.

also lead to a lack of consistency of treatment of similar cases. Equitable remedies, based historically in part on higher principles such as natural justice, are still applied by the courts but their application is dependent on the application of precedents rather than the invention of new remedies or new principles. There is, however, a considerable latitude of judicial discretion in the application of principles to concrete situations.

That said, there is a considerable history of dispensing from the law within the English legal system notwithstanding the provisions of the Bill of Rights 1688. The Bill of Rights did not absolutely remove all dispensing power but it did remove the dispensing power of the monarch acting alone and had the effect of making dispensation only available subject to Parliamentary authority and scrutiny.³⁵⁶ Many current statutes give ministers or others the authority to dispense with observance of the law, but the exercise of these powers are always subject to judicial review and parliamentary scrutiny. Even the exercise of remaining prerogative powers can be subject to scrutiny when those powers are exercised by a minister on behalf of the crown.³⁵⁷ An early principle of dispensation in canon law was that the legislator had the power to dispense with its own laws. This principle was seen in *Godden v Hales* with the assumption that the legislator (who could also dispense) was the monarch. Since 1688 it has been assumed that the legislator is the monarch in Parliament and it is Parliament that dispenses or authorises others to dispense. The Bill of Rights did not remove dispensation altogether but rejected the notion that it was a power inherent in the office of the monarch. Constitutional development has strengthened, entrenched and formalised this position. In the Church, however, as will be seen in succeeding chapters, there remains a notion that there is a power of dispensation or economy inherent in the office of the bishop.

It has also been shown that at the margins of the law those with executive authority enjoy considerable discretionary powers which are not necessarily statutory, indeed they can sometimes be contra-statutory,³⁵⁸ but which have enjoyed the protection of the

³⁵⁶ E.g. the Lord Chancellor's exercise of *economy* in retroactive validation of questionable marriages is subject to Marriage Validity Orders being laid before Parliament prior to their coming into force.

³⁵⁷ E.g. the Attorney General is accountable to Parliament post facto after entering of a *nolle prosequi* in a case.

³⁵⁸ E.g. the dispensing power of the Chief Fire Officer highlighted in *Bucocke's* case.

court because they are *inter alia* sensible, just, necessary or examples of ‘good management’.

Ladislav Örsy considered, when comparing equity with Aristotle’s concept of *epieikeia* that ‘legal positivism cannot accept the idea of *epieikeia*, since it would make the validity of a decision depend on the virtue of justice.’³⁵⁹ This concern is also seen, for instance, in the confusing judicial dicta surrounding extra-statutory concessions granted by HMRC.

The law of England and Wales, therefore, is not immune to the principle that some flexibility is necessary in the application of the law if the aims of that law and the good of individuals and society requires it.

³⁵⁹ Örsy (1985), 42. He goes on to say that ‘such prejudice, however, should not operate in the field of canon law.’

PART III - THE CHURCH OF ENGLAND

Chapter 7 - Dispensation in the Church of England

The Development of Dispensing Power since The Ecclesiastical Licences Act 1533.

Dispensations were part and parcel of the ecclesiastical law in pre-Reformation England. The development of such dispensations up to the sixteenth century gave certain dispensing powers to bishops in their dioceses, but the granting of dispensations in more serious matters was reserved to the Holy See. The Pope's power in these matters was habitually exercised by papal legates.³⁶⁰ During the Reformation appeals for dispensations that were habitually referred to Rome were henceforth to be referred to the Archbishop of Canterbury. New dispensations or dispensations that were previously to be had for a fee greater than £4 needed the sanction of the King in Council. The areas in which such dispensations were granted have also been explored above and can generally be described as either strictly ecclesiastical (e.g. dispensations concerning ordination, presentation to benefices etc) or at least touching the internal life of the Church (e.g. dispensations concerning marriage without which communicant status could have been affected). The Ecclesiastical Licences Act did not confer on the Archbishop of Canterbury a power generally to dispense with the law of England.

The Ecclesiastical Licences Act, whilst concentrating on the transfer of dispensing powers previously held by the Pope to the Archbishop of Canterbury, preserved the rights of the Archbishop of York and of diocesan bishops to grant such licences and dispensations as they had hitherto been accustomed to do.³⁶¹ The business of dispensations in the Church of England carried on in the centuries following the Reformation, Elizabeth I having restored the position to that established by her father in 1533, doing away with changes made by Edward VI and Mary I. The right to grant dispensations, given a basis in statute law by this Act, has been further embedded in the law of the Church of England by statute and canon.³⁶²

³⁶⁰ See Ecclesiastical Licences Act 1533 s1.

³⁶¹ 25 Henry VIII c.21 s.9.

³⁶² See Can C25 by which a Bishop can dispense a minister from the necessity of residence in his or her parish. See also Pluralities Act 1838 s 28 (repealed in the Statute Law (Repeals) Act 2004) wherein 'permission' (as opposed to 'dispensation') could be granted by the bishop to enable clergy to farm large acreages.

In the first volume of the *Oxford History of the Laws of England*, Richard Helmholz describes the setting up of the Faculty Office in the 1530s and 1540s. He identifies Dr Nicholas Wootton as the first master of the Faculties appointed under the terms of the *ELA*. Early registers of the Faculty Office show dispensations from the calling of banns, for marriage within the prohibited degrees, for plurality and non residence, from abstinence from fasting and ‘to wear the habit of a religious order beneath the garb of a secular priest’.³⁶³

E F Churchill’s 1919 analysis of Tudor and Stuart dispensations points to dispensations having been granted in the reigns of Henry VIII, Edward VI and Elizabeth I³⁶⁴ for the holding of benefices in plurality, for non-residence in one’s benefice, for both plurality and non-residence, for holding a benefice without ordination (such a dispensation was for postponement of ordination), for bishops, abbots, priors and monks to hold benefices, for secular dress to be worn by clerks, for those below canonical age to be ordained or to hold benefices, for the appointment of under-age abbots, priors, abbesses and prioresses, for the ordination of those of illegitimate birth (and double dispensations for the ordination of those below age and of illegitimate birth), for sons to succeed to their father’s livings, for marriage within the prohibited degrees, including dispensations for marriage between godparents and godchildren, between a person and their late spouse’s godchild or their godchild’s parent, and for the marriage of clergy and the legitimization of their children.³⁶⁵

The document³⁶⁶ from which this information is gleaned, which Churchill dates to the first year of the reign of Elizabeth (1558-9), is a composite document, written in several hands. The first part lists 98 separate dispensations with the fee payable, although number 65 has been left blank. The first part is not subscribed. The second part, itself written in different hands, lists 217 dispensations.³⁶⁷ The signatures of

³⁶³ Helmholz, Richard H *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford, 2004, 212. Helmholz expresses surprise at this last dispensation.

³⁶⁴ The subject matter detailed points to this list being of early origin. The necessity for dispensations e.g. for abbots to hold benefices would largely have disappeared after the dissolution of the monasteries in the mid-1530s, even though some religious houses were re-founded in the Marian restoration.

³⁶⁵ Churchill, E F, ‘Dispensations under the Tudors and Stuarts’, (1919) xxxiv EHR 409, 411-2.

³⁶⁶ SP 16/499 f221 ff.

³⁶⁷ Dispensation is the most common description of what is granted. Other descriptions include licence, indulgence, absolution and exemption.

Archbishop Parker, Lord Keeper Bacon, the Marquess of Winchester (who was Lord Treasurer), James Dyer (Chief Justice of the Common Pleas) and another³⁶⁸ are found at the bottom of three of the pages. Churchill takes these signatures to indicate that this is an Elizabethan document and assumes it to be coincident with the revival of the 1533 Act in 1559, with the 98 dispensations being a copy of the 1533 list and the 217 later additions. However, it is equally possible that the signatures were also copied and that the whole document is of later date – particularly as the document is now bundled together with a series of manuscripts and papers (mainly of evidence) relating to the trial of Archbishop William Laud in 1644. That said, however, Laud's papers were seized by his adversary William Prynne by order of 31 May 1643; Laud continued to carry out a number of his archiepiscopal duties (particularly those that could not easily be delegated) during his imprisonment in the Tower from 1641 and, if this list of dispensations and fees was a working document dating from the sixteenth century then it is possible that it was among those papers seized in 1643, which could explain its presence in that particular volume of the State Papers.³⁶⁹

The subject matter in the various lists argues in favour of the document being composite. Whilst references to dispensations for religious to hold benefices indicates an early date for the origins of the document, the reference to the marriage of clergy argues for a later date. Clergy were not permitted to marry until the reign of Edward VI.³⁷⁰ The fact that dispensations were granted in the reign of Elizabeth I to enable priests to marry and to legitimate their children is important in that the Edwardine statutes permitting clerical marriage were repealed by Mary I³⁷¹ but were not reinstated until the Marian statute was itself repealed in 1603.³⁷² Thus Churchill is correct in stating that, until 1603, the possibility of such a dispensation was the only legal protection of the children of the clergy.³⁷³ What this document confirms, however, is the continuance of dispensations, in the familiar situations, granted by the Archbishop of Canterbury, from 1533 through, possibly, to as late as 1643.

³⁶⁸ The name appears to be Caffyn.

³⁶⁹ Anthony Milton, 'Laud, William (1573–1645)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, Oct 2007 [<http://www.oxforddnb.com/view/article/16112>, accessed 21 Nov 2007]

³⁷⁰ Clergy Marriage Acts 1548 (2 and 3 Edw 6 c 21) and 1552 (5 and 6 Edw 6 c 12).

³⁷¹ Repeal of Acts Act 1553 (1 Mary Sess 2 c2).

³⁷² By a wide ranging Continuation of Acts Act 1603 (1 Jac I c 25).

³⁷³ Churchill (1919), 412.

Churchill goes on to compare the lists of 98 dispensations and 217 ‘uses’³⁷⁴ with those dispensations that passed through Chancery. Three chancery rolls are examined; 37 Eliz (1594/5), 13 Chas I (1637) and 4 William and Mary (1691/2). The first of these rolls contains seventy entries in a variety of categories. The most popular are dispensations for plurality, for sons succeeding to their fathers’ benefices, for eating meat on fast days and for the union of benefices. Others include the erection and consecration of new churches and cases involving dispensation and the remission of a penalty, including the pardon and remission of the penalty of a clerk for holding a canonry and prebend without ordination combined with a retrospective dispensation for him to do the same. Churchill also points out the remission of a penalty for a clerk who (inadvertently, it was claimed) committed the offence of simony. This was illegal in the pre-Reformation canon law³⁷⁵ and was specifically outlawed by the Simony Act 1589.³⁷⁶ The 1589 Act did not contain provision for the remission of a penalty by dispensation, and Churchill points out that in *Godden v Hales*³⁷⁷ counsel argued that in the case of an offence of simony contrary to the Act ‘neither the King’s pardon after, nor his dispensation before, can take away the disability.’³⁷⁸ However, the Chancery Roll appears to show otherwise in practice.

The second Chancery Roll, from 1637, shows the grant of ninety licences, eighty-seven of which fell into the categories of dispensations enabling plurality, sons succeeding their fathers in benefices and the eating of meat on fast days. The three others were pardons relating to a justifiable homicide and an assault (although Churchill does not explain why these pardons were issued by means of a dispensation from the Archbishop of Canterbury – it may have been a dispensation to enable the ordination of

³⁷⁴ The dispensations are likely to be those dating from 1533, the ‘uses’ are also dispensations and are variations on the first list. All the dispensations fall into the smaller number of broad categories described. The proliferation of distinctions is largely to do with a complex scale of fees whereby e.g. the fee goes up as the number of benefices held in plurality goes up and the fee goes up depending on the number of years below canonical age the person concerned is.

³⁷⁵ Universally condemned since the Acts of the Apostles but, according to Phillimore (1895), 854, the Council of Chalcedon and the Third and Fourth Lateran Councils (1179 and 1215) ‘which have frequently been recognized by the temporal courts as forming an integral part of the ecclesiastical laws of England’, specifically condemned it.

³⁷⁶ 31 Eliz I c 6.

³⁷⁷ 89 ER 1050.

³⁷⁸ At 1050.

a person who would otherwise be disabled by having committed such a felony)³⁷⁹ and a dispensation enabling a deacon to take possession of a benefice prior to ordination to the priesthood.³⁸⁰

The third Chancery Roll, from the reign of William and Mary in 1691/2, lists dispensations only for plurality and for sons succeeding their fathers.

The Chancery Rolls are interesting in that they show the procedure for granting a dispensation, recording the dispensation issued by the Archbishop and the letters patent issued under seal confirming that such a dispensation is lawful. This practice, according to Churchill, continued in the reign of William and Mary (i.e. after the Bill of Rights) but from the reign of Queen Anne the letters patent were no longer issued.³⁸¹ The Chancery Rolls only show those dispensations attracting a fee of over £4, which means that a number of dispensations found in Archbishops' Registers do not appear there. Notably absent from the lists on the Chancery Rolls, however, are dispensations to do with marriage. This is not because they were valued at less than £4. Churchill points out that, in the Elizabethan list of dispensations some dispensations for marrying within prohibited degrees attracted a fee of £80.³⁸² However, many of the more common dispensations were considerably cheaper than that.

W H Frere, who did not, it seems, have access to the list of dispensations discovered by Churchill, nor to Churchill's 1919 article, published a survey of dispensations granted in the *Palmer Report*. This shows that the major categories of dispensations drawn from before the Reformation continued even as late as the late seventeenth century. Dispensations granted included those given to clergy for holding benefices or preferments in plurality, for ordination when below canonical age or outside of prescribed times, for the ordination of those of illegitimate birth or with physical deformities and for ordination to the diaconate and priesthood on the same day. Dispensations were also given to lay people to hold benefices *in commendam* and to eat meat on fast days. Frere states that Archbishop Matthew Parker habitually granted

³⁷⁹ See chapter 8 below for discussion of the felonious or otherwise nature of accidental or justifiable homicide.

³⁸⁰ Churchill (1919), 413.

³⁸¹ Churchill (1919), 414.

³⁸² For marriage within the second degree of consanguinity on both sides. Churchill (1919), 412.

dispensation for commendam,³⁸³ marriage without banns, marriage in times prohibited and to defer ordination. He also granted faculties for fabric and ornaments.³⁸⁴ Frere points out that Parker also granted dispensation in exceptional matters ‘that is, with civil sanction’ but does not elaborate. Parker’s successor, Edmund Grindal, according to Frere, examined the areas in which dispensations were granted in 1576 and submitted to the Privy Council a list of those that should continue and those that should not. Frere also points to a table of fees published by Archbishop Grindal’s Faculty Office that sets out fourteen matters for which dispensations or licences are issued.

Published Acts of the Privy Council are not complete. In the record of a meeting on 15 January 1579 at which the Council considered which dispensations should be retained and which abolished in Ireland, reference is made to a meeting on 20 June 1576 (presumably the meeting to which Grindal submitted his list) but the minute of that meeting is not available. It is the list given in the 1579 meeting to which Frere clearly refers.

At the 1579 meeting some dispensations were to be abolished³⁸⁵ as ‘not agreeable to Christian Religion in the opinion of the Lords of the Council.’³⁸⁶ Contrary to Frere’s view, it seems that several very common dispensations, far from being confirmed, were abolished in Ireland. Those abolished were for triality and the holding of multiple benefices, for children and young men to receive ecclesiastical promotions, dispensations *perinde valere* (whereby the appointment of an otherwise incapacitated clerk to a preferment was made valid where it would otherwise be void), the taking of all orders of ministry at one time, dispensations to be ordained outside one’s own diocese by another bishop (except in the diocese of one’s birth or a diocese in which one had usually resided for two years) and licences to marry without banns and outside one’s parish of residence. It is abundantly clear that all of these dispensations were customarily had in England before and after this date.

³⁸³ The holding of a benefice, for the purposes of receiving its revenues, by a bishop, priest or lay person.

³⁸⁴ *Palmer Report*, 56.

³⁸⁵ Abolished in England by Order in Council 20 June 1576, extended to Ireland by order 15 January 1579.

³⁸⁶ Acts of the Privy Council 15 January 1579.

The Council did decide that certain dispensations, which fell to them to be considered should be allowed. These were Bishops holding other preferments where the value of their bishopric is small (called commendam in a marginal note in the MS record), plurality (to be held only by learned men, who must reside for eight weeks per year and preach thirteen times per year in the benefice in which they were not resident), legitimation, non residence (for a short time for the benefit of health), eating meat on fast days, the creation of notaries and dispensations *de non promovendo*, allowing a lay person who is a Doctor of Civil Law to hold some sort of ecclesiastical preferment.

Frere points to a number of other sources³⁸⁷ referring to the granting of licences and dispensations under the 1533 Act. They all fall into the same broad categories of dispensing from bars to ordination, from the ban on plurality and non-residence and from the normal rules governing marriage. It is notable, that almost all of these dispensations are no longer necessary, their having been superseded by positive law.

Plurality

The holding of two or more benefices or preferments in plurality was a typical field in which dispensation was granted. Canon 29 of the Fourth Lateran Council 1215 stated that a papal dispensation was required for plurality and enacted that otherwise, on presentation to a second benefice, appointment to the first automatically lapsed. Such ‘cessation’ remains as a way by which a benefice may become vacant in the Church of England. Such dispensations, papal up to 1533 and archiepiscopal thereafter, were frequent both before and after the Reformation. Plurality was sometimes rightly seen as an abuse – whereby clergy received incomes from a number of different benefices and preferments and, consequently, did not fulfil the functions of all (if any) of them. John Williams, for instance, in the period that he held the post of Lord Keeper under James I was also Bishop of Lincoln, Dean of Westminster and held other benefices and prebends in addition.³⁸⁸ In the early eighteenth century the difference in the value of ecclesiastical posts meant, first, that senior churchmen used plurality to make up the level of their income (e.g. in 1762 the Bishop of Bristol’s income was only £450 per year but was topped up by the revenues of a Canonry of St Paul’s and a London parish,

³⁸⁷ E.g. Godolphin, Mocket and Ougton.

³⁸⁸ See below, chapter 8.

which he also held³⁸⁹). At the other end of the spectrum, the revenue of a large number of parochial benefices was too little to provide an adequate living income. Plurality was, therefore, a necessity as well as an abuse.

The abuse of the system, as well as the related problem of non-residence brought about reform in the form of legislation. The legislation, enacted by Parliament, had the effect of limiting the discretion of the Archbishop of Canterbury in granting dispensations for plurality. However, it did not take away the Archbishop's power altogether and, in the nineteenth century, an Archbishop's dispensation remained the method whereby the continuing prohibition on plurality was waived.

The Pluralities Act 1838³⁹⁰ placed limits on the situations in which dispensation could be granted for plurality; generally only two benefices could be held together,³⁹¹ parishes with large populations or large incomes could not be held in plurality³⁹² and, unless good reason was shown to the contrary, benefices held in plurality were to be within ten miles of one another.³⁹³ The Act also contained new provisions (replacing earlier statutory provisions³⁹⁴) for the uniting of small and poorly endowed neighbouring benefices 'with advantage to the interests of religion'.³⁹⁵ This further reduced the need for dispensations for plurality, replacing dispensation with a process resulting in the union of the benefices by Order in Council – a method which still pertains today.³⁹⁶

The Act of 1838 also regulated the situations in which dispensations could be granted for non-residence in a parish or parsonage house.³⁹⁷ The power to grant such dispensations was given (in some cases) to diocesan bishops.³⁹⁸

³⁸⁹ Rack, Henry *Reasonable Enthusiast* 1st Edn., London, 1989, 11.

³⁹⁰ 1 and 2 Vict c 106.

³⁹¹ S. 2. However, there were some exceptions, e.g. Archdeacons were able to hold two benefices and an Archdeaconry.

³⁹² Ss 4 and 5.

³⁹³ S. 3.

³⁹⁴ 37 Hen 8 c21 and 17 Chas 2 c3.

³⁹⁵ Pluralities Act 1838 s16.

³⁹⁶ Pastoral Measure 1983 s 18.

³⁹⁷ Ss 32-50.

³⁹⁸ S. 43.

The provisions of the Pluralities Act 1838 were tightened up by the Pluralities Act 1850, the distance between parishes that could be held in plurality being reduced to three miles by road.³⁹⁹ Further restrictions were placed on the holding of Cathedral and University posts in plurality and on the holding of honorary canonries⁴⁰⁰ and the restriction on the maximum revenue of a united benefice was lifted.⁴⁰¹ However, the provisions of the 1838 Act as to the dispensation necessary for plurality remained. The Pluralities Acts Amendment Act 1885 made further minor amendments to the conditions of distance and revenue.⁴⁰²

Thus, during the nineteenth century, Episcopal or Archiepiscopal dispensations were necessary for the holding of benefices in plurality or for non-residence in a benefice but the union of parishes by Order in Council removed the need for dispensation in many cases. Plurality was allowed in the case of necessity, normally the necessity of pooling the resources of under-resourced benefices to provide an adequate living for an incumbent. It was, however, limited – the limitations being put in place to ensure that adequate ministry was provided (or was able to be provided) within each parish. Thus the higher motive of provision of ministry, rather than the base motive of financial gain, was the core motive behind dispensations for plurality. Plurality is now brought about by Order in Council under section 18 of the Pastoral Measure 1983, removing it from the list of areas in which dispensation is granted. New pluralities ceased to be brought about by archiepiscopal dispensation with the passing of the Pastoral Measure 1968.⁴⁰³

Fasting

Fasting is enjoined by statute⁴⁰⁴ and in the *BCP* on specified days, not least on Fridays and Saturdays and during the season of Lent. Clergy were forbidden by Canon 72 of 1603 from proclaiming or keeping extra fasts (save by the bishop's permission) and certain feast days falling on what would otherwise be fast days removed the

³⁹⁹ 13 and 14 Vict c 98 s1.

⁴⁰⁰ Ss. 5, 6 and 11.

⁴⁰¹ S 8.

⁴⁰² 48 and 49 Vict c 54.

⁴⁰³ *Halsbury* vol 14 online edition www.lexisnexis.com, paras 852-3. Accessed 4 February 2009.

⁴⁰⁴ Phillimore, W, *Phillimore's Ecclesiastical Law*, 2nd Edn, London, 1895, 806. Statutes include Holy Days and Fasting Days Act 1551 (5 and 6 Edw 6 c 3) and other statutes repealed in the nineteenth century.

requirement to fast. Phillimore points out, citing Coke,⁴⁰⁵ that failure to fast, that is, for example, eating meat on a Friday, was punishable by the Ecclesiastical Courts. Coke refers to licences ‘to eat flesh on fish days’⁴⁰⁶, of which the *Palmer Report* provides an example.⁴⁰⁷

Dispensations from fasting were, it seems, granted for reasons of the preservation of the health of the person dispensed. The necessity for obtaining a dispensation from fasting disappeared when a penalty for failing to fast was no longer meted out. Once again, changes in statute law affected the dispensing powers of the bishops and archbishops.

Impediments to ordination

Illegitimacy of birth was a longstanding bar to ordination. Phillimore, writing in 1895, cites a constitution of Otho as an authority⁴⁰⁸ and goes on to refer to ‘several constitutions of Edmund, archbishop,’ that ‘they who are born of not lawful matrimony, and have been ordained without dispensation, shall be suspended from the execution of their office, till they obtain a dispensation.’⁴⁰⁹ Thus a dispensation, whilst necessary, could be back dated. Phillimore goes on to suggest that the bar to the ordination of illegitimates was lifted by the rubrics of the *Ordinal* which laid down the conditions for a bishop’s decision as to whether to ordain a candidate or not. These conditions included being of ‘virtuous conversation’, ‘without crime’ and learned in latin and scripture but did not include being born of married parents. However, the Privy Council in 1579 considered that dispensations were necessary, stating also that they should be used sparingly as ‘bastardes seldome prove profitable members of God’s Church’.⁴¹⁰ Since 1964, the issue has been certain. The revised canons of the

⁴⁰⁵ Coke’s *Third Institute* p.200. ‘Before these late Acts the eating of flesh on Fridaies was punishable in the Ecclesiastical Court, as yet it is, the jurisdiction being saved by the said Acts.’ The Acts were the Abstinence from flesh Act 1548 (2 Edw 6 c 19), the 1551 Act above (5 and 6 Edw 6 c 3), the Maintenance of the Navy Act 1562 (ss 14 & 15) (5 Eliz c 5) and the Continuance of Acts Acts 1584 (27 Eliz c 11) and 1592 (35 Eliz c 7).

⁴⁰⁶ To which he refers readers to the preamble to the Abstinence from flesh Act 1548, subsequently repealed by the Repeal of Obsolete Statutes Act 1856 (19 and 20 Vict c 64).

⁴⁰⁷ Dispensation issued by Archbishop Juxon to George and May Gosnold of Beaconsfield 11 May 1661. *Palmer Report*, 60-61.

⁴⁰⁸ Phillimore (1895), 93.

⁴⁰⁹ Phillimore (1895), 94.

⁴¹⁰ Acts of the Privy Council, 1579.

Church of England make specific reference to illegitimacy not being a bar to ordination.⁴¹¹

Dispensation from ordination in the diocese of one's birth or usual place of residence carried on in the Elizabethan church but was superseded shortly afterwards by the introduction of a process for the issuing of letters dimissory.⁴¹²

The Canons currently in force give to the Bishop and the Archbishop authority to determine the time and place of ordination services, a dispensation from a hard and fast rule no longer, therefore, being necessary. A dispensation or faculty from the Archbishop of Canterbury is still required, however, to enable a person to be ordained deacon below the age of twenty-three or for a twenty-three year old deacon to be ordained priest.⁴¹³ Canon C3 does not purport to confer the power of granting a faculty for such an ordination, rather it is declaratory of the power that the Archbishop of Canterbury possesses. A bishop is, however, given a discretion by the same canon, if he 'shall find good cause' to ordain someone to the priesthood when they have not served a full year as a deacon.

Dispensations were often granted to enable those with physical deformities or disabilities to be ordained. The general prohibition of the ordination of such candidates has at its root the levitical codes of the Old Testament.⁴¹⁴ The *Palmer Report* gives an example of a dispensation to allow the ordination of a person with one eye. The dispensation was granted to the candidate, and had the effect of removing from him what would otherwise have been an impediment to his ordination. Perhaps surprisingly vestiges of this impediment survive in the canons of the Church of England. Canon C4. 2 states that '[n]o person shall be admitted into holy orders who is suffering, or who has suffered, from any physical or mental infirmity which in the opinion of the bishop will prevent him from ministering the word and sacraments or from performing the other duties of the minister's office.' Here, therefore, an absolute bar, dispensable in certain cases, has been replaced by canon with an Episcopal discretion. There is no reference to an avenue of appeal against the bishop's decision.

⁴¹¹ Canons C2.4 and C4.4.

⁴¹² By Canon 34 of 1603.

⁴¹³ Canon C3.

⁴¹⁴ Leviticus 21. 16-24.

Commendam

The holding of a benefice by someone other than the incumbent, for the purposes of drawing its revenues is termed holding *in commendam*. Attention has been paid above to dispensations allowing benefices to be held by lay people and Phillimore points out that *commendam* included the holding of a benefice temporarily by another priest in between incumbents.⁴¹⁵ By the time of its abolition by parliament in 1836⁴¹⁶ the practice had been reduced to a situation where bishops on appointment were allowed to continue to hold their previous benefice, which became automatically vacant on their appointment as a bishop.⁴¹⁷ Dispensations allowing this could be temporary or permanent⁴¹⁸ but all became void when *commendam* was abolished.

Marriage

Those dispensations covered by the *ELA* that still pertain to the Archbishops and Bishops of the Church of England are few in number but remain significant. The largest area of dispensation remains in matrimonial law.

The right of bishops to grant Common Licences to dispense with the necessity of banns of marriage, but not of residence, is further embedded in statute law by virtue of the Marriage Act 1949.⁴¹⁹ Whilst the right is preserved in this Act, bishops are made subject to detailed provisions as to who may or may not be granted such a licence.⁴²⁰ Whilst the incidence of grants of Archbishop's Special Licences is likely to fall with the passing of the Church of England (Marriage) Measure 2008, Common Licences are likely to be unaffected.

The Archbishop of Canterbury retains the power to dispense with the reading of banns of marriage and to dispense with the statutory limitations on the time and place of

⁴¹⁵ Phillimore (1895), 380-1.

⁴¹⁶ Ecclesiastical Commissioners Act 1836 (6 and 7 William 4 c 77 s 18).

⁴¹⁷ "Commendam" The Concise Oxford Dictionary of the Christian Church. Ed. E. A. Livingstone. Oxford University Press, 2006. Oxford Reference Online. Oxford University Press. Cambridge University. 20 November 2007

<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t95.e1333>>

⁴¹⁸ Livingstone (2006), as above. Phillimore (1895), 381.

⁴¹⁹ S. 5

⁴²⁰ S. 16.

marriage ceremonies by the issue of a Special Licence. This is a genuine dispensing power. Whilst recent Archbishops have attempted to lay down guidelines for determining applications before them⁴²¹ they do enjoy discretion in whether or not to grant such licences although there is statutory provision for an appeal against their decision to the Lord Chancellor.⁴²² The dispensing function of the Archbishop of Canterbury is also enshrined in Canon C17.7 of the Canons of the Church of England.

However, the other matters on which early post-Reformation archbishops granted dispensations have largely been superseded by positive law. The character of a dispensation is that it requires a situation where, but for the dispensation, the act or omission concerned would not be legal but where, with the dispensation, it would be legal. Where the law provides for exceptions within itself or where the law grants to specific persons the right to dispense from observance of a particular law then the general dispensing power granted to the Archbishop of Canterbury by the Ecclesiastical Licences Act, whilst not removed, is no longer necessary.

The rules on kindred and affinity were codified in the *Book of Common Prayer* and subsequently revised by statute⁴²³. In the medieval church the number of prohibited unions was greater (see above, chapter 2) but dispensation was possible and commonly granted to enable many of them, not without controversy in the case of the marriage of the future Henry VIII and Katharine of Aragon. In the post-Reformation Church of England the scope of prohibited unions was reduced but the reduced list became absolute and it is not possible for dispensation to be granted to enable a marriage prohibited in the *Table of Kindred and Affinity* as, during the sixteenth century the number of prohibited unions was reduced to what was considered to be prohibited by the law of God. For this reason attempts further to reduce the list (notoriously in the Deceased Wife's Sister's Marriage Act 1907) caused considerable controversy. The

⁴²¹ E.g. Archbishop Carey would only usually grant Special Licences to persons wishing to marry in the chapels of university colleges for five years after the person left the particular college. This limit has been withdrawn by Archbishop Williams. See <http://www.thefacultyoffice.org.uk>.

⁴²² ELA. See also *Halsbury* vol 14. 4th Edn. 1975 para 1023. There is no appeal against the decision of the Archbishop of York or other diocesan bishop to refuse to grant a Common Licence. However, the rules surrounding the granting of a Common Licence are such that it is unlikely in the extreme that such a licence would be refused if the conditions of residence, consent and lack of impediment are met. There is a procedure (see *Halsbury* para 1025) for objections to be made against the grant of a licence by entering a caveat.

⁴²³ Marriage Act 1949 s.1. Amended by the Marriage (Enabling) Act 1960 s.1 (4) and Marriage (Prohibited Degrees of Relationship) Act 1986 s. 1 (6).

Archbishop of Canterbury does not possess the power to permit marriages prohibited by statute.

Lambeth Degrees

One of the powers assumed by the Archbishop of Canterbury under the Ecclesiastical Licences Act was the power to grant degrees. This power is exercised to this day and has recently been extended, but requires some analysis. With certain exceptions (noted below) the Lambeth degree is in practice akin to a degree granted *honoris causa* by a university, without the usual requirements as to residence or examination that would be necessary for an ordinary degree.

The 1533 Act gave to the Archbishop the right to grant those dispensations, grants, faculties, licences etc. that were previously granted by the Holy See. Prior to the Reformation the Pope had granted degrees, including degrees for which the person concerned would not otherwise be qualified and which would not be granted by one of the universities. Such provision enabled those who did not have degrees from a university to take up posts (usually teaching posts) that required such a degree. The Pope accorded such people graduate status not by interfering with or dispensing with the internal rules and mechanisms of the university concerned but by awarding the degree or degree status himself.⁴²⁴ Noel Cox points out that such degrees were granted in England, often in cases where for reasons of political upheaval or ministry in the Church, scholars were prevented from keeping the residence requirements at Oxford or Cambridge. He goes on to state that ‘failure to confer a degree in the particular circumstances would be to work an injustice and might harm the Church by denying her the services of a worthy cleric.’⁴²⁵ Cox is of the opinion that this particular power is as well described as a privilege, giving a favour to an individual for a good reason, as a dispensation, releasing that person from an obligation. However, both acts can be seen to have been present in the award of papal degrees. It is difficult to defend the argument, if the Lambeth (or papal) degree is actually a degree, that the award of a degree conferring on a person the rights and dignities usually conferred by gaining a degree at Oxford or Cambridge does not interfere with the mechanisms of those

⁴²⁴ Cox, Noel, *Dispensations, Privileges, and the conferment of graduate status: With special reference to Lambeth Degrees*, *Journal of Law and Religion*, vol XVIII (2003), 101 at 106.

⁴²⁵ Cox (2003), 107.

universities. Also, if a Lambeth degree is, in point of fact, a dispensation from the requirement to hold a degree then it is difficult to argue that the Lambeth degree is a degree at all. It is significant that the possession of a Lambeth degree would not grant to a person any status within any university.

The *ELA* does not specifically mention the granting of degrees as one of the papal or legatine powers transferred to the Archbishop of Canterbury. Cox, quoting Bishop Gibson, believes that it is included in the term ‘faculty’.⁴²⁶ Since the Reformation a steady stream of degrees, at various levels and in various faculties (Arts, Divinity, Law, Medicine etc) were awarded by successive Archbishops. Cox points out that, in continuity with the medieval era, some of these grants were privileges or honours (e.g. the grant of a BD to the chaplain to Archbishop Abbot) and others were more akin to dispensations (e.g. the grant of BD degrees to priests appointed to canonries of St Paul’s, the statutes of which restricted such canonries to those who held BD or DD degrees).⁴²⁷ In such a situation it could be suggested that it is the statutes of the Cathedral to which the dispensation was applied, rather than the regulations of the university or universities. Blackstone comments that Lambeth Degrees are awarded ‘in prejudice of the two universities’ but points out that the holders do not acquire all the rights and privileges of the holders of regular university degrees.⁴²⁸ Later legislation confirmed that holders of Lambeth Medical degrees are not eligible to practise medicine or surgery on the strength of that degree.⁴²⁹

Seemingly seeking to correct Archbishop Lang’s 1937 claim to be a ‘one man university’,⁴³⁰ the Archbishop’s Faculty Office states that ‘the Archbishop is not a university’ and goes on to state that ‘the degrees he awards are full degrees of the Realm’⁴³¹ (i.e. recognised as degrees by the law of the realm).

In the twentieth century Archbishops began to use their powers to confer awards on the basis of examined work. This has recently been extended to include research degrees and the Archbishop of Canterbury is recognised and approved as a ‘recognised body’

⁴²⁶ Cox (2003), 115.

⁴²⁷ Cox (2003), 116-7.

⁴²⁸ Blackstone’s Commentary, vol 1 (15th Edn) Ed Edward Christian, London, 1809, 381.

⁴²⁹ Medical Act 1983, ss 3 and 4. *Halsbury* vol 14 para 433.

⁴³⁰ 87 HL Official Report 838.

⁴³¹ www.facultyoffice.org.uk/Degrees.html accessed 30 November 2007.

for the award of degrees by the Secretary of State.⁴³²

In a recent published statement, Archbishop Williams explained:

The Archbishop uses these powers traditionally to confer doctorates and masters' degrees *honoris causa* on worthy recipients. Within this legal framework Archbishop Randall Davidson established the Lambeth Diploma examination in 1905 as a means of allowing women access to a theological qualification and thus to ministry. A further extension opened the examination to men, and in 1990 Archbishop Robert Runcie established the MA degree by thesis. The management of this educational provision has been the responsibility of the Committee of the Archbishop's Examination in Theology, its members appointed by the Archbishop.

In my judgement it is time for a further extension of the Lambeth provision into the field of higher research degrees, MPhil and PhD.⁴³³

It is thus possible to conclude that whilst the Archbishop's degree awarding powers were used historically as a means of dispensing a person from the regulations of the universities, or possibly of other institutions, for some good reason, the powers have now developed in such a way as the degrees awarded are either equivalent to honorary degrees or earned degrees. The *ELA* remains the primary source of the Archbishop's authority but the dispensing aspect of that authority has been lost.

Modern Ecclesiastical Dispensations

The Bill of Rights 1688 denied any right that the monarch enjoyed in his or her personal capacity to dispense with or from the law. Despite this, dispensation and discretion remain part of English law with the proviso that, in most cases, the authority to dispense comes from Parliament by statutory grant or recognition rather than from any inherent authority that a person may possess. The reforms of the Church of England in the twentieth century (namely the introduction of synodical government and the absorption of the convocations into this system, legislation by measure and the major revision of the Canons of the Church of England) can be seen to have followed the pattern of secular law as regards dispensation. A large number of exceptions, discretions and dispensations are built into canons and measures (which themselves have parliamentary authority). Whilst the bishop remains the principal authority for

⁴³² Education (Recognised Bodies) (England) Order 2007, SI 2007/2688 in force 1 October 2007.

⁴³³ *Archbishop's Examination in Theology Research Degrees Programme, Introduction by the Archbishop of Canterbury*, 3 August 2007.

dispensation, other persons, for instance parochial clergy, are empowered to dispense with certain provisions in the law.

Dispensation in the Canons of the Church of England

A survey of the Canons of the Church of England shows that various individuals and classes of persons have a canonical authority to vary the law as it affects the church and to allow others not to observe particular laws. Where these are not either (a) restatements of the general law or (b) delegated legislation under, for example, the Church of England (Worship and Doctrine) Measure 1974, they are examples of the Queen in Convocation (or Synod) making additional rules binding on the clergy by canon, and also by canon allowing a power to dispense from them.

The following survey of the Canons of the Church of England brought about at or since the revision of the canons in 1964 categorises dispensing power contained in the canons in four ways.

First, there are powers that stem from pre-Reformation canonical rules. Such dispensations are recognised as having either satisfied the test laid down in *Bishop of Exeter v Marshall* of having been pleaded since the Reformation or as having survived the Reformation by virtue of *ELA* s 9.

Second, there are canons restating a dispensing power or discretion granted by parliament, either by act or measure.

Third there are canons introducing new dispensations made by virtue of powers delegated to the synod by parliamentary authority, for instance, by the Worship and Doctrine Measure 1974 or by the Ecumenical Relations Measure 1988. Such canons touch on areas affecting the clergy, who, unlike the laity, are bound by canons.

Fourth, there are a number of canons that appear to grant powers of dispensation without either being restatements of previous laws, having parliamentary backing or stemming from delegated legislation. Such powers could, arguably be void under the

terms of the Submission of the Clergy Act 1533 s 3 as being contrary to the laws of the realm.

Canon B5.1 allows a minister to vary an authorised order of service provided that the variation is ‘not of substantial importance’. This is an example of discretion, rather than dispensation, but does result in otherwise normative liturgical requirements being set aside. This canon was promulgated in 1975 under the powers delegated by the Worship and Doctrine Measure.

Canon B12.3 permits a bishop to dispense from the need for ordination before distributing the sacrament of the Lord’s Supper. The regulations on administration of Holy Communion passed by the Church Assembly in 1969,⁴³⁴ which may have fallen foul of the Submission of the Clergy Act’s ban on the making of canons contrary to the law, state that the bishop has discretion in whether or not to grant permission for a lay person to distribute the bread and wine at Holy Communion. This paragraph is, however, a very good example of episcopal dispensation. The canon does not state that lay persons may distribute communion when licensed by the bishop. It states that

No person shall distribute the holy sacrament of the Lord’s Supper to the people unless he shall have been ordained in accordance with the provisions of Canon C 1, or is otherwise authorized by Canon or unless he has been specially authorized to do so by the bishop acting under such regulations as the General Synod may make from time to time.

Regulations made by the General Synod since 1974 are made under powers delegated by the Worship and Doctrine Measure. The regulations made in 1969 may well have fallen into the trap of providing a new ecclesiastical dispensation contrary to the provisions of the *ELA* and the Submission of the Clergy Act.

Paragraph 4 of the same canon states that, subject to any episcopal directions in the matter, lay people may read the epistle or the gospel or the prayers of intercession at Holy Communion at the invitation of the minister. The dispensation is required for a lay person to distribute the elements but not to read the lessons or the prayers.

⁴³⁴ The Canons of the Church of England, Sixth Edition, 2000, 188.

Canon B14A is entirely about the powers of a minister and parochial church council or a bishop to dispense with the need for morning and evening prayer to be said or Holy Communion to be celebrated in parish churches. Section 1 (a) allows for the minister and PCC to dispense with the requirements of Canons B11 and B14 on an occasional basis. Section 1 (b) allows the bishop to dispense with the same requirements on a regular basis at the request of the minister and PCC provided that the bishop has regard to the frequency of such services in other parts of the benefice⁴³⁵ and that he ensures that no church ceases to be used for public worship.⁴³⁶ This canon, concerning worship, is made under the authority of the Worship and Doctrine Measure.

Canon B16 directs that ‘notorious offenders’ who should be barred from communion may not be so barred unless and until the bishop (or other ordinary) has so directed. The minister is, however, given power to dispense with the need for such direction in cases of ‘grave and immediate scandal’⁴³⁷ but should refer the case to the bishop and obey his order and direction. This provision is based on the common law rules on excommunication.

Canon B18.1, made under the authority of the Worship and Doctrine Measure, enables the Bishop to dispense from the necessity for a sermon to be preached each Sunday in every parish church.

Canon B23.4 permits the minister to dispense with the requirement for all godparents to be confirmed ‘in any case in which in his judgment need so requires’. This is a far-reaching dispensing power, frequently used, particularly as the incidence of confirmation has declined. It restates the provision of the rubric of the *BCP*.⁴³⁸ Once again, this is an example of dispensation where the canon could have been worded in a different way. The practical outworking of the canon is that godparents must be baptized but need not be confirmed. However, the canon does not state this. Instead it states that godparents must be confirmed unless the minister dispenses with that requirement. Practical experience shows that this dispensation gives rise to a precedent. A minister would have difficulty in justifying refusal to dispense with the requirement

⁴³⁵ Canon B14A.1(b)(i).

⁴³⁶ Canon B14A.1 (b)(ii).

⁴³⁷ Canon B16.1.

⁴³⁸ Rubrics to *The Publick Baptism of Infants*.

for confirmed godparents for a second sibling where he or she had dispensed with the requirement for the godparents of the first.

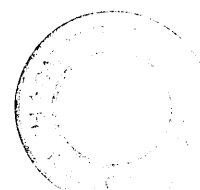
Canon B27.3 lays down strict tests for candidates for confirmation that are, in practice, dispensed with on a regular basis. Particular note needs to be taken of people with learning difficulties who are confirmed and who are not able to say the Creed, the Lord's Prayer and the Ten Commandments nor to render an account of their faith based on the catechism. Such a dispensation, not on the face of the canon, would be made by the bishop as the minister of confirmation and must have occurred throughout the history of the Church.

Canon B34.2 refers to the right of the Archbishop of Canterbury to grant Special Licences for marriage throughout England and the right of Bishops and their commissaries to grant Common Licences for the dispensing of the requirement to read banns prior to marriage. This is a restatement of the statutory provisions contained in the *ELA* and Marriage Act 1949.

Canon B40, a canonical dispensation affecting the clergy, forbids the celebration of Holy Communion outside consecrated or licensed building (other than in a private house for the communion of the sick) without permission from the Bishop.

Canon B42.2 allows the use of Latin in public worship in certain places in contravention of the rubric of the Book of Common Prayer, but restating the exceptions provided in the Act of Uniformity 1662. *Canon B42.3* also allows authorised forms of service to be translated into other languages. Presumably this includes the *Book of Common Prayer* as it is listed as a source of authorised services in *Canon B1.1*.

Canons B43 and B44 are the longest canons in the code. They were made under the authority of the Church of England (Ecumenical Relations) Measure 1988 and grant ministers, parochial church councils and bishops the power to dispense with certain rules and regulations concerning worship and the rights and duties of persons in the case of joint worship, ministry and mission with churches and people of other denominations. These canons together provide for the setting aside of a number of



norms of the liturgical law of the Church of England and permit certain things in the context of ecumenical worship and mission that are not normally permitted.

Canon B43.1(1) allows ministers or baptized lay persons in good standing in their own church to exercise certain functions in services of the Church of England. These functions are limited to those functions that baptized lay persons in the Church of England may exercise. In the case of the distribution of the sacrament⁴³⁹ the approval of the bishop is necessary (as with lay Anglicans according to Canon B12 (3)) as it is when such a person is invited to say or sing Morning or Evening Prayer or the Litany⁴⁴⁰, preach at any service⁴⁴¹, assist at a Baptism or Marriage or conduct a Funeral⁴⁴² if any of these are to be performed on a regular basis. The consent of the persons concerned⁴⁴³ or of the PCC⁴⁴⁴ is necessary in certain circumstances prior to the Bishop giving his permission. Only the Bishop may give permission for members of other churches to take part in services of ordination or confirmation and only with the approval of the incumbent and PCC⁴⁴⁵.

Most of the foregoing examples are not radical departures from the normal law and practice of the Church of England. With the exception of the requirement for confirmation for those distributing Holy Communion⁴⁴⁶ there is no requirement for explicit membership of the Church of England by dint of baptism according to the Anglican rite, confirmation or electoral roll membership prior to fulfilling most of the functions listed in the Canon. In the case of the distribution of Holy Communion, Canon B43 (intentionally or otherwise) allows the Bishop to dispense with the requirement for confirmation made by the Church Assembly's regulations on the matter⁴⁴⁷ where the person concerned is a minister or lay person in a church which does

⁴³⁹ Canon B43.1(1)(f).

⁴⁴⁰ Canon B43.1(1)(a).

⁴⁴¹ Canon B43.1(1)(c). This is consistent with the Act of Uniformity 1662, s 15.

⁴⁴² Canon B43.1(1)(e).

⁴⁴³ In the case of the occasional offices. Canon B43.1(1)(e).

⁴⁴⁴ In the case of saying or singing services, preaching or distributing the sacrament.

⁴⁴⁵ Canon B43.1(3) In all of the foregoing examples when the invitation concerns worship in a Cathedral the appropriate persons and bodies in the cathedral take the place of the incumbent and PCC.

⁴⁴⁶ A requirement laid down by Regulations on the administration of Holy Communion made by the Church Assembly in November 1969 (reproduced at page 189 of the sixth edition of the Canons of the Church of England 2000, including first and second supplements). Canon B12 provides that the General Synod may, from time to time, make regulations to guide the Bishops in their practice in this matter.

⁴⁴⁷ See above.

not practise confirmation⁴⁴⁸ or whose doctrine and practice of confirmation is different from that of the Church of England⁴⁴⁹.

The climate of ecumenical hospitality,⁴⁵⁰ which brought about the Ecumenical Relations Measure, means that Anglican clergy are invited to minister liturgically in other Churches. Practically, acceptance of such an invitation involves the ministers concerned in the use of forms of service that are not authorised for use and would potentially involve the breach of the Declaration of Assent (wherein any licensed minister undertakes only to use ‘the forms of service which are authorized or allowed by Canon’⁴⁵¹). In the case of an invitation to preside at Holy Communion according to another rite, the bishop must give his permission before the invitation may be accepted and must be satisfied that the rite and elements ‘are not contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter.’⁴⁵² Such provision in the Canon means that a breach of the Declaration of Assent is avoided: the service having the permission of the bishop under Canon B43.4 becomes ‘allowed by canon’. There is no mention of the rite used for non-Eucharistic services save that the incumbent of the parish in which the service is to take place (or, in the case of a regular invitation, the PCC of the parish and the Bishop) must approve before the invitation is accepted.⁴⁵³

Canon B43.9 allows the incumbent, PCC and bishop to authorize joint worship with other churches. Furthermore, it allows them to allow the services of other churches (according to their own forms of service and practice) to take place in churches in the parish. In practice this paragraph has been used to permit extensive interchange of ministry and worship. For instance in the Diocese of Ripon and Leeds⁴⁵⁴ and, following this model, other dioceses, the Bishop has authorised incumbents and PCCs to invite

⁴⁴⁸ E.g. Baptist Churches.

⁴⁴⁹ E.g. The Methodist Church, the United Reformed Church and others. The Church of England’s regulations on Confirmation are found *inter alia* at Canon B27.

⁴⁵⁰ See the General Note on this particular measure in Halsbury’s Statutes, fourth edition, vol 14, 1184 ‘This provision is consequent upon the development, in recent years, of formal and informal relationships between Anglican, Free and Roman Catholic Churches (eg cross-attendance and participation in church worship).’

⁴⁵¹ Canon C15.

⁴⁵² Canon B43.3(b)(ii) and B43.4.

⁴⁵³ The foregoing rules apply to clergy under Canons B43.3 and 4 and to deaconesses, lay workers and readers under Canon B43.6.

⁴⁵⁴ See Appendix 6 below.

Methodist ministers to preside at Holy Communion in Parish Churches.⁴⁵⁵ The technical reasoning behind this is, that when a Methodist minister presides at the Holy Communion that service is *de facto* a Methodist Service and allowed by Canon B43.9. A Methodist Minister is free, under his or her own discipline, to use a form of service other than those authorised by the Methodist Conference⁴⁵⁶. The incumbent and PCC of a parish may, with the approval of the bishop⁴⁵⁷ allow the use of the parish church for worship in accordance with the forms of service of another church to which the canon applies⁴⁵⁸ and, by virtue of the same paragraph, may take part in joint worship with them. The possibility arises, therefore, of a service of Holy Communion taking place in a parish church, according to the Church of England rite and presided over by a Methodist minister with Anglicans and Methodists (and possibly others) receiving communion.⁴⁵⁹

The foregoing example is probably not what was envisaged on the floor of the General Synod when the Ecumenical Relations Measure 1989 was passed. Indeed, during synod debate on this measure it was reported that a proposed amendment by Bishop Colin Buchanan to allow non-episcopally ordained ministers to preside at Holy Communion according to the rite of the Church of England had been rejected in the drafting stage.⁴⁶⁰

A question remains, therefore, as to the legality or otherwise of the example above. It is possible to conclude, given the evidence of the mind of the legislator, that the Bishop is not permitted under the Canon to allow the incumbent and PCC to issue such an invitation to a Methodist Minister. It is possible also, that the paragraph in question was sufficiently loosely drafted to enable such a scenario to develop legally. It is also possible that the Bishop feels that it is in his gift as a bishop to dispense from the strict application of the law in this case given the encouragement of the General Synod to the

⁴⁵⁵ E.g. in the Diocese of Oxford. www.oxford.anglican.org/page/5513/ accessed 24 November 2008.

⁴⁵⁶ Whilst the Methodist Conference authorises services for use such forms “are not intended to curb creative freedom, but rather to provide norms for its guidance.” Within [Methodist] heritage, both fixed forms and freer expressions of worship have been, and should continue to be, valued.’ *Methodist Worship Book* 1999, viii, quoting the preface to *The Methodist Worship Book* 1975.

⁴⁵⁷ Canon B43.9.

⁴⁵⁸ The Methodist Church of Great Britain was designated as such a Church on 14 March 1989. See *The Canons of the Church of England*, sixth edition, 2000, 196.

⁴⁵⁹ The report *An Anglican Methodist Covenant* adopted by the General Synod in the July Sessions 2003 encouraged mutual Eucharistic hospitality. *An Anglican Methodist Covenant*, 2003, GS1409, 61.

⁴⁶⁰ Proc GS 1987, 451.

process of work towards closer unity between the Church of England and the Methodist Church in the light of *An Anglican Methodist Covenant*.

Canon B44 refers to the setting up and running of Local Ecumenical Projects (known widely now and hereafter as Local Ecumenical Partnerships or LEPs). LEPs come into existence when the bishop of a diocese enters into an agreement with the appropriate authority of another church designated under the Ecumenical Relations Measure. Canon B44 allows the bishop to authorise a wide range of activity that would not be possible in parishes not covered by an LEP agreement. He may authorise a minister of another participating Church to baptize (with the good will of the persons concerned)⁴⁶¹ and to preside at Holy Communion⁴⁶² in a parish church and may authorise priests of the Church of England to use the rites of other participating Churches at the Holy Communion.⁴⁶³ He may also make provision for holding joint services of baptism and confirmation.⁴⁶⁴

Canon B44.4(1)(b) makes specific mention of the bishop's powers under three preceding canons. Canon B14A allows the bishop to dispense with the need for certain services on Sundays and Holy Days for good reason. The reference to this dispensing power in this ecumenical canon indicates that ecumenical partnership and the existence of an LEP can constitute 'good reason'. Canon B40 allows the bishop to permit the celebration of Holy Communion other than in a licensed building, the reference here is a clear indication that the bishop may permit services to take place in church buildings of other denominations. Canon B43 is the more general ecumenical canon the provisions of which are added to rather than replaced by Canon B44.

The bishop's discretion and powers of dispensation in this canon are fettered by the canon itself. He must be assured that the rites and elements used at such services of baptism and Holy Communion are not 'contrary to, nor indicative of any departure from, the doctrine of the Church of England in any essential matter'⁴⁶⁵ and must ensure that in all LEPs public worship according to the rites of the Church of England is

⁴⁶¹ Canon B44.4(1)(c).

⁴⁶² Canon B44.4(1)(f).

⁴⁶³ Canon B44.4(1)(d).

⁴⁶⁴ Canon B44.4(1)(e).

⁴⁶⁵ Canon B44.4(2).

maintained ‘with reasonable frequency’ and that a service of Holy Communion according to the Church of England rite and presided over by an episcopally ordained priest is celebrated at least on five major festivals.⁴⁶⁶ At the local level the interchangeability of ministry made possible by this canon is tempered by the requirement⁴⁶⁷ that a service of Holy Communion presided over by a minister of another Church should not be held out to be a service of the Church of England and should be advertised in advance and that there should be no reservation of nor distribution of the sacrament to the sick from that service except at the express wish of an individual communicant.

Canon C1.1 restates the general law on the subject and refers to a class of people who, whilst not ordained in the Church of England, have ‘had formerly episcopal consecration or ordination in some Church whose orders are recognized and accepted by the Church of England.’ There is no exhaustive list of such churches. There is a published list of Churches in communion with the Church of England appended to the Canons of the Church of England⁴⁶⁸ but this phrase includes ministers from churches other than those in communion. The relevant statute in this matter is the Overseas and Other Clergy (Ministry and Ordination) Measure 1967. Under the terms of the Measure the Archbishops have the final and determinative say as to whether another church is in communion with the Church of England and as to whether another Church’s orders are recognised by the Church of England. Such decisions are made on a case by case basis and (with one exception) no list or rationale is made public.⁴⁶⁹ However, it is the case that former priests of the Roman Catholic Church, with whom no relationship of Communion exists, are able to become priests of the Church of England without fresh ordination.⁴⁷⁰ The power of the Archbishops to license clergy ordained overseas or in other churches is also mentioned in Canon C17.6. The outworking of this canon and measure are examined in detail in Chapter 11 below.

⁴⁶⁶ Canon B44.5. At the time of writing, Amending Canon 28, which amends paragraph 5 to enable the bishop to exercise his powers under Canon B14A more widely than the paragraph 5 in its current form permits, is on its way through the General Synod.

⁴⁶⁷ In Canon B44.4(3).

⁴⁶⁸ Sixth Edition 2000, 199-201.

⁴⁶⁹ Adam, Will, ‘The Reception, Recognition and Reconciliation of Holy Orders’, (2005) 8EccLJ 4. The exception refers to a statement by Archbishop Runcie on his (and Archbishop Habgood’s) intention not to recognize the orders of those ordained by female Anglican bishops overseas. (1988) Proc GS 699-705.

⁴⁷⁰ E.g. The Revd Nigel Whitehouse, Team Rector of Whittlesey, Cambridgeshire. See *Crockford’s Clerical Directory*, (100th edn, 2008-9), London, 2007, 879.

Canon C2.2, following the provision of the Preface to the Ordinal appended to the *BCP* 1662, gives authority to the Archbishop to direct that the consecration of a bishop need not take place on a Sunday or Holy Day ‘for urgent and weighty cause’.

Canon C3 likewise gives to diocesan bishops the authority to permit ordination on days other than the days prescribed in the first paragraph of the canon⁴⁷¹ but only provided that it is ‘a Sunday, a Holy Day or one of the Ember Days’⁴⁷² and in a church or chapel other than the cathedral. The canon also enshrines the right of the Archbishop of Canterbury to grant faculties to allow those under the age of twenty-three to be ordained deacon,⁴⁷³ for twenty-three year old deacons to be ordained priest⁴⁷⁴ and for deacon’s and priest’s orders to be received on the same day.⁴⁷⁵ The bishop (or in the case of a Vacancy in See, the Archbishop of the province) may also dispense from the need to serve one full year as a deacon before being ordained priest. The area of canonical requirements for ordination is one of the more ancient examples of dispensing power historically exercised by popes and bishops. There is evidence, for instance, of a letter of Pope Gelasius to the Bishops of South Italy in 494 giving authority to dispense with the prescribed intervals between ordination to particular orders because of a shortage of clergy⁴⁷⁶ and by the time of the Reformation dispensation from the canonical age requirements for taking orders was one of the areas of dispensation enjoyed by the Pope⁴⁷⁷ and thus transferred to the Archbishop of Canterbury by the Ecclesiastical Licences Act 1533.

Canon C4.3 restates the statutory rule, dating from 1964, that being divorced and remarried during the lifetime of a former spouse or being married to someone who is

⁴⁷¹ The canon lists ‘the Sundays immediately following the Ember Weeks, or upon St Peter’s Day, Michaelmas Day or St Thomas’s Day, or upon a day within the week immediately following St Peter’s Day, Michaelmas Day or St Thomas’s Day’ In this canon it is assumed that St Thomas’s Day is 21 December, a traditional time for advent ordination. In the Common Worship Calendar St Thomas is celebrated on 3 July, just 5 days after St Peter’s Day. This leads to a lack of clarity in the Canon.

⁴⁷² Canon C3.1.

⁴⁷³ Canon C3.5.

⁴⁷⁴ Canon C3.6.

⁴⁷⁵ Canon C3.7.

⁴⁷⁶ *Palmer Report*, 4.

⁴⁷⁷ *Palmer Report*, 18.

divorced during the lifetime of their former spouse is an impediment to ordination.⁴⁷⁸ However, *Canon C4.3A* gives the Archbishop of the province power to grant a faculty to remove this impediment in accordance with guidelines laid down by the Archbishops acting jointly. Removal of this particular impediment was not a pre-Reformation example of dispensation, nor was it one of those dispensations habitually granted in the post-Reformation Church of England. This is a new situation and a new dispensation. The legality of this was tested in the case of *Brown v Runcie*⁴⁷⁹ where certain members of the General Synod challenged the Archbishops' powers. The canon was passed by the General Synod under the authority of the Clergy (Ordination) Measure 1990, s 1 of which provides for the amendment, as follows of s 9 of the Clergy (Ordination and Miscellaneous Provisions) Measure 1964. Section 9 was to be replaced with this new section:

9 Effect of certain remarriages on admission into Holy Orders

(1) Unless a faculty has been granted by the archbishop of the province in pursuance of a Canon made under subsection (2) of this section, a person—

(a) who has remarried and, the other party to that marriage being living, has a former spouse still living, or

(b) who is married to a person who has been previously married and whose former spouse is still living,

shall not be admitted into Holy Orders.

(2) It shall be lawful for the General Synod to make provision by Canon for empowering the archbishop of a province, on an application made to him by the bishop of a diocese, to grant a faculty to the bishop for admitting into Holy Orders a person who otherwise could not be so admitted by reason of subsection (1) of this section.

Brown v Runcie concentrated on the synodical procedure which brought about the measure, which was held to have been correct. No challenge was made to the right of the synod, by measure, scrutinised by Parliament, to empower the Archbishops to grant new dispensations. This power has, consequently, been assumed quite properly by the Synod, whose measures have the force and effect of an Act of Parliament. Parliament,

⁴⁷⁸ Clergy (Ordination and Miscellaneous Provisions) Measure 1964 s 9. This section was replaced by the section detailed above.

⁴⁷⁹ Times 26 June 1990 (Chancery Division) and Times 20 February 1991 (CA).

it has been shown above, has long considered itself competent to give to the executive a power of dispensation within prescribed limits.

Canon C4A.2 allows a bishop to dispense from certain preliminaries⁴⁸⁰ to ordination when ordaining deaconesses to the order of deacon. That said, deaconesses will have fulfilled those preliminaries prior to admission as deaconesses under the provisions of *Canon D2*. This canon is made under the authority of the Deacons (Ordination of Women) Measure 1986 s 1.

Canon C5 allows bishops to ordain deacons and priests without the usual titles if they are to be ordained for overseas service. Such ordinations are to be carried out 'in accordance with the statutory provisions in force from time to time.'⁴⁸¹ The current relevant statute is the Overseas and Other Clergy (Ministry and Ordination) Measure 1967. This canon also preserves the 'ancient privilege'⁴⁸² of fellows of colleges in the Universities of Oxford and Cambridge to be ordained by any bishop willing to ordain them. On the face of it this canon can be seen as providing the power to dispense from all preliminaries to ordination. However, the dispensation is merely from providing evidence of a title or letters dimissory. In essence it establishes that a fellowship of an Oxbridge college is sufficient as a title and recognises the traditional independence of many such institutions from diocesan authority.

The necessity for a licence or permission to officiate within a diocese prior to performing any duty in a church is waived by *Canon C8.2* if the duty is under seven days in any three months and not in contravention of any resolutions taken by the PCC under the Priests (Ordination of Women) Measure 1993.

The canons dealing with the oath of allegiance and the oath of obedience normally taken prior to ordination contain within them provision for dispensing with them for clergy ordained for service overseas.⁴⁸³

⁴⁸⁰ Including the necessity for producing certificates and testimonies required by *Canon C6*.

⁴⁸¹ *Canon C5.3*.

⁴⁸² *Canon C5.5*.

⁴⁸³ *Canon C13.2* and *C14.2*. Statutory authority is found in the Overseas and Other Clergy (Ministry and Ordination) Measure 1967 s 5.

The right of a bishop to grant licences and faculties for alterations to consecrated buildings is enshrined in, but not granted by, *Canon C18.4* and discussed further below. The same section, however, refers to places and persons who are ‘exempt by law or custom’ from the authority of the bishop and in which the bishop does not enjoy the right to exercise episcopal ministry. An example of this exception is the different rules governing permission for the alteration of the fabric of cathedrals (which are within the diocese concerned) and royal peculiars (which stand outside the diocese by which they are geographically surrounded).

Canon C24 deals with similar subject matter to *Canon B14A*; that is the possibility of dispensation from the statutory duty to provide certain acts of public worship in a parish or benefice. However, whilst *Canon B14A* allows bishops to dispense incumbents and PCCs acting jointly from the duty, *Canon C24* sets out the duties of individual ministers having the cure of souls and allows them⁴⁸⁴ or the bishop⁴⁸⁵ to dispense with these duties. *Canon C25* states that beneficed priests should be resident in their benefice but allows a bishop to license absence or non-residence. This is an example the continuation of a pre-Reformation dispensation.⁴⁸⁶ An appeal lies to the Archbishop of the province if a bishop refuses to grant a licence for extended absence.⁴⁸⁷ *Canon C28* lays down a principle that no minister holding ecclesiastical office may engage in trade or an occupation that affects the performance of the duties of that office. However, the canon admits of the possibilities of statutory provisions that would make this possible and also the possibility of the bishop granting a licence to work in this way to such a minister.⁴⁸⁸ Once again there is a right of appeal to the archbishop of the province against refusal of such a licence.⁴⁸⁹

⁴⁸⁴ *Canon C24.1* allows clergy not to say Morning and Evening Prayer daily and the Litany on appointed days if there is ‘reasonable hindrance’. This restates the provision of the introductory section of the *BCP*, *Concerning the Services of the Church*.

⁴⁸⁵ The bishop may permit a priest to omit a sermon (*Canon C24.3*).

⁴⁸⁶ See above. See also *Palmer Report*, 25.

⁴⁸⁷ *Canon C25.3*.

⁴⁸⁸ *Canon C28.1*. Statutory provision can be found in the *Pluralities Act 1838* and subsequent amendments.

⁴⁸⁹ *Canon C28.3*.

Faculty Jurisdiction

A major and widespread example of dispensation as practised in the Church of England is in the area of the alteration of church buildings. *Canon C18.4* states that a bishop has authority to grant faculties and licences for ‘all alterations, additions. Removals or repairs to the walls, fabric, ornaments, or furniture’⁴⁹⁰ of churches. There is a presumption that consecrated land and buildings are left unaltered. This presumption has expression in the possibility of an injunction being granted against a person unlawfully altering a church building⁴⁹¹ and the possibility of action for trespass being brought against a person so doing or a prosecution under the Criminal Damage Act 1971.⁴⁹² The canons contain certain provisions about the fabric of the church in the section of canons prefixed ‘F’. Most of these canons contain arbitrary requirements, however *Canon F1* directs that the font should be as near to the principal entrance of the church as possible but allows the ordinary to direct otherwise if there is a custom to the contrary.⁴⁹³ It is difficult to see how such a custom could be invoked, except perhaps in an application to replace a font that is somewhere other than near to the entrance.

The power to grant faculties for the alteration of consecrated buildings and for works in consecrated churches and churchyards lies, by measure, with the chancellor of the diocese concerned. The chancellor is appointed by the bishop of the diocese.⁴⁹⁴ There is no appeal from the chancellor to the bishop⁴⁹⁵ but in some dioceses the letters appointing the chancellor make provision for the bishop to sit himself.⁴⁹⁶ The chancellor, sitting in the Consistory Court of the diocese exercises a dispensing function in the granting of faculties. This function may also be delegated to Archdeacons.⁴⁹⁷ If, then, the granting of a faculty to make such alteration to the fabric of a consecrated or licensed church building or churchyard is an example of

⁴⁹⁰ Canon C18.4.

⁴⁹¹ Care of Churches and Ecclesiastical Jurisdiction Measure 1991 s13§4.

⁴⁹² Hill (2007), para. 7.03.

⁴⁹³ Canon F1.1.

⁴⁹⁴ After consultation with the Lord Chancellor and the Dean of the Arches and Auditor.

⁴⁹⁵ There is a process of appeal from a consistory court to the Court of Arches (in the Province of Canterbury) or to the Chancery Court (in the Province of York) and thereafter to the Privy Council. Whilst there is no appeal from a consistory court to the High Court on matters within the former’s jurisdiction the latter may restrain the former from straying outside its jurisdiction (Ecclesiastical Jurisdiction Measure 1963 s.83(2)(c)).

⁴⁹⁶ See *Re St Mary’s Barnes* [1982] 1 All ER 456 on Bishop Stockwood of Southwark’s decision to hear a faculty case. See also *Halsbury* vol 14, paras 472 and 1278.

⁴⁹⁷ Care of Churches and Ecclesiastical Jurisdiction Measure 1991 s.14.

dispensation then it should be noted that current legislation has transferred this power from being a purely episcopal function to one that can be administered by inferior clergy and lay people.

In the Roman Catholic Church a diocesan bishop is obliged to appoint a Judicial Vicar.⁴⁹⁸ The Judicial Vicar exercises the bishop's judicial function on his behalf in matters that the bishop does not reserve to himself.⁴⁹⁹ A litigant may not appeal a decision of the Judicial Vicar to the bishop neither can the bishop alter such a decision.⁵⁰⁰ Whilst the Judicial Vicar has ordinary jurisdiction⁵⁰¹ it is not distinct from that of the bishop and it is the bishop's jurisdiction that he exercises. Chancellors and Archdeacons acting on their behalf in the consistory courts of the Church of England do not seem to be acting in the same way. Whilst consistory courts are part of the general court system of England and all ecclesiastical judges are acting as the Queen's judges, chancellors have their own jurisdiction within their own court and Archdeacons, when issuing faculties in unopposed cases, act as deputies of the chancellor, not the bishop.⁵⁰² It has been noted above that in the sixteenth century Archbishop Matthew Parker granted faculties for ornaments and other matters concerning the fabric of churches. If the granting of such faculties was seen to have been within the scope of the Ecclesiastical Licences Act 1533 then what has happened subsequently is that the power of dispensation in these matters has been passed by statute from the Archbishop (or from Bishops more generally) to the ecclesiastical courts.

Bishop's Mission Orders

The Dioceses, Pastoral and Mission Measure 2007 introduced to the Church of England a new legal instrument known as a bishop's mission order. Such an order is defined by sections 47-50 of the measure and may provide for a minister licensed or permitted to officiate by the bishop to exercise their ministry in a parish in which they do not have the cure of souls and 'without obtaining the permission of the minister who

⁴⁹⁸ *CIC* Canon 1420.

⁴⁹⁹ *CIC* Canon 1420.

⁵⁰⁰ Beal, John P, Coriden, James A and Green, Thomas J; *New Commentary on the Code of Canon Law*, Paulist Press, New York, 2000, 1624.

⁵⁰¹ Beal, Coriden Green, 1624.

⁵⁰² CCEJM s.14 (4).

has that cure'.⁵⁰³ This, therefore, gives the bishop the authority to dispense such a minister from the obligation placed on them by Canons C8.4 and B29.4 to obtain the permission of the minister holding the cure of souls prior to exercising that ministry.

Section 51 of the measure obliges the House of Bishops to produce a code of practice for the operation of the initiatives laid down in sections 47-50. This code of practice, approved by the General Synod on 12 February 2008, includes the claim that among the purposes of a Bishop's Mission Order⁵⁰⁴ is provision for 'where necessary, making lawful acts that would not otherwise be lawful.'⁵⁰⁵ The Archbishop of Canterbury described the provisions of the measure as 'a principled and careful loosening of structures'⁵⁰⁶ and the Code of Practice considers that the role of the bishop in the process is 'crucial'.⁵⁰⁷

The issue leading to the instigation of bishop's mission orders was the canonical provision, backed by earlier judgments, that Anglican public ministry in a particular place, subject to certain very limited provisos,⁵⁰⁸ could not be undertaken by any minister without the permission of and outside the control of the incumbent of the parish. In *Nesbitt v Wallace* the Dean of the Arches, Sir Arthur Charles, stated 'there is no point clearer in ecclesiastical law than that under the general provisions of that law the incumbent of any parish has the right to prevent any one publicly officiating in his parish without his consent'.⁵⁰⁹ In that case the respondent was ministering in what could be described as a late Victorian version of a church plant within the promoter's parish in a building on the estate of a local landowner and leased by him and with a distinct congregation based around those who were within the household or resident on the estate of the same. The respondent was restrained from such ministry with costs.

⁵⁰³ Dioceses, Pastoral and Mission Measure 2007 s 47(11).

⁵⁰⁴ Capitals are used in the code, but not in the Measure.

⁵⁰⁵ *Dioceses, Pastoral and Mission Measure 2007, Part V: Mission Initiatives, Code of Practice, Drawn up by the House of Bishops under section 51 of the Measure, January 2008*. GS 1684 paragraph 1.2.2.

⁵⁰⁶ Presidential Address, General Synod November 2005. See also Code of Practice para 2.3.3.

⁵⁰⁷ Para 2.3.3.

⁵⁰⁸ Canon B29.4 allows any priest to exercise the ministry of absolution anywhere where the person concerned is in imminent danger of death and Canon C28 permits clergy to visit the homes of those on the electoral roll in their parish but resident in another. The Extra-Parochial Ministry Measure 1967 includes the provision contained in Canon B29 and allows for the Bishop to licence ministers to minister in institutions (schools, colleges, hospitals etc.). The Church of England (Miscellaneous Provisions) Measure 1992 s 2 dispenses with the requirement for the permission of the incumbent of the parish where a cemetery or crematorium is sited prior to the performance by another minister of a funeral for a person who died in, lived in or was on the electoral roll of their parish.

⁵⁰⁹ *Nesbitt v Wallace* [1901] P 354 at 364.

However, the thinking behind the Dioceses, Pastoral and Mission Measure 2007, based in part on the report *Mission-Shaped Church* holds that, in practice, extra-territorial expressions of church are sometimes necessary for effective mission and evangelism and that effective mission and evangelism may be hampered or hindered by incumbents preventing such ministry in their parishes.⁵¹⁰

Thus, the bishop's mission order, under the new measure, is a dispensation available to the bishop, with statutory basis, enabling him to permit something that would otherwise be not permitted. It draws on a perception of the bishop as leader in and promoter of mission⁵¹¹ (akin to, but with a greater statutory warrant than, the claims of earlier generations of bishops to an inherent right to order worship within their dioceses (*jus liturgicum*)).

Conclusion

The Church of England contains within its legal system significant examples of dispensation and of executive discretion, which has similarities with economy. The system of enabling the laying aside of the law in certain circumstances built on the complex system of dispensations of the pre-Reformation church, was developed and codified between the Reformation and the civil war and has developed since the restoration. Some areas in which dispensations were previously granted have undergone legal change which render dispensation unnecessary. New dispensations have been introduced. The system has also been influenced by English secular law and powers of dispensation and discretion given to bishops and other ministers by statute or canon mirror similar provisions in secular law.

A widespread system whereby the law can be set aside gives rise to certain problems. These problems include a weakening of the rule of law (as a dispensation has often been described as a wound in the law⁵¹²) and a lack of consistency between similar cases (for instance, the current Chancellor of the Diocese of Oxford prohibits incumbents from authorising churchyard memorials in the shape of a cross or a heart but does not prohibit those in the shape of a book. The current Chancellor of the

⁵¹⁰ *Mission Shaped Church*, GS 1523, London, 2004, 125-144.

⁵¹¹ Dioceses, Pastoral and Mission Measure 2007, Code of Practice, iii.

⁵¹² *Palmer Report*, 148.

Diocese of Ely, on the other hand, permits crosses but does not permit books or hearts).⁵¹³

It has been shown that in the law of the Church of England the normal (though not the only)⁵¹⁴ minister of dispensation is the bishop, the bishop's authority to dispense being seen to come either by delegation built into legislation (either through Act of Parliament, Measure or Canon) and thus possibly by delegation from the monarch, or by virtue of his office.⁵¹⁵ This power, which has been given judicial sanction has certain similarities with equity (i.e. the removal of an injustice), with economy (i.e. the laying aside of a certain law, without specific positive legal sanction, for a certain time, for the good of the person concerned and without setting a precedent) and with discretion (i.e. a certain breadth of latitude in the exercise of power that is common to ecclesiastical and secular legal systems).

In some instances (see especially chapters 9 and 10 below), episcopal dispensation or economy could be described as the use of discretion or the turning of an episcopal 'blind eye' to otherwise illegal behaviour.⁵¹⁶ The Caroline divine Peter Heylyn, in the sermon at the consecration of John Towers as Bishop of Peterborough in 1638, commenting on Ezekiel's mythical creatures with eyes all round, suggested that a bishop should have many eyes to keep watch but that

so should it be reported of a careful Prelate, that he is eye all over, and sees round about him. Which if he do, however he may wink at some things out of humane frailty, and possibly connive at others out of just necessity, yet will he still have one eye open to have a care upon the main.⁵¹⁷

⁵¹³ Oxford Diocesan Churchyard Regulations dated 27 November 2008 (http://www.oxford.anglican.org/index.php?option=com_docman&Itemid=241), Ely Diocesan Handbook, 2nd Edn, 2004, 139.

⁵¹⁴ For instance, in an Episcopal or archiepiscopal vacancy the power to grant marriage licences is transferred to the 'Guardian of Spiritualities', usually the Dean and Chapter of the Cathedral Church. See *Halsbury*, vol 14, paras 1023 and 432.

⁵¹⁵ See ELA s 3. Any new dispensations need the sanction of the King in Council. This could be seen to show that in such areas the Archbishop or Bishop would be acting as the King's delegate.

⁵¹⁶ See also chapter 6 above.

⁵¹⁷ Sermon 13 January 1638. In *'The Parable of the Tares expounded and applyed, in Ten Sermons preached before his late Majesty King Charles the second monarch of Great Britain' by Peter Heylyn DD to which are added three other sermons by the same Author*, London, 1659, 336.

The winking and conniving is seen by Heylyn as a necessary tool if the bishop is to play the part of physician and bring healing to the Church.⁵¹⁸

Others with executive authority in the Church may grant dispensations, but such dispensations are limited to situations for which the power and authority to dispense has been given to them by the law.

⁵¹⁸ At 321.

Chapter 8 - The Curious Case of the Homicidal Archbishop

Introduction

George Abbot was Archbishop of Canterbury from 1611 to 1633. On July 24 1621 he joined a hunting party at Bramshill⁵¹⁹ in Hampshire, on the land of Lord Zouch, the host of the party. During the hunt Abbot fired a crossbow bolt at a deer but missed and accidentally shot a gamekeeper by the name of Peter Hawkins. The keeper later died of his wounds. Abbot was distraught, retreated to a hospital that he had founded in Guildford⁵²⁰ and, later, settled a pension on the keeper's widow.

The issues at stake

The consequences of this accident have to be read within the context of the ecclesiastical politics of the time. Abbot is generally viewed as having been an unpopular Archbishop.⁵²¹ He was probably the last Archbishop of Canterbury with a Calvinistic theological perspective and was succeeded in this See by the anti-Calvinist William Laud. Within hours of the accident the news had reached John Williams, who was bishop-elect of Lincoln as well as being Lord Keeper of the Great Seal of England. In a letter dated 27 July Williams wrote to the Marquess of Buckingham to inform him that by this accidental homicide the Archbishop had 'by the common law of England' forfeit all his estates and revenues to the King and also, by the canon law in force been suspended from all ecclesiastical function.⁵²²

My most Noble Lord,

An unfortunate occasion of my Lords Grace, his killing of a man casually (as it is here constantly reported) is the cause of my seconding of my yesterdays Letter unto your Lordship. His Grace upon this Accident is by the Common Law of England to forfeit all his Estate unto his Majesty, and by the Canon Law (which is in force with us) irregular ipso facto, and so suspended from all Ecclesiastical Function, until he be again restored by his Superior, which (I take it) is the Kings Majesty in this Rank and Order of Ecclesiastical Jurisdiction. If you send for Doctor Lamb, he will acquaint your Lordship with the distinct Penalties in this kind. I wish withal my heart his Majesty would be

⁵¹⁹ Spelled 'Bramzil' or 'Bramshell' in certain contemporary sources.

⁵²⁰ Heylyn, *Cyprianus Anglicus* 1671 edn., 80.

⁵²¹ Welsby, Paul A, *George Abbot – The Unwanted Archbishop*, London, 1962, 96.

⁵²² Letter reproduced in Heylyn, 1671, 80-81. Text checked against the text in Mayor, John E B, *Letters of Archbishop Williams with Documents Relating to him*. Cambridge, 1866.

as merciful as ever he was in all his life; but yet I held it my duty to let his Majesty know by your Lordship, that his Majesty is fallen upon a matter of great Advice and Deliberation. To add affliction unto the afflicted (as no doubt he is in mind) is against the Kings Nature: To leave virum sanguinum, or a man of blood, Primate and Patriarch of all his Churches, is a thing that sounds very harsh in the old Councils and Canons of the Church. The Papists will not spare to descant upon one and the other. I leave the knott to his Majesties deep Wisdom to advise and resolve upon.

Williams is described as ‘Laud’s opponent.’⁵²³ He was also notoriously ambitious, as his accrual of ecclesiastical preferments shows.⁵²⁴ Heylyn believes that one of Bishop Lancelot Andrewes’ principal reasons for being generous to Abbot, of whom he was not a natural ally, during the ensuing crisis was that if Abbot were deposed then Williams, who enjoyed great favour at court, could well have been elevated to the See of Canterbury in his place.⁵²⁵ Heylyn points in evidence to another letter, not quoted, from Williams to the Marquess of Buckingham ‘That his majesty had promised him upon the relinquishing of the Seal, one of the best places in this Church. And what place could be more agreeable [sic] to his affection than the Chair of Canterbury?’⁵²⁶

The potential irregularity of the Archbishop of Canterbury had practical consequences. There was the question of his lands and revenues and, importantly for his allies and opponents on the Episcopal bench, the question of his carrying out episcopal functions. At the time five bishops, including Williams and Laud, had been elected to their office (in these cases the sees of Lincoln and St David’s respectively) but had not yet received Episcopal ordination. The Archbishop of Canterbury, as metropolitan, enjoyed the ancient privilege of presiding at Episcopal ordinations within his province but the

⁵²³ Anthony Milton, ‘Heylyn, Peter (1599–1662)’, Oxford Dictionary of National Biography, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/13171, accessed 19 Feb 2007]

⁵²⁴ He was described by Heylyn as ‘a perfect Diocese with himself’ being at the same time a Bishop, Dean, Prebend, Residentiary Canon and Parson. Heylyn, Peter *Cyprianus Anglicus*, London, 1671 edn, 80.

⁵²⁵ A contemporary report of one debate on the issue indicates that Andrewes ‘siding with the four lawyers so forcibly against the other five Bishops, turned the scale in his Graces’s favour’. Letter SP14 vol CXXIII no 100, November 10 1621.

⁵²⁶ Heylyn, *Cyprianus Anglicus* 1668 edn. 88. Williams’ biographer Ambrose Philips disputes Heylyn’s judgment that Williams’ scruple ‘proceeded not from his Caution, but merely from Interest’. Philips, Ambrose, *The life of John Williams* London, 1700, 234.

bishops-elect did not wish to be consecrated by an Archbishop who may have forfeited his appointment or even his orders as a result of having committed homicide.⁵²⁷

The questions that were asked at the time, and can be asked again now, were, first, whether Abbot had committed a canonical or common law offence leading to censure of some sort in the first place and, second, if he had, what remedy could be applied to restore him. Whilst there are hints that Abbot's opponents would have liked him out of the way (see above) the sources are unanimous in presenting the situation as having been entirely accidental. Paul Welsby's biography contains a brief survey of descriptions of the events, wherein the keeper is variously described as having been behind the deer⁵²⁸ or having been drunk and riding on horseback.⁵²⁹ One later source described the arrow as having glanced off a tree.⁵³⁰ No accusation of intent or negligence was levelled at the Archbishop at the time. The first hearing of the facts of the case took place in the Coroner's Court. The verdict of the Coroner was that the keeper's death had occurred 'by misfortune and his own fault'.⁵³¹ This is an unclear verdict, which Abbot initially sought to challenge, but for the purposes of this examination it is at least clear that no blame attached to the Archbishop.⁵³²

The first question, then, is whether the Archbishop had committed a common law offence. Today, or at any time since the Offences against the Person Act 1861, the Archbishop would not have been held liable to punishment or forfeiture after killing another 'by misfortune without felony'.⁵³³ However, there is a question as to when this distinction came to be made by the law.

The modern commentators, John Baker and S F C Milsom, are of the opinion that the common law was, in theory at least, very rigid on this matter at the time. There was no

⁵²⁷ Letter from John Chamberlain to Lord Carleton, 10 November 1621 'the new Bishops are so unwilling to receive consecration from his hand, that he has commissioned three other Bishops to consecrate for him.' SP14 vol CXXIII no. 100.

⁵²⁸ Letter of Lord Zouch, SP14 vol CXXII no. 37.

⁵²⁹ Welsby (1962), 92.

⁵³⁰ Hacket, John, *Scrinia Reserata*, London, 1693, 65.

⁵³¹ Welsby (1962), 93. 'Per infortunium sua propria culpa', c.f. Letter of John Chamberlain to Lord Carleton, August 4, 1621. SP14 vol CXXII no. 60.

⁵³² On the advice of counsel he asked that the coroner and jury be re-called, but two days later indicated that his counsel had changed their minds. (Letters to Lord Zouch, 5 and 7 August 1621. SP14, vol CXXII nos. 61 and 63).

⁵³³ Offences against the Person Act 1861 (24 & 25 Vict c.100 s.7).

distinction in the common law between voluntary and involuntary homicide. The penalty for both, as with all felonies, was death by hanging. The change in the law that united the offences under one capital offence probably came about in the twelfth century ‘though neither chronology nor mechanism is clear’.⁵³⁴

Older commentators are not unanimous in their reading of the distinction, if any, between culpable and non-culpable homicide in the early part of the seventeenth century. Blackstone, writing in the eighteenth century describes homicide as falling into categories of ‘justifiable,⁵³⁵ excusable and felonious’.⁵³⁶ In the preface to the 1979 facsimile edition of Blackstone’s commentaries, Thomas A Green suggests that ‘the distinction between murder and manslaughter, or between capital and non-capital homicide, was a product of the sixteenth century.’⁵³⁷ Excusable homicide is divided into ‘*per infortuniam*, by misadventure; or *se defendendo*, upon a principle of self-preservation’⁵³⁸ the former being ‘where a man, doing a lawful act, without any intention of hurt, unfortunately kills another.’⁵³⁹ An involuntary killing arising out of an unlawful action is described as manslaughter.⁵⁴⁰ So, for Blackstone, there is a distinction in the description of the homicide and, possibly, in the sanction to be applied, between one that arises from a lawful action and that which arises from an unlawful action. Such distinctions could well have been made in 1621 as the lawfulness of Abbot’s hunting was subject to detailed debate at the time (see below).

Blackstone goes on to state that

the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it, who therefore is not altogether faultless..... he who

⁵³⁴ Milsom, S F C, *Historical Foundations of the Common Law* 2nd Edn. London, 1981, 422.

⁵³⁵ Justifiable homicide includes homicide committed during war. Blackstone describes it as not only justifiable but also commendable.

⁵³⁶ Blackstone, William, *Commentaries on the Laws of England*, 1769, (Facsimile edition ed. Green, Thomas), Chicago, 1979, 177.

⁵³⁷ Blackstone, vii.

⁵³⁸ Blackstone, 182.

⁵³⁹ Blackstone, 182.

⁵⁴⁰ Blackstone, 183.

slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt⁵⁴¹

In support of the assertion that some guilt is applied even to the accidental killer Blackstone points to the Old Testament, and to the system whereby an accidental killer may flee to a certain city for asylum but that he may be caught and put to death by the victim's avengers before he gets there.⁵⁴² He also points to Roman practice for 'casual homicide' to be excused by the Emperor under the sign manual and the Greek practice of voluntary banishment of the accidental killer.⁵⁴³ Blackstone points to the English practice of pardons and writs of restitution being granted in such cases and also to judges directing acquittals where 'the death has notoriously happened by misadventure or in self-defence' and reports that the views of Coke and Hale differ on the punishment from which pardon is granted, the former saying that it is death and the latter forfeiture of goods.⁵⁴⁴

Blackstone's views largely follow those of Sir Matthew Hale in his *Historia Placitorum Coronae*. Once again this work dates from after the time of Abbot, it was left unfinished by Hale at his death in 1676 and not published until 1736. However, Hale's legal career started before the Civil War.⁵⁴⁵ Hale distinguishes between homicide that is voluntary (and in this he includes both murder and manslaughter), that which is purely involuntary and that which is 'mixt.'⁵⁴⁶ Anticipating Blackstone he states that 'Homicide *per infortunium* is, where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act the death of another ensues, as if a man be shooting at butts or pricks,⁵⁴⁷ and by casualty his hand shakes, and the arrow kills a bystander.'⁵⁴⁸ Again, anticipating Blackstone, he distinguishes between an accidental death during a lawful hunt (homicide *per infortunium*) and

⁵⁴¹ Blackstone, 186-7.

⁵⁴² Numbers 35, Deuteronomy 19.

⁵⁴³ Blackstone, 187.

⁵⁴⁴ Blackstone, 188.

⁵⁴⁵ Alan Cromartie, 'Hale, Sir Mathew (1609-1676)', Oxford Dictionary of National Biography, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/11905>, accessed 19 March 2007]

⁵⁴⁶ Hale, Sir Matthew, *Historia Placitorum Coronae* vol 1, 1736. Facsimile edition ed. P R Glazebrook, 1971, 424.

⁵⁴⁷ I.e. practicing archery.

⁵⁴⁸ Hale, 472.

accidental death arising from hunting illegally (manslaughter).⁵⁴⁹ Hale is, furthermore, very specific in his verdict on the legal process following accidental homicide;

Tho the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and therefore usually in such cases the verdict concludes, *quod interfecit per infortunium et not per felonium*, yet the party forfeits his goods, and tho he ought to have quasi de jure a pardon of course upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed till the next term or sessions to sue out his pardon of course, for tho it was not his crime, but his misfortune, yet because the King hath lost his subject, and that men may be the more careful, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed, *ut supra*.

Consequently, to follow Hale's procedure, the Archbishop of Canterbury, having killed *per infortunium* should have been committed to prison pending a pardon and his goods forfeit.⁵⁵⁰ This did not happen.

The earlier source, Sir Edward Coke, died in 1634. In his *Third Part of the Institutes of the Laws of England* he distinguishes between various different categories of homicide, distinguishing as to whether or not they were voluntary, with malice aforethought and resulting from an illegal act. At the bottom of the pile was homicide that was involuntary, with no malice aforethought and resulting from an action that was legal. To illustrate this homicide *per infortunium* or *seu casu* he uses a remarkably apt example:

If the act be unlawful it is murder. As if A. meaning to steal a deer in the park of B., shooteth at the deer and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawful, although A. had no intent to hurt the boy and knew not of him. But if B., the owner of the park, had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony.⁵⁵¹

Coke himself intervened in the Abbot case. His opinion was that it was lawful for a bishop to hunt—implicit, Coke explained, in the old rule that a bishop's pack of

⁵⁴⁹ Hale, 475.

⁵⁵⁰ This is in accordance also, with the procedure laid down by the Statute of Gloucester 1278 c.9.

⁵⁵¹ Sir Edward Coke *Third Part of the Institutes of the Laws of England* 1644 Edn. 56. (Accessed at Early English Books Online, www.eebo-chadwyck.com 30 April 2007) Quoted in Stephen, JF, *A History of the Criminal Law of England* vol III, London, 1883, 57.

hunting dogs escheated to the crown.⁵⁵² The question of whether it was lawful is discussed in greater detail below. The pardon readily given by the King and the verdict handed down by the coroner must, if Coke's interpretation of the law of the time is correct,⁵⁵³ have assumed that it was, the result of it having been otherwise would have been the prospect of the Archbishop of Canterbury on a capital charge for murder.

If Abbot had committed a Common Law felony, there would have been ways in which he could (and did) avoid censure or punishment. Of these several ways, two found their basis in the ancient prerogatives of the church, namely sanctuary and benefit of clergy. The former was the method by which a felon could escape justice by removing himself to a religious house or other place of sanctuary out of the reach of the courts. This was largely done away with by Henrician statutes, but was finally abolished after the Abbot case, in 1624.⁵⁵⁴ It would not have been possible for Abbot to have claimed sanctuary, as to have done so would have made his operation as Archbishop of Canterbury impossible.

Benefit of clergy had been one of the major causes in the celebrated battle between Henry II and Abbot's predecessor St Thomas Becket. Partly due to the backlash against the King following the murder of Becket, the principle of benefit of clergy had become settled in the law. It was not finally abolished until 1827.⁵⁵⁵ Benefit of clergy allowed someone who could show that they were a 'clerk' (i.e. not necessarily someone in the major orders of deacon, priest or bishop) to plead this fact at their trial and thereafter be handed over to the ecclesiastical authorities for punishment. Ecclesiastical punishments were notoriously light, especially when compared with the common law's mandatory death sentence for all felonies, and included imprisonment.⁵⁵⁶ Between 1350 and 1490 the test for proving clerical status became the ability to read, eventually to read Psalm

⁵⁵² Allen D. Boyer, 'Coke, Sir Edward (1552–1634)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004; online edn, May 2006 [<http://www.oxforddnb.com/view/article/5826>, accessed 19 Feb 2007].

⁵⁵³ Stephen is critical of Coke's view, but admits of its popularity. 'This astonishing doctrine has so far prevailed as to have been recognised as part of the law of England by many subsequent writers;' Stephen (1883), 57.

⁵⁵⁴ Baker, 513. The statutes in question are the Sanctuaries Act 1540 (32 Hen VIII c 12) and the Continuance of Acts Act 1623 (21 Jac I c. 28 s 7), which states 'no sanctuary or privilege of sanctuary be hereafter admitted or allowed in any case'.

⁵⁵⁵ Baker, 515.

⁵⁵⁶ Baker, 513, Milsom, 421.

51.1⁵⁵⁷ and ‘[b]y the end of the sixteenth century as many as half of all men convicted of felony were recorded as having successfully claimed benefit of clergy.’⁵⁵⁸ From time to time Parliament legislated to prevent certain felonies from being got round by benefit of clergy⁵⁵⁹ and even legislated to widen its benefit to women, who could not take orders and so otherwise were not able to benefit from the loophole.⁵⁶⁰ A woman, arraigned on a capital charge had always, however, had the option to ‘plead her belly’, that is to claim to be pregnant, which either caused a jury to acquit or brought an automatic pardon or (from the seventeenth century) commuting of a death sentence to some other form of punishment such as transportation.⁵⁶¹

It is clear that benefit of clergy had, by the time of Abbot’s case, ceased to be anything to do with the person concerned being in, or intended for, holy orders. In practice it had become a device for the avoidance of a mandatory death penalty for felonies.

For Abbot, claiming benefit of clergy would have been a possibility had he been arraigned before the court on charge of homicide. Baker states that ‘even after 1718, clergy still provided an absolute discharge, subject to a largely ineffective branding, in the case of certain offences – such as manslaughter – which were not affected by the legislative restrictions.’ However, he goes on to say that ‘It was usual to pardon persons of quality from such indignity, and since 1546 peers had been automatically exempted from the iron by law.’⁵⁶² It is, therefore, not surprising that the Archbishop of Canterbury was spared.

A third method by which the severity of the common law could be tempered was by the use of royal pardon. Baker says that, under the common law, dating from before the rise of the mandatory death penalty, the life of the felon was at the king’s mercy.⁵⁶³ Royal pardons had always been given, and mercy was (and remains) part of the royal prerogative. ‘From the time of James I it was a common practice, usually on the

⁵⁵⁷ Known as ‘the neck verse’. Baker, 514.

⁵⁵⁸ Baker, 514.

⁵⁵⁹ E.g. murder was made not clergiable by the Murders and Felonies Act 1511 (4 Hen VIII c 2) and the Benefit of Clergy Act 1531 (23 Hen VIII c1 s3). Baker, 530.

⁵⁶⁰ In s 6 of the Benefit of Clergy Act 1691 (3 William & Mary c 9.) See Milsom, 420, Baker, 514.

⁵⁶¹ See Daniel Defoe’s *Moll Flanders* where the eponymous heroine and her mother both ‘pleaded their belly’ and were transported.

⁵⁶² Baker, 514.

⁵⁶³ Baker, 512.

recommendation of the trial judge, to pardon convicts on condition of transportation.⁵⁶⁴

Pollock and Maitland state that, whilst pardons were widespread or even invariable for certain categories of felony, they were actually necessary. 'The man who commits homicide by misadventure or in self-defence deserves but needs a pardon.'⁵⁶⁵ However, Baker believes that 'from the fourteenth century, many of those found before coroners to have killed by accident were probably not arraigned at all.'⁵⁶⁶ This was the case with George Abbot. He did not face trial for felony but was pardoned by the King after the verdict of the coroner.

As well as removing any suspicion of felony, the King's pardon removed from Abbot any threat of forfeiture. The principle of forfeiture of goods was well known in the common law and fell into two categories. The first, known as *deodand*, was the forfeiting to the King of an implement used in the killing of another.⁵⁶⁷ In this case, that would have been the crossbow fired by Abbot. There is no record of whether this weapon was forfeit. The second, was the forfeiting to the King of land, goods or chattels. Coke points to some distinction here, with land only forfeit for more serious offences. A person who committed homicide *se defendendo* (in self defence) was not, in Coke's view, felonious but 'yet such a precious regard the law hath of the life of men, though the case was inevitable, that at the common law he should have suffered death: and though the Statute of Gloucester⁵⁶⁸ save his life, yet he shall forfeit all his goods and chattels.'⁵⁶⁹ There was certainly some discussion of the fate of the 'temporalities' of George Abbot in the aftermath of the accident.⁵⁷⁰ When the King gave Abbot a pardon, specific reference was made to the 'remission and restitution of

⁵⁶⁴ Baker, 515-6.

⁵⁶⁵ Pollock and Maitland *The History of English Law* vol II, (2nd Edn), Cambridge, 1968, 497.

⁵⁶⁶ Baker, 529.

⁵⁶⁷ Coke *Third Part*, 57-8.

⁵⁶⁸ The Statute of Gloucester 1278 c. 9 allowed a trial judge to make a recommendation directly to the King (without a further enquiry) that one who killed by misadventure or in self defence be pardoned. Baker, 602.

⁵⁶⁹ Coke *Third Part*, 56. Here his reference to those who 'at the common law' should have been hanged is repeated at 210 where he states that 'one judgment is given in all, nay in all the severall cases of felony, though some be more hainous than other, yet all being but felony, one and the same judgment is given.'

⁵⁷⁰ See the letter of John Williams above.

all forfeitures',⁵⁷¹ although there is no evidence that he was ever parted from his goods or his income between the accident on July 21 and the granting of the pardon on November 20 1621. Likewise, the dispensation granted to Abbot on the orders of the king refers to him being able to continue to have 'enjoyment' of his 'office and Archiepiscopacy'.⁵⁷²

The distinction made by Coke between accidental death as a consequence of lawful action, and as a consequence of unlawful action was an important distinction, traces of which are seen in later works.⁵⁷³ This distinction was also played out in the debate about the fate of Archbishop Abbot. The King was able to pardon felons on application (in July 1621 he took a long time to make up his mind whether to pardon a certain Richard Owen for the killing of a man called Butler⁵⁷⁴) and could, by pardon, absolve Abbot from any blame under the King's law and restore to him any goods forfeit. This happened by virtue of the aforementioned pardon. However, the threat of canonical irregularity, resulting in Abbot's being unable to fulfil his spiritual functions, hung over him during this time.

It has been noted above that the bishops elect, for whatever reason, refused consecration at his hands. The King was clearly less scrupulous about preachers than the bishops were about the minister of ordination as he heard Abbot preach at court in September 1621.⁵⁷⁵ As noted above, there may have been political motivations behind the bishops' scruples but there is clear evidence that questions were asked about whether the Archbishop had become in some way irregular (or even excommunicate) as a result of the accident. The matter was debated at the Sorbonne, resulting in Abbot being declared canonically irregular.⁵⁷⁶ The famous lawyer and antiquary Sir Henry Spelman examined the case and found the same.⁵⁷⁷ Coke, on the other hand, thought otherwise, as noted above.

⁵⁷¹ Grant of Pardon, 20 November 1621, SP14 vol CXXIII. Reference to *Sign Man* vol XII no 94 (Public Records Office).

⁵⁷² See Appendix 1 below for the text of the dispensation.

⁵⁷³ e.g. Blackstone, Hale.

⁵⁷⁴ SP14, vol CXXII no. 47.

⁵⁷⁵ SP 14, vol CXXIII no 117.

⁵⁷⁶ Kenneth Fincham, 'Abbot, George (1562–1633)', Oxford Dictionary of National Biography, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/4>, accessed 3 May 2007]

⁵⁷⁷ Spelman, Henry, 'An Answer to the Foregoing Apologie for Arch-Bishop Abbot', in *Reliquae Spelmannianae*, Oxford, 1698, 111-119.

The key texts in the argument about whether or not there was a canonical irregularity are the anonymous *Apologie for Arch-Bishop Abbot*, the response to this by Spelman and the opinion of Coke on the matter.

The *Apologie* sets out a number of pre-Reformation dicta pointing to accidental homicide not bringing about guilt.⁵⁷⁸ It reports that Azorius the Jesuit and Ivo of Chartres suggest that, provided the accidental killer is acting lawfully and with due care and attention, then they are innocent. It suggests that this was the case with Abbot as ‘seen in the verdict of the coroner’s inquest’. The *Apologie* then goes on to examine what became the key issue – whether hunting was illegal for clergy. If so, then Abbot would have been acting unlawfully and would therefore open himself up to censure – the homicide having come about through an illegal activity. The writer points to a medieval canon *De Clerico Venatore* which was, apparently, used to show that clergy were prohibited from hunting. He goes on to dismantle this argument by systematically unpicking the authority of this canon. Gratian is said to have described the canon as ‘no better than chaff’ and to have pointed out that it was not, as claimed, promulgated by the Fourth Council of Orleans. Furthermore, the canon forbids hunting with hounds or hawks, rather than with a bow and forbids hunting publicly or as an occupation rather than as a private recreation.⁵⁷⁹ After this, the writer moves on to point to English statute law, and especially to the Henrician principle that no canon contrary to the laws or statutes of the realm or to the royal prerogative can have continued to be operational. He points to medieval statutes such as the *Charta de Foresta* and a statute of Richard II⁵⁸⁰ that allowed Archbishops and Bishops to hunt and clergy with an income above ten pounds per year to keep hounds. This statute, the Act for Preventing the Unlawful Destruction of Game, 1389 (not repealed until 1881), stated, ‘nor any Priest, nor other Clerk, if he be not advanced to the value of Ten Pounds by the Year, shall have or keep from henceforth [hounds, ferrets or hunting equipment]’. The permission to hunt is therefore implicit in the exemption of clergy with higher incomes from the 1389 ban.

⁵⁷⁸ E.g. Bracton ‘homicidium casuali non imputatur’, Azorius the Jesuit and Ivo of Chartres. Spelman (1698), 108.

⁵⁷⁹ Spelman (1698). 109.

⁵⁸⁰ Act for Preventing the Unlawful Destruction of Game, 1389 (13 Ric II c 13). Repealed by the Statute Law Repeal and Civil Procedure Act 1881.

The canons against hunting, consequently, could not be argued to affect an English bishop in 1621.

Sir Henry Spelman's *An Answer to the Foregoing Apologie for Arch bishop Abbot* is a lengthy contradiction of the *Apologie*. It seeks to rehabilitate the canon dismissed in the *Apologie* seemingly on the authority of Gratian and goes on to give further examples of how Abbot could have committed a canonical offence. For instance, Spelman bases a number of assertions on the fact that Abbot was hunting with a cross-bow, suggesting that this is a dangerous weapon and consequently not permitted for a clerk, that arguments based on the legality of hunting as exercise and recreation are negated by the fact that firing a cross bow is neither, and that references to Archbishop Cranmer being taught to hunt are not relevant as Cranmer was taught using a long bow rather than a cross bow.⁵⁸¹ He goes on to deal with the relationship between common and canon law on the matter, examining in detail the liberties given to clergy by the medieval statutes cited by the apologist. For instance, in dealing with the *Charta de Foresta* he states that the liberty to take a deer does not necessarily extend to a liberty to shoot it oneself. That, in the same way as the *Charta* compels the bishop concerned to cause a horn to be blown so he could cause his officers or servants to shoot a deer that he might take it. According to Spelman the canon and the *Charta* are compatible and, pointing to the *Charta*'s companion statute *Magna Carta*, he suggests that for Henry III to contradict the canon law when making the *Charta de Foresta* would be contrary to the provisions of *Magna Carta* that the liberty of the Church shall be preserved.⁵⁸²

Spelman does not offer any new evidence to support the assertion that Abbot had, by misadventure, rendered himself canonically irregular. He limits his writing to answering the points put forward in the *Apologie*. Coke, as noted above, agreed with the *Apologie* that references in positive law linking clergy with hunting made it unlikely that any canonical offence could have been committed.

The question of whether Abbot was irregular seems to rest, therefore, on whether the activity in which he was engaged in at the time of the accident was itself legal. The

⁵⁸¹ Spelman (1698), 112-3 and 118.

⁵⁸² *Magna Carta*, 1215, c 1.

legality of a bishop hunting in 1621 depends on the interpretation of the general condemnation of clerical hunting in the medieval canon law and whether such a condemnation had been adopted by the common law either before or at the Reformation.

The most specific and authoritative condemnation of clerical hunting was issued by the 4th Lateran Council 1215, which stated ‘We forbid all clerics to hunt or to fowl, so let them not presume to have dogs or birds for fowling’⁵⁸³ Phillimore has claimed that the acts of this particular council have been considered as part of the Ecclesiastical Law of England.⁵⁸⁴ However, the Act for the Submission of the Clergy 1533, in limiting the authority of convocations, introduced the notion that pre-Reformation *provincial*⁵⁸⁵ ecclesiastical law had to be ‘not contrary or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king’s prerogative royal’ in order to be continued post-Reformation. It is arguable therefore that in a clash between the provisions of a Canon of the Lateran Council 1215 and a contrary provision in the *Charta de Foresta*, that the provision of the latter would prevail. In a similar vein, a prohibition would not satisfy the test laid down in the much later case of *Bishop of Exeter v Marshall* that pre-Reformation canon law, in order to be in force post-Reformation, must have been ‘received, observed, and acted upon in the Church of England since the Reformation.’⁵⁸⁶ The contemporary arguments do not provide examples of any clergy being disciplined for hunting in the years between 1533 and 1621.

The solution

What the foregoing arguments and the result of the disputation of the bishops show is that there was considerable confusion about whether or not Abbot had become canonically irregular. It is unlikely that he was as the hunting prohibition probably did not survive the Reformation, thus rendering the homicide an inculpable accident by the

⁵⁸³ Canon 15 of Lateran 1215. A note in the latest English edition (Tanner, Norman P, *Decrees of the Ecumenical Councils*, vol II, London, 1990) states that the sentence forbidding hunting or fowling is omitted in certain major authorities.

⁵⁸⁴ Phillimore (1895), 854.

⁵⁸⁵ The Canons of the Lateran Councils are not provincial law but law applying to the whole of the western church at the time of their promulgation. It is arguable, therefore, that they were not abrogated by this statute. However, it is unlikely that Henry VIII and his parliament of the time contemplated the application of *any* canon that contravened a later statute.

⁵⁸⁶ (1868) LR 3 HL 17 at 53.

law of the day. However, it is important to note that there was both the will and the mechanism in place to soften the hard edge of the law had the Archbishop been found to have been inhibited from his functions as a result of the homicide. The mechanism was a dispensation, the text of which is translated and reproduced in Appendix 1 below. The language used in the dispensation, and in the King's commission that prompted it, is that of the removal of any taint or irregularity or of the suspicion of the same. The result of the dispensation was that it would have been as if the accident had never happened. The treatment of the authority to grant such a dispensation is also interesting for this study. Whilst the King had the power to pardon (and he did so in this case) he did not claim the authority to dispense, that authority having been given to the Archbishop of Canterbury under the *ELA*. In such a curious situation prior to the Reformation the case of a homicidal Archbishop would in all likelihood have been referred to Rome for determination. Consequently, after the Reformation the proper reference would have been to the Archbishop himself, who clearly could not determine his own case. It has been shown above that dispensations were granted by Archbishops of Canterbury, under parliamentary and privy council authority, to remit penalties and censures. Such a dispensation or absolution does not appear on the list of dispensations bound with Laud's trial papers.⁵⁸⁷ Churchill⁵⁸⁸ points to an example of a dispensation, or pardon, for a justifiable homicide in the Chancery Rolls of 1637 but does not record the fee, or fine, payable.

The King's initial commission reported its findings to the King by letter dated 10 November 1621 as follows:

- a. There was no majority of the six bishops and four lawyers either way on the question of canonical irregularity as the sources and authorities were confused.
- b. The majority held that there was no cause for scandal but that scandal may be seen 'by the weak at home and the malicious abroad'.
- c. Restitution or dispensation may be granted by the King immediately under seal or by the hands of a clergyman delegated by the King or by some other means favoured by the King. The commission favoured a procedure whereby the Archbishop sued the King for dispensation.⁵⁸⁹

⁵⁸⁷ SP 16/499 f 221.

⁵⁸⁸ Churchill (1919), 413.

⁵⁸⁹ Spelman (1698), 122-123.

What is clear from this and clear from the method used in the end is that the bishops did not claim the authority to dispense Abbot from any irregularity through their own individual or collective authority. There was no suggestion that a synod of bishops could be called to grant such a dispensation. Conversely, the King did not take up the suggestion that he grant a dispensation. The procedure used can be said to be in accordance with s 17 of the *ELA* which determined that, should the Archbishop default on the granting of a dispensation, then ‘the king may give power, by commission under the great seal, to two such spiritual prelates or persons as will do and grant the same.’ In this case the Archbishop’s incapacity in the matter was due to his being the person requesting the dispensation. The King asked eight bishops, rather than two to fulfil this commission. Dispensation can, therefore, be seen as being an episcopal, or at least a clerical, function (s 11 of the *ELA* specifies that ‘spiritual prelates or persons’ may grant dispensations in certain circumstances; this need not be limited to those in episcopal orders). The resulting dispensation was granted by bishops collectively on the authority and command of the King.

Chapter 9 - The Ritual Controversy in the Nineteenth Century Church of England

Introduction and historical background

The rise of the catholic movement in the Church of England during the nineteenth century brought with it a revival in catholic ritual and ceremonial. There was a considerable backlash against these innovations and, during the second half of the nineteenth century, questions of the legality or otherwise of certain ritual practices dominated the life of the Church. 'The crisis'⁵⁹⁰ resulted in the imprisonment of five priests,⁵⁹¹ numerous court cases, two Royal Commissions and limited public disorder. The crisis dominated the archiepiscopate of Archibald Campbell Tait who, even on his deathbed, was involved in correspondence with one notorious ritualist.⁵⁹²

Prior to the mid nineteenth century there had been little interest in questions of ceremonial since the mid seventeenth century. It is generally assumed that there was largely uniform practice in the use of the services of the *BCP* and in the vesture and ornaments of the church throughout the United Church of England and Ireland.⁵⁹³ There is no doubt that, despite claims to antiquity made by proponents of a more catholic ritual, the introduction of this ritual was considered a novelty.⁵⁹⁴

The reasons for the rise of the interest in ritual practices in England have been discussed at length by historians. Owen Chadwick⁵⁹⁵ and (in a later work) Nigel Yates⁵⁹⁶ list a number of factors that, in combination, could be seen as influences on the early ritualists. These included an increase in interest in antiquity, prevalent in English society in the mid nineteenth century and the gothic revival in art, architecture and literature, but also the resurgence in interest in pre-Reformation and patristic theology brought about by the Oxford Movement. Added to these factors were pastoral

⁵⁹⁰ So called by Archbishop Tait in Convocation. *Chronicle of Convocation* 1881, 8.

⁵⁹¹ Arthur Tooth of Hatcham; S F Green of Miles Platting; T P Dale of St Vedast Foster Lane, London; R W Enraght of Bordesley; J B Cox of Toxteth.

⁵⁹² A H Mackonochie, Vicar of St Alban's Holbon. Davidson, Randall T, *Archibald Campbell Tait, Archbishop of Canterbury*, vol II, London, 1891, 478-80.

⁵⁹³ In evidence given to the Royal Commission on Ritual 1867, the Vicar of St Mary, Islington stated 'I believe no changes have taken place in the mode of conducting public worship in the parish of Islington for 100 years, or for 95 years at least'. RC Ritual, Minutes of Evidence, para 4. There were 30 Churches in the Parish of Islington at that time.

⁵⁹⁴ RCED PP 1906 xxxiii para 94.

⁵⁹⁵ Chadwick, Owen, *The Victorian Church*, vol II (2nd Edn, 1972), London, 1987, 310.

⁵⁹⁶ Yates, Nigel, *Anglican Ritualism in Victorian Britain 1830-1910*, Oxford 1999, 40 ff.

and evangelistic concerns – especially the view that the new urban working class would be attracted to the Christian faith by a more visual or experiential form of worship that had hitherto been the practice in the Church of England – and a ‘higher’ view of the clergy taken by those with a tractarian view and finding expression in symbolic clerical vesture. The earliest group to experiment with the introduction of ritual and ceremonial not seen in the services of the Church of England since the Reformation was the Cambridge Camden Society, led by the hymn-writer and antiquary John Mason Neale. The society was founded in 1839 whilst Neale and his colleagues were undergraduates. Within four years⁵⁹⁷ the society numbered 700 members, but an early controversy about the restoration of the Church of the Holy Sepulchre in Cambridge caused bad publicity for the Society.⁵⁹⁸ The practices spread from the Camden Society (renamed the Ecclesiological Society in the wake of the aforementioned controversy) through the Church of England. In 1903, in 39% of Churches in England the celebrant at Holy Communion adopted the ‘Eastward Position’,⁵⁹⁹ in 26% candles were lit and in 10% traditional Eucharistic vestments were worn.⁶⁰⁰ During the second half of the nineteenth century all of these practices had been declared illegal in the courts, yet, despite this, ritualism was clearly able successfully to spread through the Church of England.

There is no question that a large section of the Church of England was hostile to the introduction, or re-introduction, of ritual and ceremonial practices to the Church and that a similarly large number were in favour. However, the debate soon moved from being a question of taste to one of legality. The battle (for that is what it became) between the two parties was largely fought in the courts. The first case in which matters of ritual were tried was that of *Westerton v Liddell*. This case came to the London Consistory Court in 1854 and, eventually, to the Judicial Committee of the Privy Council in 1857.⁶⁰¹ The last substantial case was the trial of Edward King, Bishop of Lincoln, beginning in the Court of the Archbishop of Canterbury in 1890⁶⁰²

⁵⁹⁷ Chadwick, Owen, *The Victorian Church*, vol I (2nd Edn, 1972), London, 1987, 213.

⁵⁹⁸ Chadwick, vol I, 221.

⁵⁹⁹ I.e. standing at the altar facing east, with his back to the congregation during the prayer of Consecration.

⁶⁰⁰ Yates (1999), 280.

⁶⁰¹ (1857) Moore’s Special Report 1, PC.

⁶⁰² [1891] P 9.

and ending on appeal in the Judicial Committee of the Privy Council in 1892.⁶⁰³ This was not the end of the matter, however, but during the twentieth century the focus for disputes about ritual and ceremonial moved from penal trials of ritualistic clergy to applications for faculties for the alteration of churches⁶⁰⁴ and a long-lasting resistance to any liturgical reform that were seen as endorsing the ritualist position.

The legal position at the beginning of the twentieth century

Nigel Yates identifies six key issues that were hotly debated and subject to widespread complaint and judicial proceedings. These were, the 'eastward position' during the Prayer of Consecration in the Holy Communion, lighted candles on the altar during divine service when not required for the purposes of giving light, mixing water with wine at Holy Communion, using wafer bread at Holy Communion, the use of traditional catholic vestments and the ceremonial use of incense.⁶⁰⁵ These six major issues were not the limit of the practices that were complained about and made the subject of judicial proceedings. After the last of the penal trials the Royal Commission on Ecclesiastical Discipline 1906 (RCED) set out in its report what it considered to have been the law on ritual at the time. The details of this report are set out below. The law at 1906 had taken half a century to develop from the earliest cases in the mid 1850s. Where there were conflicting judgments statements of higher courts have greater authority. The ultimate authority in such cases was, at this stage, the Judicial Committee of the Privy Council which (by the Privy Council Appeals Act 1832 and the Judicial Committee Act 1833) had succeeded to the role of the Court of Delegates, established as the final court of appeal in ecclesiastical matters by the Submission of the Clergy Act 1533. The RCED's summary of the law is useful as it takes into account the broad spectrum of judicial decisions during the previous fifty years. Any single case only deals with the specific issues pleaded in that case.

The RCED took as its premise that the only forms of worship that were legal for use in the Church of England were those contained in the *BCP* of 1662. This rigidity was imposed by the Act of Uniformity 1662 but had been amended by three nineteenth

⁶⁰³ [1892] AC 644 PC.

⁶⁰⁴ Such cases continue to this day. See, for instance, the contended applications for faculties for the introduction of furnishings appropriate for 'catholic' ritual practices in *re St Oswald, Oswestry* (1998) 6 Ecc LJ 78 and *re St Nicholas, Arundel* (2001) 6 Ecc LJ 290.

⁶⁰⁵ Yates (1999), 334.

century statutes which allowed for a certain amount of flexibility in the pattern of bible readings during the year, in the pattern of services on Sundays and weekdays and the addition of extra services as well as the statutory ones and in the conduct of services of burial of those for whom the *BCP* burial service could not be used.⁶⁰⁶ However, apart from these statutory changes the courts were consistent in their ruling that ‘the directions contained in [the *BCP*] must be strictly observed; no omission and no addition can be permitted.’⁶⁰⁷

Royal authority had been used consistently since the Reformation to alter the strict observance of the rites and rubrics of the *BCP*.⁶⁰⁸ These alterations included the sanctioning of the singing of hymns and metrical psalms by *The Queen’s Injunctions* of 1559 and by the frequent authorisation of extra services and state prayers.⁶⁰⁹ The Clerical Subscription Act 1865⁶¹⁰ recognised and enshrined the principle that some alteration to the *BCP* was possible, not least, by Royal authority, with the addition of the clause ‘by lawful authority’ to the oaths taken by clergy at ordination and institution or licensing.

Appeal to the services and rubrics of the *BCP* resolved, or helped to resolve, many of the issues at stake in the ritual cases. However, a great deal of debate centred around the *BCP*’s rubric on ‘ornaments’. Debate on the legality of vestments and artefacts used during worship conducted according to the rites of the *BCP* centred on the interpretation of the rubric positioned in the *BCP* just before the beginning of the order for Morning Prayer, unchanged from the book annexed to the Act of Uniformity 1559⁶¹¹ stating that during services those ornaments are to be used that were in use ‘by the Authority of Parliament, in the second year of King Edward the Sixth.’ The very first *BCP* of 1549 was authorised by parliament towards the end of that regnal year and envisaged the use of virtually all the items and articles disputed in the nineteenth

⁶⁰⁶ These statutes were, respectively, the Prayer Book (Tables of Lessons) Act 1871 (34&35 Vict c 37), the Act of Uniformity Amendment Act 1872 (The Shortened Services Act – 35 & 36 Vict c 35) and the Burial Laws Amendment Act 1880 (43 & 44 Vict c 41).

⁶⁰⁷ *Westerton v Liddell* (1857) Moore’s Special Report 1, *PC Martin v Mackonochie* (1868) LR 2 PC 365 at 365-6.

⁶⁰⁸ RCED. PP 1906 xxxiii para 35.

⁶⁰⁹ E.g. the services appended to the *BCP* to commemorate the martyrdom of Charles I, the discovery of the Gunpowder Plot and the accession of William and Mary. These services were promulgated by Royal Proclamation and discontinued by the same (in 1859).

⁶¹⁰ 28 & 29 Vict c 122.

⁶¹¹ 1 Eliz c 2.

century. However, the authoritative judgments of the courts were that for the vesture of the clergy the rubrics of the *BCP* had been overruled by a document known as the *Advertisements*, issued by Archbishop Parker under questionable royal authority in 1566. Later scholarship has shown that it is unlikely in the extreme that this document did have sufficient authority to overrule the plain meaning of the rubric.⁶¹² However, the usual dress of the clergy in officiating between 1566 and the mid nineteenth century was as laid down in the *Advertisements* and re-stated in part in the Canons of 1604,⁶¹³ that is, the use of a surplice for all ministrations in parish churches with the addition of a cope for the principal minister at Holy Communion in Cathedrals with ‘the gospeller and epistoller agreeably’.⁶¹⁴ The Privy Council ruled in the case of *Ridsdale v Clifton* that this pattern of dress was the lawful pattern for the Church of England.⁶¹⁵ The *Advertisements* did not deal with furnishings or other ornaments in Churches. The RCED concluded that ‘for ceremonies the date of the standard is 1662, for vestments 1566, and for church ornaments 1549’.⁶¹⁶

The RCED, concluding that the liturgical law of the Church of England was too narrow for the requirements of the church at the time, pointed to a long list of breaches of the strict application of the law. Some of these breaches were tolerated and had been tolerated for a number of years.⁶¹⁷ The Commission distinguished between ‘non significant’ breaches of the law and those that were significant. In the first category they included the use of special services, harvest festivals, for example, that had in some cases been approved by bishops. Likewise the practice of a bishop preaching at a service of confirmation, for which there was no provision in the rubrics of the *BCP*. In

⁶¹² See *The Ornaments of the Church and its Ministers*, a report of a Sub-Committee of the Upper House of the Convocation of Canterbury 1908, 74-84. See also Rodes, Robert E Jr, *Law and Modernization in the Church of England: Charles II to the Welfare State*, Notre Dame, 1991, 253 and 280-1.

⁶¹³ Can 58.

⁶¹⁴ The use of the Cope in Cathedrals was not universal, but it never entirely died out. It is entirely unclear what agreeable dress for the gospeller and epistoller was. The *BCP* of 1549 had retained the ‘tunicle’ (a pre-Reformation vestment for the sub-deacon, very similar, if not identical, to the ‘dalmatic’ worn by a deacon). There is pictorial evidence of the Archbishop of Canterbury and supporting bishops in copes at the coronation of Queen Victoria and of the Archbishop and the Dean of Westminster in copes at the coronation of George IV (with other bishops in rochet and chimere).

⁶¹⁵ (1877) 2 PD 276 at 338-9.

⁶¹⁶ RCED PP 1906 xxxiii para 27.

⁶¹⁷ E.g. refusal to wear the surplice. Whilst the surplice had been enforced in the Elizabethan era, the practice of not wearing it had been tolerated in that era and since. RCED PP 1906 xxxiii para 39.

this category the Commission also placed gospel acclamations and the omission of services on weekdays and holy days.⁶¹⁸

A longer list of significant breaches requires deeper examination. Such breaches were not necessarily indicative of a departure from the doctrine of the Church of England, but had been judicially or by statute defined as illegal. However some breaches were held to be inconsistent with Church doctrine, particularly those that indicated the real presence of Christ in the bread and wine of the Eucharist,⁶¹⁹ the repeat at the celebration of Holy Communion of the sacrifice of Christ on the cross and the adoration of Christ as present in the bread and wine of the Eucharist.⁶²⁰ Breaches held by the Commission to be of lesser (rather than of no) significance are as follows:

Vestments. A coloured stole, in place of a black scarf, was ‘generally worn’ by 1906 without the wearer being subject to censure.⁶²¹ The wearing of full eucharistic vestments (i.e. the alb rather than the surplice with the addition of stole, maniple and chasuble) was ‘a practice condemned by law, but for thirty years unrepressed.’⁶²² Further detailed discussion of the toleration of illegal practices can be found below.

Confiteor or private prayers of confession before or during the service were considered by the Commission to be breaches of the law as they were taken from a pre-Reformation service and not incorporated in the *BCP*. However, there is no specific judicial condemnation of these prayers.⁶²³

The Mixed Chalice, that is, adding water to the wine at Holy Communion, was declared legal in the Lincoln judgment, provided the mixing was not a distinct ceremony for which there was no provision in the *BCP*.⁶²⁴ However, mixing water and wine as a distinct liturgical ceremony would be illegal.⁶²⁵

⁶¹⁸ RCED 1906 PP xxxiii paras 45-75.

⁶¹⁹ Specifically via the doctrine of transubstantiation, outlawed by Article XXVII.

⁶²⁰ RCED paras 83-6.

⁶²¹ RCED PP 1906 xxxiii para 88.

⁶²² RCED para 94. The wearing of Eucharistic vestments, specifically the alb and chasuble, were declared illegal in the case of *Hebbert v Purchas* (1870) LR 3 PC 605 affirmed in *Ridsdale v Clifton* no. 2 (1877) LR 2 PD 276.

⁶²³ RCED paras 95-8.

⁶²⁴ *Read v Bishop of Lincoln* [1892] AC 644.

⁶²⁵ *Read v Bishop of Lincoln*.

Unleavened Wafer Bread, as opposed to leavened bread at Holy Communion, was declared illegal by the Privy Council,⁶²⁶ although leavened bread pressed into a flat wafer shape was not.⁶²⁷

The lavabo or a ceremony wherein the priest washes his hands at the offertory was considered by the Commission to be an additional, and consequently unlawful, ceremony, but had not been condemned judicially.⁶²⁸

The Eastward Position, whereby the priest stood during the Prayer of Consecration, facing the altar set against the east wall of the Church, with his back to the congregation, was controversial and had been condemned in the Court of Arches in *Ridsdale v Clifton* but the accused's conviction on this count had been overturned in the Privy Council for want of evidence that the manual acts (i.e. the taking into his hands of the bread and the cup and the breaking of the bread) had been rendered invisible to the people. The importance of the visibility of the manual acts was reinforced by the judgment of the Archbishop of Canterbury, affirmed by the Privy Council, in *Read v the Bishop of Lincoln*.⁶²⁹ Thus, according to the Commission, the Eastward position was not illegal, but the concealing of the manual acts was.⁶³⁰

The making of the sign of the cross by the priest or bishop, most commonly at the words of absolution and blessing were condemned as unjustified in the Lincoln judgment.⁶³¹ The making of the sign of the cross on the candidate at baptism was retained in the rubrics and the making of the sign of the cross on oneself was considered a private devotion and not illegal.⁶³²

The ringing of a Sanctus bell was condemned as illegal in the Court of Arches in *Elphistone v Purchas*.⁶³³

⁶²⁶ *Ridsdale v Clifton* no 2 at 346-9.

⁶²⁷ PP 1906 xxxiii para 110.

⁶²⁸ RCED paras 111-113.

⁶²⁹ [1892] AC 644.

⁶³⁰ RCED paras 114-5.

⁶³¹ [1891] P 9 at 9.

⁶³² *Martin v Mackonochie* (1874) LR 4 A&E 279 at 291, Court of Arches.

⁶³³ (1870) LR 3 A & E 66 at 99.

Ceremonial use of incense was the subject of protracted debate outside of court but was never subject to adverse judgment in the Privy Council. It was condemned in *Sumner v Wix*⁶³⁴ and in *Martin v Mackonochie*⁶³⁵, both in the Court of Arches. It was also condemned by the Archbishops of Canterbury and York in 1901, who were supported by all the other bishops with the exception of the Bishop of Sodor and Man.⁶³⁶

Portable lights carried in procession were condemned in *Sumner v Wix*⁶³⁷ and by the Archbishops.⁶³⁸

Lighted candles on the Holy Table became very common over the second half of the nineteenth century but were consistently condemned in the courts when not used for the purposes of giving light.⁶³⁹ In the Lincoln judgment the Archbishop of Canterbury ruled that they were not illegal provided that they were lit before the beginning of the service and not as a ceremony during that service.⁶⁴⁰

Holy Water was, according to the Commission, not fully dealt with by the courts. In the earlier hearings of the case against John Purchas a charge of illegally producing holy water for the use of the congregation was not proved but in two separate hearings in the Chichester Consistory Court in *Davey v Hinde* Dr Tristram, the Chancellor, held that holy water stoups, whether temporary or permanent, were illegal ornaments.⁶⁴¹

The Commission also declared that the blessing of palms on Palm Sunday, the service of *Tenebrae*, washing the altars on Maundy Thursday, the Paschal Candle and Stations of the Cross and observing feast days not appointed by the *BCP* were also illegal but of minor gravity.⁶⁴²

⁶³⁴ (1860) 3 A & E 58 at 66.

⁶³⁵ (1868) 2 A & E 116 at 215.

⁶³⁶ RCED paras 123-145.

⁶³⁷ (1860) 3 A&E 58 at 62.

⁶³⁸ See also RCED paras 146-9.

⁶³⁹ RCED paras 150-3. Lighted candles were condemned in, *inter alia*, *Martin v Mackonochie* in the Privy Council and *Sumner v Wix*

⁶⁴⁰ *Read v the Bishop of Lincoln* [1891] P 9 at 9.

⁶⁴¹ *Elphinstone v Purchas* (1870) 3 A&E 66 at 108, *Davey v Hinde* [1901] P 95 at 120-121 and [1903] P 221 at 234.

⁶⁴² RCED paras 159-185.

Celebrations of the Holy Communion where the principal minister was the only communicant started the list of practices considered by the commission to be of graver illegality. The *BCP* ordered that the Holy Communion be not celebrated without at least three people to communicate with the priest. Nineteenth century catholic tastes and a resurgence of an insistence on fasting as a prerequisite for communion led to the introduction, in some parishes, of ‘sung’ or ‘high’ mass⁶⁴³ where only the priest (or, to comply with the rubric, only the priest and a handful of servers or assistants) communicated.⁶⁴⁴ This practice was vocally opposed by anti-ritualists, as was the very presence of non-communicant children at Holy Communion. Such services were considered by the commission to be against the presumption of the *BCP* that those attending Holy Communion would be communicants, but it was pointed out that ‘there is nothing in the Prayer Book to bid every non-communicant to withdraw.’⁶⁴⁵

Allied to the distaste for non-communicating services was the profusion of *secondary altars* and concurrent celebrations of Holy Communion. Private celebrations, save for the Communion of the Sick, had been outlawed by Canon 71 of 1604.⁶⁴⁶ The holding of concurrent services of Holy Communion, as long as they used the *BCP* rite were nowhere legally condemned, although it could be argued that such practice was indicative of an interpolation of the obligation placed on Roman Catholic priests to preside at the Mass daily, an obligation not placed at any point on priests of the Church of England.

*The Canon of the Roman Mass*⁶⁴⁷ was, it was alleged, used silently by priests during the singing of hymns such as the *Benedictus* and *Agnus Dei* before and after the prayer of consecration. Whilst the Commission was clear that such a practice, being virtually identical to the practice of the Roman Catholic Church, was not legal, as the prayers were not part of the *BCP*, and as use of the Roman Mass had been suppressed, yet there

⁶⁴³ At a ‘high’ mass the priest would be assisted by a deacon and sub-deacon who would also communicate.

⁶⁴⁴ The practice was condemned in the Court of Arches in *Clifton v Ridsdale* (1876) LR 1 PD 316.

⁶⁴⁵ RCED paras 187-194. The quotation is from the Bishop Davidson of Winchester’s visitation charge in 1899. The Bishop was, by the time of the Commission, Archbishop of Canterbury and a Commissioner.

⁶⁴⁶ RCED paras 196-198.

⁶⁴⁷ I.e. the Eucharistic Prayer or prayer of consecration from the Roman Catholic rite.

had been argument before them that they were legal as part of the private devotions of the priest.⁶⁴⁸

Elevation of the consecrated elements had become very common but had been condemned in the Court of Arches in *Martin v Mackonochie*⁶⁴⁹ and in Article XXVIII. *Genuflexion*, like elevation, was controversial as it was seen to ascribe to the consecrated elements the real presence of Christ and to imply the proscribed doctrine of transubstantiation. It was condemned, as was kneeling during the prayer of consecration, in *Martin v Mackonochie*.⁶⁵⁰ In a similar vein, adding the phrase ‘Behold the Lamb of God, that taketh away the sins of the world’⁶⁵¹ at the end of the prayer of consecration, was taken to be an interpolation from the Roman Missal and probably illegal as such.⁶⁵²

The Reservation of the Sacrament was controversial and is dealt with in greater depth in chapter 10 below. The commission stated that it ‘has not been the subject of an actual decision in the Ecclesiastical Courts or the Judicial Committee, although its unlawfulness has been stated incidentally in judgments of both tribunals.’⁶⁵³ Services connected to the reserved sacrament, *The Mass of the Pre-Sanctified*, *Eucharistic Adoration*, *the Maundy Thursday Vigil* and *Benediction* would, logically, be illegal if reservation were illegal.

All the above ‘grave’ illegalities were connected with services of Holy Communion, and especially with the increasingly popular catholic views on the presence of Christ in the Eucharistic elements. Heated debate on whether it was legal to hold such views in the Church of England raged on for many years and were instrumental in the debates on the proposed revision of the *BCP* in 1927 and 1928.

⁶⁴⁸ RCED paras 199-203.

⁶⁴⁹ (1868) LR 2 A&E 116 at 209.

⁶⁵⁰ (1868) LR 2 PC 365 at 385.

⁶⁵¹ John 1. 29. The objection was not to the use of scripture but to the link being made between Jesus (hailed in these words by John the Baptist) and the consecrated bread and wine.

⁶⁵² RCED para 217-8.

⁶⁵³ RCED para 228. The references given are *Martin v Mackonochie* (1868) L R 2 A & E 116 at 237 (obiter) and 3 PC 52 at 68 (incorrect) and *Shepherd v Bennett* (no 2) (1871-2) LR 4 PC 350 at 414.

The RCED went on to describe other practices that were possibly unlawful but which were not connected to Holy Communion.⁶⁵⁴ In the course of the Royal Commission an enormous body of evidence was built up that showed that, in the years from (roughly) 1850 many practices declared illegal in the courts had become commonplace and were tolerated by bishops and others in authority.

The attempt to control ritual innovation

Anti-ritualist voices were loud and plentiful. Prominent in the mid to late nineteenth century was the Earl of Shaftesbury who attempted on a number of occasions to introduce legislation to outlaw certain practices. Notably his Clerical Vestments Bill of 1867⁶⁵⁵ was defeated by a motion to adjourn debate in the House of Lords⁶⁵⁶ but only after Archbishop Longley promised to press for a Royal Commission on Ritual, which met between 1867 and 1870⁶⁵⁷. The Church Association was founded in 1865 as an attempt to co-ordinate the anti-ritual campaign and to promote the resistance of the spread of ritual by legal means.⁶⁵⁸ Queen Victoria herself was decidedly anti-ritual and in favour of a legal method by which it could be controlled, stating in a letter to Dean Stanley that ‘the archbishop should have the power given him, by Parliament, to stop all these ritualistic practices, dressings, bowings etc., and everything of that kind, and above all, all attempts at confession.’⁶⁵⁹ Both P T Marsh and David L Edwards claim that the Queen threatened abdication if ritual was not clamped down upon.⁶⁶⁰ It is clear that the driving force behind the anti-ritualist movement was a fear of the influence of the Roman Catholic Church and of any change in the Church of England that would lead to it becoming less distinctly protestant. The coincidence of the rise of ritualism with the culmination of the equally controversial emancipation of Roman Catholics (culminating in the Catholic Emancipation Act 1829 and the re-establishment of the

⁶⁵⁴ Observance of pre-Reformation feast days excluded from the *BCP*, hymns and prayers directed to or honouring Mary and other saints, the veneration of images, the veneration of roods, auricular confession, prayers for the dead and the publication of a number of manuals and books of prayers for use in the Church of England.

⁶⁵⁵ Which sought to make illegal all vestments with the exception of the surplice, scarf or tippet and academic hood.

⁶⁵⁶ 14 May 1867. See also Yates (1999), 224.

⁶⁵⁷ Reports of the Commission are found in PP 1867 XX, 719ff, PP 1867-8 XXXVIII, 1ff and PP 1870 XIX, 443 and 461ff.

⁶⁵⁸ Chadwick, vol II, 319.

⁶⁵⁹ Letter dated 13 November 1873, *Letters of Queen Victoria* II ii, 290-1.

⁶⁶⁰ Marsh, P T, *Victorian Church in Decline*, London, 1969; Edwards, David L, *Leaders of the Church of England 1828-1944*, London, 1971, 117. The former shows no source. It is likely that the former is the latter's only source for this.

Roman Catholic hierarchy in England in 1850) led to an equation of ritual with popery. Ritualistic clergy and laity were accused, throughout the rest of the century and beyond, with seeking a 'Romeward movement' of the Church of England.⁶⁶¹ W. E. Gladstone, in the aftermath of the passing of the Public Worship Regulation Act 1874 wrote that whilst there was, possibly, a small part of the Church of England that was 'engaged in such a [Romanizing] conspiracy'⁶⁶² that this was by no means all ritualist clergy and laity. Archbishop Tait, speaking in Convocation, likewise stated that he had 'no reason for a moment' to suppose that those seeking liberty in matters of ritual were advocating the introduction of the 'Romish Mass' or 'Romish doctrine' to the Church of England.⁶⁶³

The antipathy between the two sides in the debate on ritual was clear, both sides became entrenched in their positions and were well organised. The Church Association was committed to the unearthing of clergy introducing new ritual to parish churches and to bringing pressure to bear, including prosecution, in an attempt to stop the practices, backed by considerable financial assets donated by members.⁶⁶⁴ On the other side, the English Church Union, founded in 1859, gave financial aid to ritualist clergy facing litigation.⁶⁶⁵

Legislation

Two pieces of legislation were used in an attempt to control the spread of ritualism; the Church Discipline Act 1840 and the Public Worship Regulation Act 1874. The first Act provided a process by which an individual clergyman could be prosecuted for 'any offence against the laws ecclesiastical.'⁶⁶⁶ The prosecution hinged on the bishop of the diocese,⁶⁶⁷ who was empowered to set up a commission of five people to investigate

⁶⁶¹ See e.g. Walsh, Walter, *The Ritualists: Their Romanising Objects and Work*, London, 1900.

⁶⁶² Gladstone, William E, *The Church of England and Ritualism* London 1875, 83. Quotation and brackets from Yates (1999), 239.

⁶⁶³ Chronicle of Convocation, 1881, 9.

⁶⁶⁴ On 13 June 1879 the Council of the Church Association resolved to indemnify Dr Julius (a party in the case surrounding Canon T T Carter of Clewer) against costs including surety of £200 and the signing of a bond for £500. LPL MS CS/CA/5, 173. In November 1878, the Council pledged a contribution of £50 towards 'parliamentary action' aimed at amending the Public Worship Regulation Act 1874. LPL MS CS/CA/5, 57.

⁶⁶⁵ Yates estimates that the annual income of both the Church Association and the English Church Union was between £3,500 and £5,500 per year in the 1870s. Yates (1999), 152.

⁶⁶⁶ S. 3.

⁶⁶⁷ Or the Archbishop if the accused held a preferment in the gift of the Bishop. S. 24.

the alleged offence. The Bishop was empowered to suspend the accused minister during the course of the case⁶⁶⁸ and, if the commissioners found a case to answer to either (a) pronounce judgment if the offence were admitted, (b) hear the case in court with the assistance of three assessors or (c) pass the case to the Provincial court for it to be heard there.⁶⁶⁹ An appeal lay from the diocesan court to the provincial and from the Provincial court to the Privy Council.⁶⁷⁰

In practice, the office of the judge (in this case usually the diocesan bishop) was almost always promoted by another person. For instance, the case against the Revd John Purchas of Brighton was promoted first by C.J. Elphinstone, secretary of the Brighton branch of the Church Association.⁶⁷¹ On Elphinstone's death in 1870 leave was given to Henry Hebbert to promote the suit in his place.⁶⁷² The bishop did not, however, have to allow the promotion of his office,⁶⁷³ a point which is discussed further below.

Some of the high profile cases against ritualists were prosecuted under the Church Discipline Act, among them the aforementioned case against Purchas and the long-running dispute between John Martin and Alexander Herriot Mackonochie, Vicar of St Alban's Holborn. There were, however, only a very small number of prosecutions for liturgical offences under this Act. This was due not to lack of complaint about the practices but to the reluctance of the bishops to start proceedings. Instead, bishops frequently entered into compromise agreements with the clergy against whom complaints were made.⁶⁷⁴ The weakness of the procedure was compounded by the hostility of many clergy to the 'secular' Judicial Committee of the Privy Council.⁶⁷⁵ Opponents of ritual sought to legislate against the fashion. The setting up of the Royal Commission on Ritual in 1867 was an attempt to find a way to control the spread of ritual practices. The role and authority of the bishop in ritual matters was taken up by one commissioner, J D Coleridge who put forward a paper arguing for discretion in

⁶⁶⁸ S. 14.

⁶⁶⁹ Ss 9-13.

⁶⁷⁰ S. 15.

⁶⁷¹ Yates (1999), 218.

⁶⁷² (1870) LR 3 PC 245.

⁶⁷³ *R v Bishop of Chichester* (1859) 2 EL. & EL. 209, *Julius v the Bishop of Oxford* (1879-80) L.R. 5 App.Cas. 214 HL.

⁶⁷⁴ E.g. in *R v the Bishop of Chichester* (at 209) the headnote states that 'the Bishop then obtained a promise from [the incumbent] to discontinue [the practices complained of] at the celebration of the Holy Communion and at baptism.'

⁶⁷⁵ Yates (1999), 219.

ritual matters, provided that any usages permitted were not in conflict with Anglican doctrine⁶⁷⁶ and arguing against ‘a rigid uniformity in matters not essential’.⁶⁷⁷ The majority recommendation of the Commission was that bishops could suppress ‘lighted candles, vestments and incense upon any complaint being made to them.’ Dissenting voices included Sir Robert Phillimore (Dean of the Arches) and Bishop Wilberforce of Oxford.⁶⁷⁸ No legislation on matters of ritual came about as a result of the Royal Commission.

However, Archbishop Tait was under pressure to do something about ritual, of which the bishops were not supporters. In 1871 he received a deputation from the Church Association who expressed ‘the very great anxiety and alarm that prevailed amongst their numerous branches and subsections in all parts of the country’⁶⁷⁹ about ritualism and, in particular, the refusal of certain ritualist clergy to obey the monition of their bishop and the judgment of the court given in the *Purchas* case.⁶⁸⁰ That the Church Association represented a sizeable constituency within the Church is supported by the fact that a memorial sponsored by the Association, asking for the suppression of practices held to be illegal and presented to the Archbishops of Canterbury and York in 1873 was signed by 60,000 laymen.⁶⁸¹ Ritual even became an issue in some constituencies at the general election of 1874.⁶⁸²

Tait’s response was the Public Worship Regulation Bill, which became law in 1874. The Act (hereafter PWRA) set out a new parallel method for litigation on complaints about the liturgical practices of the clergy. It did not repeal the CDA. The PWRA provided for the appointment of a single judge of the provincial courts of Canterbury and York, to be, therefore, both Dean of the Arches and Auditor of the Chancery Court of York. The process for beginning proceedings under the act lay not with the bishop or a promoter of his office (as had been the case under the CDA) but with the archdeacon, a churchwarden of the parish or any three parishioners.⁶⁸³ They were able

⁶⁷⁶ Yates (1999), 231.

⁶⁷⁷ PP 1867-68 XXXVIII, 3.

⁶⁷⁸ PP 1867-68 XXXVIII, 3.

⁶⁷⁹ Minutes of the Church Association Meeting 21 July 1871. LPL MS CS/CA/2, 558.

⁶⁸⁰ In the definitive case of *Hebbert v Purchas* in 1870. LR 3 PC 605.

⁶⁸¹ Yates (1999), 235.

⁶⁸² Yates (1999), 236.

⁶⁸³ PWRA ss. 6 and 8. Parishioners were defined in s.6 of the Act as male, of full age, and having been resident in the parish for one year before the start of proceedings.

to complain about unlawful alterations to the church,⁶⁸⁴ the use of unlawful ornaments by the minister or neglect to use prescribed ornaments or vesture⁶⁸⁵ or unlawful addition to, alteration of or omission from the services of the *Book of Common Prayer*.⁶⁸⁶ A form of declaration to be made to the bishop was annexed to the Act and the bishop was able, on consideration of the submission, to allow a prosecution in the provincial court (with an appeal to the Judicial Committee of the Privy Council) or to veto such a prosecution.⁶⁸⁷ The veto proved the undoing of the Act, as discussed below.

Cases

Complaints were made against clergy under both the CDA and the PWRA. Nearly all the cases involved multiple court hearings and a number of conflicting judgments. However, over the course of the 1860s and 1870s case law developed, resulting in the legal situation codified by the Royal Commission on Ecclesiastical Discipline in 1906. As pointed out above, the question of legality rested on the interpretation of the rubrics of the *Book of Common Prayer* along with the Canons of 1604. The defence of many clergy⁶⁸⁸ was that the ornaments and ceremonies complained of were not illegal. The first judicial test of the disputes concentrated on the furnishings of the church. Lighted candles were not declared illegal, and on appeal to the Privy Council,⁶⁸⁹ neither were the credence table, altar crosses and coloured altar hangings. The cases against John Purchas⁶⁹⁰ and Alexander Mackonochie⁶⁹¹ were more wide ranging and included judicial declarations on all of the six key issues identified by Yates. In addition judgment was given against the ritualists in such matters as kneeling during the prayer of consecration⁶⁹² and processions.⁶⁹³

⁶⁸⁴ S. 8(1). Provided that the alteration complained of had been within the last five years.

⁶⁸⁵ S. 8(2).

⁶⁸⁶ S. 8(3).

⁶⁸⁷ S. 9.

⁶⁸⁸ E.g. the Bishop of Lincoln in *Read v the Bishop of Lincoln*, and the Revd C J Ridsdale in *Clifton v Ridsdale*.

⁶⁸⁹ *Westerton v Liddell* 1854-7. Moore's Special Report 1 PC.

⁶⁹⁰ (1869-71) LR3PC 605.

⁶⁹¹ There are no fewer than eleven reported cases involving Mackonochie. The substantive judgments of the Court of Arches are found at (1867) LR 2 A&E 116 and (1872-5) LR 4 A&E 279 and an appeal to the Privy Council on matters of substance at (1868) LR 2 PC 365. The other hearings were mainly concerned with the enforcement of the monition issued to Mackonochie to desist from practices declared illegal by the Court. See Smith, Charlotte, 'Martin v Mackonochie/Mackonochie v Penzance: A Crisis of Character and Identity in the Court of Arches?', *Journal of Legal History*, 24:3 (2003), 36-58.

⁶⁹² *Martin v Mackonochie* (1868) LR 2 PC 365.

⁶⁹³ *Elphinstone v Purchas* (1869-72) LR 3 A&E 66.

The final appeal in the case against Purchas was a turning point in the debate on ritual. The case was brought under the terms of the CDA and, as such, the highest court of appeal was the Judicial Committee of the Privy Council. Prior to the judgment of the Privy Council the Court of Arches had held those vestments in use in the *Book of Common Prayer* in 1549⁶⁹⁴ to be legal⁶⁹⁵ and also judged in favour of candles lit not only for the purposes of light.⁶⁹⁶ However, in a sweeping judgment in 1870 the Privy Council, on appeal from the Court of Arches, defined the legality or otherwise of a variety of ritual practices, items of vesture and ornaments. Flower vases set up in church were declared legal. Vestments, including those laid down in the *BCP* 1549, the biretta, the eastward position, wafer bread, the mixed chalice, processions, the setting up of crucifixes and images and an uncovered Holy Table were all declared to be illegal. This judgment was to be the benchmark for future judgments and for assumptions in practice about what was and was not legal in the Church of England. In a later hearing the Privy Council monished Purchas to desist from illegal practices, saying that he was found ‘to have offended in [his] said Church or Chapel, during or in connection with the performance of Divine Service, against the Statute Law, and the Constitutions and Canons Ecclesiastical of the realm’⁶⁹⁷

In *Martin v Mackonochie*⁶⁹⁸ the Privy Council had already overturned the Court of Arches decision that lighted candles were legal and, where (in the case of kneeling during the prayer of consecration) the Court of Arches had referred the matter to the direction of the bishop, had declared that illegal too. Later, in 1874, the Court of Arches declared that the singing of the *Agnus Dei* was likewise illegal.⁶⁹⁹

After these judgments very little was added to the case law until the trial of Bishop Edward King in 1890.⁷⁰⁰ In the intervening time the few trials held under the PWRA were conducted against the backdrop of the definitions of the Purchas and Mackonochie

⁶⁹⁴ Detailed above.

⁶⁹⁵ *Elphinstone v Purchas* (1869-72) LR 3 A&E 66.

⁶⁹⁶ *Martin v Mackonochie* (1867) LR 2 A&E 116. The judgment stated that lighted candles were in use in 1547.

⁶⁹⁷ *Hebbert v Purchas* (1871-73) LR 4 PC 301 at 302.

⁶⁹⁸ (1868) LR 2 PC 365.

⁶⁹⁹ *Martin v Mackonochie* (1871-75) LR 4 A&E 279.

⁷⁰⁰ The report of the RCED states that in the five years following the passing of the PWRA, with the exception of the Ridsdale case, ‘the litigation was rather for the enforcement of the declared law than for the decision of disputable points.’ RCED PP 1906 xxxiii para 338.

judgments. In the case against Edward King, however, the Archbishop of Canterbury (by this time Edward White Benson) ruled in favour of the Eastward position, provided that the manual acts were not invisible to the people and in favour of lighted candles when they had no ceremonial use. He also judged in favour of the use of the mixed chalice if the water and wine were mixed before the service and did not form a distinct ceremony within it. On many points, this judgment contradicted the Privy Council in the *Purchas* case.

As a matter of jurisprudence the *King* case is interesting. The legislation (the CDA and PWRA) was not designed to be used against a bishop and there was no statutory mechanism for trying the case. In the end the Archbishop revived his own court and found largely in favour of King. The authority of the Archbishop's Court was not challenged by the Privy Council when the Church Association (through the offices of Ernest de Lacy Read, a Churchwarden in the Diocese) appealed. Indeed, the Judicial Committee of the Privy Council upheld the Archbishop's judgment on all but one point.⁷⁰¹ This judgment, by not overruling the Archbishop's judgment had the effect of overturning various points in the *Purchas* judgment.

The Bishops

The bishops were not generally in favour of ritual⁷⁰² but they were faced on the one hand by anti-ritualists demanding that something be done and sponsoring litigation which ended up with the deprivation or imprisonment of parochial clergy, and on the other hand by clergy who were not prepared to desist from practices condemned by the courts and were not prepared to obey the orders of their bishops to desist. In a telling sentence from evidence presented to the RCED Archbishop Maclagen of York stated that he had 'in no way sanctioned' illegal practices, rather that they 'have only been permitted to continue in consequence of the difficulty of bringing them to an end.'⁷⁰³

⁷⁰¹ [1892] AC 644. On the question of lighted candles, the Archbishop found that they were a decoration, that the reformers found nothing wrong with them and that they were in regular use through most of the seventeenth century. He held, consequently, that they were legal. The Privy Council (at 668) held that whilst they were not necessarily legal, King did not commit an offence by failing to object to them.

⁷⁰² The Low-Church Bishop Thorold of Rochester made this clear on his own part in Convocation in 1881 (*Chronicle of Convocation 1881*, 155-159) and Bishop Mackarness of Oxford, though a hero of the ritualist party after the Clewer case, did not support introduction of ritual (Letter to the Oxford Branch of the Society of the Holy Cross 11 August 1877, printed in Mackarness, Charles C, *Memorials of the Episcopate of John Fielder Mackarness DD*. Oxford 1892).

⁷⁰³ PP 1906 xxxiii Appendix A, 4.

The bishops attempted, with limited success, to negotiate with clergy so that, if they did not desist from controversial ritual altogether, they at least toned it down. In the case of the Revd C J Ridsdale at St Peter's Folkestone, Archbishop Tait could not persuade Ridsdale that he was not bound to wear Eucharistic vestments. Ridsdale's defence in court was, like a number of others in the same position, that the ornaments rubric of 1549, confirmed in 1662 was binding on him, and that this rubric enjoined the use of vestments and lighted candles. This was in opposition to the previously stated finding of the Privy Council, which also ruled against his appeal on the subject of vestments.⁷⁰⁴

Ridsdale was not convinced and told Archbishop Tait (also his diocesan bishop) that he could only obey the judgment of the court if the Archbishop were to grant him a dispensation not to obey the ornaments rubric. Tait did:

I am ready to use all the authority I possess as Diocesan and Archbishop to relieve you from any such supposed obligation, and I gladly take upon myself the whole responsibility of directing that you do not wear a chasuble and alb at the administration of the Holy Communion; also that you abstain from using lighted candles at such celebration, except when they are required for purposes of light; and also that you abstain from mixing water with the wine in the Holy Communion.⁷⁰⁵

Tait considered that Ridsdale did not need to be dispensed from his observance of the rubric and the Society of the Holy Cross, to which most of the ritualist clergy involved in such cases belonged, questioned whether the Archbishop had the power so to dispense.⁷⁰⁶ The 'dispensation' was a pastoral response to the need for compliance with the findings of the court.

In evidence given to the RCED in 1906, the then Bishop of London, Arthur Winnington-Ingram, gave numerous examples of the toleration, both by him and by his predecessor Mandell Creighton, within prescribed limits, of illegal ritual practices in various parishes. For instance, Creighton compromised on the ceremonial use of

⁷⁰⁴ *Ridsdale v Clifton* (1877) 2 PD 276 affirming the judgment of *Hebbert v Purchas* (1870) LR 3 PC 605.

⁷⁰⁵ Letter dated 30 May 1877. Davidson, *Life of Tait*, vol 2, 241.

⁷⁰⁶ Yates (1999), 253.

incense in a number of parishes, allowing the use of a censer before the beginning of Holy Communion and during processions and allowing it to be swung in the service to keep it alight, but not to cense people or things.⁷⁰⁷ He did allow, however, the full ceremonial use of incense at two churches on major festivals.⁷⁰⁸ Parishes who refused to compromise and tone down more extreme ritual were placed ‘under discipline’. In London under Winnington-Ingram this resulted in the bishop not visiting the parish for confirmations, not licensing or renewing the licences of curates and withdrawing grants towards the stipends of curates.⁷⁰⁹ The pattern of compromise with the threat of extra-judicial ‘discipline’ for those who did not comply became an established pattern. The RCED report states that the bishops of Southwark, St Albans and Lichfield followed Creighton’s pattern and the parish of St Matthew, Carver Street, Sheffield found itself under discipline for thirty years in during the incumbency of Fr G C Ommaney.⁷¹⁰

Ridsdale, and other clergy who were willing to compromise, remained reasonably comfortably in their posts for many years. However, this was not the case with the other famous cases. John Purchas died in office in 1879, resistant to the last.⁷¹¹ Tait and Bishop Jackson of London arranged for Mackonochie to exchange livings with another extreme ritualist, the Revd Charles Fuge Lowder, Vicar of St Peter’s London Docks. Both Tooth and S F Green resigned their livings, the latter just prior to being deprived under s. 13 of the PWRA for failing to undertake to obey the monition of the court.

Prolonged litigation cast the church in a bad light. Winnington-Ingram was aware that, in the early twentieth century, he still had the option of prosecuting ritualist clergy. The consistent willingness of the courts to find against ritualists showed that such prosecutions would, in the main, succeed. However, the experience of the process under both the CDA and the PWRA was that trials were lengthy⁷¹² and costly.⁷¹³ As

⁷⁰⁷ PP 1906 xxxiii para 134 and para 387.

⁷⁰⁸ PP 1906 xxxiv paras 20817-20, 20851. The Churches were St Cuthbert’s, Philbeach Gardens and St Alban’s, Holborn. Bishop Winnington Ingram allowed full use of incense at St Colmba’s Haggerston on fifteen specified holy days in the year.

⁷⁰⁹ PP 1906 xxxiii para 143.

⁷¹⁰ Yates (1999), 332.

⁷¹¹ The Church Association did not enforce against his estate their order for costs against him. He was survived by his widow and six children. His estate was valued at £3650, his liability for costs at £2096, 14s, 10d. Minutes of the Council of the Church Association 17 October 1879. LPL MS CS/CA/5, 215-217.

⁷¹² See the above comment on the eleven reported hearings in *Martin v Mackonochie*.

⁷¹³ See the note above on the costs in the Purchas case.

early as 1881 it is clear that the Bishops had decided that prosecutions had to stop. The Bishops of the Province of Canterbury came to a common mind on this issue by the meeting of the Upper House of Convocation in April 1881. During that meeting reference was made to ‘private conversations amongst ourselves’,⁷¹⁴ which points to the inevitable fact of unrecorded discussions on the issue prior to the public debate. The Upper House unanimously passed a motion stating that litigation in matters of ritual is to deprecated and deplored and, if possible, avoided.⁷¹⁵

Before and after 1881 the Bishops had frequently stopped litigation. They had done so in complaints brought to them under both the CDA and the PWRA. Section 9 of the latter gave the bishop the option to veto proceedings ‘after considering the whole circumstances of the case.’ The wide discretion given to bishops in the matter allowed them to veto any potential prosecution. The statutory ability to veto was used by the bishops in almost every case and, after 1881, when they⁷¹⁶ had made it clear that they did not favour continued litigation and would veto any further attempts at prosecutions, only the prosecution in 1885 of J B Cox of St Margaret’s Toxteth was allowed to proceed. In this case, the Bishop of Liverpool, J C Ryle,⁷¹⁷ who had been a member of the Council of the Church Association did not veto the prosecution. Ryle ‘had moral objections to the use of the veto’⁷¹⁸ stating to Cox that ‘laws and legal decisions may be bad, but so long as they are not repealed, or reversed, they must be obeyed; or else there is nothing left but chaos and confusion’.⁷¹⁹ However, even after a brief imprisonment, Cox remained the incumbent of the parish and the ritual remained in the face of his bishop’s opposition.⁷²⁰

The PWRA did not limit the circumstances in which the bishop could exercise his veto. In 1899 the House of Commons undertook a survey⁷²¹ of the use of the veto and asked each bishop to list the number of complaints that had been made to him and to his

⁷¹⁴ Per the Bishop of Winchester, Chronicle of Convocation 1881, 20.

⁷¹⁵ Chronicle of Convocation 1881, 176.

⁷¹⁶ At least the bishops of the southern province made it clear.

⁷¹⁷ Who was not part of the Convocation of Canterbury and therefore did not take part in the debate in the Upper House in 1881.

⁷¹⁸ Yates (1999), 272.

⁷¹⁹ Yates (1999), 270.

⁷²⁰ Ryle refused to license curates to the parish but did not institute further proceedings against Cox. Yates (1999), 272-3.

⁷²¹ 23 February 1899 PP 1899 lxxiii, 941.

predecessors under the PWRA.⁷²² The total number of complaints up to that point had been 23; the bishop concerned had vetoed proceedings in 17 of those cases. There can be no doubt that the practices condemned in the six cases that were allowed to proceed (the five aforementioned cases resulting in the imprisonment of the clergy concerned and the aforementioned case against Ridsdale) were in regular use in the cases that were vetoed. It is therefore clear that the Bishops use of the veto was not because they considered that there was no illegal ritual in use. Examination of the stated reasons for the use of the veto is aided by the requirement in section 9 that the bishop ‘shall state in writing the reason of his opinion, and such statement shall be deposited in the registry of the diocese’. A number of the responses indicate that the bishop had attempted (with some successes) to persuade the priest concerned to desist from illegal practices. Other bishops stated that they had vetoed the proceedings due to a pending appeal in a similar case. However, Tait (acting on behalf of Bishop Jackson of London who was prevented by the statute from acting in the case as he was the patron of the living), vetoed the prosecution of C F Lowder in November 1878 on these grounds but neither he nor Bishop Jackson extracted any undertaking from Lowder to desist and the ritual at St Peter’s London Docks remained unchanged.⁷²³

The PWRA had been designed ‘for the better administration of the Laws respecting the regulation of Public Worship’. In the end it became a dead-letter as it became clear that, even if complaints were made, the bishops would veto proceedings. The Church Association had foreseen that the veto might have been used to protect ritualists and had urged in 1874 that an appeal from the decision of a Bishop to veto should lie to the Archbishop,⁷²⁴ but the right of the bishop to veto for whatsoever reason he chose was never overturned.

Bishop Mackarness of Oxford vetoed proceedings following a complaint against Canon Carter of Clewer, made under the PWRA on 11 August 1877. In his statement accompanying the veto he stated that:

A deed has been secretly executed, by which a guarantee has been given by persons, not being parishioners of Clewer, to one or more of the Complainants

⁷²² A form of words for making an official complaint was annexed to the statute as Schedule B.

⁷²³ Chadwick, vol II, 348.

⁷²⁴ LPL CS/CA/3,145.

against expenses to be incurred on this Suit, the effect of which is to transfer the control and direction of the proceedings from the nominal Complainants to other than parishioners, thereby defeating the intent of the Act. It is unnecessary to consider whether extreme poverty on the part of the Complainants would in any case justify a disregard of the spirit and chief purpose of the Act, as the circumstances attending the Representation which has been transmitted to me entirely exclude this consideration from the present case.

Mackarness had discovered that the Church Association had (with some difficulty) found a parishioner (Dr Julius) who was prepared to declare himself 'aggrieved' by the ritualism of Carter and had underwritten his costs in the case. This was the method by which the Church Association worked in order to secure prosecutions. The minutes of the Council of the Church Association show that, on hearing a complaint, they would commission a legal opinion on whether or not a prosecution was possible and then proceed to finance the action. The Association itself had no *locus standi* under either the CDA or the PWRA to institute proceedings but instead financed (and, according to Mackarness, controlled) the process on behalf of their nominal complainants.

The case against Canon Carter was long-running. When the above complaint under the PWRA was vetoed by Mackarness, the Church Association instituted a complaint under the unrepealed CDA.

The CDA, like the PWRA, required that complaints be channelled through the Bishop of the Diocese. S. 9 of the PWRA was explicit in its granting of a veto to the Bishop. The CDA is drafted in different terms and states that 'it shall be lawful' for the Bishop to refer the case to a commission, to hear the case and pronounce sentence and to institute proceedings in the provincial court. When the further complaint was made against Carter, Mackarness refused to entertain the complaint and refused to set up a commission or to institute proceedings. The Church Association financed a suit against Mackarness, seeking a mandamus to compel him to act.

In preparation for the suit the Church Association obtained the opinion of Mr (later Sir Francis) Jeune, who stated that 'It is necessary in moving for a Mandamus to be able to shew a clear and positive refusal' on the part of the Bishop. Jeune further pointed out

that the case law of cases under the CDA⁷²⁵ showed clear declarations of the illegality of the practices complained of. Letters to the bishop from the Proctors for the complainant elicited confirmation from the bishop that he was not going to act.⁷²⁶ Lord Shaftesbury wished the power of the Bishop under the CDA to be tested in court and on 22 November 1878 the Church Association resolved to seek ‘a Rule for the Bishop of Oxford to shew cause why a mandamus should not issue to compel him to grant a Commission to inquire with the matters complained of.’

The initial judgment of the Divisional Court in *Julius v the Bishop of Oxford*⁷²⁷ found against the bishop. In his judgment Lord Cockburn CJ stated that:

The bishop has declined, however, to issue the commission as required, assigning as a reason, not that the matters complained of were not offences against the ecclesiastical law, or were of too unsubstantial and trivial a character to call for inquiry, but resting his refusal on the ground that the repeated failures, which had occurred during the last few years in legal proceedings of this kind, had had a tendency to cover those concerned in them with ridicule and to bring the Church itself into contempt, as well as on the advanced age of the incumbent, the respect and love in which he was held, and the fact that the complaint was made in opposition to the expressed wish of the great majority of the parishioners.⁷²⁸

The facts in this judgment are not contested but the mandamus was overturned by the Court of Appeal⁷²⁹ and this decision was upheld by the House of Lords.⁷³⁰

In the Court of Appeal and the House of Lords the question was raised as to whether the Bishop could prevent his office as judge being promoted by another. Both courts held that he could. In the court of Appeal the judgments made reference to *Procurator-General v Stone*⁷³¹ where Sir W Scott said that the Bishop had no power to refuse the process of the court to someone aggrieved. Yet Bramwell LJ pointed to both *R v the*

⁷²⁵ *Martin v Mackonochie* and *Hebbert v Purchas*, in particular.

⁷²⁶ Minutes of the Church Association Council 8 November 1878. LPL MS CS/CA/5, 26 and 38-9.

⁷²⁷ 8 March 1879. (1879) 4 QBD 245.

⁷²⁸ At 250-251.

⁷²⁹ (1879) 4 QBD 525 CA.

⁷³⁰ (1880) LR 5 AC 214.

⁷³¹ (1808) 1 Hagg Cons 424.

*Bishop of Chichester*⁷³² and *Elphistone v Purchas*⁷³³ wherein the right of the bishop not to proceed under the CDA had been established. In his judgment he stated:

Complaint is made that there may be a wrong unpunished. So there may be at Common Law. The Queen may pardon, the Attorney General may enter a *nolle prosequi* to any indictment. Why may not the bishop, who is in the nature of prosecutor, do the same? It is strange that if Mr Carter should be indicted for these offences, the prosecution could be stopped, but cannot be if proceedings are in the Ecclesiastical Courts⁷³⁴

but, that

it does seem to me (I speak with sincere respect) that the discretion here has been most erroneously exercised. It is as though a public prosecutor should refuse to prosecute a man guilty of persisting in a public nuisance against the rights and to the injury of the neighbourhood, because the offender was old and respected and because some of the neighbours worked for him, and because some prosecutions for nuisance had recently failed.⁷³⁵

In the House of Lords Lord Penzance stated that ‘the judge always had a right and power to refuse to permit his office to be promoted if he sought fit.’⁷³⁶

Mackarness, by his own admission⁷³⁷ was aware of the illegality of Carter’s ritual. However, he was well aware that ‘there are few churches in England in which some departure from exact uniformity of ritual may not be found.’⁷³⁸ He was not in favour of ‘unrestrained license for wilful departure from the usage and ritual of the church’⁷³⁹ but in favour of ‘as large a measure of liberty as the faith and discipline of the Church would bear.’⁷⁴⁰

⁷³² (1859) 2 EL & EL 209. In this case the possibility of the office of judge being promoted by another had been established. Also that the bishop had discretion whether or not to issue a commission. The court in this case would not have issued a mandamus in any case as the applicant was a stranger to the parish and diocese and had no personal interest in the investigation of the charges.

⁷³³ *Elphistone v Purchas* (1845) LR 3 PC 245.

⁷³⁴ (1879) 4 QBD 525 at 553

⁷³⁵ At 556.

⁷³⁶ (1880) LR 5 AC 214 at 229.

⁷³⁷ Mackarness *Memorials*, 156- 178.

⁷³⁸ Mackarness *Memorials*, 157.

⁷³⁹ Mackarness *Memorials*, 176.

⁷⁴⁰ Mackarness *Memorials*, 177.

Therefore, the approach of Mackarness was that whilst he was not personally in favour of advanced ritual,⁷⁴¹ he was in favour of a certain amount of toleration of illegal practice for the greater good of the Christian Church. In this he was, eventually, supported by Tait who, in Convocation in 1881 admitted to turning a blind eye to illegality:

What a Bishop is entitled to say is “I shall shut my eyes, I shall not press hard upon you with regard to a matter of that kind. Of course there are limits, but I shall take care that you are not molested so far as I am concerned”⁷⁴²

Mackarness, in a similar vein, stated that he was prepared to tolerate certain irregularity provided he knew about it and that what he was prepared to tolerate he was ‘prepared to justify in the House of Lords.’⁷⁴³

Conclusions

The ritual controversies of the late nineteenth and early twentieth centuries show a protracted battle between strict application of the law and the setting aside in certain circumstances of that strict application. Central to this battle and debate were the bishops of the Church of England.

Bishops are given an authority by the rubrics of the *BCP* to resolve doubts on the interpretation of rubrics and to provide or authorise services for occasions for which there is no provision in the *BCP*. However, that right was not held to extend to overrule ‘what is expressly ordered and prohibited by the rubric’. In such cases the Bishop has ‘no jurisdiction to modify or dispense with the rubrical provisions.’⁷⁴⁴ Bishops also had a specific role to play in the processes leading to prosecution under the *CDA* and *PWRA*. In the former they were empowered to prosecute, or to allow their office to be promoted by another. In the latter they had a power to veto any prosecution brought by another eligible party.

In the ordination service the new bishop undertakes to ‘banish and drive away from the Church all erroneous and strange doctrine contrary to God's Word; and both privately

⁷⁴¹ He quietly counselled clergy to withdraw from the Society of the Holy Cross. Mackarness *Memorials*, 84.

⁷⁴² Chronicle of Convocation 1881, 174.

⁷⁴³ Mackarness, *Memorials*, 41.

⁷⁴⁴ Per Lord Cairns in *Martin v Mackonochie* (1868) LR 2 PC 365 at 385.

and openly to call upon and encourage others to the same' and to 'correct and punish, according to such authority as you have by God's Word, and as to you shall be committed by the Ordinance of this Realm'. However, in the ordination prayer itself, immediately prior to the laying on of hands, the ordaining bishop or archbishop prays that the new bishop may 'use the authority given him, not to destruction, but to salvation; not to hurt, but to help'.⁷⁴⁵ It seems clear that during the ritual controversies of the nineteenth century there was a real tension within the church and within the episcopate between the competing Episcopal functions of discipline and mercy. There were those on the one hand who saw the clear duty of the bishop to 'banish and drive away' ritualism and the perceived error it represented and who, when faced with an example such as the Clewer case, would see Mackarness's refusal to allow prosecution as contrary to his ordination promise to 'encourage others to the same'. There were also those on the other hand, as has been shown, and particularly the bishops themselves, who saw the dangers in such action and the threat of 'destruction' rather than 'salvation' in the protraction of legal, ritual and doctrinal infighting within the Church of England.

In evidence to the *RCED* a number of bishops referred to the *jus liturgicum* as attaching to the bishop by virtue of his consecration and office. They derived this claim from pre-Reformation canon law, and defined it loosely as the authority inherent in the bishop to make provision for and to regulate the services of the Church. In evidence they claimed this right as justification, *inter alia*, for leaving unchecked customary liturgical practices *contra legem* and sanctioning additional, sometimes informal services.⁷⁴⁶

Bishop Moule of Durham gave evidence of occasions on which he had authorised informal services, but also of having authorised the conveying of the sacrament to the sick (not permitted under the *BCP* rubrics) and of not enforcing the prohibition on Eucharistic vestments.⁷⁴⁷ Bishop Compton of Ely claimed that 'it appears that the Act of Uniformity did not deprive the bishop of his *Jus Liturgicum*', which he exercised

⁷⁴⁵ *The Form of Ordaining or Consecrating of an Archbishop or Bishop*, in *BCP*, 1662.

⁷⁴⁶ *RCED* PP 1906 xxxiii para 43. See written evidence of the Archbishop of York in *RCED* PP 1906 xxxiii Appendix A, 4-5.

⁷⁴⁷ *RCED* PP 1906 xxxiii Appendix A, 16-17. The Archbishop of York also allowed the carrying of communion to the sick.

mainly by not enforcing prohibitions on ritual practices.⁷⁴⁸ Bishop Paget of Oxford was happy to go beyond the strict interpretation of the Act of Uniformity as ‘it seemed to [him] that some further liberty was required by practical needs and allowed by almost universal custom.’⁷⁴⁹

Thus, by the beginning of the twentieth century a number of ritual and ceremonial practices that would have been unthinkable a century earlier had become common in the Church of England. The sometimes conflicting and contradictory judgments of the various courts which had the opportunity to try these matters make clarity on any particular question difficult to attain. The bishops had, since 1881 at least, preferred to veto legal proceedings in favour of (often unsuccessful) attempts to persuade more advanced ritualists to moderate their behaviour. This confusing picture then becomes the backdrop for the attempted liturgical reforms of the early twentieth century.

⁷⁴⁸ RCED PP 1906 xxxiii Appendix A, 17 ff.

⁷⁴⁹ RCED PP 1906 xxxiii Appendix A, 32.

Chapter 10 - The Proposed Revision of *The Book of Common Prayer* 1927-28

Introduction

The Royal Commission on Ecclesiastical Discipline of 1906 concluded *inter alia* that the liturgical law of the Church of England, based solely on the use of the BCP of 1662, was too restrictive for the needs of the church at that time. The Commissioners stated that the law ‘needlessly condemns much which a great section of Church people, including many of her most devoted members, value.’⁷⁵⁰

By the early part of the twentieth century omissions from and additions to the 1662 liturgy were commonplace, if not universal.⁷⁵¹ As well as the well-publicised illegal practices of the ritualists various other practices, described by the commission as ‘Non-significant breaches’ of the law⁷⁵², were in regular use. These included such practices as the holding of special Harvest Festival services, the preaching of a sermon by the bishop at confirmation, taking collections at Morning or Evening Prayer and the addition of a blessing at the end of these services. These and other practices were not doctrinally controversial but if the state of liturgical law was that the only services authorised for use in public worship in churches were those contained in the 1662 *BCP* and that these services had to be conducted according to the letter of the rubrics then such additions and variations were consequently illegal. The Royal Commission stated that

The obligation to conform to the standard is rigid “In the performance of the services, rites, and ceremonies ordered by the Prayer Book the directions contained in it must be strictly observed. No omission and no addition can be permitted.” The distinction between what is important and what appears to be trivial has been expressly and emphatically precluded.⁷⁵³

The Commission went on to point to certain permissible variations made permissible by the Prayer Book (Tables of Lessons) Act 1871, the Act of Uniformity Amendment

⁷⁵⁰ RCED PP 1906 xxxiii 75.

⁷⁵¹ See generally Cuming, G J, *A History of Anglican Liturgy* 2nd ed. Macmillan, Basingstoke, 1982, 162ff.

⁷⁵² RCED PP 1906 xxxiii 11-12.

⁷⁵³ RCED PP 1906 xxxiii, 6-7. Quotation from *Westerton v Liddell* (1857) Moore’s Special Report 1 PC at 187.

Act 1872,⁷⁵⁴ and the Burial Laws Amendment Act 1880. These statutes ‘introduced a certain amount of freedom.’⁷⁵⁵ The conclusion to be drawn from this is that the only method by which variations or additions to the strict letter of the text and rubrics of the Prayer Book was by Act of Parliament. The question of whether or not other variations were permissible was debated in the wake of the Royal Commission appointed to examine clerical subscriptions and declarations. The report of this Commission unanimously recommended a change to the subscriptions and oaths taken by clergy at ordination or on taking up a new benefice or preferment. Canon 36 of 1603 compelled subscription to the Royal Supremacy, to the use of the BCP and none other in public prayer and the administration of the sacraments and to the thirty-nine articles of religion.⁷⁵⁶ The change, enshrined in the Clerical Subscriptions Act 1865, altered the second subscription so that it concluded ‘.... I will use the form in the said Book prescribed and none other, except so far as shall be ordered by lawful authority.’⁷⁵⁷ The question whether this was a real change – in other words, what constituted ‘lawful authority’ - was important. It certainly included statutory changes to the use of the BCP as outlined above (e.g the Act of Uniformity Amendment Act 1872) and the right of the sovereign in council to change the names of the Sovereign and the Royal Family in the State Prayers.⁷⁵⁸ During debate in the House of Lords Lord Stanhope suggested that such authority gave latitude for the introduction of special services for occasions not envisaged by the BCP and authorized by the Queen in Council. Lord Westbury, the Lord Chancellor, stated in debate that only parliament could change the text of the BCP but that the Queen in Council could add special prayers and services for special occasions.⁷⁵⁹ The change in clerical subscription did not change the Bishop’s power to ‘appease diversity and resolve doubts’ as set down in the exhortation *Concerning the Services of the Church* in the BCP. That said, the history of legal challenges to liturgical innovation in the Church of England in the later part of the nineteenth century, and especially the trial of Bishop King, shows that this power was not considered by the courts to be the ‘lawful authority’ that could permit alteration to the

⁷⁵⁴ Known as the ‘Shortened Services Act’ as it enabled the shortening of Morning and Evening Prayer *inter alia*. Gray, Donald, *The 1927-28 Prayer Book Crisis* vol 1, London, 2005, 13.

⁷⁵⁵ Gray (2005), 7.

⁷⁵⁶ Vaisey H, ‘Lawful Authority – a Memorandum’ in *The Canon Law of the Church of England*, London, 1947, 215.

⁷⁵⁷ Vaisey, 215.

⁷⁵⁸ Act of Uniformity 1662 s.25.

⁷⁵⁹ Vaisey, 217.

rubrics or texts of the BCP. Harvey Goodwin, Dean of Ely, and a member of the Royal Commission looking at Clerical subscription did not believe ‘lawful authority’ could easily be defined and concluded ‘we were content to leave the question as to what is lawful authority to be determined by other persons or in other ways than any that were open to ourselves.’⁷⁶⁰

Following the Report of the Royal Commission on Ecclesiastical Discipline ‘Letters of Business’ were issued⁷⁶¹ to the Archbishops under the Royal Sign Manual on 10 November 1906 authorising the Convocations to debate and agree upon changes to the ornaments rubric and the law on the conduct of divine service and the ornaments and fittings of Churches. Once agreed, the Convocations were to report back to the King.⁷⁶² These letters started the process of Prayer Book Revision that finally ended with the rejection of the proposed revised book by Parliament in 1927 and again (in a further revised form) in 1928.

Liturgical Law at the beginning of the process of Prayer Book Revision with particular reference to the Reservation of the Sacrament

During the nineteenth century a conservative interpretation of the rubrics of the prayer book, in particular the *ornaments rubric* had prevailed in the Courts as discussed in detail above. The courts’ strict interpretation on many matters of ritual and ceremonial had become largely irrelevant in many cases.⁷⁶³ The collective decision by the Bishops in the 1880s not to prosecute ritualist clergy meant that even the activities of John Purchas would have gone unchallenged in the courts in the Edwardian era. That said, however, ‘Kensitite’⁷⁶⁴ disruption of ritualist worship continued. Whilst the rites and ceremonies proscribed by the courts in, for example, the Purchas and King cases were still, strictly speaking, illegal they were by now largely tolerated. In the period during which the revision of the Prayer Book was undertaken the focus of contention within the Church of England shifted to the question of the reservation of the sacrament. As

⁷⁶⁰ Vaisey, 220. Goodwin was speaking in the Lower House of the Convocation of Canterbury.

⁷⁶¹ At the request of the Archbishops of Canterbury and York.

⁷⁶² Bell, G K A, *Randall Davidson, Archbishop of Canterbury*, 3rd ed. OUP, Oxford, 1952, 649-50.

⁷⁶³ As noted above, Nigel Yates claims widespread use of the Eastward position and lighted candles in 1903. Also, according to the English Church Union, Eucharistic vestments were worn in 1,536 out of 14,242 parishes in England. See Gray (2005), 29.

⁷⁶⁴ Named after John Kensit, who habitually disrupted supposedly ritualist services. Others followed his lead. See e.g. *Kensit v the Dean and Chapter of St Pauls* [1905] 2 KB 249 on objections during a service of ordination.

with the nineteenth century ritualist controversy, opponents of the re-introduction of reservation (a practice which had been in continuous disuse since the accession of Elizabeth I) accused its proponents of popery⁷⁶⁵. The debate about reservation was central to the parliamentary debates on the deposited Prayer Book in 1927 and 1928 and it was also extensively argued in court but, unlike in the nineteenth century ritualist cases, such argument was not generally in criminal suits but in applications for faculties to add to or to remove from churches the fixtures and fittings associated with reservation.⁷⁶⁶

There is a stated distinction at the time between reservation for purposes of adoration and reservation for the purpose of communion of the sick (or of others unable to attend the regular Sunday service, for example shift workers⁷⁶⁷). The Royal Commission recommended the immediate cessation of 'Reservation of the Sacrament under conditions which lead to its adoration'⁷⁶⁸ but, whilst, pointing out that reservation for the purposes of communion was illegal did not condemn it as necessarily contrary to the teaching of the Church of England.

During 1899 and 1900, in what became known as the *Lambeth Hearing* the Archbishops of Canterbury and York⁷⁶⁹ considered the question of whether or not reservation of the sacrament was permissible in the Church of England. Temple's published opinion was that

....after weighing carefully all that has been put before us, I am obliged to decide that the Church of England does not at present allow reservation in any form, and that those who think it ought to be allowed, though perfectly justified

⁷⁶⁵ E.g. the speech of Rosslyn Mitchell MP in the House of Commons on 13 June 1928. *Hansard* Fifth Series 1928 vol 218 cols 1121ff. Esp. at col 1126 'this Book is an outward sign of an inward movement which was established and exists for no other purpose than the overthrow of Protestantism in England.' See also the summary of objections contained in the *Report by the Ecclesiastical Committee on the Prayer Book Measure* 1927 at 17. PP 1927.vii.509.

⁷⁶⁶ E.g. *Davey v Hinde* [1901] P 95 and [1903] P 221, *Capel St Mary (Rector and Churchwardens) v Packard* [1927] P 289.

⁷⁶⁷ For the example of reservation for the communion of workers unable to attend regular services see *Re Lapford (Devon) Parish Church* [1955] P 205.

⁷⁶⁸ RCED, 75. It condemned as plainly illegal and inconsistent with the teaching of the Church of England other practices indicative of a doctrine of the real presence of Christ in the elements of Holy Communion e.g. the Mass of the Pre-Sanctified, Corpus Christi processions and Benediction. It also condemned certain practices surrounding the cult of the Saints and the veneration of images.

⁷⁶⁹ Frederick Temple and William Maclagen.

in endeavouring to get the proper authorities to alter the law, are not justified in practising reservation until the law has been altered.⁷⁷⁰

It is doubtful that the opinions themselves were definitive. Owen Chadwick comments

... was a declaration by archbishops equal to determination in a properly constituted court? It had not authority over the defiant. And it would not determine whether these practices were legal or not.⁷⁷¹

In *Bishop of Oxford v Henly*⁷⁷² the Dean of the Arches, Sir Lewis Dibdin, reviewed the law on the reservation of the sacrament and concluded that it was 'impossible to reserve the blessed sacrament without a departure from the rubrics of the Prayer Book, and therefore without a breach of the Acts of Uniformity, which is an ecclesiastical offence.' He went on to state that perpetual reservation of the sacrament over the altar of a church as was the practice prior to the Reformation was 'an offence against the common law of the Church of England'. The same judge made the same conclusion, that reservation was illegal, in the later case of *Rector and Churchwardens of Chapel St Mary (Suffolk) v Packard*.⁷⁷³

The reasoning behind the judgment in the Henly case was explained with reference to the detailed instructions of the rubrics of the *BCP*, notably that the celebrant at Holy Communion is instructed to 'place upon the Table so much Bread and Wine as he shall think sufficient', that if this proves insufficient he should 'consecrate more according to the Form before prescribed' and that consecrated bread and wine that is left over should be reverently eaten and drunk immediately after the blessing. Reservation for the communion of the sick was also prohibited in that the Prayer Book provided that when a housebound sick person required communion the sacrament should be celebrated in the sick person's house according to the rubrics laid down for the Communion of the Sick.

The Dean's judgment in the Henly and Chapel St Mary cases and that of the Archbishops in the *Lambeth Hearing* concur. During the process of Prayer Book

⁷⁷⁰ Quoted in *Re: Lapford (Devon) Parish Church* [1955] P 205 Court of Arches.

⁷⁷¹ Chadwick, vol II, 356.

⁷⁷² [1907] P 88.

⁷⁷³ [1927] P 289.

revision the practice of reservation was not legal and would not be so until the law was changed by lawful authority – namely by statute.

The Deposited Book: Debate and Defeat

In response to the Royal Letters of business Archbishop Davidson summoned a committee of liturgical experts⁷⁷⁴ and the Bishops of the southern province set up three committees, examining, respectively, the *Ornaments Rubric*, legal procedure and changes in rubrics.⁷⁷⁵ The Convocations produced a schedule of Amendments to the Prayer Book in 1920. Pressure groups within the Church produced their own proposals⁷⁷⁶ and the proposals were debated in the Convocations and in the newly formed Church Assembly after 1920. The experience of the nation and the Church (and especially the experience of military chaplains) during the First World War informed the debate (in particular on the question of reservation of the sacrament for the communion of the sick).⁷⁷⁷ The revision was finalised by votes in the Convocations and in the Church Assembly, which produced a large majority in favour of the proposals.⁷⁷⁸ It was rejected by the House of Commons on 15 December 1927.⁷⁷⁹

Following this defeat the Deposited Book was slightly revised ‘chiefly with the object of removing misapprehensions which had arisen.’⁷⁸⁰ The debate in the House of Commons in 1927 had focussed on the Alternative Order for the Administration of the Lord’s Supper or Holy Communion and the Alternative Order for the Communion of the Sick, containing as they did, the provision for the reservation of the Sacrament. The revised book of 1928 re-introduced the ‘Black Rubric’ (which declared that kneeling to receive the bread and wine of Holy Communion was not indicative of adoration of the blessed sacrament) at the end of the Alternative Communion service and revised the rubrics in the proposed service for the Communion of the Sick to place careful

⁷⁷⁴ Gray (2005), 33.

⁷⁷⁵ Cuming (1982), 166.

⁷⁷⁶ E.g. the ‘Green’ book of the catholic-leaning English Church Union, the ‘Grey’ book from a more liberal lobby and W H Frere’s ‘Orange’ book attempting to harmonise the two. See Cuming *op cit* p 169.

⁷⁷⁷ See the speech by the Bishop of St Albans in the Upper House of the Convocation of Canterbury 10 July 1929 *Chronicle of Convocation* 1929, 59. See also Gray (2005), 45.

⁷⁷⁸ Smethurst, A F, and Wilson, H R, *Acts of the Convocations of Canterbury and York*, London, 1948; Lowther–Clarke, W K, *The Prayer Book of 1928 Reconsidered*, London, 1943, *Report by the Ecclesiastical Committee upon the Prayer Book Measure 1927*, 4. PP 1927.vii. 495ff. and *Report by the Ecclesiastical Committee upon the Prayer Book Measure 1928*, 4. PP 1928.vii.398.

⁷⁷⁹ By a majority of 230 to 205. Hansard Fifth Series vol 211 1928 col 2652.

⁷⁸⁰ *Comments and Explanations submitted to the Ecclesiastical Committee by the legislative committee with the Prayer Book Measure 1928*. PP 1928.vii.401.

restrictions on the practice of reservation⁷⁸¹ so as to discourage perpetual reservation and avoid controversial services such as benediction and eucharistic devotions.⁷⁸² However, the revised ornaments rubric, permitting the use of Eucharistic vestments, and the provision for the reservation of the sacrament and for its being carried out of the Church for the purposes of communicating the sick were retained. The Revised Book was laid before Parliament and was rejected by the House of Commons. The debate in the House of Commons was similar to that of the previous year. Much was made of the Anglo-Catholic nature of the book and of the controversy about reservation of the sacrament.⁷⁸³ Several members voiced fears of a Rome-ward drift of the Church of England and voiced opposition to such matters as the ‘Malines Conversations’,⁷⁸⁴ transubstantiation,⁷⁸⁵ confession,⁷⁸⁶ and the perceived wish of the Roman Catholic Church to convert the English people.⁷⁸⁷ George Courthope was of the opinion that ‘the question at issue boils down to the doctrine of Transubstantiation and the Reserved Sacrament.’⁷⁸⁸ Reading the debate in the House of Commons it is clear that his analysis was correct. However, Archbishop Davidson had given assurances to Parliament that the doctrine of the Church of England, which rejected the doctrine of transubstantiation, had not changed.

In a speech in favour of the book the evangelical Mr C Atkinson suggested that ‘the method adopted [by opponents of the book] has been to stir up indignation against the Bishops and to paint lurid pictures of illegalities which have been going on in the Church, with the suggestion that these illegalities will be made legal if this Book is passed.’⁷⁸⁹

⁷⁸¹ E.g. the rubrics of 1928 allow the Bishop to license perpetual reservation so as to ensure that the acutely sick or dying can receive communion but, unlike in the proposed rubric of 1927, the PCC was to be given the power to refer the grant or refusal of such a licence to the Archbishop and Bishops of the Province.

⁷⁸² Prayer Book Measure 1928 [18 and 19 Geo 5] First Schedule. PP 1928.vii.389. The 1928 rubric details that the sacrament should be reserved in an aumbry in the North or South wall of the Church. I.e. not in a tabernacle above the altar, a practice linked with Eucharistic adoration.

⁷⁸³ e.g. the speeches of Sir Samuel Roberts Hansard Fifth Series vol 218. cols. 1023-1033 and of Lieut-Commander Kenworthy cols. 1036-1039.

⁷⁸⁴ Early ecumenical dialogue between the members of the Church of England and the Roman Catholic Church. Hansard col. 1085.

⁷⁸⁵ Col 1091.

⁷⁸⁶ Col 1063.

⁷⁸⁷ Col 1126.

⁷⁸⁸ Col 1119.

⁷⁸⁹ Col 1212.

One member claimed that public opinion was strongly against the deposited Book.⁷⁹⁰ However, at the very end of the debate in 1927 another member had stated that the great mass of working people were ‘more interested in the rent book than they are in the Prayer Book.’⁷⁹¹ Towards the end of the 1928 debate Winston Churchill doubted that there was uniform public opinion one way or the other.⁷⁹² He further predicted, correctly, that ‘the rejection of this Measure will inaugurate a period of chaos.’⁷⁹³ The Measure was defeated by 266 votes to 220.⁷⁹⁴

The Church’s Response

The rejection of the Deposited Book at the second attempt left the Church in something of a crisis. The Royal Commission had concluded that the law as it stood in 1906 (and it had not yet been amended) was unworkable and had seen the revision of the Prayer Book as a way of restoring discipline and legality in the Church.⁷⁹⁵ The Church had produced an agreed book and revised it following the 1927 parliamentary rejection. The book incorporated a number of variations from the Prayer Book of 1662 that had become commonplace already. The approval by statutory process of the deposited book would have brought into the category of legal those practices that were almost universally observed and tolerated but were strictly speaking illegal. The acceptance of the deposited book would have brought an end to the period of anomaly in which clergy and parish churches were consistently breaching the law and in which bishops and others in authority were consistently declining to enforce obedience to the law.

However, the law did not change. William Temple summarised it thus; ‘a Measure was presented; the House of Commons did not accept it. As far as the law is concerned, no change at all took place.’⁷⁹⁶

The Convocations met less than one month after the debate in the House of Commons. On 3 July 1928 the Archbishop of Canterbury, Randall Davidson, wrote to *The Times* that

⁷⁹⁰ Mr Hayes. Col 1049-50.

⁷⁹¹ Mr J Jones. Hansard Fifth Series vol 211 col 2652.

⁷⁹² Hansard vol 218 col 1264.

⁷⁹³ Col 1270.

⁷⁹⁴ Col 1320.

⁷⁹⁵ H H Henson, *The Book and the Vote*, London, 1928.

⁷⁹⁶ Speech in Convocation 10 July 1929. *York Journal of Convocation* 1929-30, 21.

It is a fundamental principle that the Church – that is, the Bishops together with the Clergy and Laity – must in the last resort, when its mind has been fully ascertained, retain its inalienable right, in loyalty to our Lord and Saviour Jesus Christ, to formulate its faith in Him, and to arranged the expression of that holy faith in its forms of worship.⁷⁹⁷

With hindsight, this can be seen as setting the scene for the Church's response. In short, the Convocations resolved to press on with using the Deposited Book of 1928 despite it not having parliamentary approval. During the House of Commons debate Mr Snell quoted William Swayne, Bishop of Lincoln as having said

If the House of Commons rejects the revised Prayer Book, that will not prevent its being used. The lesson of history is that liberty is seldom conceded, it must be taken. We must take to ourselves the liberty we need.⁷⁹⁸

At the meetings of the Convocations in the Summer of 1929 a motion was approved which approved the following statement from the Bishops setting out a course of action:

The worship of God is in every generation a primary concern of the Church. For many years the Church of England has been engaged in an endeavour to amend the existing laws of public worship so as to make fuller provision for the spiritual needs of the Church and to bring order into the variety of usage which has become prevalent. This endeavour has for the present failed. It is impossible and undesirable to bring back the conduct of public worship strictly within the limits of the Prayer Book of 1662. Accordingly the Bishops, having failed to secure the statutory sanction which was desired and sought, are compelled in the present difficult situation to fulfil by administrative action their responsibility for the regulation of public worship.

On September 29th, 1928, the Bishops announced that they intended to consult the clergy and laity of their dioceses. These consultations have now been held in almost every diocese, and, in view of the information gained and desires expressed, the Bishops hereby resolve that in the exercise of their administrative discretion they will in their respective dioceses consider the circumstances and needs of parishes severally, and give counsel and directions. In these directions the Bishops will conform to the principles which they have already laid down, namely:-

(1) That during the present emergency and until further order be taken the Bishops, having in view the fact that the Convocations of Canterbury and York

⁷⁹⁷ As read by the Archbishop of York (C G Lang) to the Upper House of the Convocation of York 11 July 1928. *York Journal of Convocation* 1927-8, July Sessions 1928, 7.

⁷⁹⁸ Reported in *The Times* 26 May 1928. Hansard 5th Series vol 218 col. 1085.

gave their consent to the proposals for deviations from and additions to the Book of 1662, as set forth in the Book of 1928, being laid before the National Assembly of the Church of England for Final Approval, and that the National Assembly voted Final Approval to these proposals, cannot regard as inconsistent with loyalty to the principles of the Church of England the use of such additions or deviations as fall within the limits of these proposals. For the same reason they must regard as inconsistent with Church Order⁷⁹⁹ the use of any other deviations from or additions to the Forms and Orders contained in the Book of 1662.

(2) That accordingly the Bishops, in the exercise of that legal or administrative discretion, which belongs to each Bishop in his own Diocese⁸⁰⁰ will be guided by the proposals set forth in the Book of 1928, and will endeavour to secure that the practices which are consistent neither with the Book of 1662 nor with the Book of 1928 shall cease.

Further-

(3) That the Bishops, in the exercise of their authority, will only permit⁸⁰¹ the ordinary use of any of the Forms and Orders contained in the Book of 1928 if they are satisfied that such use would have the good will of the people as represented in the Parochial Church Council, and that in the case of the Occasional Offices, the consent of the parties concerned will always be obtained.⁸⁰²

This motion was passed in the Upper House of the Convocation of Canterbury by 23 votes to 4 on 11 July 1929. On the afternoon of the same day the Lower House passed a resolution (by 74 votes to 19) stating that:

This House thanks his Grace the President [of the Convocation, the Archbishop of Canterbury] for his statement of the policy which the Bishops have agreed to follow in the administration of their dioceses, and assures him of its loyal support.⁸⁰³

The Lower House added two following resolutions, requesting that the concurrence of Convocation or of the Diocesan Conference be obtained before general provincial or diocesan regulations on the matter be issued and the second that a joint committee of convocation should be convened to consider the situation caused by the rejection of the

⁷⁹⁹ The original motion read 'such loyalty' but 'Church Order' was substituted in an amendment on 11 July 1929.

⁸⁰⁰ '...that legal or administrative discretion, which belongs to each Bishop in his own Diocese' had originally read 'their legal or administrative discretion' and was amended on 11 July 1929.

⁸⁰¹ Originally 'sanction'.

⁸⁰² Chronicle of Convocation July Sessions 1929, xxix ff.

⁸⁰³ Chronicle of Convocation July Sessions 1929, xxxviii.

deposited book.⁸⁰⁴ The Upper House of the Convocation of York, meeting at the same time, passed the unamended motion *nem con*⁸⁰⁵ with a supportive motion from the Lower House as follows:

That this House, having carefully considered the resolution submitted to it by the Upper House, respectfully records its confidence in the administrative discretion of the Bishops; it would welcome united action on the part of the episcopate in the present emergency, and believes that liberty with order may be secured by reliance upon the loyal support of the clergy of the Province until further order shall be constitutionally determined.⁸⁰⁶

From this point onwards the use of the 1928 Prayer Book became commonplace. There were suggestions from the Catholic wing of the Church that, seeing as Parliament had rejected both the initial (and in their view more acceptable) deposited book of 1927 and that of 1928 and that the Bishops were prepared to countenance the use of a book without statutory authority that the basis of the Bishops' permissions after the Convocations of July 1929 should have been the Church's originally preferred book of 1927. This suggestion was proposed in motions put before the Lower House of the Convocation of Canterbury in July 1929⁸⁰⁷ but adopted neither by the Lower House, nor by the Bishops.

Editions of the BCP were printed with the alternative services and rubrics of 1928 included alongside the texts of 1662.⁸⁰⁸ Bishops gave permission for the Sacrament to be reserved in Churches in line with the rubrics of the deposited book⁸⁰⁹ and Chancellors issued faculties for the installation of aumbries to house the reserved sacrament.⁸¹⁰

⁸⁰⁴ Chronicle of Convocation July Sessions 1929, xxxviii.

⁸⁰⁵ York Journal of Convocation, July Sessions 1929, 58.

⁸⁰⁶ York Journal of Convocation July 1929, 57.

⁸⁰⁷ Chronicle of Convocation July Sessions 1929. 140.

⁸⁰⁸ E.g. *The Book of Common Prayer with the Additions and Deviations Proposed in 1928* published in London by Eyre and Spottiswoode and containing the declaration in bold type 'The publication of this Book does not directly or indirectly imply that it can be regarded as authorized for use in churches' (p. v).

⁸⁰⁹ See *Re St Mary, Tyne Dock* [1954] P 369.

⁸¹⁰ E.g. *Re St Mary, Tyne Dock* op cit, *Rector and Churchwardens of Bishopwearmouth v Adey* [1958] All ER 441, *Re St Mary Tyne Dock* Number 2 [1958] P 156. In *Re Lapford (Devon) Parish Church* in the Court of Arches [1955] P 205, the Dean stated that 'a chancellor is justified in granting a faculty for an aumbry, but not for a tabernacle or pyx.' at 214.

The Bishop of Gloucester, A C Headlam, published his charge to the Gloucester Diocesan Conference on 8 October 1929 in which he laid out his views on the process of prayer book revision and the ways in which he would use and permit to be used the 1928 book.⁸¹¹ He rejected the charge of Romanism in the deposited book, opting instead to describe it as taking ‘a moderate Modernist position’ and claiming that it had been constructed so as to be ‘less susceptible of Roman interpretation’.⁸¹² He criticised the House of Commons and pointed out that ‘[the book] was thrown out by the votes of Scotch Presbyterians, of Irish Protestants, and of Welsh Calvinists.’⁸¹³ Here he is correct, if a little direct. Hensley Henson, in *The Book and the Vote*⁸¹⁴ also points to this early example of the ‘West Lothian Question’⁸¹⁵ and states that the majority of English MPs voted in favour of the Measure.

Headlam goes on to state that the Prayer Book of 1662 was too narrow for the needs of the day, that ‘it is not possible to enforce a law which is not, and cannot be, obeyed’⁸¹⁶ and that ‘No-one in the church obeys the Prayer Book as we have it.’⁸¹⁷ He argues that the Bishop has the lawful authority to regulate services, pointing first to the paragraph in the *BCP* which gives the Bishop the power to resolve disputes over the interpretation of the book and second to the Bishop’s veto in the Public Worship Regulation Act 1874. This, he claims ‘can have no purpose, except to allow [the bishop] to acquiesce in things being done which might possibly be a cause of prosecution.’⁸¹⁸

Having established a claim to episcopal *jus liturgicum* in the Church of England, Headlam goes on to give general advice to his diocese on the implementation and use of the deposited book. He recognises that much of that which is laid down in the book is already in use in the diocese, stating that ‘the introduction of the new Prayer Book

⁸¹¹ Headlam, Arthur C, *The New Prayer Book: Directions for its use. An address delivered to the Gloucester Diocesan Conference*. London, 1929.

⁸¹² Headlam (1929), 2.

⁸¹³ Headlam (1929), 5.

⁸¹⁴ London, 1928, xiii.

⁸¹⁵ The modern day question, first posed by Tam Dalyell MP in the 1970s about the participation of Scottish, Welsh and Northern Irish MPs in voting on English issues after devolution. See Sear, C, *The West Lothian Question*, House of Commons Library Standard Note SN/PC/2586, 22 August 2003. www.parliament.uk/commons/lib/research/notes/snpc-02586.pdf

⁸¹⁶ Headlam (1929), 10.

⁸¹⁷ Headlam (1929), 11.

⁸¹⁸ Headlam (1929), 14.

makes really no change in the customs that have prevailed in this Diocese.⁸¹⁹ He indicates that he believes an aumbry to be a good thing for a church to possess but that he will only allow perpetual reservation of the sacrament where there are special circumstances and where the PCC supports it.⁸²⁰ He recommends that where it is proposed that new Prayer Books be purchased for Parish Churches that the books be the newly printed version incorporating services from 1662 and 1928 and recommends that every clergyman have a copy.⁸²¹ Whilst doubting that the use of incense is legal in the Church of England he affirms that it is at least biblical and goes on to say that 'I do not say that in every case I should forbid its use, but I should hesitate very much to allow it, and only after consultation both with the Parochial Church Council and other Parishioners.'⁸²²

Headlam's approach may probably be seen as typical amongst the Bishops. He was a 'central churchman who rejected extremists of all parties.'⁸²³ He was convinced of 'the church's right to revise its own formularies against the wishes of parliament' but maintained a 'fervent attachment to the principle of establishment.'⁸²⁴ The approach of the bishops was not uniform, and Ernest Barnes, Bishop of Birmingham was active in attempting to prevent reservation of the sacrament in his diocese.⁸²⁵

Analysis of the Significance of the Bishops' Actions.

On the face of it the motions passed in the Convocations were a declared majority policy of the bishops⁸²⁶ to permit, sanction or make legal the use of the alternative services provided in the 1928 Prayer Book with the consent of the PCC or, in the case of the occasional offices, the parties concerned. During debate in the Convocation of York, Bishop Seaton of Wakefield referred to a survey undertaken by Bishop Frere of Truro in the Truro Diocesan Conference. The survey indicated overwhelmingly that

⁸¹⁹ Headlam (1929), 19.

⁸²⁰ Headlam (1929), 19.

⁸²¹ Headlam (1929), 20.

⁸²² Headlam (1929), 25.

⁸²³ Grimley M, 'Headlam Arthur Caley (1862 – 1947)', in *Oxford Dictionary of National Biography*, Oxford, 2004.

⁸²⁴ Grimley, *Headlam* (2004).

⁸²⁵ Rawlinson, A E J, rev. Grimley, M, 'Barnes, Ernest William (1874-1953)', in *Oxford Dictionary of National Biography*, Oxford, 2004.

⁸²⁶ Although Bishop Barnes of Birmingham indicated in the debate that he would not permit the use of 1928 service of Holy Communion nor sanction reservation of the sacrament for any purposes in his diocese. Chronicle of Convocation, July 1929, xxx and 78.

worship should not be carried out strictly in accordance with the rubrics and services of 1662, that some deviations and additions be permitted, that such deviations should not be left at the sole discretion of the incumbent, but should be regulated by the Bishop according to the limits laid down by the deposited book and subject to the consent of the laity.⁸²⁷

At this point it is worth noting the alternatives before the Bishops. The first alternative was to accept that the only permitted services for use in Church were those of the 1662 Prayer Book and to submit to the strict interpretation of the rubrics of that book as declared by the courts. Geoffrey Cuming says that the Evangelical party within the Church were happy with the 1662 Prayer Book,⁸²⁸ but the consensus in the Church was that liturgical law as it stood was unworkable. Attempts to enforce strict observance of 1662, either by criminal proceedings or by gentle persuasion,⁸²⁹ had manifestly failed.

The second option was to attempt to get round Parliament by legislating by canon. Canons are made by Convocation and receive Royal Assent but unlike Acts or Measures are not subject to parliamentary scrutiny or approval. It would have been possible to draft a canon enabling clergy to use alternative services. However, this approach was problematic for two reasons. First, the relative status of statutes, measures and canons meant that that which was forbidden by statute could not be allowed by canon. Second, Archbishop Lang informed the Convocation of Canterbury that such a canon would not receive Royal Assent when its express intention was to thwart the will of parliament.⁸³⁰

The third option would have been to attempt a further revision of the Prayer Book, but one that would have attracted the support of parliament. Such a project would not have attracted the support of the vociferous anglo-catholic party within the Church.⁸³¹ Bishop Henson of Durham mooted the possibility in the Upper House of the Convocation of York on 10 July 1929 but stated first that there was no reason to

⁸²⁷ *York Journal of Covocation* July 1929, 54.

⁸²⁸ Cuming (1982), 169.

⁸²⁹ The stated approach of Bishop Thorold of Winchester, in 1881. *Chronicle of Convocation* 1881, 155-159.

⁸³⁰ *Chronicle of Convocation*, 1929, 72.

⁸³¹ This party would have preferred the use of the book of 1927 to prevail. See above.

suppose that the House of Commons would change its position⁸³² and second that he did not wish to establish a principle that the Church of England should be subject to Parliament in such spiritual matters.⁸³³

The final resolution of the bishops with the concurrence of the Lower Houses of Convocation to allow the use of the 1928 Prayer Book was justified in their resolution with reference to their 'administrative discretion.' Some analysis of this discretion is necessary.

It has been shown that the strict state of liturgical law was that the only services that could be used in the Church of England were those in the BCP of 1662 together with such extra services and subject to such variation as was allowed by 'lawful authority'.⁸³⁴ The limits of lawful authority were generally seen to have been the Sovereign in Council in matters such as the alteration of names in the State Prayers⁸³⁵ and possibly in the provision of special services and thanksgivings or Parliament itself by statute.⁸³⁶ Liturgical change could have been brought about by a measure of the Church Assembly under the Church Assembly Powers Act 1919 and with the scrutiny of Parliament but in 1927 and 1928 this route failed. The Bishop of the Diocese had authority to resolve doubts about the interpretation or application of the rubrics of the BCP but only within the limits of the BCP itself. The Bishop was subject to the rubrics himself when presiding at a service.⁸³⁷ However, nothing in the foregoing statements can be seen as declaratory of a right for Bishops, acting individually in their own dioceses or collectively in provinces or the national church, to permit addition to or deviation from the prescribed services. Regulating public worship and permitting different forms of service within his diocese was unquestionably part of the legal rights and duties of the medieval Bishop⁸³⁸ but Bursell states that 'even if there were such a *jus liturgicum* recognized in England, it is extremely doubtful whether it survived the Reformation'.⁸³⁹ The variety of use of the English Church prior to the Reformation was

⁸³² There is no reference in Henson's speech to the Church changing its position.

⁸³³ *York Journal of Convocation*, 1929, 42.

⁸³⁴ Clerical Subscriptions Act 1865.

⁸³⁵ Act of Uniformity 1662.

⁸³⁶ E.g. Prayer Book (Tables of Lessons) Act 1871.

⁸³⁷ *Read v the Bishop of Lincoln* (1889) 14 PD 148.

⁸³⁸ Bursell *Liturgy, Order and the Law*, Oxford, 1996, 272. Bursell cites Lyndwood, Sir Robert Phillimore and the Act of Uniformity 1548 once enacted as authorities.

⁸³⁹ Bursell, 272.

replaced with uniformity of use based on the BCP and the Bishop's *jus liturgicum* removed.

If it is accepted that the medieval *jus liturgicum* did not survive the changes of the Reformation then it must then be asked whether the bishops acquired discretion in matters of liturgy wide enough for them legally to have taken the step that they took in allowing the use of the 1928 Prayer Book. In his memorandum on 'Lawful Authority' Sir Harry Vaisey admits that the 'lawful authority' within the meaning of the Clerical Subscriptions Act 1865 includes 'deviations allowed by such episcopal authority as can be brought within the Bishop's power "to appease diversity and resolve doubts" pursuant to the exhortation *Concerning the Services of the Church* which forms part of the Prayer Book' but goes on to point to 'great uncertainty' in defining the area covered by this power.⁸⁴⁰ In his evidence to the Royal Commission on Ecclesiastical Discipline, Archbishop Davidson claimed that these exceptive words 'are capable of giving to the Episcopate some larger authority than existed before.'⁸⁴¹ It is unclear, however, what this larger authority meant in practice and such authority was not judicially recognised. That said, the bishop's veto of prosecutions of clergy under the Public Worship Regulation Act 1874 and the bishop's ability to refuse to proceed or to allow the office of the judge to be promoted in suits under the Clergy Discipline Act 1840 has been shown⁸⁴² to have given the bishops a significant amount of latitude in what they were practically able to permit. As pointed out above Bishop Headlam claimed that the combination of the power to resolve differences and the veto gave the bishop to authority to acquiesce in things that might otherwise be illegal.

In the convocation debates of the Summer of 1929 the Bishops were debating whether or not to make the proposed (and ultimately successful) statement reported above. Archbishop William Temple⁸⁴³ conceded that what was proposed was outside the limits of the law. He admitted that 'at present all of us are more or less law-breakers'⁸⁴⁴ but stated that 'we are confronted with irregularity so great as to imperil the peace of the Church. We cannot at present fall back upon the law. We are bound to do our best,

⁸⁴⁰ Vaisey, 219.

⁸⁴¹ Vaisey, 219.

⁸⁴² Chapter 9 above.

⁸⁴³ At that time a newly appointed Archbishop of York.

⁸⁴⁴ 10 July 1929. *York Journal of Convocation*, 1929, 22.

during a transitional period, apart from the law'.⁸⁴⁵ Hensley Henson echoed this when he said that the bishops 'found themselves compelled to act outside the law because the aid of the law, which was indispensable to the healthy progress of the Church, had been refused to them.'⁸⁴⁶

In the Upper House of the Convocation of Canterbury a variety of views was expressed. Bishop Barnes of Birmingham, a vocal opponent of the reservation of the sacrament, urged the house not to act as if the 1928 book had the force of law.⁸⁴⁷ In this view he was backed by Bishop Cecil of Exeter who brought up the subject of lawful authority in his speech in the same debate. He asked why, if the bishops had the authority to decide these matters, did they seek the sanction of the state in the first place? He went on to describe the forthcoming general permission by the bishops as an important breach of the law and warned that it could lead to a more general liturgical lawlessness in the Church. In this view he was supported by voices from the Lower House, including Prebendary Hinde, who unsuccessfully moved a motion calling on the Lower House to reject the Upper House's proposed statement as it was contrary to bishops' and priests' ordination pledge to observe and uphold the law.⁸⁴⁸ Canon Guy Rogers made specific mention of the invocation of *jus liturgicum*, which he understood to be appropriately used to fill gaps in the Church's system but not to overrule Parliament.⁸⁴⁹

On the other side of the debate, Bishop Furse of St Albans criticised the use of the term 'illegal' in respect of the 1928 Prayer Book and the additions and deviations that it proposed.⁸⁵⁰ Bishop Swayne of Lincoln, whose intention to thwart a parliamentary rejection of the deposited book had been reported in the House of Commons, claimed that any vestige of legality in liturgical matters had 'surely gone altogether' and that the proposal to permit the use of the 1928 book was an attempt to move the church to a situation where it was governed by consent rather than by legality.⁸⁵¹

⁸⁴⁵ *York Journal of Convocation*, 1929, 23.

⁸⁴⁶ *York Journal of Convocation*, 1929, 43. The report quoted here is not a verbatim account of Henson's speech.

⁸⁴⁷ *Chronicle of Convocation* 10 July 1929, 20-21.

⁸⁴⁸ *Chronicle of Convocation*, 1929, 146.

⁸⁴⁹ *Chronicle of Convocation*, 1929, 152.

⁸⁵⁰ *Chronicle of Convocation*, 1929, 55-60.

⁸⁵¹ *Chronicle of Convocation*, 1929, 23-25.

The bishops' resolution was understood to have been a temporary measure. The resolution refers to 'the present emergency' and envisages that 'further order' shall be taken. It was not until the 1960s and the introduction of the first set of Alternative Services (Series 1)⁸⁵² that a service based on the Alternative Order for Holy Communion of 1928 was given statutory legality. William Temple, as reported above, referred to a 'transitional period' during which the Church had to move outside of the law. Other commentators picked up on the provisional nature of the Bishops' resolution. Hardman, for instance, refers to 'emergency regulations' put in place 'while attempts are being made to arrive at a better understanding with the State.'⁸⁵³ W K Lowther-Clarke pointed out in 1943 that 'no objection has been raised by the State to our carrying on in the present provisional manner.'⁸⁵⁴

The Bishops' actions in permitting, but regulating, the use of the 1928 book was a clear example of a provisional or temporary setting aside of the law. The use of the alternative liturgies was not legal between 1928 and the publication of the first set of alternative services in the mid-1960s. The precise form of this provisionality is open to debate. It is possible that it fits into the western concept of dispensation. For this to be the case the person granting the dispensation (in this case the bishop of the diocese exercising his 'legal or administrative discretion') must have the power so to dispense. To do that he must either be the source of the law from which he is granting a dispensation or otherwise to possess the power to dispense. In this case the law from which the dispensation is granted is not bishop-made law but the law as laid down by the Act of Uniformity 1662 and amending statutes as interpreted and applied by the courts. This law as it stood did not allow for bishops, individually or collectively, to dispense clergy or lay people individually or corporately, from the strict observation of the services and rubrics of the Book of Common Prayer. Such dispensations as were allowed were strictly defined. For instance, the power of the Archbishop of Canterbury to dispense from the reading of banns by special licence and the power of the Archbishop of York and other bishops to do the same by common licence. This authority was defined by the Ecclesiastical Licences Act 1533. Any claim to a residual

⁸⁵² Authorised under the authority of the Prayer Book (Alternative and Other Services) Measure 1965.

⁸⁵³ Hardman, O, *A Companion to the 1928 Prayer Book*, London, 1929.

⁸⁵⁴ Lowther-Clarke (1943).

jus liturgicum on the part of the Bishops is weak. Such a general power of liturgical dispensation may have been allowed by the Ecclesiastical Licences Act if it could be shown that this was a customary power held prior to the Reformation and not repugnant to the laws of the realm or the royal prerogative. However, such a power would not have survived the various Acts of Uniformity, which sought to end the diversity of liturgical practice of the medieval Church and to enforce uniformity of worship.

The bishops were not, therefore, exercising a power of dispensation as understood in the western canonical tradition or in English law. However, it is possible that the alternative, eastern, concept of economy could better describe their approach. In the Eastern canonical tradition, the *oikonomos* is usually the bishop in his diocese or a synod of bishops. An economy, put simply, is the allowing of a breach in the law for a greater purpose – namely the salvation of souls. The Royal Commission declared the need for a change in liturgical law, in order to provide for the spiritual and liturgical needs of the Church as far back as 1906. Such a change did not come. However, the need remained. This is particularly noticeable in the rise of the importance of the service of Holy Communion and the administration of communion to the sick and dying during the First World War, in which Army Chaplains ‘had found Prayer Book services totally inadequate at the front.’⁸⁵⁵

There is no evidence that the Bishops explicitly intended to draw on the Eastern tradition,⁸⁵⁶ such evidence as there is points rather to their reliance on a vestigial *jus liturgicum*. However, individually and collectively, they acted in a manner not dissimilar to Bishops of the Eastern Orthodox Churches in granting a general economy not to observe the strict liturgical law of the Church of England temporarily and within certain limits.

Liturgical Law from 1928 to Series 1

The temporary period of the ‘present emergency’ lasted rather longer than anyone at the time would have imagined. Donald Gray considers the process of liturgical revision

⁸⁵⁵ Gray (2005), 45.

⁸⁵⁶ In comparison with Resolution 54 of the Lambeth Conference of 1948 on the admission to communion of members of the Church of South India.
www.lambethconference.org/resolutions/1948/1948-54.cfm

of Exeter. At first instance, the Chancellor refused a faculty for the tabernacle, following the decision of the Court of Arches in *re Capel St Mary (Rector and Churchwardens) v Packard*⁸⁶¹ and concluding that a tabernacle was ‘an illegal ornament’ used in connection with ‘an illegal ceremony’, namely reservation of the sacrament. However, in the course of the judgment in the Lapford case the Chancellor stated:

I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by article 28 or by the rubric at the end of the Communion service which was inserted for a wholly different reason, namely, for the prevention of the irreverent practices of Puritans. In my view, the prayer book neither forbids nor authorizes reservation; it makes no provision for it. Where the bishop considers that something not provided for is needed, it is for the bishop to make provision in the exercise of that authority with he has in his diocese. Where he considers reservation to be needed it is for him to sanction it, and where he sanctions it, this court can and should by faculty authorize such alterations and additions in the church as are necessary to secure that due provision is made for reservation.⁸⁶²

Chancellor Wigglesworth here takes a different view to that of Sir Lewis Dibdin in the Capel St Mary case and goes against the standard early twentieth century view of reservation as illegal as outlined above. However, he followed the authority of the higher court in disallowing the installation of a tabernacle.

On appeal, Sir Philip Baker-Wilbraham, who succeeded Dibdin as Dean of the Arches, questioned Wigglesworth’s interpretation of the law, stating that ‘although the bishop has no doubt a large discretion in matters which are doubtful, or not fully provided for by the rubrics, it does not enable him to legalize anything which is plainly illegal.’⁸⁶³ However, and significantly, he went on give significant authority to the decision by the bishops to allow continued use of the 1928 Prayer book:

Of course these resolutions [the resolutions of the Convocations in July 1929] could not alter the law in any respect. But they did constituted a claim by the Church to do a number of illegal things within certain limits, coupled with an obligation to endeavour not to transgress those limits. The obligation could not be absolute; none knew better than the bishops the impossibility of securing

⁸⁶¹ [1927] P 289.

⁸⁶² [1954] P 205 at 416.

⁸⁶³ [1955] P 205 at 211.

absolute uniformity. But it is an obligation which should be honoured as far as possible. An aumbry set in a side wall of a church is clearly within the limits which the church has claimed to authorize. A tabernacle of pyx 'immediately behind or above a holy table' is clearly outside those limits.⁸⁶⁴

In a lesser degree, the rejection of the Prayer Book measures caused a difficulty for diocesan chancellors. They would be asked to decree faculties for the installation of aumbries. Could they rightly do so in connexion with a practice which they knew or believed to be unlawful? In the course of time, this question appears to have been answered in accordance with common sense. The duty of a diocesan chancellor in this matter is ancillary. He is not responsible for the reservation; but if he finds that reservation is in fact practised with the sanction of the bishop in a church within his jurisdiction, it is his duty to see that the provision made for keeping the consecrated bread and wine is both safe and seemly.

He dismissed the appeal but referred the appellants to the chancellor's offer to consider revised proposals for the installation of an aumbry, rather than a tabernacle. In general conclusions the Dean stated:

(1) That reservation of the Blessed Sacrament for any purpose is still, strictly speaking, illegal; (2) that nevertheless reservation for the communion of the sick may be practised, not only with impunity but (from every point of view except that of strict law) blamelessly and rightly, provided that the conditions laid down in the Alternative Order for the Communion of the Sick are complied with; and (3) that where the bishop has sanctioned the reservation a diocesan chancellor is justified in granting a faculty for an aumbry, but not for a tabernacle or pyx immediately behind or above a holy table.

Thus reservation gained judicial recognition, albeit with the curious qualification of it being illegal yet allowable. This was a major change in the judicial practice and represented a volte face from the Capel St Mary case in the same court. The significant change that had taken place in the meantime was the rejection of the 1928 Prayer Book and the Bishops' granting of a general economy as set down by the Convocations' resolutions of July 1929. The significance of the Dean's judgment was that it gave added weight to the bishops' decision and judicial recognition of their authority to take the step that they took.

⁸⁶⁴ The distinction between an aumbry and a tabernacle is that the latter aroused suspicion of its being used for the purpose of adoration. The former was less susceptible to such suspicion.

This judgment, in giving such recognition, gave the resolutions of the Convocations the dignity of legal authority. The general economy granted by the bishops and, more particularly, the specific grants of economy of individual bishops to individual parishes regarding, for instance, the reservation of the sacrament, became a means by which the law was set aside. It could be argued that this is the same as saying that the law was changed by these resolutions. It could further be argued that, even if state law did not change as a result of the resolutions, that the canon law of the Church of England did change.

Subsequent cases on point referred to the Lapford judgment. Of particular note are those in the consistory courts of the northern province. These courts are not bound by the precedent set in the Court of Arches although the Dean of the Arches is also the Auditor of the Chancery Court of York, the appeal court for that province. Had Chancellors considered the view of the Dean to have been a misreading of the liturgical law of the time then they would have had the opportunity, in a number of cases in the late 1950s to have delivered opposing judgments. They did not. In *Re St Mary, Tyne Dock*,⁸⁶⁵ Chancellor Hylton-Foster declined to pronounce on the legality or otherwise of reservation, but allowed the installation of an aumbry. In the second hearing⁸⁶⁶ of the same case Deputy Chancellor Wigglesworth, specifically followed the Lapford judgment, in which he had sat at the first instance, stating that the Dean

considered that a faculty could be granted authorizing the introduction of an aumbry in a case where the bishop has sanctioned the reservation of the Blessed Sacrament, and where there is compliance with the provisions of the rubric in the Alternative Order for the Communion of the Sick contained in the Prayer Book approved by the Church Assembly but rejected by the House of Commons in 1928.

In Wakefield Consistory Court, Chancellor Vaisey, whose contribution to the debate on lawful authority is discussed above, also followed the Lapford approach

If I am told that the sacred elements are to be reserved in a church with the sanction or, at any rate, not contrary to the directions or express wishes of the bishop (that is a fact to which I am bound to pay attention), I regard it as my duty as chancellor of the diocese and, as such, custodian of all churches in it, to

⁸⁶⁵ Durham Consistory Court, [1954] P 369.

⁸⁶⁶ *Re St Mary, Tyne Dock No 2* [1958] P 156.

see that such reasonable steps are taken to secure the sacred elements, which are in point of fact to be reserved in the church, from anything in the nature of desecration or profanation.⁸⁶⁷

Chancellor Garth Moore, sitting in Durham Consistory Court,⁸⁶⁸ passed comment on the Lapford judgment, summarising it as follows:

(i) that reservation is illegal; but (ii) that, since Parliament in 1928 refused to make it lawful, it is proper for courts of law to grant faculties to enable it to take place.. that is something which is so wholly at variance with what I understand to be the duty of a court, that I can only suppose that for some reason or another, I have misunderstood the learned Dean. What, however, is clear beyond doubt is that, according to the learned Dean, it is proper for a consistory court to grant a faculty for an aumbry when the bishop has sanctioned reservation.

He went on

I would not lightly subscribe to a theory that it could be proper to grant faculties for what is illegal.

But, with reference to the doctrine on necessity, went on to grant a faculty for an aumbry.

Thus, the practice of reserving the sacrament found judicial tolerance, and consequently protection and regulation, during the 1950s. It is worth pointing out again that behind every application for a faculty for the installation of a receptacle for the reserved elements was a licence from the Bishop permitting reservation for the purposes of the communion of the sick. Chancellors maintained the distinction between reservation for the purposes of communion and reservation for the purposes of adoration, and as a mark of this distinction, consistently refused faculties for the installation of tabernacles. This distinction, and the ability and willingness of bishops to license reservation, come directly from the 1928 Prayer Book and the rubrics of the Alternative Order for Holy Communion and the Alternative Order for the Communion of the Sick. The applicability of these rubrics comes from the bishops' decision to allow the use of this book after its rejection by Parliament.

⁸⁶⁷ *Re St Mary Magdalene, Altofts*, [1958] P 172.

⁸⁶⁸ *In re Rector and Churchwardens of Bishopwearmouth v Adey*, [1958] 3 All ER 441.

Conclusion

The collective decision of the Bishops in 1881 to veto further prosecutions brought under the Public Worship Regulation Act 1874 effectively ushered in an era of toleration of catholic ritual practices in the Church of England. The law had not changed and the judgments against ritual obtained by the Church Association and others still stood. The process of Prayer Book revision sought to put this toleration on a statutory footing by revising the liturgies and rubrics of the BCP. The rejection of the 1927 and 1928 Prayer Books meant that the law still did not change.

The action of the Bishops in 1929, with the support of the lower houses of convocation, to allow the use of the 1928 Prayer Book and, therefore, to permit the introduction of such practices as were allowed by that book, was an exercise of economy. They sanctioned the breaking of the law, without changing the law, for a period of time for a specific purpose – in this case to improve the worship of the church. The period of the temporary suspension of observance of the law was lengthy and lasted until 1965 when alternative services were permitted by a further measure of the Church Assembly. In this case, therefore, the economy ended not when observance of the original law was re-asserted but when the law changed to accommodate what had previously been a breach.

The bishops' decision affected the ecclesiastical courts in that the breach of the law sanctioned by the bishops necessitated, in the minds of some notable ecclesiastical judges,⁸⁶⁹ a change in the approach of chancellors to deciding on the legality of certain ornaments. The economy granted by the bishops in Convocation was therefore given effect in the decisions of the courts to, for instance, allow the installation of aumbries for the reservation of the sacrament.

Thus the resolutions of the upper houses of convocation became a means by which the law was changed. This is a further example of a concept akin to economy – in the canonical tradition of the Church of England.

⁸⁶⁹ E.g. Sir Philip Wilbraham Baker Wilbraham, Sir Harry Vaisey, E Garth Moore.

Chapter 11 - Ecumenical agreements between Anglican and other churches with particular reference to the recognition of holy orders

Introduction

The earliest uses of the concept of economy in the early church were concerned with the reunion of the church after a schism or the easing of the passage back into the church for those who had lapsed through heresy. Divisions in the modern church are numerous and, particularly during the twentieth century, methods have been sought to make possible the reunion of Christian churches and denominations. Where Anglican churches are concerned, the question of the recognition of holy orders has been seen to dominate dialogue with other churches. This domination is expressed in two ways. First, in dialogue with the Roman Catholic and Orthodox churches, Anglicans have sought to show that the orders conferred in the Church of England in the sixteenth and seventeenth centuries and down to the present day throughout the Anglican Communion are capable of being considered 'valid' in the Roman Catholic and Orthodox Churches. Second, in dialogue with protestant churches, Anglican churches have themselves insisted, without using the language of sacramental validity in the case of orders, on the preservation of the threefold order of ministry of bishops, priests and deacons as a non-negotiable requirement of any agreement of reunion or communion between churches.⁸⁷⁰ Within the Church of England the principle being insisted upon is enshrined in legal provision in, for example, s 10 of the Act of Uniformity 1662.

However, setting up something as non-negotiable leaves little leeway for dialogue. Anglican churches have found, in ecumenical dialogue, that a hard and fast insistence on an Anglican understanding of ordination and, in particular, on the concepts of apostolic succession and the historic episcopate, has led to the criticism that Anglicans deny the efficacy or validity of any non-episcopal ordination. Dialogue partners have been unwilling to enter into any agreement with an Anglican church on the basis of denying their previous ministry.⁸⁷¹ As a result of this, Anglican churches can be seen to have employed theological and legal mechanisms akin to dispensations or economy to enable recognition of orders (and other sacraments) that would not normally be recognisable but to maintain in the long run their usual rules.

⁸⁷⁰ The Chicago-Lambeth Quadrilateral, see below.

⁸⁷¹ This criticism was levelled as early as the Jerusalem Bishopric Scheme and continues today.

The Law of ordination in the Church of England with particular reference to the historic episcopate

The earliest ministers of the Church of England at its separation from the papacy were bishops, priests and deacons ordained in the pre-Reformation church. The various versions of the *Ordinal*, technically a work separate from the *BCP* but from very early on printed and bound with it, reduced the number of separate orders to which one could be ordained to three – bishop, priest and deacon. The minister of ordination prior to the Reformation had always been the bishop (for the ordination or consecration of a bishop the norm was to have at least three ordaining bishops following the rule laid down by Canon IV of the Council of Nicea in 325) and this continued in the ordinals published in the reigns of Edward VI and Elizabeth I. In spite of the *Nag's Head Fable* which held that Archbishop Matthew Parker (who was to become the chief consecrator of bishops in the Elizabethan era) had been consecrated as a bishop in a tavern in Cheapside with minimal ceremony and without episcopal hands being laid on him, the Church of England maintained the tactile historic succession of bishops ordaining bishops and those bishops ordaining priests and deacons. Parker was, in fact, ordained to the episcopate in the Chapel at Lambeth Palace by four bishops, who had themselves been ordained bishops either before the Reformation according to the Roman rite or during the reign of Edward VI according to the rite of Cranmer's *Ordinals* of 1550 and 1552. Thus in the Elizabethan and early Stuart periods the clergy of the Church of England had received their ordination at the hands of bishops and according to the Roman pontificals (before 1550 and between 1553 and 1559) or to rites of the Church of England (between 1550 and 1553 and after 1559).

Archbishop Cranmer set out in the preface to the ordinals of 1550 (revised in 1552 and restored in 1559) that:

It is evident unto all men, diligently reading holy Scripture, and ancient authors, that from the Apostles' time there hath been these orders of Ministers in Christ's Church: Bishops, Priests and Deacons: which Offices were evermore had in such reverent estimation, that no man by his own private authority might presume to execute any of them, except he were first called, tried, examined,

and known to have such qualities as were requisite for the same; And also, by public prayer, with imposition of hands, approved, and admitted thereunto.⁸⁷²

The Nicene formula of three bishops ordaining a bishop is preserved in the liturgy, in that two bishops are required to present the candidate to the archbishop and that the laying on of hands is directed to be by 'the Archbishop and Bishops present'.⁸⁷³

During the period between the 1530s and the restoration in 1660 there was considerable contact between ministers of the different Reformation churches in Europe. In some of these churches episcopal ordination had been preserved, but in most it had been lost. In the Lutheran churches of Germany, for instance, the title and role of Superintendent remained but the distinction between presbyteral and episcopal orders as separate orders of ministry was lost. Elsewhere in continental Europe in the streams of the Reformation that are now labelled 'Reformed' rather than 'Lutheran' the ministry of oversight focussed in an individual bishop was also lost, but in this case after a more principled rejection of the concept of personal episcopacy. In both Lutheran and Reformed traditions, therefore, the minister of ordination was a presbyter and there was a radical division in the understanding of the church's ordained ministry between the continental (and Scottish) church and the English church.⁸⁷⁴

There is patchy evidence 'that non-episcopally ordained clergy were occasionally licensed in the Church of England before 1662.'⁸⁷⁵ One concrete example is that of a French Calvinist Minister called du Moulin who was appointed to a canonry of Canterbury during the reign of James I. There is, however, no evidence that he ever exercised any ministry as a result of this appointment.⁸⁷⁶ In addition, the canonry in question was one to which a layman could be appointed.⁸⁷⁷ Norman Sykes is of the view that on this question 'so much partisan controversy has raged that it is difficult amidst the smoke to discern the authentic historical lineaments of the position.'⁸⁷⁸ With

⁸⁷² *The First and Second Prayer Books of Edward VI*, 438.

⁸⁷³ *The First and Second Prayer Books of Edward VI*, 459 and 462.

⁸⁷⁴ Adam, W *The Reception, Recognition and Reconciliation of Holy Orders* unpublished LLM dissertation, Cardiff, 2003, 35.

⁸⁷⁵ Hill, Christopher and Monsarrat, Jean-Pierre, 'An Outline of Our Relationships' in *Called to Witness and Service: The Reilly Common Statement with Essays on Church, Eucharist and Ministry*. London 1999, 53.

⁸⁷⁶ Adam (2003), 36.

⁸⁷⁷ Hill and Monsarrat, 53.

⁸⁷⁸ Sykes, Norman, *Old Priest and New Presbyter*, Cambridge, 1956, 87.

this note of caution Sykes cites examples of those who were in non-episcopally conferred orders being appointed to livings in Norfolk and Essex.⁸⁷⁹ Continental protestants were given considerable support in England during this time, including support from the Crown,⁸⁸⁰ but this support does not translate into evidence of the interchangeability of the ministries of non-episcopal churches with those of the Church of England and does not lead to a weakening of the Church of England's general position on episcopacy.⁸⁸¹

The Ordination of Ministers Act 1571 makes reference to those who claim to be priests 'by reason of any other Form of Institution, Consecration or Ordering, than the Form set forth by Parliament in the Time of the late King of most worthy Memory, King Edward the Sixth or now used in the Reign of our most gracious Sovereign Lady'. The act goes on to require such a minister to declare assent to and subscribe the Articles of Religion in the presence of the Bishop or guardian of the spiritualities, to obtain a certificate that he had done the same and to read out both the Articles and the certificate in their parish before Christmas Day 1570.⁸⁸² In the nineteenth century case of *Bishop of St Albans v Fillingham*, discussed in detail below, it was argued that this Act recognised non-episcopal ordination and allowed those so ordained to take up office in the Church of England by subscription to the *Articles* rather than by episcopal ordination. However, given the date of the statute and the context of the rise of recusancy at the time of its passing, it is more likely to be aimed at ensuring subscription by those ordained prior to 1550 and in the reign of Queen Mary I (i.e. according to the Roman rite), or abroad, without having subscribed and assented to the protestantism of Edward and Elizabeth.

Richard Hooker, the Elizabethan divine looked to as a considerable authority on the development of the polity of the Church of England, was unwilling entirely to close the door on those who had not received episcopal ordination. He stated that the reformed churches in Scotland and France had 'defect and imperfection' in their governance

⁸⁷⁹ Sykes (1956), 89-95.

⁸⁸⁰ Hill and Monsarrat, 54.

⁸⁸¹ Sykes, Norman, *The Church of England and Non-Episcopal Churches in the Sixteenth and Seventeenth Centuries*, London, 1948, 25.

⁸⁸² 13 Eliz I c 12 s 1.

through lack of bishops but saw this as a cause for lament rather than rejection.⁸⁸³ He went on to state that

.... we are not simply without exception to urge a lineal descent of power from the Apostles by continued succession of bishops in every effectual ordination. These cases of inevitable necessity excepted, none may ordain but only bishops: by the imposition of their hands it is, that the Church giveth power of order, both unto presbyters and deacons.⁸⁸⁴

Thus Hooker admits of the possibility of 'inevitable necessity' whereby ordination may be administered by one other than a bishop. Sykes' analysis of the writings of influential (but not extreme) Anglican divines in the Elizabethan period leads him to state that

The Anglican attitude was to marshal the evidences, both Scriptural and patristic, for episcopacy without asserting exclusive validity of an Episcopal ministry or unchurching non-episcopal churches.⁸⁸⁵

This understanding was to be excluded completely in the seventeenth century but to see a revival in the twentieth.

The key moment for the future pattern of ministry in the Church of England was the Act of Uniformity 1662, brought in at the restoration of the monarchy and the reconstitution of the episcopate of the Church of England after the Commonwealth regime. During the period from 1645 to 1660 some English bishops lived in exile and some clergy sought out episcopal ordination during that time. However, most newly ordained ministers during the Commonwealth were ordained according to a Presbyterian pattern.

Ss 9 and 10 of the Act of Uniformity 1662⁸⁸⁶ state:

Provided always, and be it Enacted, That from and after the Feast of Saint Bartholomew, which shall be in the year of our Lord, One thousand six hundred sixty and two, no person, who now is Incumbent, and in possession of any Parsonage, Vicarage, or Benefice, and who is not already in holy Orders by

⁸⁸³ *Laws of Ecclesiastical Polity* III.xi.16 in Bell, GKA, *Christian Unity: The Anglican Position*, London, 1948, 18-19.

⁸⁸⁴ VIII.xiv.11 in Bell, 1948, 20.

⁸⁸⁵ Sykes (1948), 12.

⁸⁸⁶ 13 Chas II c 4.

Episcopal Ordination, or shall not before the said Feast-day of Saint Bartholomew be Ordained Priest, or Deacon, according to the form of Episcopal Ordination, shall have, hold, or enjoy the said Parsonage, Vicarage Benefice with Cure or other Ecclesiastical Promotion within this Kingdom of England, or the Dominion of Wales, or Town of Berwick upon Tweed; But shall be utterly disabled, and ipso facto deprived of the same; And all his Ecclesiastical Promotions shall be void, as if he was naturally dead.

And be it further Enacted by the Authority aforesaid, That no person whatsoever shall thenceforth be capable to be admitted to any Parsonage, Vicarage, Benefice, or other Ecclesiastical Promotion or Dignity whatsoever, nor shall presume to Consecrate and Administer the holy Sacrament of the Lords Supper, before such time as he shall be Ordained Priest, according to the form, and manner in, and by the said Book prescribed, unless he have formerly been made Priest by Episcopal Ordination, upon pain to forfeit for every offence the sum of One hundred pounds; (one moiety thereof to the Kings Majesty, the other moiety thereof to be equally divided between the poor of the Parish where the offence shall be committed, and such person, or personas as shall sue for the same by Action of Debt, Bill, Plaint, or Information in any of his Majesties Courts of Record, wherein no Essoign, Protection, or Wager of Law shall be allowed) And to be disabled from taking, or being admitted into the Order of Priest, by the space of one whole year next following.

The result of this legislation was that incumbents who had been ordained during the Commonwealth period and who were not willing to be episcopally ordained were ejected from their livings on 24 August 1662. Many went on to minister in independent conventicles. It has been consistently affirmed in judgments that clergy of the Church of England are not able to teach or to hold doctrines that contradict the doctrine of the Church⁸⁸⁷ and it seems that the requirement for episcopal ordination falls within the scope of doctrine. Halsbury's Laws of England states that the term 'Holy Orders' implies episcopal ordination, according to law.⁸⁸⁸

The question of who may lawfully ordain was brought before the Court of Arches in 1906 in the case of *Bishop of St Albans v Fillingham*⁸⁸⁹. This was an action brought by the Bishop under the Church Discipline Act 1840 after Fillingham, who was an incumbent in the Diocese of St Albans, visited a non-conformist chapel in Southend (within the Diocese but outside his parish) and against the express instruction of the

⁸⁸⁷ Ordination of Ministers Act 1571 (13 Eliz I c 12) s 2, *Kemp v Wickes* (1809) 161 ER 1320 (3 Phill Ecc 264), *Escott v Mastin* (1842) 13 ER 241 (4 Moo PCC 104), *Procurator General v Stone* (1808) ER 161 604 (1 Hagg Con 424).

⁸⁸⁸ Vol 14, para 654 n3. Cited: *AG v Glasgow College* (1846) 10 Jur 676, *Glasgow College v AG* (1848) 1 HLCas 800, *Bishop of St Albans v Fillingham* [1906] P 163.

⁸⁸⁹ [1906] P 163.

bishop to desist, proceeded to ‘ordain’ a certain Mr White. Fillingham was a keen Kensitite⁸⁹⁰ and supported the ministry of this particular chapel whose members were opposed to the ritualist practices of the incumbent of their parish. Fillingham used the service for the ordination of priests from the *BCP*, with some variations, taking the part of the Bishop himself. The facts were admitted but Fillingham claimed that he had not committed an offence. The court found otherwise and, in the course of judgment, the Dean of the Arches (Sir Lewis Dibdin) held that the *Ordinal* ‘requires that a priest should be ordained by a bishop, and that before being so ordained he should be in Deacon’s Orders’.⁸⁹¹ The offences (which, as well as the purported ordination, included the offence of unauthorised incursion into another incumbent’s parish and consistent contravention of his bishop’s instructions) were considered to have been so serious that the Dean proposed to deprive Fillingham of his benefice and even after Fillingham undertook to submit to the court and to ‘admit and regret’ his error. The Dean suspended him *ab officio et beneficio* for two years.⁸⁹²

Despite evidence of contact and a certain amount of hospitality between the Church of England and its ministers and continental protestant churches which, at the Reformation, adopted a different pattern of ministry and oversight,⁸⁹³ there is no concrete evidence that the law of England ever allowed those who were not ordained by bishops who had themselves been ordained by bishops in the historic succession to exercise ordained ministry in the Church of England. This is plain on the face of the Act of Uniformity 1662 and in the preface and rubrics of the *Ordinal*. It was confirmed by the judgment of the court in Fillingham’s case. That the threefold order of bishops, priests and deacons is part of the self-understanding of the Church of England, and the wider Anglican Communion, was affirmed by ARCIC, which agreed that this understanding ‘does substantially reflect the [Anglican] view on ministry and ordination as conveyed in liturgical documents’.⁸⁹⁴ Owen Chadwick, in analysing

⁸⁹⁰ I.e. a follower of the anti-ritualist protester John Kensit. See chapter 9 above.

⁸⁹¹ *Bishop of St Albans v Fillingham* at 177.

⁸⁹² *Bishop of St Albans v Fillingham* at 187-8.

⁸⁹³ Williams, Rowan, ‘Unity and Universality, Locality and Diversity in Anglicanism’, conference paper given at *Receptive Ecumenism and Ecclesial Learning: Learning to Be Church Together*, Joint 2nd International Receptive Ecumenism Conference & 3rd Annual Gathering of the Ecclesiological Investigations Network, Ushaw College, Durham, 13 January 2009.

⁸⁹⁴ *Towards a Church of England Response to BEM and ARCIC* GS 661, London, 1985, 80.

decisions of successive Lambeth Conferences, states that the bishops of the Anglican Communion

believed that their ministry must indispensably be a ministry of persons ordained by bishops in succession from the apostles; the sacrament of ordination lay at the heart of their practical concern for Christian unity.⁸⁹⁵

This opinion is backed by the terms of the Chicago-Lambeth Quadrilateral⁸⁹⁶, the famous *Lambeth Appeal to All Christian People* of 1920 and Archbishop Fisher's 1946 Cambridge University Sermon⁸⁹⁷ where the Lambeth Conference and the Archbishop called on those who had lost the historic episcopate to take it into their system. The *Lambeth Appeal* stated that the spiritual reality of other churches was not in doubt but it stopped short of recommending any interchangeability of ministry (or even mutual Eucharistic hospitality) without other ministers accepting 'a commission through episcopal ordination.'⁸⁹⁸

However, the Church of England was never entirely insulated from contact with non-episcopal churches and, particularly during the course of the twentieth century, agreements whereby the strict rule laid down by the Reformation statutes, confirmed by the Court and consistently stated by Lambeth Conferences, bishops and Convocations can be seen to have been relaxed, primarily in order to bring about unity amongst Christians.

⁸⁹⁵ Coleman, Roger (ed) *Resolutions of the twelve Lambeth Conferences 1867 – 1988*, Toronto, 1992, xxii.

⁸⁹⁶ The Chicago-Lambeth Quadrilateral, based on a text agreed in Chicago at the 1886 General Convention of the Episcopal Church in the United States of America, was agreed at the Lambeth Conference of 1888. It states that agreement on the following four areas is the basis on which Anglican churches would be able to unite with other churches:

- a. The Holy Scriptures as the rule and ultimate standard of faith.
- b. The Apostles Creed and Nicene Creed as sufficient statements of the Christian faith.
- c. The sacraments of Baptism and the Lord's supper.
- d. The Historic Episcopate.

see Evans, G R and Wright J R, *The Anglican Tradition* London, 1991, paras 343 and 355.

⁸⁹⁷ The University Sermon, on 23 November 1946. See Carpenter, E *Archbishop Fisher; His Life and Times*, Norwich, 1991, 310.

⁸⁹⁸ Resolution 9 of Lambeth Conference 1920, in Stephenson, Alan, *Anglicanism and the Lambeth Conference*, London, 1978, 144 – 146.

The Jerusalem Bishopric 1841

The scheme to appoint, ordain and maintain a bishop in Jerusalem who would be bishop for both Anglicans and German protestants resident in the Holy Land came into effect in 1841 and lasted until 1881. The scheme must be understood against the political and diplomatic backdrop of the time. The Holy Land was part of the Ottoman Empire, in which Christians had been given, at least in theory, equal rights in 1839.⁸⁹⁹ The indigenous Christians of the area were almost all either Roman or Eastern Catholic ('latins') or Orthodox, their interests being promoted diplomatically in the empire by the French and Russian governments respectively. French Roman Catholic missionaries were beginning to become more numerous in the area. The Prussian government of King Frederick William IV was keen not to lose out on any opportunity for influence in the region⁹⁰⁰ and was concerned that, due to their small numbers of adherents, individual protestant denominations would not be recognised by the Turkish state.⁹⁰¹ To this political background must be added the important views of evangelical protestants in England, particularly Anthony Ashley-Cooper, later the Earl of Shaftesbury and his supporters, on the importance of Jerusalem. Ashley-Cooper wanted to see Jerusalem re-populated with Jews under British protection, with a view to converting them to Christianity.⁹⁰² Such a scheme would be a 'portent of the second coming'.⁹⁰³

Frederick William sent the Prussian diplomat von Bunsen to London to propose the setting up of a joint bishopric in Jerusalem to oversee Anglican and German Protestant congregations in the Holy Land. After a series of meetings with interested parties the scheme was agreed to in outline at a meeting at which Archbishop Howley of Canterbury was present with Bishop Blomfield of London, Ashley-Cooper and Bunsen. The scheme proposed the appointment of a bishop in Jerusalem to be nominated alternately by the crowns of England and Prussia. The Archbishop of Canterbury would retain a veto over any nomination made by Prussia. The bishop would have spiritual jurisdiction over English clergy and congregations and 'those who

⁸⁹⁹ Greaves R W, 'The Jerusalem Bishopric, 1841', in *English Historical Review* (1949) lxiv, 328-352, 329.

⁹⁰⁰ Greaves, 330 ff.

⁹⁰¹ Letter Frederick William IV to Bunsen 8 August 1841 in Hechler, William H (ed) *The Jerusalem Bishopric: Documents with Translations* London 1883, documents section, 4.

⁹⁰² Greaves, 333.

⁹⁰³ Chandler, M, *Life of Henry Parry Liddon* 59.

may join his Church and place themselves under his Episcopal authority in Palestine' subject to the metropolitical authority of the Archbishop of Canterbury.⁹⁰⁴ This category of persons was to include German protestant clergy and congregations who would 'be under the care of German clergymen ordained by [the bishop] for that purpose; who will officiate in the German language, according to the forms of their national liturgy.' The German liturgy used was to be checked by the bishop for conformity to the doctrine of the Church of England and sanctioned by him, with the consent of the Metropolitan, for use in these congregations. The chief missionary concern of the bishop was to be the conversion of the Jewish people but he was to maintain good relations with other local churches, especially the Greek Orthodox.⁹⁰⁵

The scheme was certainly a novelty. It envisaged the possibility of the consecration of a German protestant clergyman as a bishop according to the rite of the Church of England and the ordination of ministers by the bishop for German congregations. German protestant candidates were required to subscribe to the Articles of Religion and also, if they were to serve German congregations, to show that they had similarly subscribed to the Augsburg Confession.⁹⁰⁶ In earlier times the appointment of a foreign subject as a bishop would not have been possible. This inconvenience had made it impossible, for instance, for English bishops to ordain a bishop for independent Connecticut, whose first bishop, Samuel Seabury, was consecrated by bishops of the Scottish Episcopal Church.⁹⁰⁷ A statute of George III allowed foreign nationals to be ordained to serve in countries over which the crown claimed no jurisdiction without taking the oath of allegiance.⁹⁰⁸ Such consecrations, however, required royal licence before they could take place.⁹⁰⁹ They took place at the request of overseas congregations. There was no provision, prior to 1841, for the appointment of a British citizen as a bishop to serve a place over which the crown claimed no jurisdiction. The procedure under the 1786 Act was not suitable for the inter-governmental project envisaged for Jerusalem. Consequently, Howley was encouraged to introduce the

⁹⁰⁴ *Statement of Proceedings relating to the Establishment of a Bishopric of the United Church of England and Ireland in Jerusalem. Published by Authority*, London 1841, 6-7.

⁹⁰⁵ *Statement of Proceedings*, 8.

⁹⁰⁶ *Statement of Proceedings*, 9.

⁹⁰⁷ Gerald M. D. Howat, 'Seabury, Samuel (1729–1796)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/59086>, accessed 18 Oct 2007]

⁹⁰⁸ Consecration of Bishops Abroad Act 1786. (26 Geo 3 c 84).

⁹⁰⁹ S 2.

Bishops in Foreign Countries Bill to parliament.⁹¹⁰ The Act, once passed, made it lawful for the Archbishop of Canterbury or of York and others called by them to consecrate either British or foreign bishops for places not subject to the crown without first obtaining the Queen's licence for the election of the bishop or a royal mandate and without the candidate having sworn the oath of allegiance (if he was a foreign subject) or the oath of obedience to the Archbishop. The Archbishop still, however, needed to obtain a royal licence to authorize and empower him to perform the consecration.⁹¹¹ The bishop in question might exercise jurisdiction over British congregations of the United Church of England and Ireland and 'over such other Protestant congregations as may be desirous of placing themselves under his or their authority'.⁹¹² However, neither he nor those ordained by him would be able to minister in England without specific authority.⁹¹³

The first bishop appointed under the scheme, Michael Solomon Alexander, was British, of Jewish birth and already in priests' orders in the Church of England. By the time the scheme was finally wound up by an exchange of letters between Archbishop Benson and the Prussian authorities in 1885, there had been no German protestant minister consecrated as a bishop according to the Anglican rite.

The scheme was unpopular in England and Prussia. Liddon described it as 'doomed from birth',⁹¹⁴ and Newman regarded it as one of the reasons for his departure from the Church of England.⁹¹⁵ Some Prussian opposition considered that the scheme failed sufficiently to recognise the 'equal rights of the German Evangelical Church and community' by giving the Archbishop of Canterbury a right of veto over Prussian nominations that was not reciprocal and that the conditions imposed on German clergy operating under the jurisdiction of the Bishop in Jerusalem meant that they were *de facto* required to join the Church of England.⁹¹⁶ The scheme was also open to criticism from the viewpoint of international comity, since the reference to 'jurisdiction over

⁹¹⁰ Hansard vol LIX 1841 cols 473, 488, 495-6, 511, 702. The Act received Royal Assent in October 1841, as the Bishops in Foreign Countries Act 1841, 5 Vict c 6.

⁹¹¹ Bishops in Foreign Countries Act 1841, s 3.

⁹¹² S 2.

⁹¹³ S 4. Authority is provided by the Scottish Episcopal and Other Clergy Act 1840 (3&4 Vict c 33).

⁹¹⁴ Chandler, 59.

⁹¹⁵ Newman, John Henry, *Apologia pro vita sua* Oxford, 1967 ed., 144-148.

⁹¹⁶ Letter Count Münster to Earl Granville 17 July 1882, Memorandum of Baron Plessen 19 September 1884. PP (1887) Germany: No 1, c 5051 ff.

British congregations' could be seen to be extra-territorial legislation by Parliament for the Ottoman Empire.

Opposition to the scheme in England was fiercest from the High Church or Tractarian party, who, in part, opposed the perceived departure or dispensation from the usual practice of the Church of England regarding doctrine and recognition of other churches. Newman wrote a sternly worded protest stating that 'Lutheranism and Calvinism are heresies, repugnant to Scripture, springing up three centuries since, and anathematized by East as well as West' and went on to say that the Bishops in Foreign Countries Act seemed to be 'dispensing at the same time, not in particular cases and accidentally, but as if on principle and universally, any abjuration of error on the part of such congregations [as place themselves under the authority of the bishop]..... thereby giving some sort of formal recognition to the doctrines which such congregations maintain.'⁹¹⁷ James R Hope, also writing in 1841, asks the question whether the Queen can dispense with ecclesiastical laws and concludes that she cannot, citing the coronation oath to maintain laws and the ban on royal dispensations enshrined in the Bill of Rights as authorities. He goes on to conclude that, contrary to Newman's view, there was no dispensation planned or executed in the Jerusalem bishopric scheme. He argues that Bishop Alexander was a bishop of the Church of England, not of Prussia and suggests that those German congregations coming under his jurisdiction would not be dispensed from the normal requirements for, for instance, episcopal confirmation.⁹¹⁸ Other opponents, among them Palmer of Magdalen and Liddon were opposed to the scheme as an incursion into the territory and jurisdiction of the Orthodox Churches.

Howley and, surprisingly, E B Pusey defended the scheme on the basis that it would, in time, introduce the historic episcopate to the German protestant church.⁹¹⁹ W F Hook saw no harm in the making of an exception in order to promote such a rapprochement between Christians. 'For Hook the question was not whether every step in the process of setting up the see was sanctioned by Catholic precedent but whether, in making an exception to a general rule one was actually led to the violation of any Catholic

⁹¹⁷ Protest dated 11 November 1841 in *Apoligia*, 147-8.

⁹¹⁸ Hope, James R *The Bishopric of the United Church of England and Ireland at Jerusalem, considered in a letter to a friend* London, 1841, 23-36.

⁹¹⁹ Chandler, *Life of Liddon*, 60. Greaves, 347.

principle.⁹²⁰ Hook went on to point out, taking the view, decidedly different to that of Newman, that the (unamended) Augsburg Confession was significantly stronger in its teaching of the real presence and baptismal regeneration than were the historic formularies of the Church of England.⁹²¹

Analysis of the legal position of the Jerusalem bishopric is difficult as sources are rarely neutral on the subject. It is clear that the Bishops in Foreign Countries Act allowed the Archbishops to consecrate overseas citizens as bishops to serve overseas. It allowed the Archbishops to dispense, where appropriate, with the required oaths at such a consecration. It also allowed those bishops to exercise jurisdiction over congregations that were not congregations of the Church of England. The Act was intended to sanction the scheme for the oversight of German congregations by the Bishop in Jerusalem but there was no statutory mechanism set up for how that oversight might be exercised. There are conflicting views on how the scheme worked in practice. It seems that some German missionaries joined English mission societies and were ordained by the bishops in Jerusalem to look after German congregations but that many German clergy arrived in the Holy Land already ordained as ministers of word and sacrament in their own protestant churches and that these clergy were not re-ordained. The scheme⁹²² allowed the Bishop in Jerusalem to ordain, or so it seems, those who were not episcopally confirmed (in the case of German candidates seeking ordination), which would not be possible in England, and to oversee and sanction worship according to a rite that was not that of the *BCP*. German congregations under the jurisdiction of the bishop used German language worship sanctioned by the Bishop. In a letter to King Frederick William IV, Howley indicated that he had himself ‘carefully perused’ the Prussian liturgy with the intention of consenting to Bishop Alexander’s authorisation of its use.⁹²³ It was later categorically shown in the ritual trials (especially in *Westerton v Liddell* in 1857) that the only permitted liturgy for use in the Church of England (in England) was that of the *BCP*. The claim, based on the Jerusalem bishopric agreement, of episcopal authority to approve and sanction the use of a liturgy that was not the *BCP* is certainly inconsistent with the law as it developed

⁹²⁰ Garrard, James R, *William Howley (1766-1848): Bishop of London 1813-28; Archbishop of Canterbury 1828-48* unpublished Oxford DPhil Thesis 1992, 346-7. Used with permission.

⁹²¹ Garrard, 346-7.

⁹²² Although this was not explicitly provided for in the Act.

⁹²³ Letter dated 18 June 1842 in Hechel, documents section, 116ff.

later in the century. No claim is made to *jus liturgicum* or a dispensing power inherent in the office of the bishop that made such approval possible but the approval clearly happened.

The Jerusalem bishopric scheme does show, once again, that in the history of the Church of England those in authority, in this case Archbishop Howley with the express sanction and authority of Parliament, have been prepared to set aside the strict application of the law where there is a good reason so to do. In this case the good reason was, in Howley's mind, the mission to the Jews, care for English Christians in the Middle East and the prospect of the introduction of the episcopate to the German Church. This coincided propitiously with the different good reasons of Ashley-Cooper (Shaftesbury) and of those seeking greater political or diplomatic influence in the Levant.

The Church of South India Scheme

A century after the beginning of the Jerusalem Bishopric the dioceses of the Church of India, Burma and Ceylon situated in the South of India entered into a scheme of union with the Methodist Church and the already united South India United Church (which was made up of Presbyterian and Congregational churches). The Church of South India, which came into being in 1947, was the result of a long process of negotiation between the parties.

The basis of the agreement was that the new united Church would be episcopal in structure and that the bishops of the Church would be ordained as bishops in the historic succession. This would be ensured by the participation of bishops of the Church of India, Burma and Ceylon at the consecration of some ministers of the other churches as bishops to serve the united Church. The distinctive part of the scheme, which was also the most controversial part, was that presbyters of the non-episcopal churches were enabled to become presbyters of the united church without fresh, episcopal, ordination.

In entering into this agreement the General Council and the Diocesan Synods of the Church of India, Burma and Ceylon set aside the requirement for episcopal ordination

as a prerequisite for the exercise of presbyteral ministry in the new, united, church, whilst maintaining the requirements in those areas that remained within the CIBC. During the lengthy planning⁹²⁴ a joint statement was issued by the Anglican Dioceses and the South India United Church to the effect that:

.... after union all future ordinations to the Presbyterate would be performed by the laying on of hands of the Bishops and Presbyters; and that all consecrations of Bishops would be performed by Bishops, not less than three taking part in each consecration.

but also that

with reference to the question of equality of ministry, it was recorded that the South India United Church makes it a condition of union that its present ministers (Presbyters) shall after union be recognized as ministers (Presbyters) without re-ordination⁹²⁵

This represents a distinct departure from the norms laid down in the *Ordinal* and in the Act of Uniformity 1662 on the part of the Dioceses of the Church of India, Burma and Ceylon who became part of the CSI. The Church of India, Burma and Ceylon had become a separate, self-governing Church independent of the Church of England after the passing of the Indian Church Measure 1927 and the Indian Church Act 1927. Prior to this legislation the Indian church was established as a part of the Church of England. The Government of India Act 1833⁹²⁶ provided for the division of the Diocese of Calcutta (established in 1814) and the appointment by the Crown of Bishops of Bombay and Madras, who were to be subject to the Bishop of Calcutta as Metropolitan⁹²⁷ and who were to operate under the terms of the letters patent by which they were to be appointed.⁹²⁸ The Act further established the authority of the Crown by letters patent issued under the great seal to alter and determine the boundaries of these three dioceses.⁹²⁹ In 1915, another Government of India Act⁹³⁰ repealed the 1833

⁹²⁴ Co-operation between missionaries in southern India began in the late nineteenth century. See Adam (2003), 47-8. See also Sundkler, Bengt, *Church of South India: the Movement towards Union 1900-1947*, London, 1954 (rev. 1965), 23 ff.

⁹²⁵ Reprinted in Evans, Gillian R and Wright, J Robert (eds), *The Anglican Tradition*, London, 1991.

⁹²⁶ 3 & 4 William IV c85 also known as the St Helena Act 1833.

⁹²⁷ S. 84. The Metropolitan was himself subject to general guidance and supervision by the Archbishop of Canterbury.

⁹²⁸ S. 92.

⁹²⁹ S. 93.

⁹³⁰ 5 & 6 Geo V c 61.

Act⁹³¹ but confirmed the Crown's powers and made provision for the payment of the salaries of the three bishops (as well as of two ministers of the Church of Scotland occupying chaplaincies in India) from the revenues of India.⁹³²

The Measure and the Act of 1927 separated the Church of India, Burma and Ceylon from the Church of England, stopped the ecclesiastical law of the Church of England from being applied as law in Indian courts,⁹³³ made the Rules of the Indian Church (which appeared as a schedule to the measure) binding on members 'as if they had mutually agreed to be so bound' and capable of enforcement in matters of property,⁹³⁴ set up a General Council to make, amend or repeal rules for the Church,⁹³⁵ counted as spent any letters patent regarding appointments in the Indian Church and abolished the Crown's patronage of Indian bishoprics.⁹³⁶ The rules in force at the point of separation in 1927 continued the ecclesiastical law of the Church of England in the Church of India, Burma and Ceylon as terms of the deemed consensual compact that it set up. Embedded in this law was the requirement for episcopal ordination prior to the exercise of ministry contained in the *Ordinal* of 1662. However, Canon I of Chapter XXI of the Constitution and Canons of the Church states that the Church 'desires to work towards the development of forms of worship congenial to the nature of the Indian races; to give opportunities for great liberty of experiment in the direction of such development, but at the same time to safeguard provincial unity.' Thus the aim of making the Church in India less of a carbon copy of the Church of England and more of a church adapted to the cultural and missionary milieu in which it ministered appears from the moment of disestablishment in 1927.

After much negotiation, ten of the eleven dioceses⁹³⁷ and the General Council of the Church agreed to the CSI scheme.⁹³⁸ The power to make and alter rules, and thus to agree to a situation in which ministers who had not been episcopally ordained were enabled to minister in churches in contravention of the *Act of Uniformity* and the *BCP*

⁹³¹ As well as repealing the intermediate Indian Bishops Act 1842 (5 & 6 Vict c 119).

⁹³² Government of India Act 1915 ss. 115-123.

⁹³³ Indian Church Measure (17 & 18 Geo V no1) s 2(iv).

⁹³⁴ S 2(v).

⁹³⁵ S 3.

⁹³⁶ Indian Church Act 1927 (17&18 Geo V c 40) s 2(ii) and (iii).

⁹³⁷ The Synod of the Diocese of Rangoon was unable to meet due to the Second World War.

⁹³⁸ Between 1944 and 1947. Sundkler, 321 and 333-4.

and *Ordinal* that were established as the original ecclesiastical law of the Church after disestablishment, had been granted to the Council by the Indian Church Measure. A conscience clause was inserted, in that the scheme imposed a duty (hotly contested at the time) on bishops not to send ministers who had not been episcopally ordained prior to the union to minister in congregations where members conscientiously objected to their ministry.⁹³⁹

The reaction of the wider Anglican Communion was equivocal. The Lambeth Conference had given guarded approval to the scheme in 1930, stating that the CSI's bishops 'will be received as Bishops by these Churches. Its episcopally ordained ministers – a continually increasing number – will be entitled under the usual rules to administer the Communion in the Churches of the Anglican Communion...On the other hand no right to minister in the Churches of that Communion will be acquired by those ministers who have not been episcopally ordained.'⁹⁴⁰ A meeting of the Convocation of Canterbury in 1943 resolved that communicants of the CSI would be welcomed as communicants in the province of Canterbury, that no censure would be attached to members of the Church of England who received communion in the CSI and that episcopally ordained ministers of the CSI (i.e. former Anglican CSI presbyters and those ordained after the union) would be welcomed in their orders subject to licence under the Colonial Clergy Measure and subject to their not undertaking whilst in England tasks in other Churches (i.e. Free Churches whose Indian counterparts had also joined the CSI) that priests of the Church of England were not permitted to undertake. The Lambeth Conference of 1948 stated that CSI communicants who had not been episcopally confirmed could 'be admissible to communion by an exercise of the principle of "economy"'.⁹⁴¹

Thus, the relationship between the Church of South India and the rest of the Anglican Communion had become, in the words of Archbishop William Temple, something less than 'organic union or full communion' but more than 'total lack of any communion *in sacris*'.⁹⁴² An anomalous situation had occurred in which a bishop of the CSI was able

⁹³⁹ Sundkler, 320-1.

⁹⁴⁰ *Encyclical Letter, Lambeth Conference 1930* in Evans and Wright, 391.

⁹⁴¹ *The Lambeth Conference 1948 – Encyclical Letter / Resolutions and Reports* SPCK, London, 1948. Resolution 54(g).

⁹⁴² Sundkler, 333.

to recognise the orders of a formerly Methodist minister whilst in India but, if both returned to work in England (a large number of bishops and presbyters of the CSI were, at that time, Europeans) that minister would not be able to take up a post in that bishop's diocese.

The Bishops and the synodical and conciliar structures of the Church of India, Burma and Ceylon had certainly, by agreeing to the setting up of the CSI, set aside former legal requirements. Indeed, Michael Hollis, Bishop of Madras before union and Moderator of the CSI afterwards, wrote in 1966 'so far as the situation in England is concerned, it is hard to believe that any judge would hold that the requirements of the Preface to the Ordinal or of the Colonial Clergy Act had been met and that a minister had received episcopal ordination, if episcopal hands had never at any point been laid on him.'⁹⁴³ In consequence of this the relationship of communion between those dioceses and the rest of the Anglican Communion was impaired. The action was temporary (at the time it was thought that a thirty year period of anomaly would see the CSI become a fully episcopally ordered Church – in the end it was not until the Lambeth Conference of 1988 that the CSI bishops took their place on equal terms) and acknowledged as anomalous within Anglican polity.

The anomaly of the situation was pointed out by Colin Buchanan on the floor of General Synod in 1971, when he stated that

We have already had the extraordinary situation of one province in Africa which has full communion with South India while at the same time not revising its Canons – and it means they say no-one except those episcopally ordained may minister in the Church, but at the same time that those who are not may do so.⁹⁴⁴

It is interesting to note that, when the Church of North India came into being in 1970 there was no unqualified acceptance of the ministry of non-episcopally ordained presbyters. The Church was brought into being liturgically via a service of reconciliation, which was capable of interpretation as episcopal re-ordination.⁹⁴⁵ That

⁹⁴³ Hollis, Michael, *The Significance of South India*, London, 1966, 66.

⁹⁴⁴ Proc GS 2 (1971), 29.

⁹⁴⁵ Newbiggin, J E Leslie, *The Reunion of the Church; A defence of the South India Scheme* Revised Ed, London, 1960.

is was so interpreted is demonstrated by the case of the Revd Kenyon Wright, a British Methodist Minister who served in North India at the time of the union and 'was integrated into the Church of North India.'⁹⁴⁶ The opinion of the Archbishop of Canterbury's registrar was that Wright was capable of being licensed under the Overseas and Other Clergy (Ministry and Ordination) Measure 1967. He stated that 'following the decision of the General Synod we must accept the validity of the Orders of such ministers who have been "unified" just as they are accepted by the former Anglican priests there.'⁹⁴⁷

The decision referred to was taken in the General Synod on 13 July 1971. The first motion read

That this Synod declares that bishops and presbyters of the Church of North India and the Church of Pakistan who have taken part in the Act of Unification of the Ministries have received grace and authority for the office and work of bishops or priests in the Church of God.⁹⁴⁸

and a second motion read

That this synod accepts the advice of the Legal Board that no legislation is required for a minister of either the Church of North India or the Church of Pakistan to be received into the ministry of the Church of England in accordance with Canon C1 and to celebrate the Holy Communion in accordance with the terms of Canon B12 or to exercise his ministry within the terms of Canon C8.⁹⁴⁹

When, in 1974, Bishop Bardsley wished to appoint Wright as a residentiary canon of Coventry Cathedral he came up against the Cathedral statutes which stated that those appointed as canons needed to have been in priest's orders for six years. This was only three years after the union.⁹⁵⁰ The registrar advised Ramsey (citing the opinion of the Dean of the Arches, Sir Harold Kent) that Wright was qualified for appointment as a residentiary canon and the appointment went ahead.⁹⁵¹ This indicates that the act

⁹⁴⁶ Letter Bishop Bardsley of Coventry to Archbishop Ramsey, 31 May 1973, LPL Ramsey 285 f. 134.

⁹⁴⁷ Letter David Carey to Archbishop Ramsey, 7 June 1973, LPL Ramsey 285 f. 135.

⁹⁴⁸ Proc GS 2 (1971) 329

⁹⁴⁹ Proc GS 2 (1971) 329-332

⁹⁵⁰ Wright is listed in *Crockford's Clerical Directory* as having been ordained deacon and priest in 1971, the year of the 'unification'.

⁹⁵¹ Letter David Carey to Bishop Tiarks of Maidstone, 12 February 1974, LPL Ramsey 285 f. 140.

wherein former non-anglican ministers of the Church of North India had hands laid on them by Anglican bishops was accepted as 'episcopal ordination' and, moreover, that the recognition of their orders was in some sense capable of being backdated to a date prior to the union.

Anglican-Methodist Unity – 1968-72

A fully worked out scheme for the reunion of the Church of England and the Methodist Church of Great Britain was proposed in the late 1960s but failed to achieve the required 75% special majority in the General Synod of the Church of England in 1972. Consequently the scheme was not put into practice. It is of interest, however, as a model of how agreement might have been reached. The union of the two churches was to be brought about by an Act of Parliament, ready drafted as part of the scheme,⁹⁵² thus giving statutory authority to the scheme. The liturgical reconciliation of the ministries of the Churches was to take place via a series of services known as 'Acts of Reconciliation' made legal by the proposed Act of Parliament. The statute would also have made legal the proposed new ordinal, the consecration of Methodist presbyters as bishops in the Methodist Church by bishops of the Church of England, the acceptance within the Church of England of the newly formed and consecrated episcopate of the Methodist Church and the acceptance of ordinations carried out by Methodist bishops. It also safeguarded the independence of the Methodist Church from the authority of the Church of England until such time as structural unity of the two churches was achieved.⁹⁵³

The Act of Reconciliation involved prayer with the laying on of hands, the classical and normative act of ordination, by Methodist ministers on Anglican clergy and by Anglican bishops on Methodist ministers. The prayers were as follows:

Prayer over Anglican Priests

Send the Holy Spirit upon them, each according to his need, that in the office of a Presbyter in thy Church, in the coming together of the Methodist Church and the Church of England, they may serve thee acceptably.

⁹⁵² To have been known as the *Anglican-Methodist Reconciliation Act 19..*

⁹⁵³ *Anglican Methodist Unity: 2 The Scheme*, London, 1963, 103ff.

Prayer over Methodist Ministers

We pray thee to send upon each of these thy servants, according to his need, thy Holy Spirit for the office and work of a Presbyter in thy universal Church and in the coming together of the Methodist Church and the Church of England.

This compares with the formula used in the *Ordinal* of 1662:

Receive the Holy Ghost for the Office and Work of a Priest in the Church of God, now committed unto thee by the Imposition of our hands. Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful Dispenser of the Word of God, and of his holy Sacraments; In the Name of the Father, and of the Son, and of the Holy Ghost. Amen.

The Act of Reconciliation, and in particular the question of whether the Act did or did not constitute episcopal ordination to the priesthood of those who were not already episcopally ordained, caused great controversy at the time and arguably brought about the failure of the scheme.⁹⁵⁴ The scheme itself acknowledged that some might not consider the Act of Reconciliation to have made those ordained as presbyters in the Methodist Church prior to the consecration of Methodist bishops recognisably interchangeable with Anglican priests in that it gave to Parochial Church Councils the option to veto any invitation to a Methodist Minister to preside at the Eucharist in a parish church.⁹⁵⁵

It has been pointed out elsewhere that the scheme ‘built on the scheme of the Church of South India. It did not propose the unconditional acceptance of the ministry of non-episcopally ordained ministers by the Church of England as had happened with the Anglican church in India but it also stopped short of the unambiguous re-ordination of those ministers.’⁹⁵⁶

The ambiguity of the Act of Reconciliation *vis à vis* ordination opens the question of whether discretion, dispensation or economy were proposed as part of the scheme. The scheme would have enabled Methodist ministers who had taken part in the Act of Reconciliation to minister in the Church of England and to use the rites and ceremonies of that church. This could, as has been noted above, be read to have been in

⁹⁵⁴ See Buchanan C, Leonard G, Packer J and Mascall E; *Growing into Union*, London, 1970.

⁹⁵⁵ *Anglican Methodist Unity*: 2, 101.

⁹⁵⁶ Adam (2003), 53.

contravention of s 10 of the Act of Uniformity and of the preface to the Ordinal of 1662. The power to dispense with or to disregard these statutory provisions was itself to be statutory and thus there would have been no suggestion of unlawfulness in the proposals. However, the example of the Revd Kenyon Wright, cited above, indicates that it would have been possible for the Act of Reconciliation to have been interpreted as episcopal ordination and that, despite anticipated scruples on the part of some, no dispensation or economy was necessary. The scheme would also have given permission for the dispensing of the requirement for candidates for ordination to be episcopally confirmed and for candidates for ordination to the episcopate to be in priest's orders.

The scheme failed but it remains as an interesting episode in the history of ecumenical dialogue and, may provide a potential model for other such schemes.

The Porvoo Agreement

Contact between the Anglican churches of the British Isles and the Nordic and Baltic Lutheran Churches dates back to the sixteenth century. A tradition of mutual participation of bishops in episcopal consecrations existed between the British Anglican churches and the Lutheran Churches of Sweden, Finland, Latvia and Estonia.⁹⁵⁷ The history of the Reformation of the Church in Sweden was similar to that in England in that the historic succession of bishops ordaining bishops was not broken as it was in other parts of Europe. The succession of bishops in Finland, Lithuania and Estonia derived from the Swedish succession.⁹⁵⁸ Latvia's Reformation was influenced by German Lutheranism but the historic episcopate had been re-introduced by Swedish bishops in 1920 and in 1989 a bishop of the Church of England took part in a Latvian consecration.⁹⁵⁹ There was, consequently, mutual recognition of ordination between those churches. However, that recognition was qualified. Whilst early Anglo-Swedish agreements (usually set up by exchange of letter between the Archbishops of Canterbury and Uppsala, after consultation with and the agreement (in England) of the Convocations) were generous in offering mutual Eucharistic hospitality, invitations to ministers to minister in the other church were limited to invitations to preach.

⁹⁵⁷ Hill, Christopher in *Together in Mission and Ministry*, London, 1993, 53-58.

⁹⁵⁸ *Together in Mission and Ministry*, 55.

⁹⁵⁹ *Together in Mission and Ministry*, 117.

Archbishop Fisher of Canterbury suspended mutual participation in consecrations in 1959 when the Church of Sweden began to ordain women priests.⁹⁶⁰ In 1961 the Convocations recommended that invitations could be made to male Swedish priests to preach and to celebrate Holy Communion using their own rite in churches of the Church of England.⁹⁶¹ The ordinations of deacons, priests and bishops in the Churches of Sweden, Finland and the Baltic states fulfilled the conditions laid down by the Act of Uniformity and the preface to the ordinal for episcopal ordination. In Denmark, however, the tactile succession had been broken (by necessity rather than by design⁹⁶²) but, after the initial consecration by a Priest of seven bishops to fill the pre-Reformation Danish sees, those sees had continued to be occupied by those bishops who in turn consecrated bishops to succeed them. There was no mutual participation in consecrations between the Churches of Denmark and Sweden, indeed Swedish bishops have consistently been prevented from taking part at the laying on of hands in Danish consecrations.⁹⁶³ The Church of Denmark has also been unwilling to enter into an arrangement of intercommunion with the Church of England, limited intercommunion having only been established in 1956/7.⁹⁶⁴ The churches in Norway and Iceland derive their episcopal succession from Denmark. In the Church of Norway it was possible for priests to be ordained by Deans of Cathedrals, who were not themselves in episcopal orders, during a vacancy in see, but this rarely happened and will now have ceased as a result of the Porvoo agreement.⁹⁶⁵ It is a matter of record that, prior to the Porvoo agreement, the other Anglican Churches of the British Isles and of the wider Anglican Communion tended also to accept agreements made by the Church of England with the Nordic and Baltic Churches.⁹⁶⁶

The agreement, finalised at and named after the Finnish city of Porvoo, included the provision that all signatory churches⁹⁶⁷ were to undertake:

⁹⁶⁰ The practice was resumed in 1976.

⁹⁶¹ *Together in Mission and Ministry*, 54-5.

⁹⁶² *Together in Mission and Ministry*, 85-6.

⁹⁶³ *Together in Mission and Ministry*, 89.

⁹⁶⁴ *Together in Mission and Ministry*, 58.

⁹⁶⁵ *Together in Mission and Ministry*, 98.

⁹⁶⁶ *Together in Mission and Ministry*, 58.

⁹⁶⁷ The Churches of Denmark and Latvia, whilst having been full members of the dialogue did not sign the agreement.

to welcome persons episcopally ordained in any of our churches to the office of bishop, priest or deacon to serve, by invitation and in accordance with any regulations which may from time to time be in force, in that ministry in the receiving church without re-ordination.⁹⁶⁸

Some analysis of this agreement, and its practical outworking is necessary.

The reference is to those ‘episcopally ordained’. This would seem to exclude those who have been ordained by Deans of Cathedrals. It would also seem to comply with the requirements of the Act of Uniformity and the preface to the Ordinal. However, the understanding of what constitutes ‘episcopal’ is not necessarily congruent with previously stated understandings. The *Meissen* agreement between the Church of England and the Protestant Church in Germany (the EKD) did not progress to a situation where ordained ministries could be interchangeable due to disagreement on the historic episcopate.⁹⁶⁹ The Report of the Anglican Lutheran European Regional Commission stated that

Concerning the question of the *historical succession* of bishops, there still remains a difference between us because, while Anglicans cannot envisage any form of organic church union without the historic episcopate, Lutheran churches are not able to attribute to the historic episcopate the same significance for organic church union.⁹⁷⁰

Whilst most of the regional churches making up the EKD maintain the office and ministry of a minister with the title ‘bishop’, they do not maintain that the bishops are an order apart from the order of presbyter and do not ordain their bishops within the historic succession. There are some similarities between the history, ecclesiology and practice of the EKD and the Churches of Denmark and Norway, not least in the fact that the strict historic succession has been broken. However, the Porvoo Agreement is based on the understanding that, unlike in the EKD, all the participating Churches, including the Churches of Denmark,⁹⁷¹ Norway and Iceland, intended to carry forward the threefold order of bishops, priests and deacons, and that those Churches in which the tactile historic succession of ordination of bishops had been breached and in which the minister of ordination has sometimes been a presbyter and not a bishop

⁹⁶⁸ *Porvoo Common Statement* para 58 (b) (v).

⁹⁶⁹ *Meissen Agreement* para 17.

⁹⁷⁰ *Report of the Anglican Lutheran European Regional Commission* 1982, published 1983 para 43.

⁹⁷¹ Which, it must be remembered, has not yet signed the agreement.

nevertheless maintained a succession of bishops. In support of this proposition it has been pointed out that in the Churches concerned bishops were appointed to the historic pre-Reformation sees without a break.⁹⁷² The statement maintains that

The mutual acknowledgment of our churches and ministries is theologically prior to the use of the sign of the laying on of hands in the historic succession. Resumption of the use of the sign does not imply an adverse judgment on the ministries of those churches which did not previously make use of the sign. It is rather a means of making more visible the unity and continuity of the Church at all times and in all places⁹⁷³

and that

those churches in which the sign [of the historic episcopal succession] has at some time not been used are free to recognize the value of the sign and should embrace it without denying their own apostolic continuity. This also means that those churches in which the sign has been used are free to recognize the reality of the episcopal office and should affirm the apostolic continuity of those churches in which the sign of episcopal succession has at some time not been used.⁹⁷⁴

An understanding of Apostolic Succession as wider than the historic, tactile, episcopal succession has been widely discussed in twentieth century ecumenical documents. Lutheran – Roman Catholic Dialogue came up with the following statement in 1984:

...the apostolic succession in the episcopal office does not consist primarily in an unbroken chain of those ordaining to those ordained, but in a succession in the presiding ministry of a Church which stands in the continuity of apostolic faith and which is overseen by the bishop in order to keep it in the communion of the catholic and apostolic church.⁹⁷⁵

and the House of Bishops of the Church of England, in answer to suggestions that the Porvoo Agreement indicated a laying aside of the necessity of the historic succession, stated that 'the reality may be present without the sign and the sign without the reality.'⁹⁷⁶

⁹⁷² See Adam (2003), 57. *Porvoo Common Statement* para 34.

⁹⁷³ *Porvoo Common Statement*, para 53.

⁹⁷⁴ *Porvoo Common Statement*, para 57.

⁹⁷⁵ 'The Ministry of the Church' para 62. In *Apostolicity and Succession*, House of Bishops' Occasional Paper, GS Misc 432, London, 1994, 25, para 65.

⁹⁷⁶ *The Porvoo Agreement: A Report by the House of Bishops* GS 1156, London, 1995, 6 para 12.

The recognition by the Church of England, the Church of Ireland, the Church in Wales and the Scottish Episcopal Church of ordained ministries received in Churches which had not retained the historic episcopate as traditionally understood was a novelty. As recently as 1947 the experience of the Church of South India, where ministers who had not been ordained either by Anglican bishops or by the new bishops of the Church of South India were not recognised in their orders by the other churches of the Anglican Communion, had shown that Anglican churches were inclined to take a conservative approach to such recognition.

Practically, from the point of view of the Church of England,⁹⁷⁷ recognition of orders conferred in another church becomes an issue when a minister of that church seeks to or is invited to hold preferment or to minister in the Church of England. The Porvoo agreement, cited above, envisages the ministers of all signatory churches, including, for instance, the Church of Norway, being able to minister in all other churches, including the Church of England. Such invitations are subject to the provisions of the Overseas and Other Clergy (Ministry and Ordination) Measure 1967 whereby the Archbishop of Canterbury or York may license a minister of another church with whom the Church of England is in communion.⁹⁷⁸ He may also similarly license episcopally ordained ministers of churches not in communion with the Church of England if the orders of that church are recognised and accepted by the Church of England.⁹⁷⁹ Determination of which churches are in communion and which churches not in communion have orders that are recognised and accepted falls to the Archbishops, presumably acting jointly.⁹⁸⁰

The Porvoo signatory churches are considered by the Church of England to be Churches in Communion with the Church of England. This status, informed by Act of Synod in 1995, came about when the agreement was signed by the Archbishops of Canterbury and York and when they subsequently used their powers under the Overseas Clergy Measure to permit the interchange of ministry envisaged by the agreement. The undertaking by the signatory churches that had not preserved the historic tactile succession to take this succession into their system was inevitably a

⁹⁷⁷ It is on the Church of England that this analysis will concentrate, rather than on the other Anglican Churches of the British Isles.

⁹⁷⁸ S 1.

⁹⁷⁹ S 3.

⁹⁸⁰ S 6(2).

major consideration in the decision of Synod (and of the Anglican members of the Porvoo dialogue). The model of recognition of orders was less radical than that of the church of South India in that all⁹⁸¹ Nordic and Baltic Lutheran clergy had been ordained by a bishop in some sort of succession but more radical in that the visibly united churches would, for a generation, contain within them bishops who were not ordained as such within the tactile historic succession. The Churches of Estonia, Finland, Iceland, Lithuania, Norway and Sweden appear in the list of churches with which the Church of England is in communion.⁹⁸² The House of Bishops stated, in advance of the agreement that ‘The Archbishops of Canterbury and York have indicated that they will take Final Approval [by the General Synod] of the Porvoo declaration as their basis for treating these churches named in the Preamble to the Declaration which themselves approve the Declaration as “Churches in Communion with the Church of England” for the purposes of the Overseas Clergy Measure 1967.’⁹⁸³ This included the Churches of Norway and Iceland but excluded the Church of Denmark, which did not approve the declaration.

Whilst Lambeth Palace refuses to make public details of licences granted under the Overseas Clergy Measure, *Crockford’s Clerical Directory*⁹⁸⁴ lists four priests ordained in Norway, two of whom were ordained prior to the signing of the Porvoo agreement, who hold or have held licences or benefices in the Church of England since 1995. None of these held such licence or benefice prior to 1995. There is no record in *Crockford* of Swedish or Finnish priests holding licences or benefices prior to 1995 and no record of any Danish priest having held such at all. An interim report from the Council for Christian Unity to the General Synod in 1993 stated that agreements with those Churches that had retained or recovered the sign of the historic succession had to date been limited to mutual participation in episcopal consecrations and mutual Eucharistic hospitality. They had stopped short of interchangeability of ministers.⁹⁸⁵ There is also a question about the ministry of priests from the Nordic Churches who have been ordained by a female bishop. At the time of the first ordinations of women to

⁹⁸¹ However, see the comment about the ability of Norwegian Cathedral Deans to ordain, albeit very rarely.

⁹⁸² *Canons of the Church of England* Sixth Edition 2000 Incorporating first supplement, 206-8.

⁹⁸³ *The Porvoo Agreement: A Report by the House of Bishops*, GS 1156, London, 1995, 17, para 37.

⁹⁸⁴ July 2007 update, accessed via www.knowuk.co.uk 10 October 2007.

⁹⁸⁵ *Communion with the Nordic and Baltic Lutheran Churches: A report by the Council for Christian Unity*, GS Misc 427, London, 1993.

the episcopate in the Anglican Communion, Archbishops Runcie and Habgood made a statement to the General Synod indicating that, as the Church of England did not at that time ordain women as bishops (or priests) they would not permit clergy ordained by women bishops to officiate in the Church of England under the Overseas and Other Clergy (Ministry and Ordination) Measure 1967.⁹⁸⁶ This statement is not binding on their successors. Its implementation was assumed by the Council for Christian Unity in 1993.⁹⁸⁷ Guidelines issued by the Church of England's Porvoo Panel in 2000 for bishops of the Church of England⁹⁸⁸ state that those ordained by women bishops in the Nordic and Baltic churches may not be received in the Church of England in their orders.⁹⁸⁹

Porvoo constituted a laying aside of the norms of the Church of England in its understanding of 'episcopal ordination' in its own laws and formularies. That this is the case is shown by the absence of an agreement on intercommunion and mutual co-consecration between the Church of England and the Churches of Norway and Iceland prior to Porvoo and by statements by those involved in the process, including Bishop Hind of Chichester (formerly Bishop of Gibraltar in Europe) who said that Porvoo represented a 'significant shift' in that it brought about 'an interchangeability of ministries with churches which did not presently possess the unbroken succession of the laying on of hands in episcopal succession.'⁹⁹⁰ The purpose of the Porvoo agreement, and the reason for the Church of England to lay aside its usual norms in this particular case, was to bring about full visible unity between the churches.⁹⁹¹ The legal basis for this recognition lies in the authority of General Synod and of the archbishops. There has been no judicial review of any archiepiscopal decisions in this area. The archbishops have a statutory authority, with no statutory right of appeal against their decision⁹⁹² to determine which churches are in communion and the Synod has the right, limited by statute, to approve a scheme for a substantial change in the relationship

⁹⁸⁶ (1989) 1(5) Ecc LJ 9. Doe, N, *Canon Law in the Anglican Communion*, Oxford, 1998, 352, n 63.

⁹⁸⁷ *Communion with the Nordic and Baltic Lutheran Churches*, 7, para 16.

⁹⁸⁸ Reproduced in Appendix 4. The Porvoo Panel is a sub-committee of the Church of England's Council for Christian Unity.

⁹⁸⁹ Paragraph 3.

⁹⁹⁰ Hüffmeier, W and Podmore, C (eds.) *Leuenberg, Meissen and Porvoo*, Leuenberger Texte Heft 4, Frankfurt am Main, 1995, 177.

⁹⁹¹ *The Porvoo Common Statement* para 60 in *Together in Mission and Ministry*, 32.

⁹⁹² There is no appeal process built into the Overseas Clergy Measure, but the Archbishops' determinations may be subject to judicial review.

between the Church of England and another Christian body.⁹⁹³ However, it should be noted that there is a question as to whether the power of the archbishops to declare a church ‘in communion’ is sufficient power to override the statutory requirements of the Act of Uniformity and whether an Act of Synod is sufficiently authoritative to do the same.

Anglican-Lutheran agreements in North America

One of the arguments in favour of extending recognition of the orders of bishops in the Churches of Denmark, Norway and Iceland was that, whilst the historic succession of bishops ordaining bishops had been broken in those churches, the succession of occupants of the historic episcopal sees had not been broken and there had been an intention on the part of those churches not only to continue the apostolic succession of faithful teaching but to continue the apostolic succession of episcopal ministry. Such an argument was not at the disposal of the Anglican and Lutheran Churches of North America, all of whose ecclesiastical forebears arrived on that continent after the Reformation.

Agreements between the Episcopal Church of the United States and the Evangelical Lutheran Church of America (the *Concordat* of agreement, revised and approved under the title *Commitment to Mission and Ministry [CMM]*) and between the Anglican Church of Canada and the Evangelical Lutheran Church of Canada (the *Waterloo Declaration*) emerged after dialogue in the 1990s. The agreements went further than those of both Porvoo and the CSI. ‘Full Communion’ was declared between the signatory churches. The Lutheran churches agreed that all bishops elected after the signing of the agreements would be ‘installed’ as bishops in the historic succession,⁹⁹⁴ with at least three bishops already in that succession taking part in the laying on of hands,⁹⁹⁵ and that subsequent ordinations of Lutheran pastors (presbyters) would be by bishops, who within a generation would all be bishops in the historic succession.⁹⁹⁶

⁹⁹³ Synodical Government Measure 1969, schedule 2, article 8. *Halsbury* 14, para 405.

⁹⁹⁴ *CCM* para 18.

⁹⁹⁵ *CCM* para 19. The assumption of this paragraph is that the bishops in the historic succession that were to be invited to the installation of the next presiding bishop would primarily be from Lutheran Churches with bishops in that succession (e.g. the Nordic and Baltic Churches) but that bishops from TEC could also be invited.

⁹⁹⁶ *CCM* para 20.

The decision of the General Convention of TEC resolved:

Resolved, That the 72nd General Convention of the Episcopal Church having affirmed in the Concordat of Agreement (as presented to the 73rd General Convention in the document Called to Common Mission: A Lutheran Proposal for a Revision of the Concordat of Agreement) the full authenticity of existing ordained ministries in the Evangelical Lutheran Church in America, having reached fundamental agreement in faith with the same church, and having agreed that the threefold ministry of Bishops, Presbyters, and Deacons in historic succession will be the future pattern of the one ordained ministry shared corporately within the two churches in full communion, the 73rd General Convention of the Episcopal Church hereby enact a temporary suspension, in this case only, of the seventeenth-century restriction that "no persons are allowed to exercise the offices of Bishop, Priest, or Deacon in this Church unless they are so ordained, or have already received such ordination with the laying on of hands by Bishops who are themselves duly qualified to confer Holy Orders," as set forth in the Preface to the Ordination Rites (Book of Common Prayer, p. 510); and be it further *Resolved*, That this resolution take effect on January 1, 2001.⁹⁹⁷

The agreement went further than the Porvoo agreement in a two ways. First, the reasoning of Porvoo was that, whilst the tactile succession of bishops had been broken in some churches, the succession of occupants of historic sees had not. This was not possible in the new world. Second, prior to the Porvoo agreement, the bishop was the normative minister for the ordination of presbyters in all the participant churches and the agreement was based, first, on the recognition of existing ministries as being episcopal in foundation. Up to 2001 the normal minister of ordination in the ELCA was a presbyter, rather than an ELCA bishop. The agreement went further than the CSI agreement in that there were, after the agreement, Lutheran bishops (who became, save in 'unusual circumstances' the invariable ministers of ordination to the presbyterate) who were not themselves within the historic succession. These bishops continued to ordain and those whom they ordained post-agreement are recognised as interchangeable with priests of TEC, just as those ordained prior to the agreement and those ordained by Lutheran bishops in the historic succession after the agreement. As a consequence of this the period of anomaly is likely to last longer than that of the Church of South India, in which all ordinations after 1947 were carried out by bishops who were unambiguously within the historic succession. Since 2001 some thirty-three

⁹⁹⁷ General Convention, *Journal of the General Convention of...The Episcopal Church, Denver, 2000* (New York: General Convention, 2001), 475.

of the sixty-six serving bishops of ELCA have been ‘installed’ by means of episcopal consecration.⁹⁹⁸

Despite the agreement outlined above a subsequent decision of the Churchwide Assembly of the ELCA allowed for ordination of pastors in ‘unusual circumstances’ without a bishop as presiding minister;

for pastoral reasons in unusual circumstances, a synodical bishop may provide for the ordination by another pastor of the ELCA of an approved candidate....prior to authorization of such an ordination, the bishop of the synod of the candidate's first call shall consult with the presiding bishop as this church's chief ecumenical officer and shall seek the advice of the Synod Council.⁹⁹⁹

In debate on the issue, a bishop of the Episcopal Church stated ‘those ordained by bishops after last January's inaugural service will be transferable for service in the Episcopal Church, those ordained by pastors will not be.’¹⁰⁰⁰ To date the advice on the orderly exchange of ministers published by the Churches in January 2001 has not been changed in the light of this decision.¹⁰⁰¹

The Canadian Churches made a similar arrangement in 2001 when the Anglican Church of Canada and the Evangelical Lutheran Church in Canada approved the *Waterloo Declaration*. This declaration, borrowing heavily from the texts of *Porvoo* and the *Concordat* and *CMM*, commits each church to recognise the ‘full authenticity’ of the ordained ministries of the other¹⁰⁰² with the consequential commitment to invite Bishops of the other church to take part in episcopal ordinations.¹⁰⁰³ There is no mention in the agreement, however, of the future ordination of presbyteral ministers by bishops in the ELCIC after the date of the agreement. The Constitution of ELCIC maintains that the regional Synod is responsible for the ordination of pastors¹⁰⁰⁴ and

⁹⁹⁸ Information from Bishop Chris Epting of TEC in an e-mail dated 12 October 2007.

⁹⁹⁹ Churchwide Assembly of the Evangelical Lutheran Church in America Bylaw 7.31.17.

¹⁰⁰⁰ Bishop Epting remarks to the ELCA Churchwide Assembly, August 2001,

http://ecusa.anglican.org/6947_10416_ENG_HTM.htm accessed 11 October 2007.

¹⁰⁰¹ *The Orderly Exchange of Pastors and Priests under Called to Common Mission. Principles and Guidelines*, 1 January 2001.

¹⁰⁰² *Waterloo* paras B1 and B2. Note the lack of the use of the term ‘validity’.

¹⁰⁰³ *Waterloo*, para D2.

¹⁰⁰⁴ Article VII(3).

lays down that there are to be synodal bishops,¹⁰⁰⁵ but the commitment made in the CSI, *Porvoo* and *CCM* seems to be missing from the official documents. There is evidence that the ordination of pastors is the duty of the bishop,¹⁰⁰⁶ but ambiguity remains.

Conclusions and proposals for Anglican-Methodist unity in the twenty-first century.

The examples given above show, first, that there is a long-standing and generally immutable requirement within the Church of England and in other Anglican Churches for ordinations to be conducted according to the rules laid down in the various Reformation statutes and the liturgies. These rules carried on the pre-Reformation and ancient discipline of the Church. The rules prescribed limits on the minimum age for ordination, and set certain preconditions for candidates for ordination. Certain dispensations had, in the period following the Reformation, been granted by the Archbishop of Canterbury to enable, for instance those who were under the prescribed minimum age to be ordained (this was envisaged in the ordinal itself)¹⁰⁰⁷ and for those who were of illegitimate birth to be ordained. There is no evidence that the obligation for episcopal confirmation, for being in deacon's orders at the time of ordination to the priesthood (and in priest's orders prior to ordination to the episcopate) or for the minister of ordination to have been a bishop in the historic succession, were ever dispensed with by any authority.

Twentieth century Ecumenical agreements, and the potential good contained in and brought about by such agreements, presented those in authority with a difficult situation. The unity of the Church was something that should be sought. Reconciliation between Christians was something for which the early church laboured. Unity was one of the marks of the church as laid down in the Nicene Creed.¹⁰⁰⁸ At their consecration bishops of the Church of England were charged with seeking to ensure peace between

¹⁰⁰⁵ Article IX(11).

¹⁰⁰⁶ E.g. *Bylaws of the Saskatchewan Synod of the Evangelical Lutheran Church in Canada* Part IX Section 1(b) states among the bishop's duties that they 'Ordain approved candidates for ministry, consecrate approved candidates for lay diaconal ministry and provide for the installation into office;' Article XII Section 7(f) of the *Constitution of the Eastern Synod of the Evangelical Lutheran Church in Canada* places on the bishop an obligation to 'Ordain, or provide for the ordination of, all candidates accepted for the ministerial office', which is slightly more ambiguous.

¹⁰⁰⁷ *Palmer Report* 25.

¹⁰⁰⁸ 'We believe in one, holy, catholic and apostolic Church'.

people.¹⁰⁰⁹ Historically, there had been two seemingly irreconcilable attitudes to orders conferred outside of the historic episcopal succession. On the one hand the hard line taken by the clergy in the case of *Kemp v Wickes*¹⁰¹⁰ and *Escott v Mastin*¹⁰¹¹ and by the tractarians, that the ordination of those not ordained by bishops within the historic succession were null and void. This could be described as an extreme Cyprianic view. On the other hand there were those who, whilst remaining committed to the ongoing importance of the maintenance of the historic succession, were unwilling to count as nothing the ministry of those who had not received ordination within that succession. In this category can be placed Richard Hooker, who admitted of occasions of ‘necessity’ when bishops were not essential for ordination and the Caroline divine John Cosin, Bishop of Durham after the Restoration, who had been in exile in France and who stated that some believed that in the French protestant church

by reason of this defect there is a total *nullity* in their ordination, or that they be therefore no Priests or Ministers of the Church at all, because they are ordained by those only who are no more but Priests or Ministers among them, for my part, I would be loath to affirm and determine against them.¹⁰¹²

In later ecumenical discussions on the place of the historic succession three distinct views can be discerned; that the historic succession is of the *esse* of the Church, that it is of the *bene esse*, or that it is of the *plene esse*. In the first, this would mean that without the historic episcopate there can be no church, the second that it is a good thing for the church to have the historic episcopate but that the lack of it does not cause the church to cease fully to exist, the third, that it is necessary for the fullness of the life of the church, rather than for its very existence. John Bramhall, Archbishop of Armagh, argued as long ago as the seventeenth century for an understanding of episcopacy based on the third view, stating that those who held a more extreme episcopalian position make a mistake that

.... proceedeth from not distinguishing between the true nature and essence of a church, which we do readily grant them, and the integrity or perfection of a

¹⁰⁰⁹ *Ordinal* 1662.

¹⁰¹⁰ (1809) 161 ER 1320.

¹⁰¹¹ (1842) 13 ER 241 (4 Moo PCC 104).

¹⁰¹² Letter dated 7 February 1650. Bell, 1948, 41.

church, which we cannot grant them without swerving from the judgement of the Catholic Church.¹⁰¹³

The ecumenical agreements of the twentieth century, the Chicago-Lambeth Quadrilateral of the late nineteenth century and even the Jerusalem Bishopric scheme point to a general understanding that the historic episcopate as traditionally understood is of the *plene esse* of the Church.

However, there remains considerable ambiguity, which can best be explained with reference to the concepts of dispensation and economy. The agreements examined above all involved some softening or setting aside of the law for a particular purpose, for the most part leaving that law unchanged but for that particular situation. This can be summarised as follows:

The Jerusalem Bishopric scheme envisaged the ordination as a bishop of a candidate who was not in priest's orders as accepted and recognised by the Church of England. In the end this did not happen. It envisaged the ordination as deacons and priests of German citizens who were not episcopally confirmed. This did happen. These ordinations would not have been possible in England, neither would the use of a liturgy by the bishop or other clergy that was not the *Book of Common Prayer*. It also allowed the admission to communion of members of a church not in communion with the Church of England and who would not usually qualify for admission under the rubrics of the *BCP*. This setting aside was brought about by Act of Parliament and is best described as statutory authority for the bishop in Jerusalem to dispense with the usual preliminaries to the rite of ordination.

The Church of South India scheme set aside, as a temporary measure, the requirement for episcopal ordination prior to ministry in those dioceses of the Church of India, Burma and Ceylon which left that church to become part of the new, united, church. This was a clear anomaly, shown not least by the requirement that all ordinations from the point of union on would be episcopal. It also dispensed with the requirement to be in priest's orders at the time of ordination to the episcopate and for episcopal

¹⁰¹³ Bramhall, John, *Bishop Bramhall's vindication of himself and the Episcopal clergy from the Presbyterian charge of Popery*, London, 1672, 31-2. See also Sykes (1948) 17. Sykes points to other contemporary divines with similar views.

confirmation. The Lambeth Conference used the term 'economy' to describe parts of the scheme. It was brought about by legal process, by a decision of the Governing Council of the Church of India, Burma and Ceylon and was not, therefore, schism. In the scheme can be seen actions akin to dispensation (the higher authorities, the Governing Council and the Metropolitan, allowed the bishops and people of the southern dioceses to behave in this irregular fashion) and economy (those bishops and people relaxed their rules touching ministry and the sacraments in order to achieve reunion with their separated brothers and sisters). The scheme also shows a commitment to live with a period of temporary anomaly, which falls into the definition neither of dispensation nor economy.

The Church of North India and the *Anglican-Methodist Unity Scheme* of 1968-72 were both less radical in terms of the period of temporary anomaly. There was certainly a setting aside of the requirement to be in priest's orders prior to ordination as a bishop and a setting aside of the requirement for episcopal confirmation, neither of which were set aside (or were planned to be set aside) more widely than in the CNI or the Church of England. The latter scheme was to have been statutory and, like the Jerusalem Bishopric scheme, was a dispensation with statutory authority; the crown and parliament dispensing those in authority in the Church of England (mainly Bishops) from observing the usual requirements of the law and of the liturgy in this case only. The surviving sections of the Act of Uniformity 1662 were not to be repealed. It has been shown that 'unification' in the CNI was considered as sufficient ordination for the taking up of a post in the Church of England. This would have, in turn, meant that such a person acquired other legal rights, duties and their ministry would have had an effect in, for instance, the change of the legal status of those at whose marriage the minister concerned officiated.

The Porvoo Agreement built on piecemeal agreements with other northern European churches that had been based on episcopal, synodical and convocational authority. Whilst some argue that the agreement did not constitute a setting aside of the requirement for episcopal ordination, it did set aside the requirement for episcopal ordination as previously understood by the Church of England. The agreement had the characteristics of an exercise of dispensation or economy in that it did not alter the requirement or change the law generally, but only in this particular case. That a change

was made is made clear by the change in policy of the Archbishops of Canterbury and York after the agreement to permit priests of the signatory churches to officiate and to be licensed and instituted to benefices in the Church of England. The agreement did, however, take away one sphere of dispensation in that once the Churches concerned were designated as churches in communion with the Church of England, the bishops of the Church of England were permitted, under Canon B43, to take part in the laying on of hands at ordinations in those churches, something which may previously have been uncanonical.¹⁰¹⁴

The North American Anglican-Lutheran Agreements are closely allied to Porvoo but cannot make the claim that was made in Porvoo that the continuous occupancy of historic sees was an equivalent sign (though not a guarantee), acceptable to Anglicans, of the historic succession of bishops. The agreement between TEC and ELCA involved a very specific suspension of the force of the preface to the ordinal in the 1979 American *BCP*. This was brought about by a decision of the General Convention, which, through its constitution, is able to make such decisions touching the ministry of the church. This had the effect of allowing those not episcopally ordained to take up ministry in the Episcopal Church. TEC bishops were also permitted by the agreement to take part in the ordination of Lutheran bishops. The limits of the agreement were tested, however, by the ELCA insistence on retaining the possibility of presbyteral ordination. The fact that the recognition of non-episcopal ordination involves dispensation or economy on the part of TEC is shown by the apparent insistence that such presbyterally ordained ministers ordained after the agreement would not by that ordination be eligible for ministry in TEC. The Canadian agreement follows the same pattern.

All of the proposals and agreements above show some of the hallmarks of dispensation and economy. It is worth noting again the judgment of Thalassinus in his review of the work of Alivisatos on economy

¹⁰¹⁴ The uncertainty as to whether it was uncanonical is that such participation is only permitted in a church with which the Church of England has established 'intercommunion'. This term is undefined and could mean either 'communion', which implies a recognition of aspects of the life of that church as equivalent to those of the Church of England – something which did not happen in these cases until the Porvoo Agreement or it could mean mutual Eucharistic hospitality, which had been established as described above.

The significance of economy is obvious: It enables the church to deal both with her inner complications and with the Christian groups that are not in communion with her, without damage to her fundamental claims and aspirations.¹⁰¹⁵

This statement neatly describes the various mechanisms used by Anglican churches in the ecumenical agreements described.

The *Anglican-Methodist Covenant*, signed in 2003, between the Church of England and the Methodist Church of Great Britain does not provide for the interchangeability of ministers. A future phase in the dialogue between the two churches is charged with bringing this about.¹⁰¹⁶ The Church of England is not currently capable of recognising the orders of the Methodist Church as interchangeable with its own orders. The Methodist Church, on the other hand, is unlikely in the current climate to accept an agreement based on the 1968-72 proposals that would lead to its ministers being arguably re-ordained. Those involved will be able to look at the agreements forged in Porvoo and in the North American schemes and see that the ability of Anglican churches to enact temporary suspensions of their rules was not confined to South India. However, there are differences between the Methodist Church and the aforementioned Lutheran Churches. The Porvoo churches had bishops and had a historic succession. That succession had in some churches been broken. However, Anglicans were able to look at those churches, see that they maintained a system of 'episcopal ordination' and then re-define what constituted 'episcopal' in order to get round the rule. This was not possible in North America, but the North American Lutheran Churches did have ministers called bishops exercising a ministry of oversight that was personal, collegial and communal and that could be considered as equivalent in practice to the ministry of Episcopal bishops. These Lutheran bishops were liturgically 'installed' into their office and it was not difficult for the two churches to agree on a formula whereby this installation could be considered as equivalent to consecration within the historic succession. In the Methodist Church in Great Britain oversight is exercised personally, communally and collegially at a number of levels but there is currently no minister or class of ministers who are called bishops and thus a different approach is necessary to those used in Anglican-Lutheran agreements.

¹⁰¹⁵ *Journal of Religion* 33.3 (1953), 243.

¹⁰¹⁶ A successful following motion in General Synod from the Diocese of Southwark in the debate about the *Covenant* charged the Joint Implementation Commission with making this issue a priority.

The Interim Report of the Joint Implementation Commission of the Anglican-Methodist Covenant suggested that a possible way forward would be for the Methodist Church to constitute itself within the historic episcopate by the ordination of one or more Methodist ministers as bishops. The Report suggests that such ordination could be carried out by bishops within the historic episcopate from churches with which the Methodist Church has an existing relationship. This would include the united churches of South Asia of which the Methodist Church was a constituent part and those Nordic and Baltic Lutheran churches that are co-signatories with the Methodist Church of the Leuenberg Agreement. Such ordination would certainly need an alteration to Methodist liturgy and standing orders and may require an amendment to the Methodist Church Act. The final report of the Joint Implementation Commission (commended by the General Synod and Methodist Conference in July 2008¹⁰¹⁷) suggested that the ordering of the Methodist Church in the historic episcopate be brought about by the consecration as a bishop of the incoming President of the Methodist Conference¹⁰¹⁸ and that the 'President-Bishop' (or, in subsequent years, the 'President-Bishop' and past-presidents in Episcopal orders) be the invariable minister of ordination.¹⁰¹⁹

What is more important for this study, however, is the possibility of the participation of bishops of the Church of England in such an ordination and the consequences that would flow from that. Bishops of the Church of England are prevented from taking part in ordinations in churches with which the Church of England has not established intercommunion.¹⁰²⁰ Legislation would be required to enable them to take part in such a service.

The consequence of the ordination of Methodist bishops within the historic succession is that they, and those who they ordain as presbyters, would then be in orders that are capable of recognition by the Archbishops under the Overseas Clergy Measure. However, ministers not ordained by bishops would not be; the current arrangement,

¹⁰¹⁷ See General Synod Report of Business 7 July 2008, <http://www.cofe.anglican.org/news/gsjul080707.html> and Scarborough Methodist Conference 2008, *Daily Record* no 6, Representative Session, 8 July 2008, para 6/24 ff.

¹⁰¹⁸ *Embracing the Covenant* GS 1691, Wellingborough, 2008, 105.

¹⁰¹⁹ *Embracing the Covenant*, 107-8.

¹⁰²⁰ Canon B43.5. See also the Appointment of Bishops Act 1533 and the Suffragan Bishops Act 1534.

whereby Methodist ministers who wish to serve as ministers in the Church of England need to be episcopally ordained, would not change.

If the Church of England wished, by the will of the General Synod, to recognise the orders, *pro tem*, of non-episcopally ordained Methodist ministers after or at the same time as the ordination of the first Methodist bishops then it is certain that legislation by measure with special majorities¹⁰²¹ would be needed to bring this to effect. Such legislation could repeal s 10 of the Act of Uniformity 1662¹⁰²² to enable Methodist Ministers to be appointed to Church of England parishes. The contentious nature of such a repeal, however, would be that it would make permanent and more wide-ranging the dropping of the requirement for episcopal ordination. The model shown by agreements with churches in other parts of the world, whereby the anomaly is temporary, would seem to suggest that such a measure should specifically enable ministers of the Methodist Church of Great Britain ordained prior to the measure to take up ministries within the Church of England notwithstanding the provision of the Act of Uniformity, and to leave s 10 of the Act unamended.

Such legislation could be seen as providing another set of dispensations backed by statute (as envisaged in the *ELA*). It would enable a bishop to license or to institute to a benefice a minister who had not received episcopal ordination as understood by the Church of England. He would be consequently enabled to dispense with the statutory requirement for episcopal ordination prior to the licensing or institution. This dispensation would have wider legal effect in that, by virtue of institution or licensing a Methodist minister would have authority, for instance, to conduct Church of England marriages under English marriage law.

That this would be a dispensation would be shown by the keeping in place of s 10 of the Act of Uniformity as amended and in the continued insistence, as happened in the precedents set in south Asian, north American and northern European schemes, on episcopal ordination as traditionally understood in the future pattern of ministry in the

¹⁰²¹ Article 8 of the Schedule to the Synodical Government Measure 1969.

¹⁰²² The only part of this section still in force reads 'And ... no person whatsoever shall thenceforth be capable to bee admitted to any parsonage vicarage benefice or other ecclesiastical promotion or dignity whatsoever ... before such time as he shall be ordained priest according to the forme and manner in and by the said booke prescribed unlesse he have formerly beene made priest by episcopall ordination ...'

Church. It would also be shown by the limited nature of the provision. A bishop who would be allowed under such a measure to license a Methodist minister need not necessarily and consequently gain the authority to license, say, a Baptist or United Reformed Church minister.

It is possible, therefore, to see such actions as dispensations without having to resort to exploration of whether economy is being applied. The authority for the recognition of the orders of Methodist ministers would not be seen as coming from the inherent authority of the bishop as did, for instance, the bishops claims to *jus liturgicum* in the wake of the 1928 Prayer Book crisis. Authority would, rather, come from statutory provisions. The law would have been made capable of being set aside for a particular time, in particular cases and for particular reasons. A precedent would not necessarily be set and the dispensation would not be capable of wider application.

PART IV - CONCLUSIONS

Chapter 12 - Dispensation, Economy and Jurisprudence

The Nature of English Ecclesiastical Law

At the heart of the debate about whether there can be a recognisable dispensing power in the law governing the Church of England is a question about the canonical jurisprudence of the Church of England. The definition that is common to dispensation and economy, as outlined in the opening chapter, is that both are mechanisms whereby an action which would, other than for the dispensation or economy granted, be illegal or impossible, is made possible and legal. The second, and very important, principle behind both concepts is that, despite this setting aside of the law in the particular case, the law remains unchanged in other cases and a precedent is not necessarily set for future similar cases. This contrasts, for example, with equity as it has developed in the UK and in similar jurisdictions, in that precedent is an important part of the application of equity and that equitable rights and responsibilities can become fixed by precedent.

Until the Reformation the relationship between the ecclesiastical and temporal branches of the law as it applied in England entailed a reasonably clear, though sometimes uncomfortable, demarcation of responsibility. ‘Spirituals’ were legislated for by the episcopate (and later by bishops together with inferior clergy), and enforced through ecclesiastical officials and courts. It has been noted how the middle ages saw increasing centralisation of this authority in the papacy, a development to which both canonical learning (centred on Gratian) and crises (such as the central European Investiture Contest) contributed. Some of the resultant occasional tensions were felt in England, including the dispute that led to the martyrdom of St Thomas Becket in 1170.¹⁰²³ The Crown’s concession in principle was summed up in the guarantee of Magna Carta that ‘the English Church shall be free’; that is, that the hierarchy should be able to exercise its claimed role in spiritual government without royal intervention.

The rules by which the English bishops and their various officers operated, when left to their own devices, owed much to the tradition stemming from the undivided Church of

¹⁰²³ Duggan, Anne *Thomas Becket*, London, 2004. See also Chapter 8 above. See also Frank Barlow, ‘Becket, Thomas (1120?-1170)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/27201>, accessed 14 Nov 2008].

prior to the great schism of 1054, in which both *oikonomia* and dispensation had played their part, although as part of the Western church a strong Latin emphasis had generally sidelined whatever had purely Eastern roots. The English ecclesiastical authorities did in some areas have to bow to English common law where English feelings ran high (for example, the 1236 declaration at the parliament at Merton regarding legitimation by subsequent marriage¹⁰²⁴). However, the distinct origins, supranational application and separate personnel of the canon law allowed its jurisprudence to develop for the most part independently of the currents of thought that were shaping English understandings of the roles of the English nation and its courts, crown and estates. The canon law system retained a flexibility which, despite the growth of equity noted in chapter 6 above, the King's courts were steadily losing. It also retained a notion of the law's ultimate goal – the salvation of souls – against which the outworking of its positive rules could be judged, something which has been shown to be at the heart of definitions of economy.

Reformation Changes

The Reformation, which began in the sixteenth century, brought with it numerous shifts in religious and political thought. Assumptions about the relationship of church and state from the middle ages were turned on their head. Scholars such as Marsilius of Padua¹⁰²⁵ could be invoked to support a radical reduction in the spheres considered 'spiritual' to a short list consisting of Word, sacrament, spiritual counsel and the 'power of the keys'. Whilst in England in the sixteenth century the monarch did not seek to trespass into these areas, the English Reformation settlement was prepared to claim for the whole community of the realm, monarch and people together, the final authority in all other areas that could be subject to human government at all – the public liturgy, the definition of heresy, ministerial doctrinal standards and marriage impediments, the visitation of the ecclesiastical establishment and the final adjudication of ecclesiastical suits among them. In the reforms under Henry VIII, largely driven by Sir Thomas Cromwell the autonomy of the English nation-state was

¹⁰²⁴ Given-Wilson, Chris and Curteis, Alice, *The Royal Bastards of Medieval England*, London, 1984, 44.

¹⁰²⁵ Jeannine Quillet "Marsilius of Padua" *Encyclopedia of the Middle Ages*. Ed. André Vauchez. © 2001 by James Clarke & Co. *Encyclopedia of the Middle Ages* (e-reference edition). Distributed by Oxford University Press. Accessed Cardiff University 20 February 2009
<<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t179.e1795>>

proclaimed in the King's adoption of the Imperial style of 'Majesty', in the parliamentary declaration that 'this realm ... is an Empire', in the casting-off of Roman control in spirituals and in the assertion that rules of Western canon law had been adopted by the English 'at their own free liberty'.

England remained very much a Christian nation, with true religion at the heart of its concerns, although from the accession of Elizabeth who would not 'make windows into men's souls' this was more a matter of outward preaching, worship and conduct than of internal belief. These were areas that could be more easily governed by the ordinary processes of law-making and judicature, and although from Elizabeth to James II there was a serious question over where sovereignty in lawmaking resided – with the prince alone, through bishops of his choosing, or with the prince in parliament – the lesson of the Glorious Revolution answered this firmly in favour of the latter and brought with it the by-product of an independent judiciary.

Helmholz summarises the changes to the ecclesiastical legal position at the end of the sixteenth century using four points: first, that English ecclesiastical jurisdiction remained a separate system from the courts of Westminster Hall; second, that while papal jurisdiction had been abolished, the monarch's power in ecclesiastical causes was not absolute; third, that statute was a normal source of religious law and the vehicle for legal development in the ecclesiastical sphere; and fourth, that the inherited canon law, subject to statute, remained in force. All these points could be reconciled with the Tudor perception shift. The bishops and their officials continued to judge in spirituals because they possessed the necessary learning and because the community of the realm wished it so; they operated however 'within the King's jurisdiction and authority' and the final court to which such causes might be appealed was a panel of royal Delegates. The monarch alone could not legislate without parliament, but when acting with parliament's advice and consent the monarch was, in human terms, supreme, or, in the words of Norman Sykes 'the veritable *shaliach* [emissary or agent] of God Almighty',¹⁰²⁶ and the ultimate judge of the law of God. The Tudor doctrine of adoption asserted that such parts of the canon law that did survive the Reformation could be said to have been adopted freely by the realm of England and owe their continuance to their

¹⁰²⁶ Sykes (1948), 4.

adoption. Cromwell's conviction that there was no distinction between religious and general authority was borne out in the Tudor Statutes, the *ELA* included, where ecclesiastical jurisdiction was seen as part and parcel of, and subject to the jurisdiction of the godly prince.¹⁰²⁷ Until the early eighteenth century the clergy in convocation continued to make canons but these had become merely re-statements of the general law or supplements to it specifically for the clergy.

The dispensing power, as it had developed during the Middle Ages, and as it was enjoyed by medieval bishops (and supremely by the pope), was caught up (along with other canonical rules) in the reforms of the ecclesiastical law in the sixteenth century. Some dispensations were deemed to have been 'adopted' and the papal power was deemed to have been a usurpation of power and was rejected, with many dispensations formerly granted by the pope or his legate domesticated by being placed in the power of the Archbishop of Canterbury, subject to royal supervision and an appeals process. The preamble to the *ELA* spelled out that the source of the dispensing power was, like the source of legislation, the monarch in parliament. However, s 9 of the Act simultaneously confirmed the rights of the Archbishop of York and other bishops to grant dispensations as they were wont to grant previously by the custom or common law of the realm. This could be interpreted either as Parliament claiming them as parliamentary delegates in this function, but could also be seen as confirming (or domesticating or adopting) their inherent or customary rights. Both the *ELA* and the royal nullity suit against Princess Katharine made clear that there were some dispensations no human power could give. When Archbishop Abbot of Canterbury himself required a dispensation, the King commissioned clerical dispensers in the manner that the Act envisaged for the case of an Archbishop wrongfully refusing to dispense another, as has been explored in chapter 8 above.

Seventeenth Century Developments

The experience of Kings Charles II and James II emphasised that the dispensing power was finite, even in the Crown. The sacramental tests of the Test Act 1672 had not existed in the middle ages and so could hardly be among the established subject-matter of dispensation preserved in 1533. The struggles in parliament and in the courts in the

¹⁰²⁷ Pearce, Augur, 'Episcopacy and the Common Law', (2003) 7 Ecc LJ 195, 197-8.

later part of the seventeenth century resulted in a situation where it became clear that, religious or secular, there was no power to dispense from laws without parliament's consent. Both the general principle and a specific condemnation of dispensation 'as it hath been exercised of late' were spelt out by the revolutionary convention of 1688 and accepted by the William and Mary as recognised principles of English government.¹⁰²⁸

The Rule of Law and the Separation of Powers

Through the eighteenth century parliament's legislative supremacy was joined by the other two shibboleths of the modern English constitution: the separation of powers and the rule of law. The independence secured for the King's judges of Westminster Hall by the Act of Settlement 1701 had already been prefigured by comparable security of tenure for the (generally lay) chancellors (or officials principal) of the episcopal courts.¹⁰²⁹ At the same time as the bishops had finally to concede that they were not legislators for the laity, they also suffered a significant loss of influence over the ecclesiastical judicial process. Their most important courts were still staffed by civilians, but the prevalence of parliamentary legislation and the frequent use of prohibition by the King's Bench meant that even Doctors' Commons could hardly remain immune to the influence of common law attitudes. As the perceived task of the consistory court became more and more closely assimilated to that of the 'common law' tribunals, the 'salvation of souls' in a particular case increasingly gave place to the task of ascertaining the law correctly and applying it. The novel reporting of ecclesiastical judgments favoured consistency through a doctrine of precedent formerly alien to the canonical sphere. By 1809 the Dean of the Arches could state judicially that their task was to administer law, not theology.¹⁰³⁰ And by this time the 'rule of law' principle eschewed subjective exemptions from universal compliance: regardless of conflicting morality: common law and statute were to be obeyed simply because they were the law.

¹⁰²⁸ Bill of Rights 1688, preamble

¹⁰²⁹ *Jones v. Bp of Llandaff* (1693) 12 Mod Rep 47

¹⁰³⁰ *Kemp v. Wickes*, (1809) 161 ER 1320.

Legal Positivism and the development of jurisprudence

The nineteenth and early twentieth century controversies over the Jerusalem Bishopric scheme, the rise of ritualism and Prayer Book revision took place against a background not only of the assimilation of the courts, but also of the widespread popularity of legal positivism. This had its bedrock in the work of Jeremy Bentham and his disciple John Austin.

Bentham, rejecting as ‘nonsense upon stilts’ Blackstone’s concept of natural rights as a source of English law, followed the philosophy of David Hume that natural law could never be objectively and empirically determined and that it relied on the subjective viewpoints of those involved.¹⁰³¹ (In so doing he rejected, of course, one of the first premises from which the medieval and Roman Catholic canonists reasoned.) Law, to Bentham and his followers, did not exist until enacted by a sovereign authority to permit or compel the actions of subjects,¹⁰³² and it was pointless to consider what the law should be rather than what it actually was. Building on Bentham, Austin insisted on the separation of law and morals and defined a sovereign as an authority habitually obeyed by its subjects and not in the habit of obeying anyone else.¹⁰³³ For Austin the sovereign, who commanded the means to enforce the sovereign’s will, was supreme. There could be no limit to the sovereign’s authority, for that would mean that the sovereign was not sovereign. A viceroy could not be a sovereign, nor could any authority whose power acknowledged external limits.¹⁰³⁴

Austin’s works dominated English jurisprudence in the years following its publication; indeed despite many criticisms¹⁰³⁵ it could still be said in 1891 that the fundamental concepts of government and law ‘held by the majority of instructed persons in England at the present day ... is derived in the main from Austin’.¹⁰³⁶ And in a legal positivist world there was no room for either economy or dispensation as an inherent capacity in any office short of the sovereign power. To the nineteenth or twentieth century

¹⁰³¹ Freeman M D A (ed), *Lloyd’s Introduction to Jurisprudence*, 7th edn, London, 2001, 200-1.

¹⁰³² Freeman (2001), 207.

¹⁰³³ Austin, John, *The Province of Jurisprudence Determined*, in Freeman (2001), 252.

¹⁰³⁴ Austin, in Freeman (2001), 253.

¹⁰³⁵ Criticism came from influential sources such as Dicey, Bagehot and Maitland. See Rumble, Wilfrid E, *Doing Austin Justice, The Reception of John Austin’s Philosophy of Law in Nineteenth-Century England*, London, 2005, 247 and 250.

¹⁰³⁶ Sidgwick, Henry, *The Elements of Politics*, London, 1891, 15. Abbreviation of quotation found in Rumble (2005), 245.

positivist considering the laws governing the Church of England, the preamble of 1533 could not be faulted: if any power existed to make exceptions to or relax a legal rule, it must be found in the concurrence of England's prince and people, whether in the formation of the common law (in the classical understanding of that term as laws which, 'by suffrance of your Grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent to be used among them, and have bound themselves by long use and custom to the observance of the same'¹⁰³⁷) or in statute. By the mid-nineteenth century, furthermore, the law had risen considerably in public estimation thanks to the increased democratic legitimacy of the legislature. So for others to take upon themselves to moderate the effect of the law must either be ascribed to delegation from the sovereign (in which case it would not be a suspension but an outworking of the law), or an illegal usurpation of power (irrespective whether it met with factual success or were halted and punished).

Unlike his neighbour James Mill, Austin did not seek to write God out of his world view:¹⁰³⁸ but the monarch in parliament was England's sovereign for all practical purposes even if it were accepted that he was in England God's vicegerent. If viceregal powers, although only exercised on behalf of the true King, were locally unlimited and enforceable, and the one who exercised them were the only interpreter of those limits imposed by the true King's laws, with no practical mechanism of appeal, then the state of affairs experienced by subjects would be indistinguishable from that obtaining if he were himself the sovereign.

The basis of Roman Catholic Canon Law is that God is sovereign but that the Pope, as Vicar of Christ and successor of Peter, has ultimate authority to determine how God's law is interpreted in the Church and has power to legislate and to dispense within the Church.¹⁰³⁹ All members of the Church are obliged to obey the law and thus, whilst the Pope does not claim ultimate sovereignty, the experience of those who are subject to the law of the Church is akin to the subjects of the viceroy. The presence of the higher authority is known but there is a sole authentic interpreter and legislator in the name of

¹⁰³⁷ ELA, Preamble.

¹⁰³⁸ See e.g. Lecture III of *The Province of Jurisprudence Determined*.

¹⁰³⁹ CIC c 331 states 'By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.'

the ultimate sovereign. No appeal is possible against a decision of the Pope.¹⁰⁴⁰ Likewise, economy as it has developed in the Orthodox Churches relies on the ultimate sovereignty of God being interpreted, legislated and enforced by the Church as steward (oikonomos) of God.

However, in England, the fact that since the statutes of the 1530s parliament had been making statutory assertions about the 'laws of God' meant that, so long as the law denied to the bishops any special competence to review, confirm or deny such assertions, divine law was in practice written out of any possible role as a standard by which to measure, apply or disapply parliament's enactments.

Legal Positivism and Ecclesiastical Law

In relation to the laws governing the Church of England, an Austinian view could only be tenable among those who either had no concept of divine sovereignty, or trusted prince and people, speaking through parliament, to be the true or the best interpreter of the divine will. Roman Catholics, Independents and Baptists had never trusted parliament in that way; as the centuries passed other dissenting voices were added: Quaker and Jew, Presbyterian, Nonjuror, Unitarian, atheist and Mormon. Also among those who conformed to the Church of England, a minority (among them Whitgift, Laud and Gibson in successive centuries) held to the medieval view of a separate 'spiritual' sphere in which clergy in convocation, rather than monarch in parliament, would be the most reliable guides. Down to the early nineteenth century, though, this was ruled out for the majority of conformists – as it had been for Richard Hooker more than two centuries earlier – by a broad consensus accepting Church and Kingdom of England as coterminous. In the space of three decades, between the 1820s and 1850s, that consensus was lost.¹⁰⁴¹ The admission of dissenters and Catholics to parliament and the willingness of the courts and the Crown's advisers to tolerate perceived heterodoxy led the pioneers of the Oxford Movement to seek for reliable authority elsewhere. Carrying large numbers with them, they argued in their Tracts that it was through the historic episcopate that Christ truly governed his church – that the roles of 'state' organs in ecclesiastical affairs were mere incidentals of a pact ('establishment')

¹⁰⁴⁰ CIC c 332 §3.

¹⁰⁴¹ Byrne, Georgina, *Consulting the Faithful*, unpublished MPhil Thesis, Cambridge, 1998, 48-63.

which had its advantages but could be sacrificed if it became too burdensome. Owen Chadwick has suggested that in ‘a perfectly Christian state the commands of Caesar conform to the commands of God. Few early Victorians did not think that the law of England must seek to conform to the law of God.’ However, by the 1850s ‘few considered that ... the House of Commons was fit to determine which religious doctrines were true’.¹⁰⁴²

The later developments studied in this thesis were therefore likely to be interpreted differently according to one’s view of the rightful locus of ecclesiastical authority for the English church at the time. The Jerusalem Bishopric scheme combined an Act of Parliament with an extra-statutory agreement between Archbishop Howley and representatives of the Prussian *summus episcopus* Frederick William IV. The Tractarian view saw rules of divine origin as to right belief and sacramental progression swept aside by the agreement and agonised over whether a dispensation on such far-reaching issues could lie within the Archbishop’s power. The Austinian saw nothing unusual in a statute that authorised the consecration of a bishop in England, and since whatever happened in Palestine would lie within the sovereignty of an apparently indifferent Sultan, was content to leave that aspect to local agreement between expatriate bishop, English and Prussian congregations.

The bishops’ solution to the ritual controversy – putting a blanket stop to further proceedings – lay within the discretions which they clearly enjoyed by statute. This thesis contends that the powers were used in a manner analogous to economy, in that the bar to prosecutions effectively permitted breaches of the law to continue, but did so for the church’s greater good and so was justified on the same basis as the exercise of economy under the inherent powers of Eastern bishops. The Tractarian view would have found this a satisfactory argument, while for the Austinian the constitutional sovereign was the only proper judge of the national church’s ‘greater good’ and the bishops’ action in condoning illegality was unpardonable.

The bishops’ line on the 1928 ‘Deposited Book’ was recognisable as quasi-economy in much the same way. It lay open to even stronger Austinian objections, in that the

¹⁰⁴² Chadwick, vol I, 466-7.

bishops' public statement fell outside any recognised legal discretion (although had a prosecution for use of the 1928 Book been attempted and vetoed, that would have raised the same issues as the veto of ritual prosecutions). Nobody attempted to proceed against the bishops for the positive incitement of illegality, although this charge could have been brought, at the very least, against Bishop Headlam of Gloucester for recommending parochial purchase of the combined Book.¹⁰⁴³ The practical argument that the bishops' statement 'worked', in reducing internal tensions and setting limits to the excesses of most ritualist clergy until the law changed in the 1960s, was also a typical vindication of economy but irrelevant to the Austinian line.

An Austinian approach to the law governing the Church of England at home was still influential in high places after the Second World War.¹⁰⁴⁴ But it was less appropriate to relationships between the English Church and other Churches of the developing Anglican Communion which had, despite a common heritage, by then lost their constitutional link to the Imperial religious establishment. As private associations governed only by their own constitutions and the (largely silent) general law of the territory where they operated, these groups were no longer bound to defer on decisions regarding ordained ministry to any 'sovereign' outside themselves. Austin would have regarded them as unconstrained in such decisions – effectively, their own sovereigns. Tractarians, however, who did not consider ecclesiastical rules simply a branch of the law of England, could appeal to criteria of 'catholicity' or to agreements (such as the *Lambeth Quadrilateral*) adopted by successive Lambeth Conferences as norms, rendering the groups less than sovereign and whose condoned temporary breach might require the exercise, by the remainder of the Anglican Communion, of something very similar to economy for the greater good of Christian unity.

¹⁰⁴³ The technical difficulties at that date of prosecuting Archbishop Davidson on this charge, a step for which there was no post-Reformation precedent and which (unless the House of Commons were prepared to embark upon an impeachment) would have required creating a novel royal Commission and devising its procedure, may explain why even the Church Association never proceeded against the bishops.

¹⁰⁴⁴ For example the words in which Sir Thomas Barnes put an end to attempts to redefine by Canon the sources of law governing the national church: 'The law of the Church of England is, like any other part of the law of England, to be found in the common law and in statutes ... and it would seem unnecessary to state this', Pearce, Augur, 'Episcopacy and the Common Law', (2003) 7 Ecc LJ 195, 206.

Legal Positivism and Natural Law

In modern jurisprudence the debate between legal positivism and other schools of thought continues. Whilst greatly advanced in subtlety and sophistication since the time of Austin, legal positivism remains uncomfortable with wide discretionary powers. Trevor Allan suggests that ‘freedom requires equality before the law’ and that the rule of law, which he considers fundamental, demands that any discretionary powers be limited so that freedom can be protected. He states that the ‘exercise of broad discretionary power by the executive, circumscribed only by its own broadly framed official rules, offends the principle of equality’. He points to the work of Hayek who disapproved ‘of the exercise of discretionary administrative powers’ on the basis that it could lead to unfairness when ‘public resources are applied for the benefit of specific groups at the expense of others’. However, he concedes that it is not possible altogether to eliminate discretion from the law and that the rule of law does not exclude special burdens or benefits applying to particular people. Such burdens and benefits must, however, be justified by rational grounds, equal dignity and the public good. Discretionary powers must be conferred by the legislature and the abusive use of discretionary power must be controlled.¹⁰⁴⁵

Positivist legal theory is often placed in opposition to theories expounding natural law. Natural law theories tend to assume that there are certain revealed truths in nature or creation and that there are certain immutable principles such as ‘justice’ or ‘fairness’ which are unaffected by whatever laws are made in a particular system. Natural law sees morality and law as intertwined in ways that legal positivism attempts to unravel. Natural law was the dominant theoretical basis on which much pre-Reformation church law was based and one can see its influence in earlier discussions on economy and dispensation. St Thomas Aquinas, on whose work much natural law theory depends, states that ‘the validity of law depends upon its justice’ and that ‘if a human law is at variance in any particular with the natural law, it is no longer legal, but rather a corruption of law.’¹⁰⁴⁶ For Aquinas human law should reflect divine law. The latter is eternal and unchangeable but human law should be changed ‘whenever something better occurs’ but, because of the need for stability and the importance of human

¹⁰⁴⁵ Allan, T R S, *Constitutional Justice*, Oxford, 2001, 31-52.

¹⁰⁴⁶ Thomas Aquinas, *Summa Theologica*, Prima Secunda Partis, Qu 95, Art 2, Conclusion. www.newadvent.org/summa/2095.htm#article2 accessed 17 November 2008.

customs, such change should not happen quickly.¹⁰⁴⁷ He considers that custom can overturn human law¹⁰⁴⁸ and that, whilst it is not possible to dispense from eternal, divine law, it is possible to dispense from human laws. However, Aquinas is cautious in his support for a wide-ranging power of dispensation. His conclusion to Article 4 of Question 97 of the *Summa Theologica* reads

Dispensation, properly speaking, denotes a measuring out to individuals of some common goods: thus the head of a household is called a dispenser, because to each member of the household he distributes work and necessities of life in due weight and measure. Accordingly in every community a man is said to dispense, from the very fact that he directs how some general precept is to be fulfilled by each individual. Now it happens at times that a precept, which is conducive to the common weal as a general rule, is not good for a particular individual, or in some particular case, either because it would hinder some greater good, or because it would be the occasion of some evil But it would be dangerous to leave this to the discretion of each individual, except perhaps by reason of an evident and sudden emergency Consequently he who is placed over a community is empowered to dispense in a human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may allow the precept of the law not to be observed. If however he grant this permission without any such reason, and of his mere will, he will be an unfaithful or an imprudent dispenser: unfaithful, if he has not the common good in view; imprudent, if he ignores the reasons for granting dispensations. Hence Our Lord says (Luke 12:42): "Who, thinkest thou, is the faithful and wise dispenser [steward or oikonomos], whom his lord setteth over his family?"¹⁰⁴⁹

And he concludes that:

just as none can dispense from public human law, except the man from whom the law derives its authority, or his delegate; so, in the precepts of the Divine law, which are from God, none can dispense but God, or the man to whom He may give special power for that purpose.¹⁰⁵⁰

Despite the influence of legal positivism on the development of English law in recent centuries certain theorists have attempted to see the traces of natural law in modern law. John Finnis, for instance, determines that there are seven self-evident and objective goods; life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion, in no particular hierarchy. These objective goods in turn

¹⁰⁴⁷ *Summa Theologica* Qu 97, Art 2.

¹⁰⁴⁸ *Summa Theologica* Qu 97, Art 3.

¹⁰⁴⁹ *Summa Theologica* Qu 97.

¹⁰⁵⁰ *Summa Theologica* Qu 97.

affect and influence human behaviour and law.¹⁰⁵¹ Denise Meyerson¹⁰⁵² points to the use made by English courts of Common Law principles as, as she puts it, a ‘proxy’ for natural law. She points to a number of examples, including a decision in the House of Lords in which certain laws, lawfully made in Nazi Germany, were held (with hindsight) to have been not recognisable by English courts on the basis that they were unjust and barbaric.¹⁰⁵³ A more recent case involved the stopping of benefit to an asylum seeker. Following the relevant statutory regulations¹⁰⁵⁴ benefit was to be stopped when the order to do so was ‘recorded’. However, the House of Lords held that there was a principle that ‘a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected.’¹⁰⁵⁵ Thus, a decision based on what was considered by the respondents to have been a plain application of the relevant law was quashed in the interests of a higher principle that could be termed natural justice, of which there is no definition but which, it can be assumed, must have been present in Parliament’s intentions in conferring the relevant (but misused) statutory power. In a more recent case public interest can be seen to have been cast in the role of ‘proxy’ (to use Meyerson’s term) for a hard to define greater purpose. After the assisted suicide of Daniel James at a Swiss clinic the Director of Public Prosecutions decided not to take action against Mr James’s parents and a family friend. He stated

The police have investigated the acts of Daniel's parents and a family friend. I have concluded that there would be sufficient evidence to prosecute each of them for an offence of aiding and abetting Daniel's suicide, contrary to section 2(1) Suicide Act 1961, but that, on the particular facts of this case, a prosecution would not be in the public interest.¹⁰⁵⁶

Obligation to obey the law

At the root of much of the argument above is the assumption that it is right and good to obey the law. On this maxim there is general agreement. Whether the obligation

¹⁰⁵¹ See Finnis, John, *Natural Law and Natural Rights*, Oxford, 1980.

¹⁰⁵² In *Understanding Jurisprudence*, Abingdon, 2007, 36-38.

¹⁰⁵³ *Oppenheimer v Cattermole* [1976] AC 249. See particularly the judgment of Lord Salmon at 282.

¹⁰⁵⁴ Regulation 70(3A)(b)(i) of the Income Support (General) Regulations 1987.

¹⁰⁵⁵ Per Lord Steyn, *R (Anufrijeva) v Secretary of State for the Home Department and another* [2004] AC 604 at 621.

¹⁰⁵⁶ *Decision On Prosecution - The Death By Suicide Of Daniel James*, 9 December 2008, para 1. www.cps.gov.uk/news/nationalnews/death_by_suicide_of_daniel_james.html

springs from the ability of the sovereign to impose obligation by force or whether the obligation springs from the innate desire of the individual to seek the common good for his or her and others' benefit, it is difficult to find a theorist who states that there is no obligation to obey the law of a system of which one is a part.

Richard Hooker, in arguing for a comprehensive system of government with Church and State working in harmony, stated:

let us place man in some public society with others, whether Civil or Spiritual: and in this case there is no remedy but we must add yet a further law. For although even here likewise the laws of nature and reason be of necessary use; yet somewhat over and besides them is necessary, namely humane and positive law, together with that law which is of commerce between grand societies, the law of nations and of nations Christian. For which cause the law of God hath likewise said, Let every soul be subject to the higher powers. [Romans 13.1] The public power of all societies is above every soul contained in the same societies. And the principal use of that power is to give laws unto all that are under it; which laws in such case we must obey, unless there be reason showed which may necessarily enforce, that the law or reason or of God doth enjoin the contrary.¹⁰⁵⁷

Yet, lest this be seen as a mandate for seeking out reasons for not obeying the law, Hooker had earlier pointed out that the wisdom of some laws made by civil powers might be at first sight hidden;

Furthermore although we perceive not the goodness of laws made, nevertheless sith things in themselves may have that which we peradventure discern not, should not this breed a fear in our hearts, how we speak or judge in the worse part concerning that, the unadvised disgrace whereof may be no mean dishonour to him, towards whom we professes all submission and awe?¹⁰⁵⁸

Jeremy Bentham considered that legal obligation to perform a certain act 'is said to attach upon a man [. . .] when in the event of his performing the act at the time and place in question he will not suffer any pain, but in the event of his not performing it he will suffer a certain pain.'¹⁰⁵⁹ His model of obligation is based on the command of the sovereign backed up by sanctions, which may not only be penal sanctions but could be

¹⁰⁵⁷ Hooker, Richard *Of the Lawes of Ecclesiasticall Politie* (1553) London, 1604, Book 1, Ch 16. Spelling updated.

¹⁰⁵⁸ Hooker (1553), Book 1, Ch 16. Spelling updated.

¹⁰⁵⁹ See Perreau-Saussine, Amanda, 'Bentham and the boot-strappers of jurisprudence: The moral commitments of a rationalist legal positivist', CLJ 63(2), (2004) 346-383, 360.

‘alluring’ or ‘promissory’. Austin follows this model but concentrates much more on the coercive sanction and adds the requirement that the sovereign himself must not be in the habit of obeying any superior authority.¹⁰⁶⁰

Hart adds to the coercive model of ‘being obliged’ a more communal view of obligation, that of being ‘under obligation’, which he describes as the recognition by the individual of a sense of duty to observe the law.¹⁰⁶¹ Allan suggests that the individual is able to choose whether or not to conform to what the law states that they should or should not do, adding that the existence of a legal obligation is the ‘product of a personal moral judgment that obedience is justified.’ He points to the work of Finnis, who suggests that legal authority is necessary in society and, as a result, people seldom fail to observe the law but, on the other hand, a good citizen has no moral duty to comply with a bad law even if it is treated as valid by the courts.¹⁰⁶² Fuller, on the other hand, assumes the existence of a moral obligation to obey.¹⁰⁶³

This moral obligation can be seen in Aquinas, who states that whilst a law needs to be promulgated, it is binding even on those who were not present when the law was promulgated.¹⁰⁶⁴ He assumes that ‘man has a natural aptitude for virtue’ and states that ‘men who are well disposed are led willingly to virtue by being admonished better than by coercion: but men who are evilly disposed are not led to virtue unless they are compelled.’¹⁰⁶⁵

Obedience and compliance with the commands of those in authority has a long and seemingly unbroken tradition within the canonical tradition. Obedience to the law of Moses is enjoined in the Old Testament, both in coercive (‘And if in spite of this you will not obey me, I will continue to punish you sevenfold for your sins. I will break your proud glory, and I will make your sky like iron and your earth like copper.’)¹⁰⁶⁶ and in incentive terms (‘Now therefore, if you obey my voice and keep my covenant,

¹⁰⁶⁰ McCoubrie, Hilaire, *The obligation to obey in legal theory*, Aldershot, 1997, 20-21.

¹⁰⁶¹ McCoubrie (1997), 5.

¹⁰⁶² Allan (2001), 67-8.

¹⁰⁶³ Fuller, Lon, ‘Positivism and Fidelity to Law’, (1958) 71 Harvard Law Review, 630.

¹⁰⁶⁴ Aquinas, *Summa Theologica*, qu 90.

¹⁰⁶⁵ Aquinas, *Summa Theologica*, qu 95.

¹⁰⁶⁶ Leviticus 26. 18-19.

you shall be my treasured possession out of all the peoples.’)¹⁰⁶⁷ Jesus said to his followers ‘If you love me, you will keep my commandments’¹⁰⁶⁸ and St Paul wrote that ‘obeying the commandments of God is everything.’¹⁰⁶⁹ Whilst he sought to overturn what he saw as the unhelpful traditions of observance of the Jewish Law, Paul did not fall prey to antinomianism.

In the Roman Catholic Church obedience to authority is enjoined in the Catechism of the Catholic Church and in *CIC*.¹⁰⁷⁰ However, paragraph 2242 of the Catechism also envisages situations in which a citizen is obliged in conscience *not* to obey civil authority where the command of that authority contradicts the law of God.

In the Church of England the oath of canonical obedience to the bishop is taken by all clergy at the point of ordination or on taking up a new ecclesiastical post.¹⁰⁷¹ The oath of canonical obedience was not affected by the Clerical Subscriptions Act 1865¹⁰⁷² and, therefore, rests on more ancient authority. Canonical obedience was required of clergy taking office prior to the Reformation, although the earliest printed version of the form used today dates from 1713.¹⁰⁷³ Lay Readers are also required to make a similar undertaking to give due obedience to the bishop.¹⁰⁷⁴

Thus within the Church of England there is a specific canonical obligation for ministers to obey their bishop ‘in all things lawful and honest’ and, through the oath of allegiance, which is also taken in the same circumstances as the oath of canonical obedience, to bear true allegiance to the sovereign ‘according to law’.¹⁰⁷⁵

This *ex animo* undertaking to obey the law assumes but also takes further the general assumption of legal theorists that obedience to the law is a good thing. It is not only

¹⁰⁶⁷ Exodus 19. 5.

¹⁰⁶⁸ John 14. 15.

¹⁰⁶⁹ 1 Corinthians 7. 19.

¹⁰⁷⁰ *Catechism of the Catholic Church* para 144. *CIC* c 11.

¹⁰⁷¹ Canon C14. The Canon comes with the option of making a solemn affirmation instead of swearing the oath.

¹⁰⁷² S 12 of that Act stating ‘Nothing in this Act contained shall extend to or affect the oath of canonical obedience to the bishop, or the oath of due obedience to the archbishop taken by bishops on consecration.’

¹⁰⁷³ Bray, Gerald, *The Oath of Canonical Obedience*, London, 2004.

¹⁰⁷⁴ Canon E5. 4.

¹⁰⁷⁵ Canon C 13.

clergy who take the oath of allegiance but also Members of Parliament, members of the armed forces, judges and certain others holding public office.¹⁰⁷⁶

Authority to dispense

It has been shown that there are times and situations in which a strict application of the law leads to a consequence not intended by the legislator or to a compromise of a higher principle or morality or justice. This leads to a question, however, as to who within a legal system has the authority to decide, first, whether this is the case and second, what action should be taken. Broadly speaking it is possible to discern four places in which such a decision may be taken.

First, there is the legislator him, her or itself. The reservation of certain dispensations (in Roman Catholic Canon Law) to the Holy See or, in England, the right of Parliament to dispense or authorise dispensation, fall into this category. The history of English law in the late seventeenth century showed that the King was not able unilaterally to assume the position of dispenser for purposes outside those where Parliament had entrusted the task to him. However, the executive Royal Prerogative does currently include a number of powers akin to dispensation, at least in their ultimate effect. The law governing the Church of England grants to or recognises, in exceptive clauses and other provisions, the right of a bishop to dispense or set aside an otherwise binding command or obligation. This is often subject to his discretion.¹⁰⁷⁷

Second there are judges. In this context a judge is a person or tribunal within a legal system who is particularly charged with making decisions on whether and how the law applies in any given situation. There is, in the legal system of England and Wales a developed system of judge-made law through case law and binding precedent. However, it is possible to distinguish judicial decision-making from the exercise of a power of dispensation or economy. Whilst the end result (e.g. an absolute discharge) may be strikingly similar, judges have not, hitherto, tended to make judgments which state that, whilst the law applies to the person or body in front of them, that person is not obliged to observe the law. Likewise, one hallmark of dispensation and economy is

¹⁰⁷⁶ See e.g. *Halsbury* vol 2(2) para 197 and vol 8(2) para 923.

¹⁰⁷⁷ E.g. Canon B18 on preaching sermons and Canons C4.3 and C4.3(A) on ordination and divorce.

that they are discretionary and not necessarily subject to binding by precedent. This is not the case with judicial decisions. Faculty cases in the ecclesiastical courts are a case in point. 'Faculty' is one of the words used to describe those dispensations in the *ELA*. There is now, however, a highly developed system of precedents in faculty cases.

Third is the executive, often called ministers and sometimes called officials. It has been shown that some Ministers of the Crown or others with executive authority exercise powers akin to dispensation or economy within English law. Examples include the power of the Lord Chancellor to issue a retroactive marriage validity order, of the Revenue to make extra-statutory concessions or of the Archbishops to declare holy orders 'recognised and accepted' regardless of quasi-legal arguments to the contrary. Prerogative power could be said to belong to this category. Also within this category is the broad and difficult to define discretion that is necessarily exercised by a variety of executives or officials discussed in more detail above.

Fourth, the individual who is affected by a law may, as Allan has pointed out, make the moral decision not to obey the law. It has been noted above that disobedience is even sanctioned by the *Catechism of the Catholic Church*. The assumption of the *Catechism* is that there is a division and clear distinction between ecclesial and civil authority and, where the latter conflicts with the former, the believer is enjoined to disobey in conscience. Principled refusal to conform to seemingly unjust authority has been at the root of the stories of Christian martyrs from St Stephen¹⁰⁷⁸ to Archbishop Oscar Romero and beyond.¹⁰⁷⁹ As has been noted above, Richard Hooker envisaged the possibility of situations where the conscience of the believer might lead him or her to obey higher, divine, law in the face of contrary human-made law. However, no such disobedience is envisaged in the law of England and Wales.

Precedent and Judicial Review

It has been noted that dispensations are discretionary and, in common with the granting of economy in the eastern canonical tradition, the granting of a dispensation in one case does not necessarily mean that the same dispensation will be granted in another case, no matter how similar the situation. It has further been noted that this distinguished

¹⁰⁷⁸ Acts 7.

¹⁰⁷⁹ *The Times*, Wednesday, Mar 26, 1980, 17.

dispensation from equity in English law. The development of a doctrine of binding precedent in the Chancery courts led, as has been seen in chapter 6 above, to the fixing of equitable principles and the loss of the earlier flexibility of the equity jurisdiction.

Precedent does not sit easily with the concepts of dispensation and economy. The setting aside of a legal obligation by dispensation theoretically leaves the law dispensed unchanged and therefore binding on the individual or group dispensed in other circumstances and binding on those not dispensed in the same circumstances.

However, the law on dispensation is not without reference to precedent. The *ELA* refers to dispensations that were customarily granted, transferring papal authority in such matters to the Archbishop of Canterbury and saving Episcopal authority in such matters to the bishops. Furthermore, it has been shown in chapter 7 above, that there were certain subject areas (e.g. illegitimacy and plurality) in which dispensations became commonplace and precedented. Section 11 of the *ELA* provides a mechanism for appeal against the refusal of the Archbishop (or Guardian of the Spiritualities) to grant a dispensation. The appeal as laid down was, and is, to the Lord Chancellor.¹⁰⁸⁰ Thus, as the doctrine of precedent took hold within these courts so precedent would have applied to appeals against refusals to grant dispensations. There is no appeal mechanism laid down in the *ELA* against the refusal of the Archbishop of York or other bishops to grant such dispensations as they may¹⁰⁸¹ although an unsuccessful applicant could apply to the Archbishop of Canterbury for a Common Licence, which he may grant for marriage throughout England.¹⁰⁸² In 1895 Chancellor Tristram ‘held that a licence must be granted *ex debito justitiae* where no legal objection existed, and that there was no discretion in him or (by implication) in the bishop.’ Pearce points out that in this case Tristram opposes the earlier line taken by Dr Nicholl, sitting in the Court of Faculties in *Prince Capua v Count de Ludolf* and suggests the earlier view is to be preferred and that ‘there is now no doubt in the minds of most bishops – and many of their advisers – that a discretion to refuse a licence does exist.’¹⁰⁸³

¹⁰⁸⁰ See also *Halsbury* vol 14 para 1023 n7.

¹⁰⁸¹ *ELA* s9.

¹⁰⁸² Marriage Act 1949 s 5.

¹⁰⁸³ Pearce, Augur, ‘The roles of the vicar-general and surrogate in the granting of marriage licences’, (1990) 2 Ecc LJ 28 at 31-32. See also *Ex p Brinckman* (1895) 11 TLR 387 and *Prince Capua v Count de Ludolf* (1836) partially reported as a note in (1861) 30 LJ PM&A 71.

It has further been shown that Bishops have considerable statutory and canonical powers to grant dispensations and to permit that which would otherwise not be permitted. In some cases the Bishop's decision is subject to an appeal process laid down by the covering legislation.¹⁰⁸⁴ In other cases it is not.¹⁰⁸⁵ Bishops actions have in both the recent and remote past been subject to applications for judicial review.¹⁰⁸⁶ Judicial review seeks to ensure that authorities subject to the review of the court act legally, reasonably and with procedural propriety¹⁰⁸⁷ and, whilst the question of the refusal to grant a dispensation has not been put to the test, it would be interesting to see whether the refusal of a bishop to grant a dispensation in a case where the facts were substantially similar to a case in which he had granted a dispensation could be seen to satisfy the criteria for *Wednesbury* reasonableness. Thus, whilst precedent has not hitherto been an integral part of dispensation and economy, such dispensations and actions akin to economy as are granted and carried out by bishops in the Church of England may in the future become subject to precedent if and when they are tested in the courts.

¹⁰⁸⁴ E.g. there is an appeal to the Archbishop of the province against the refusal of a bishop to grant a licence for non residence to an incumbent laid down in canon C25.

¹⁰⁸⁵ E.g. the power of the Archbishops to make determinations on the recognition of holy orders in the *Overseas and Other Clergy (Ministry and Ordination) Measure* 1967.

¹⁰⁸⁶ E.g. *R v the Bishop of Stafford ex parte Owen*, (2000) 6 EccLJ 83.

¹⁰⁸⁷ *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 at 407-413 per Lord Diplock. *Halsbury* vol 1(1) para 59.

Chapter 13 - Conclusion

Dispensation and economy, in theory and in practice, have at their base the assumptions first, that there exists a general obligation to obey the law as it applies to the individual or group concerned and, second, that there will be times and occasions in the functioning of church or society in which the strict enforcement of obedience to the law would lead to unintended or unwanted consequences.

Definitions and Development of Dispensation and Economy

In the patristic era of the Church the concept of economy began to develop. Whilst the linguistic root of the word combines *oikos* (house) and *nomos* (law), the use and application of the word does not have legal overtones. Rather, its use was in the field of household management, stewardship and the dispensing and distribution of goods.¹⁰⁸⁸ However, Orthodox commentators stress that this power of stewardship and of generosity is part of the law of the church, along with strictness (*akribeia*).¹⁰⁸⁹ Economy enabled the early church to maintain its rigorous sense of obedience whilst at the same time exercising generosity when the rigour of the law caused harm. Economy was primarily of use in regulation of access to the sacraments and in the reconciliation of heretical and schismatic groups to the mainstream church. It was, and continues to be, applied in both the private and public spheres, including in the reconciliation of individuals and groups to the church. What is more, in the use of economy (and dispensation in the West) in the private lives of individual Christians in turn may affect the public life of the Church as evidenced by the *Tetragamy Affair* described in Chapter 1 where the imperial succession depended on the restoration to communion, by economy, of the Emperor himself.

After the Great Schism of 1054 the eastern and western churches developed their shared canonical history in different ways. Economy remained in use in the east. In the

¹⁰⁸⁸ See Danker, F W (ed), *A Greek-English Lexicon of the New Testament and other Early Christian Literature* (3rd Edn), Chicago, 2000 where the definitions given are grouped into three: (1) Responsibility of management, (2) state of being arranged and (3) programme of instruction or training. See also Lampe, G W H, *A Patristic Greek Lexicon*, Oxford, 1961. Lampe identifies four broad categories: (1) Ministration or management, (2) disposition, organisation, constitution, (3) dispensation or ordering and (4) adaption of means to an end or prudent handling of any matter.

¹⁰⁸⁹ Örsy (1982) 314-5, representing the views of Pierre L'Huiller and of Bartholomeos Archontonis. See also Nicodemus the Hagiorite *Pedalion*, 71, who states there is 'no contradiction or contrariety between [strictness and economy]'.

west the same principles developed into the practice of dispensation. In both systems the principal person or category of persons with authority to exercise this dispensing function was the bishop or bishops and, in the west, supremely the Pope. Papal authority, as it developed prior to the Reformation, combined legislative, judicial and executive functions. Bishops, in their dioceses and provinces exercised legislative (usually in Synod), judicial and executive powers. The Church of England inherited the western model but, at the Reformation the domestication of the canon law was based on the concept of the law of the Church being a specialist part of the general body of the law. The Submission of the Clergy Act 1533 declares void canons thought to be contrary to the King's law.¹⁰⁹⁰ The *ELA* is a statute concerned with matters ecclesiastical, but its preamble speaks of laws generally, making the point that the King, with Parliament, may not only make laws but grant dispensations from them and also appoint fit persons to exercise powers of dispensation. In ecclesiastical spheres the *ELA* goes on, as detailed above, to appoint the Archbishop of Canterbury to grant some ecclesiastical dispensations formerly issued at Rome and to recognise the customary dispensing powers of the Archbishops and Bishops. Thus, as in the earlier canonical tradition, the legislator and those executive officers authorised by him possessed the authority to dispense.

In the jurisprudential thought of the English Reformation, as outlined in Chapter 12, the locus of ecclesiastical lawmaking was emphatically Parliament and thus any claims to a wide or loosely defined power of dispensation or economy sit uncomfortably alongside this thought. The discovery of a little known list of dispensations and the fees payable for them within the State Papers shows the extent of the subjects in which dispensations were granted in the years up to the mid-seventeenth century. Since the Reformation the number of dispensations has been reduced, usually through changes in the law rendering such dispensations unnecessary.

It has been shown above that dispensations continue to be built into ecclesiastical and other legislation.¹⁰⁹¹ The consistory court system, however, has seen a transfer of authority for the granting of faculties for the alteration of church buildings from bishops to ecclesiastical judges. This means that whilst dispensation remains, for the

¹⁰⁹⁰ S. 1.

¹⁰⁹¹ E.g. in the Canons of the Church of England analysed in Chapter 7 above.

most part, a legislative or executive function, at least one traditional area of dispensation has become judicial, or quasi-judicial.

Chapter 7 examined the use of dispensations in the law of the Church of England today, and especially in the Canons. The examination of the canons showed that there are a large number of instances of discretionary powers and dispensations in the internal law of the Church, brought about by different means and under different guises. This analysis may be linked with Joseph Koury's analysis of the *CIC* of 1983 and in particular his observation that *CIC* contains 'institutionalized legal flexibility'.¹⁰⁹² Koury points out that *CIC* makes use of such terms as 'can', 'may', 'unless', 'except' and even 'danger of death'. Such terms are also found in the Canons of the Church of England.¹⁰⁹³ This language of flexibility is extended through *inter alia* conscience clauses contained in, for example, the Matrimonial Causes Act 1965 s.8 and schedule 4 of the Gender Recognition Act 2004. Such exemptions are not strictly speaking dispensations as they do not require the intervention of an authority but along with more concrete examples of modern dispensations they are indicative of the presence of traits in the law governing the Church of England similar to those outlined by Koury.

It has been shown that whilst in theory post-Reformation England produced an integrated system of law governing all aspects of life, including the life of the Church, based on an assumption of protestant uniformity, over time there were situations in which individuals and groups within the Church began to question whether the law complied with the law of God as they understood it. The Church had, in its background, both a long tradition of obedience to authority¹⁰⁹⁴ and the natural law tradition, which admitted of the possibility of questioning human law where it was

¹⁰⁹² Koury (1990), 487.

¹⁰⁹³ E.g. Can B18.1 – '...a sermon shall be preached at least once each Sunday, except for some reasonable cause....' and Can B29.4 – 'No priest shall exercise the ministry of absolution in any place without the permission of the minister having the cure of souls thereof, unless he is by law authorized to exercise his ministry in that place without being subject to the control of the minister having the general cure of souls of the parish or district in which it is situated: Provided always that, notwithstanding the foregoing provisions of the Canon, a priest may exercise the ministry of absolution anywhere in respect of any person who is in danger of death or if there is some urgent or weighty cause.'

¹⁰⁹⁴ E.g. Romans 13. 1.

perceived to contravene divine law.¹⁰⁹⁵ The Bill of Rights criticised both the general ‘suspension’ of the operation of laws and the specific ‘dispensation’ of individuals from observance of applicable law and the historical development of the law outlined in chapter 12 has led to a situation in which a wide scope for those with executive authority routinely to dispense others from legal obligations is not possible. However, those with executive authority in the Church (often but not exclusively bishops) were also part of a tradition allowing limited dispensing power, which continued, albeit in a revised form, through the reforms of the Reformation, Restoration and Glorious Revolution.

Reforms and development of the life of the Church of England in the wake of the Oxford movement, comprising the revival of certain ritual practices and the consequent proposed reform of the liturgy of the Church caused a crisis of authority within the Church. There was a clash within the Church and in the country as to whether these reforms were right or wrong. Successive court judgments and Acts of Parliament sought to maintain the status quo and in 1927 and 1928 Parliament declined to authorise a proposed edition of the *Book of Common Prayer*. The consistent reaffirmation of the status quo masked the depth of division within the Church and radical reforms took place and became widespread in spite of the proscriptions.

At various points during this period bishops individually or collectively took decisions that bore the hallmarks of dispensation or economy. Key among these were the collective decision taken in 1881 not to prosecute ritualist clergy (and to veto prosecutions brought by others) and in 1929 to permit the use of the amended *Book of Common Prayer* that had not received the authority of Parliament and Royal Assent. In both cases they attempted to tread the fine line between the obligation to obey the law and the perceived harshness of the strict application of the law by, in the first instance attempting to control more extreme ritual practice and, in the second, attempting to limit liturgical innovation to those amendments set out in the 1928 book.

In both cases the result could be interpreted as encouragement by those in authority (i.e. the bishops; who on assuming office took an oath of allegiance to the sovereign

¹⁰⁹⁵ This could be described with reference to the tags ‘malum in se’ and ‘malum prohibitum’, where something contrary to divine law is ‘malum in se’.

reinforcing their obligation to observe and uphold the law) simply to break the law. The result could, on the other hand, be that individuals or classes of people were permitted to do that which they would not otherwise have been permitted to do. In the former case certain bishops relied on a belief that they had a right inherent in their office to regulate the conduct of worship and they exercised this right by using the power given to them by the CDA and the PWRA to veto or to refuse to start proceedings against ritualist clergy. In neither case did the bishops lay claim to be exercising the power of economy, but their actions and decisions bore significant similarities to economy. For instance, in the Prayer Book controversy the bishops appealed to their perceived inherent ‘administrative discretion’¹⁰⁹⁶ and, both in evidence to the RCED and in the aftermath of the rejection of the 1928 Prayer Book, to a perceived *jus liturgicum*. Analysis of what they meant by this has been shown in chapters 9 and 10 above to be similar in form to a power of economy. The case for a continued *jus liturgicum* is weak, to say the least, but stronger is the argument that those in authority have a certain amount of discretion in the exercise of that authority. A series of judgments by Lord Denning detailed in chapter 6 developed the law on discretion, which bears many of the hallmarks of dispensation and economy. Ministerial discretion has at its root the unfettered power of the monarch, rather than the ‘salvation of souls’. In this sense it differs from dispensation and economy. However, it has been shown that the methods and results can be strikingly similar.

In the series of case studies developed above there were occasions where those exercising powers of dispensation or economy did so deliberately.¹⁰⁹⁷ However, in other cases the actions of bishops or synods were not justified at the time by reference to either concept. In the mid-Victorian period Bishops were unclear as to how far their powers of dispensation went, as evidenced by their reluctance to permit the taking of vows in religious orders;¹⁰⁹⁸ in the Prayer Book crisis the bishops laid claim to ‘discretion’; and the Porvoo agreement, brought about legislatively by Act of Synod, informs the decision-making of the Archbishops but does not mention economy. The concepts of dispensation and economy do, on the other hand, provide a coherent

¹⁰⁹⁶ York Journal of Convocation July 1929, 57.

¹⁰⁹⁷ E.g. in the dispensation granted to Archbishop Abbot and the Lambeth Conference of 1948’s use of the term ‘economy’ to justify the admission to communion of members of the Church of South India who had not been episcopally confirmed.

¹⁰⁹⁸ On vows see Dunstan, Petà, *Bishops and Religious 1897-1914*, from Project Canterbury, www.anglicanhistory.org, downloaded 12 May 2008.

theoretical and practical underpinning for the actions taken in these case studies, even if this was not recognised at the time.

Classical and Medieval Underpinnings

The thesis has shown that the principles first, of an obligation to obey the law and, second, of the necessity at times for the strictness of this obligation to be lifted by some proper authority, can be discerned widely in legal systems. The tempering of the strictness (*akribeia*) of the law by economy (*oikonomia*) finds echoes in the Aristotelian tradition of *epieikeia*, in the civil law tradition where *aequitas* could be employed as a remedy¹⁰⁹⁹ and in the medieval canon law and common law traditions where the *rigor iuris* could be tempered by *aequitas* or *misericordia*.¹¹⁰⁰ Whilst sharing a common root modern equity has been seen to have become less flexible and more predictable than dispensation or economy. That said, however, the use by courts of flexible and elastic concepts such as ‘reasonableness’¹¹⁰¹ and also of ‘proxies’ mentioned above, including public interest¹¹⁰² and ‘common law principles’¹¹⁰³ show that some of the flexibility and responsiveness of the equitable tradition remains, albeit in a different guise. However, the dispensatory aspects of the faculty jurisdiction, being administered judicially and subject to a clear doctrine of judicial precedent, have developed in a similar way, with decisions being made ‘by precedent out of principle.’¹¹⁰⁴

Establishment, Parliamentary Sovereignty and the Rule of Law

A V Dicey considered the two principal hallmarks of the constitution to be Parliamentary Sovereignty and the Rule of Law. It has been shown that dispensation and economy have the potential to challenge both. The nature of the establishment of the Church of England gives rise to a complex interrelationship between Church and

¹⁰⁹⁹ See the discussion in chapter 6 above.

¹¹⁰⁰ See Landau, Peter “‘Aequitas’ in the “Corpus Iuris Canonici”” (1994) 20 Syracuse J. Int’l L. & Com. 95-104, Doe, Norman *Fundamental Authority in late medieval English Law*, Cambridge, 1990, especially at 99-107 and Doe, Norman, ‘The positivist thesis in fifteenth-century legal theory and practice’, (1990) *Journal of Legal History*, 11:1, 29-39.

¹¹⁰¹ Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.

¹¹⁰² *Decision On Prosecution - The Death By Suicide Of Daniel James*, 9 December 2008, para 1.

www.cps.gov.uk/news/nationalnews/death_by_suicide_of_daniel_james.html

¹¹⁰³ Meyerson (2007).

¹¹⁰⁴ Per Bagnall J, *Cowcher v Cowcher* [1972] 1 All ER 943 at 948.

Parliament. From the Reformation to the Enabling Act 1919 Parliament was the principal legislator for English ecclesiastical affairs. The Convocations produced little in the way of canonical legislation (and indeed did not meet for well over a century in the eighteenth and nineteenth centuries) and since the Enabling Act the main form of synodical legislation has been subject to Parliamentary scrutiny and approval. It has been shown that many examples of dispensations are provided for and regulated by statute. When this is the case there is no conflict between dispensation and Parliamentary Sovereignty. Attention has been paid above¹¹⁰⁵ to the use of the Bishops' statutory discretion and veto under the CDA and PWRA respectively, allowing them at least tacitly to permit or tolerate ritual practices which had been held contrary to the rubrics of the *Book of Common Prayer* and thus forbidden by another statute (the Act of Uniformity 1662). This is susceptible to interpretation as the use (or abuse) of a statutory power to permit breach of a statutory duty (and indeed it was thus interpreted during the process of the Clewer case through the courts).¹¹⁰⁶

Parliamentary sovereignty was challenged more directly in the Prayer Book controversy. The majority in the House of Commons deliberately rejected the proposed book and yet the Bishops collectively, with the support of the Lower Houses of Convocation, permitted its use. What is more, the Ecclesiastical Courts (which, it must be remembered, form part of the English court system) made decisions based on the rubrics of the revised book. The rationale of Garth Moore Ch in the *Bishopwearmouth* case was based on the application of *jus liturgicum* and 'necessity', which he took to have 'even an older place in the jus commune of the church and [to be], if anything, there more firmly entrenched [than in the common law]'.¹¹⁰⁷ The necessity for reservation was shown by the number of housebound communicants to be visited by the parish clergy. As such it could be seen as an example of the application of a higher concern (the communion of the sick) to temper the severity of the law (under a strict interpretation of which the clergy, who were bound by the *BCP* to celebrate the Eucharist afresh in the house of each sick communicant, would not have been able to fulfil this obligation and attend to their other, equally important, duties). This appeal to necessity has not been taken up or developed subsequently and was criticised in a later

¹¹⁰⁵ Chapters 9 and 10.

¹¹⁰⁶ *Julius v the Bishop of Oxford* (1878-79) L.R. 4 Q.B.D. 245 (QBD), (1878-79) L.R. 4 Q.B.D. 525 (CA), (1880) LR 5 AC 214 (HL).

¹¹⁰⁷ *Bishopwearmouth (Rector and Churchwardens) v Adey* [1958] All ER 441 at 446.

judgment in the Durham Consistory Court, where Bursell Ch stated ‘although I have no doubt that it still plays a part in the ecclesiastical law it is difficult to see how what would otherwise be illegal can be justified by a reference to a ‘necessity’ that is not immediate.’¹¹⁰⁸

The equilibrium of the relationship between the Church Assembly and Parliament was restored with the passing of the Prayer Book (Alternative Services) Measure 1965, which gave statutory sanction to alternative services authorised for use under the Measure’s terms.

In Chapter 12 it was shown that the dominance of legal positivism (derived largely from the work of John Austin) in English legal thought left no room for wide discretionary powers of dispensation or economy within an established Church of England whose legislative and judicial organs were bound up with those of the state. Dicey’s conception of the Rule of Law has been similarly influential and it has recently been stated that it is ‘accepted as never before as one of the fundamental principles of our unwritten democratic constitution.’¹¹⁰⁹ Of particular interest to this study is Dicey’s first definition of the Rule of Law, that individuals be not subject to officials with wide discretionary powers. Dicey contrasted the constitution of England with those of other, sometimes undemocratic and totalitarian, regimes. This has been taken up by other writers since including Friedrich Hayek, who is confident in the assertion ‘that the discretion left to the executive organs wielding coercive power should be reduced as much as possible’.¹¹¹⁰

It is worth pointing out that the criticism of discretionary power levelled by Hayek is criticism of *coercive* discretionary power. It has been shown consistently above that dispensation and economy are rarely, if ever, coercive, rather they are *permissive*. To borrow a phrase from the language of other branches of English law, like estoppel they are a shield rather than a sword. However, it has also been shown above that

¹¹⁰⁸ *Re St Thomas, Pennywell*, [1995] 4 All ER 167 at 175. The Chancellor cites as examples of necessity in the law of the Church of England, Can B22. 9 (concerning baptism in private houses) and *Hutchins v Denziloe and Loveland* (1792) 1 Hag Con 170 at 173–174, 161 ER 514 at 516 (concerning the right of churchwardens to intervene in public worship in cases of ‘instant and overbearing necessity’.)

¹¹⁰⁹ Jowell, Jeffery, ‘The Rule of Law and its underlying values’ in Jowell, J and Oliver, D, *The Changing Constitution*, Oxford, 2007, 6.

¹¹¹⁰ Hayek, Friedrich A, *The Road to Serfdom*, Chicago, 1944, 72-3.

permissive power wrongly used can be undesirable, as in the case of the suspending and dispensing of laws by the later Stuart kings that was specifically criticised in the Bill of Rights.

Dicey's assertions have not been immune from criticism, not least for misunderstanding the breadth of discretionary powers and the emerging body of administrative law and tribunal-based justice already in existence in nineteenth century England.¹¹¹¹ Dicey's commitment to his definition of the Rule of Law is also influenced by his own legal positivism. Laws are consistent with a Diceyan Rule of Law if they are properly made, regardless of their moral content, and laws that are consistent with the Rule of Law should be obeyed and enforced. Joseph Raz develops this theme in his work on the Rule of Law, pointing out that whilst Dicey's formal or procedural view of the Rule of Law is necessary for the Rule of Law to make sense it is not to be confused with, for example, morality, equality or justice as laws can be properly made albeit for bad ends or by corrupt regimes.¹¹¹²

A further potential criticism of dispensation and economy is that far from ensuring the predictability and certainty of law they usher in notions of discretion and subjectivity and the threat of an inconsistency of approach inconsistent both with Dicey's view of the Rule of Law¹¹¹³ and the views of other legal positivists.¹¹¹⁴

Other theorists attempt to square commitment to the Rule of Law with notions of principles of rights and freedoms¹¹¹⁵ and may point out that discretionary power is 'often desirable and, in a complex modern state, is inevitable'.¹¹¹⁶ It has been shown that the theoretical basis of economy as received in the Eastern churches holds together strictness and economy as integral to the law and administration of the church. There is no suggestion in this theory that prudent use of economy is an affront to the operation of the law. On the contrary, it is a necessary part of it. Whilst dispensation and

¹¹¹¹ Craig, Paul P, 'Formal and substantive conceptions of the rule of law: an analytical framework', (1997) PL 467-87 at 470-2.

¹¹¹² Raz, Joseph, 'The Rule of Law and its virtue' (1977) 93 LQR 195-211.

¹¹¹³ Jowell writes of the 'Diceyan view that all discretionary power is bad'. Jowell (2007), 9.

¹¹¹⁴ E.g. Kramer, who writes that objectivity 'is integral to every system of legal governance' and is 'essential for the Rule of Law'. Kramer, Matthew, *Objectivity and the Rule of Law*, Cambridge, 2007, 232.

¹¹¹⁵ E.g. Ronald Dworkin and Sir John Laws. See Craig (1997), 477-9.

¹¹¹⁶ Jowell (2007), 15.

economy can be understood as weakening a commitment to the Rule of Law where the Rule of Law is determined according to a restrictive understanding based on a combination of Dicey and traditional legal positivism, this is not the case if the Rule of Law is construed as including the necessity of discretion, dispensation or economy as means of ensuring the better delivery of the ends of the law; be this justice, equity or salvation of souls.

Reception, Desuetude and Custom

Dispensation and economy generally require deliberate action on the part of a person or body with authority. The granting of a dispensation for, for instance, marriage without banns is a positive action by the bishop or archbishop and the setting aside of certain requirements for the recognition of ordination set out in chapter 11 required deliberate legislative action on the part of the legislative body of the Church concerned. The assumption behind the use of dispensation and economy is that but for the dispensation the law applies and continues to apply. This distinguishes dispensation and economy from other methods whereby seemingly applicable laws can be said not to apply. It cannot be argued that certain dispensations are examples of law being not received, the laws from which dispensations are granted have been received and do apply. For instance, in the ritual and Prayer Book controversies the law of the time was reasonably clear but was set aside. The lack of or inappropriateness of effective sanctions to prevent disapplication of the relevant law could give rise to criticism, after Kelsen, that the lack of sanction means that the law is inoperative or invalid. However, Kelsen's view that there can be no 'delict' if there is no sanction has been criticised 'on the ground that though the absence of a sanction may make law ineffective, this is not the same as it being invalid, nor does the absence of a sanction necessarily entail invalidity.'¹¹¹⁷ Likewise dispensation is not the same as desuetude or abrogation of the law by custom. In the same cases the result of the actions of the bishops in actively permitting or tolerating¹¹¹⁸ strictly unlawful liturgical development clearly led to the relevant laws becoming dead letter, but the dispensation or economy came first.

¹¹¹⁷ Freeman (2001), 262.

¹¹¹⁸ There is evidence outlined in chapter 9 that the bishops made a policy of toleration in 1881 and that they subsequently actively negotiated with ritualist incumbents the parameters of their toleration.

Dispensation, Economy and Christian Unity

It has been noted that the reconciliation of Christians in unity in the Church was one of the principal aims of the exercise of economy in the early Church. Unity, as one of the ‘marks’ of the Church¹¹¹⁹ was considered sufficiently important that special measures should be taken to achieve it and that particular generosity should be extended to individuals and groups separated from the mainstream, catholic or orthodox Church to enable reunion. The result was that, by economy, individuals and groups who, but for economy, would not be recognised as ordained (if they were ordained) or possibly even as baptized, as a result of heresy or, more likely, schism, were so recognised, thus facilitating the virtue of unity within the church. In the late nineteenth and early twentieth centuries considerable attention was paid in England to the concept of economy. This is more than likely because, as has been seen, economy was seen as fluid and, importantly, gave to bishops a seemingly unlimited discretion to relieve people of legal obligations.¹¹²⁰

Similar questions have been asked in more recent centuries. Chapter 5 has detailed the series of negotiations and statements that led to declarations by various Orthodox churches that Anglican orders could be recognised by economy in the case of reunion between the churches. This was not, as was optimistically believed in some circles however, a declaration of the validity of Anglican orders *per se*, but only theoretically and in the case of reunion.

Chapter 11 examined the attitude of the Church of England and other Anglican churches towards the recognition of the orders of other churches within schemes for the uniting of Anglican and other churches. It is contended that a similar doctrine of economy, whilst not necessarily spelled out as such, can be seen to be practically present and working within the ecclesiological framework of Anglicanism and within the legal framework of the Church of England. Examples from the united Churches of South Asia, from the proposed but unsuccessful Anglican-Methodist Unity scheme of the 1960s and 1970s and from Anglican-Lutheran unity schemes in Europe and North

¹¹¹⁹ Along with holiness, catholicity and apostolicity, from the phrase in the Nicene Creed ‘We believe in one, holy, catholic and apostolic Church’.

¹¹²⁰ ‘There is no limitation in regards to the exercise of the most ancient institution of economy; provided that no harm is done to the dogma of the Orthodox faith.... Economy is an expression of unfettered Church freedom’ Rodopoulos, P *An Overview of Orthodox Canon Law*, Rollinsford NH, 2007, 103.

America in the last twenty years have shown this to be the case. In all of these cases the usual requirements of Episcopal ordination, as understood by Anglican churches and as enforced in all other circumstances in Anglican churches, have been set aside. In the agreements between Anglican churches and Lutherans in Northern Europe (Porvoo) and North America (*CCM* and the *Waterloo* agreement) and in the agreements between Anglican and other churches in South Asia, it has been possible for Anglican churches to accept clergy ordained in the signatory churches but outside of the strict understanding of ‘episcopal ordination’ as if they had been so ordained. This gives rise to a new kind of legal fiction and shows the ability of the Churches in question to live with a period of uncertainty and to set aside established and valued legal principles for a higher or greater end is consistent with economy as developed in the early church and in the eastern churches. It is notable that the decisions in such cases are made not by bishops individually but by synods or other synodical or legislative bodies, including, but not limited to bishops. The agreements, whilst giving authority to various individuals, including bishops,¹¹²¹ are made by synods and are legislative in character. The synodical character of economy has been noted in the aforementioned decisions of the synods of various Orthodox Churches about Anglican orders.

Concluding Remarks

The question posed at the beginning of this thesis was whether it can be shown that the law governing the Church of England, or indeed the law governing the rest of English life, gives to those in authority a general power of dispensation and, if so, in what circumstances. Despite the caution of commentators about the place of dispensation, economy or ‘canonical equity’ in English law or, specifically, in English ecclesiastical law, the concept has been shown to exist in a number of guises. The necessity for there to be a system for providing a remedy for times when the strict application of the law is unfeasible or undesirable has led to a number of instances akin to dispensation or economy in the law of England and Wales.¹¹²² It is not surprising, therefore, that similar remedies have developed in the Church of England. The continued existence of dispensing authority has been recognised in the laws common to the churches of the

¹¹²¹ E.g. the ability given by the *Waterloo Declaration* enabling invitations to be given to bishops of the Anglican Church of Canada and the Evangelical Lutheran Church in Canada to participate in Episcopal ordinations in the other church. See Appendix 5 below.

¹¹²² E.g. Prerogative powers, statutory powers such as Marriage Validity Orders, discretionary powers and extra-statutory concessions detailed in chapter 6 above.

Anglican Communion. The document *Principles of Canon Law common to the Churches of the Anglican Communion* states that ‘Laws may be dispensed with in their application to particular cases on the basis of legitimate necessity provided authority to dispense is clearly given by the law.’¹¹²³ This statement, whilst noting the existence of dispensing power limits that power to situations where the discretion has been ‘clearly given’ by the law itself. The document does not present a wide-ranging power of Episcopal discretion within the churches of the Anglican Communion akin to economy. It does, however, recognise that there are some laws which ‘articulate immutable truths and values.’¹¹²⁴

However, the extent to which dispensation and economy are used in the Church of England, or in other parts of the legal system, should not be over-estimated. Most of the powers that bear the hallmarks of dispensation or economy were granted and limited by statute. The use of any such power is likely to be subject to judicial review.

In conclusion, we have seen that there are methods in the legal systems that have been examined whereby, within the general assumption of obedience to the law, the strictness of the law can be tempered and obligations remitted with impunity. As well as the specific canonical concepts of dispensation and economy we have seen that familiar concepts and actions such as discretion, custom, desuetude and inaction on the part of those charged with enforcing the law can function in the same way. Thus, whilst certainty and equality before the law are rarely if ever held not to be good, those in authority frequently have recourse to action akin to dispensation or economy for the prudent and just management of church and society.

¹¹²³ *The Principles of Canon Law Common to the Churches of the Anglican Communion*, London, 2008, Principle 7.6

¹¹²⁴ Principle 3.6.

APPENDICES

1. Translation of the text of the Dispensation granted to George Abbot, Archbishop of Canterbury, 1621.¹¹²⁵

DISPENSATION IN THE CASE OF GEORGE, ARCHBISHOP OF CANTERBURY CONCERNING AN IRREGULARITY

To the Most Reverend Father in Christ George, by divine providence Archbishop of Canterbury, Primate of All England and Metropolitan, from John, George, Lancelot, Samuel, Thomas, Arthur, Nicholas and George, by divine permission bishops respectively of Lincoln, London, Winchester, Norwich, Coventry and Lichfield, Bath and Wells, Ely, and Chichester bishops of the Province of Canterbury. Grace and Peace to you in God everlasting. We are in receipt of letters of commission from his most serene highness in Christ our Lord James by the grace of God King of England, Scotland, France and Ireland, defender of the faith etc delivered and directed to us under the great seal of England; the tenor of which is as follows;

‘JAMES, by the Grace of God, King of England, Scotland, France and Ireland, defender of the faith etc. to the Reverend Father in Christ our greatly beloved and trusty counsellor, John, bishop of Lincoln, Keeper of our great seal of England, to the reverend father in Christ George, bishop of London, to the Reverend father in Christ, our greatly beloved and trusted counsellor Lancelot, bishop of Winchester, also to the Reverend fathers in Christ Samuel of Norwich, Thomas of Coventry and Lichfield, Nicholas of Ely, Arthur of Bath and Wells and George of Chichester, bishops of their respective sees, Health and Grace.

‘IN HUMBLE SUPPLICATION to us, the Most Reverend Father in Christ, our greatly beloved and trusted Counsellor, George, Archbishop of Canterbury, EXPLAINED THAT when recently in a certain park called Bramzil Park at Bramzil in our County of Southampton, being asked and invited by an honourable gentleman the owner of this same park, he intended to shoot a deer with an arrow, giving due care that no danger from this should come to anyone; it nevertheless happened by chance that the arrow he had shot and aimed at a wild beast, struck a certain Peter Hawkins at that time keeper of the aforesaid park, who was improvidently and carelessly exposing himself to the danger of being struck by an arrow, and was running headlong across a place where he could not be seen by the said Archbishop; it wounded the man’s arm, and indeed as a result of this wound in less than the space of one hour he was breathing his last; and although because of the accidental nature of this kind of homicide, it happening through no fault of the aforesaid Archbishop but through the rashness of the slain man himself, AND ALTHOUGH this same Most Reverend Father relying on a clear conscience was completely convinced that he had committed no irregularity whatever; nevertheless in an attitude of cautious circumspection and so that every scruple might

¹¹²⁵ Translation by Mrs Betty Munday with the assistance of the author.

be removed from the minds of the weak, HE HUMBLY BEGGED US that in his case with respect to every and every kind of irregularity and taint or suspicion of irregularity, if perchance he could seem to some people to have incurred any by reason of the aforementioned, a precautionary and excessive dispensation should be given:

‘KNOW THEREFORE, THAT WE, weighing in our own royal mind and out of compassion, the force and validity of such a petition and being assured of the truth by careful investigation of the aforementioned and so that we may comply with the conscientious intent of the Most Reverend Father in this matter, and with abundant caution that we may be seen to strengthen the status, reputation, and dignity of our extremely loyal Counsellor and President to whom the Church and State owe so much, and indeed out of our own far from weak patronage, HAVE COME to this present arrangement:

‘And to you or some six of you, four of whom we wish to be you, the aforesaid John, George, Lancelot and Samuel respectively bishops of Lincoln, London, Winchester and Norwich, in whose loyalty, judgment, and diligence we have supreme confidence, WE COMMISSION, and by the special grace which is ours, and according to our royal authority supreme and Ecclesiastical, which we wield on our own behalf and on that of our heirs and successors, DO GIVE AND GRANT FULL RIGHT AND POWER through this document as far as you or some six of you are concerned, four of whom we wish to be the aforesaid John, George, Lancelot and Samuel, bishops respectively of Lincoln, London, Winchester and Norwich, that in the case of the aforesaid Most Reverend Father, regarding every and every kind of legal or actual defect, criticism or any penalty canonical or ecclesiastical, but particularly every irregularity or taint of irregularity (if by chance by reason of the aforementioned any has been incurred) or may seem to certain people to have been incurred, and so that in the Offices and Judicial Administrations for which he has responsibility according to the power entrusted to him by his Office and Archiepiscopacy he may be able freely to minister, have the enjoyment of, exercise and take delight in, as a great precaution you should make a dispensation, and you should do all and every other single thing which shall prove necessary in this task, or as you may have opportunity to preserve and strengthen the status, benefit and honour of the aforesaid Most Reverend Father AND THAT a dispensation to this effect and all other things according to your preference or that of some six of you, four of whom we wish to be you, the aforesaid John, George, Lancelot and Samuel respectively bishops of Lincoln, London, Winchester and Norwich, should be made, and, having been put together in due legal form, and when inscribed, reverted and made firm by your seals, or some authentic seal, delivered without delay to the aforesaid Archbishop. Furthermore, this Dispensation, and all other matters according to your preference, or that of some six of you, four of whom we wish to be the aforesaid John, George, Lancelot and Samuel respectively bishops of Lincoln, London, Winchester and Norwich, we wish to be confirmed by passing under our great seal of England, and in respect of these things we expressly commission the Lord Keeper of the aforesaid great seal of ours and all the ministers of our Chancery and grant them full power by the contents of these presents.

Witnessed by myself at Westminster on the 22nd day of November in the nineteenth year of our reign in England, France and Ireland and the fifty-fifth in Scotland.’

In accordance with the contents and demands of the previously communicated commissioning letter, and to remove every scruple from the minds of the weak if

perchance any is or shall have been conceived in that quarter. We, the aforesaid John, George, Lancelot, Samuel, Thomas, Arthur, Richard and George, bishops respectively of Lincoln, London, Winchester, Norwich, Coventry and Lichfield, Bath and Wells, Ely and Chichester, and having God the father alone before our eyes and in his name first, and bearing in mind and being certain that the said hunt over which you had taken pains, seeing that the said homicide occurred accidentally (without you suspecting any such thing) was well-conducted, orderly and quiet, and that the careful attention required by the occasion had been taken in the said hunt to guard against any danger there from happening to any one, to You, the aforesaid Archbishop of Canterbury, concerning all irregularity and taint of irregularity, if perchance you have incurred any be reason of the accidental homicide or death of the aforesaid Peter Hawkins, or if you should seem to some people to have incurred, we grant dispensation as regards every and every kind of consequence of the law; and from every single awkwardness, difficult situation, irregularity, and other penalties, adverse criticism, and any restraints whatever, Canonical or Ecclesiastical (if perchance you have incurred any by reason of the aforementioned or seem to some people to have incurred any) we set you free regarding all and every kind of consequence of the law and by the contents of this document we decree and announce that you be considered an innocent man: and every defect, blot, taint or stain (if perchance you have contracted any by reason of the aforementioned or seem to some people to have contracted any) we completely abolish these and declare and pronounce that they be considered abolished. And you, even the aforesaid George, Archbishop of Canterbury, excessively and from great precaution we reinstate and restore as regards every and every kind of consequence of the law. And so that in all and every single administration of justice, privilege, distinction, prerogative, honour and in all other matters which in any way have connection with and pertain to the said Archiepiscopacy you may have power to minister freely, we give consent and permission just as if the aforesaid accidental homicide had not been committed; there being no hindrance in any way to this from Canons, Laws, Decrees, Ordinances and Ecclesiastical Regulations to the contrary (if there be any contrary rulings in this sphere). In witness to this matter, we have caused our Episcopal seals to be affixed to this document, Given this 12th day of December in the year of our Lord 1621.

Witnessed by the King at Westminster, on the 24th day of December in the 19th year of the reign of King James etc and his 55th in Scotland.

2. Declaration of Indulgence 1687

His Majesty's gracious declaration to all his loving subjects for liberty of conscience.

James R.

It having pleased Almighty God not only to bring us to the imperial crown of these kingdoms through the greatest difficulties, but to preserve us by a more than ordinary providence upon the throne of our royal ancestors, there is nothing now that we so earnestly desire as to establish our government on such a foundation as may make our subjects happy, and unite them to us by inclination as well as duty; which we think can be done by no means so effectually as by granting to them the free exercise of their religion for the time to come, and add that to the perfect enjoyment of their property, which has never been in any case invaded by us since our coming to the crown; which being the two things men value most, shall ever be preserved in these kingdoms, during our reign over them, as the truest methods of their peace and our glory.

We cannot but heartily wish, as it will easily be believed, that all the people of our dominions were members of the Catholic Church. Yet we humbly thank Almighty God, it is and has of long time been our constant sense and opinion (which upon divers occasions we have declared) that conscience ought not to be constrained nor people forced in matters of mere religion; it has ever been directly contrary to our inclination, as we think it is to the interest of government, which it destroys by spoiling trade, depopulating countries, and discouraging strangers, and finally, that it never obtained the end for which it was employed. And in this we are the more confirmed by the reflections we have made upon the conduct of the four last reigns. For after all the frequent and pressing endeavours that were used in each of them to reduce this kingdom to an exact conformity in religion, it is visible the success has not answered the design, and that the difficulty is invincible.

We therefore, out of our princely care and affection unto all our loving subjects that they may live at ease and quiet, and for the increase of trade and encouragement of strangers, have thought fit by virtue of our royal prerogative to issue forth this our declaration of indulgence, making no doubt of the concurrence of our two Houses of Parliament when we shall think it convenient for them to meet.

In the first place we do declare, that we will protect and maintain the archbishops, bishops, and clergy, and all other our subjects of the Church of England, in the free exercise of their religion, as by law established, and in the quiet and full enjoyment of all their possessions, without any molestation or disturbance whatsoever.

We do likewise declare, that it is our royal will and pleasure, that from henceforth the execution of all and all manner of penal laws in matters ecclesiastical, for not coming to church, or not receiving the Sacrament, or for any other nonconformity to the religion established, or for or by reason of the exercise of religion in any manner whatsoever, be immediately suspended; and the further execution of the said penal laws and every of them is hereby suspended.

And to the end that by the liberty hereby granted, the peace and security of our government in the practice thereof may not be endangered, we have thought fit, and do

hereby straightly charge and command all our loving subjects, that as we do freely give them leave to meet and serve God after their own way and manner, be it in private houses or in places purposely hired or built for that use, so that they take especial care, that nothing be preached or taught amongst them which may any ways tend to alienate the hearts of our people from us or our government; and that their meetings and assemblies be peaceably, openly, and publicly held, and all persons freely admitted to them; and that they do signify and make known to some one or more of the next justices of the peace what place or places they set apart for those uses.

And that all our subjects may enjoy such their religious assemblies with greater assurance and protection, we have thought it requisite, and do hereby command, that no disturbance of any kind be made or given unto them, under pain of our displeasure, and to be further proceeded against with the uttermost severity.

And forasmuch as we are desirous to have the benefit of the service of all our loving subjects, which by the law of nature is inseparably annexed to, and inherent in, our royal person, and that none of our subjects may for the future be under any discouragement or disability (who are otherwise well inclined and fit to serve us) by reason of some oaths or tests, that have been usually administered on such occasions, we do hereby further declare, that it is our royal will and pleasure, that the oaths commonly called, The Oaths of Supremacy and Allegiance, and also the several tests and declarations mentioned in the Acts of Parliament made in the 25th and 30th years of the reign of our late royal brother King Charles the Second, shall not at any time hereafter be required to be taken, declared, or subscribed by any person or persons whatsoever, who is or shall be employed in any office or place of trust either civil or military, under us or under our government. And we do further declare it to be our pleasure and intention from time to time hereafter, to grant our royal dispensations under our great seal to all our loving subjects so to be employed, who shall not take the said oaths, or subscribe or declare the said tests or declarations in the abovementioned Acts and every of them.

And to the end that all our loving subjects may receive and enjoy the full benefit and advantage of our gracious indulgence hereby intended, and may be acquitted and discharged from all pains, penalties, forfeitures and disabilities by them or any of them incurred or forfeited, or which they shall or may at any time hereafter be liable to, for or by reason of their nonconformity or the exercise of their religion, and from all suits, troubles, or disturbances for the same, we do hereby give our free and ample pardon unto all nonconformists, recusants, and other our loving subjects, for all crimes and things by them committed or done contrary to the penal laws formerly made relating to religion and the profession or exercise thereof, hereby declaring, that this our royal pardon and indemnity shall be as good and effectual to all intents and purposes, as if every individual person had been therein particularly named, or had particular pardons under our great seal, which we do likewise declare shall from time to time be granted unto any person or persons desiring the same, willing and requiring our judges, justices, and other officers, to take notice of and obey our royal will and pleasure herein before declared.

And although the freedom and assurance we have hereby given in relation to religion and property might be sufficient to remove from the minds of our loving subjects all fears and jealousies in relation to either, yet we have thought fit further to declare, that

we will maintain them in all their properties and possessions, as well of church and abbey-lands as in any other their lands and properties whatsoever.

Given at our court at Whitehall, the fourth day of April, 1687, in the third year of our reign.

3. The Porvoo Declaration, 1994.

We, the Church of Denmark,¹¹²⁶ the Church of England, the Estonian Evangelical-Lutheran Church, the Evangelical-Lutheran Church of Finland, the Evangelical-Lutheran Church of Iceland, the Church of Ireland, the Evangelical-Lutheran Church of Latvia, the Evangelical-Lutheran Church of Lithuania, the Church of Norway, the Scottish Episcopal Church, the Church of Sweden and the Church in Wales, on the basis of our common understanding of the nature and purpose of the Church, fundamental agreement in faith and our agreement on episcopacy in the service of the apostolicity of the Church, contained in Chapters II-IV of The Porvoo Common Statement, make the following acknowledgements and commitments:

- a
 - i. we acknowledge one another's churches as churches belonging to the One, Holy, Catholic and Apostolic Church of Jesus Christ and truly participating in the apostolic mission of the whole people of God;
 - ii. we acknowledge that in all our churches the Word of God is authentically preached, and the sacraments of baptism and the eucharist are duly administered;
 - iii. we acknowledge that all our churches share in the common confession of the apostolic faith;
 - iv. we acknowledge that one another's ordained ministries are given by God as instruments of his grace and as possessing not only the inward call of the Spirit, but also Christ's commission through his Body, the Church;
 - v. we acknowledge that personal, collegial and communal oversight (episcopate) is embodied and exercised in all our churches in a variety of forms, in continuity of apostolic life, mission and ministry;
 - vi. we acknowledge that the episcopal office is valued and maintained in all our churches as a visible sign expressing and serving the Church's unity and continuity in apostolic life, mission and ministry.
- b We commit ourselves:
 - i. to share a common life in mission and service, to pray for and with one another, and to share resources;
 - ii. to welcome one another's members to receive sacramental and other pastoral ministrations;
 - iii. to regard baptized members of all our churches as members of our own;
 - iv. to welcome diaspora congregations into the life of the indigenous churches, to their mutual enrichment;
 - v. to welcome persons episcopally ordained in any of our churches to the office of bishop, priest or deacon to serve, by invitation and in accordance with any regulations which may from time to time be in force, in that ministry in the receiving church without re-ordination;
 - vi. to invite one another's bishops normally to participate in the laying on of hands at the ordination of bishops as a sign of the unity and continuity of the Church;
 - vii. to work towards a common understanding of diaconal ministry;

¹¹²⁶ The Churches of Denmark and Latvia did not, at the time, make this declaration.

- viii. to establish appropriate forms of collegial and conciliar consultation on significant matters of faith and order, life and work;
- ix. to encourage consultations of representatives of our churches, and to facilitate learning and exchange of ideas and information in theological and pastoral matters;
- x. to establish a contact group to nurture our growth in communion and to co-ordinate the implementation of this agreement.

4. Porvoo Clergy Appointment Guidelines, 10 October 2000¹¹²⁷

1. The Porvoo Agreement was finally approved by the General Synod in June 1995, and ratified by an Act of Synod in November 1996. It established communion between the Church of England (together with the Church in Wales, Church of Ireland and the Scottish Episcopal Church) and certain Nordic and Baltic Lutheran churches which also signed, namely those of Estonia, Finland, Iceland, Lithuania, Norway and Sweden.
2. The Porvoo Agreement provides *inter alia*, for clergy ordained by bishops of the signatory churches to be invited to minister in a like capacity in the Church of England subject to current regulations. In this respect they are placed in the same position as those ordained by Anglican bishops overseas, i.e. subject to The Overseas and Other Clergy (Ministry and Ordination) Measure 1967.
3. It should be noted that the Porvoo Agreement's arrangements for the exchange of ministers does not apply to the small minority of Lutheran clergy who were ordained by a Cathedral Dean not in episcopal orders. Nor do these arrangements apply to a priest (whether male or female) who was ordained by a woman bishop. However, there is no such bar if a priest (male or female) was ordained by a male bishop even though he/she is currently serving under a woman bishop.
4. In practice overseas clergy who are visiting the Provinces of Canterbury and York (including the Diocese in Europe) for less than one month are not normally licensed formally. Under such circumstances they cannot lawfully solemnise a marriage according to the rites and ceremonies of the Church of England, but may be invited to assist at a baptism, marriage or funeral, or to celebrate the eucharist and/or to preach, subject to the usual permission. A letter of commendation should be sought from his/her current bishop to confirm good standing.
5. For an intended stay of longer than one month formal application should be made for the respective Archbishop's Permission to officiate under the 1967 Measure. When an enquiry is received from an interested priest of one of the Porvoo churches, or if arrangements are to be initiated from the English side, it is advisable to check at an early stage whether the Church of England bishop in question (in consultation with his senior staff) is willing in principle to license such a priest and, if so, to what post, at what stipend and for what period.
6. If it is considered necessary to interview the candidate, this can sometimes be combined with his/her visiting this country for some other purpose at their own expense. Alternatively, the Church of England bishop may arrange for an interview to be conducted in the candidate's country of residence by a suitable Commissary. Suggestions about the name of someone to act in this role could be sought from the Bishop in Europe or from the European Secretary of the Council for Christian Unity.
7. An important consideration at the preliminary stage concerns fluency in English. This needs to be not only good enough to preach and conduct public worship in

¹¹²⁷ www.cofe.anglican.org/info/ccu/europe/ecumbbackground/porvooappointment.html

English without a heavy foreign accent, but a sufficient command of idiomatic English is required to be able to minister pastorally in the local English context. The applicant's competency in this respect needs to be carefully assessed.

8. Where applicants are coming from the Church of Sweden, it is reasonable to enquire whether they have completed the training course organised in Uppsala on ministry in an Anglican setting. In the current absence of similar provision for those coming from the other Porvoo churches, it needs to be asked how familiar the applicant is with Anglican practice and some judgement made as to how much practical induction would be required.

9. The DBF's policy on paying for travel and removals from abroad should be made explicit at an early stage. In cases where a Porvoo priest takes up a permanent or long term appointment (such as Team Vicar), the normal arrangement for paying a moving-in grant may be appropriate and the cost of removals met from the point of entry to the UK. For a temporary appointment lasting only for several months it is not usually feasible for the visiting priests to set up a fully furnished household, and special arrangements may need to be made. What has already worked well in several instances is for the normal moving-in grant to be paid directly to the PCC towards the cost of providing basic furnishings, and any unused balance is available towards reimbursing the cost of travelling to England. Whether the appointment is long or short stay, the incumbent will need to check that the PCC is willing to repay normal working expenses.

10. The following documents need to be provided by the Bishop, and sent to the applicant:

(a) parish profile of the vacant post, (b) an application form for the respective Archbishop's Permission to officiate obtainable from the Provincial Registrar (see Annex to this Note), unless the priest concerned already holds the current permission of the respective Archbishop for a further sufficient period, and (c) the normal declaration form relating to Child Protection.

11. The applicant from abroad should then return the following documents to the Church of England Bishop: the completed forms (b) and (c) above, together with (d) a Curriculum Vitae and photograph, (e) certified proof of episcopal ordination, and (f) a formal letter of commendation from his/her current bishop, stipulating that the applicant is a minister in good standing.

12. When the Church of England Bishop has received the completed self-declaration form regarding Child Protection, he should retain this on file. The Department of Health is unable to process the particulars, since they fall outside the scope of the British system. If the Bishop is content, a formal written offer of appointment may then be extended, subject to the grant of the respective Archbishop's Permission, setting out the stipend and other financial arrangements (including the assignation of fees) together with requirements regarding Declaration and Oaths. (The oath of allegiance can be dispensed for those of non-British nationality).

13. When the applicant accepts the post, the Bishop then forwards the application to the Provincial Registrar, accompanied by a letter indicating his own willingness to license the priest concerned to the post in question, and indicating the intended duration.

14. When the respective Archbishop's Permission is received at the Diocesan Registry, arrangements for the licensing and welcome can go ahead in the normal way.

15. The question of pension arrangements needs to be carefully discussed with the DBF and Pensions Board. Normally clergy in a stipendiary post are included in the Church of England Pensions Board pensions scheme. However, where the stay is under 24 months no pension entitlement will accrue and, if single, the only benefit in the event of death during their stay would be life assurance cover. If married, a spouse's pension would be paid. It is not possible for the Pensions Board to give a reduced rate of contribution in cases where the only benefit is life assurance. The dates of birth and ordination need to be notified to the Pensions Board. There is generally every advantage in a Porvoo priest remaining within his/her own pensions scheme if possible.

16. Information on double taxation may be obtained from the clergy payroll section of the Church Commissioners. Current arrangements allow that if a person is in England for 183 days (six months) or more, then generally UK tax status applies. However, if the person is visiting from a country with which the UK has a 'Double Taxation Agreement' then he/she could apply to pay back tax in that country.

17. When arrangements have been finalised, it is helpful if the Bishop notifies the European Secretary of the Council for Christian Unity who, in turn, can then keep the Porvoo Panel and the relevant Lutheran chaplains in London informed..

18. The Diocese in Europe's normal appointments procedure would be followed — including application under the 1967 Measure — where a licence is required for ministry in a wholly Church of England context, or in conjunction with ministry in one of the Nordic-Baltic Churches or any of their diaspora congregations elsewhere in Continental Europe.

The completed self-declaration form relating to Child Protection must be supported by a document indicating no criminal record, or a transcript of criminal record, or a Certificate of Good Conduct which will normally be available on application to local police or other official authority. The Bishop in Europe's senior staff would review to what extent sections 15-17 of these Guidelines are relevant to the circumstances of the particular appointment.

5. Called to Full Communion (The Waterloo Declaration), 2001.

as approved by the National Convention of the Evangelical Lutheran Church in Canada and the General Synod of the Anglican Church of Canada Waterloo Ontario 2001.

Introduction

1. In John 17:20-21, our Lord prayed that Christians might all be one so that the world might believe in Christ through the witness of our unity. The 20th century has given rise to an increase of movements which seek to give visible expression to this prayer. Christians have begun to see the fulfillment of Jesus' words as they unite in action to address the needs of local and global communities. The churches themselves have entered into partnerships at every level, from the neighbourhood to the world, through councils of churches, theological dialogues, and covenants which have fostered greater understanding in the search for common witness and visible unity. All these steps have moved us towards a healing of ancient divisions, including those which occurred during the 16th century in Europe.
2. Lutherans and Anglicans are graced in that we can respond to this prayer for unity without having experienced formal separation from one another. We share a common heritage as catholic churches of the Reformation. Despite our previous geographic, linguistic and cultural differences, in recent years we have discovered in one another a shared faith and spirituality. This discovery has called us into a search for more visible unity in mission and ministry.
3. On the international scene, the Lutheran World Federation and the Anglican Consultative Council have participated in a number of formal discussions since 1970. These conversations were encouraged by the international multilateral consensus document *Baptism, Eucharist and Ministry* (Faith and Order, WCC, 1982). In 1987 an international Lutheran Anglican consultation on *episcopate* was held in Niagara. From this gathering some specific recommendations were directed to the churches for their discussion. Consideration of these recommendations led in northern Europe to *The Porvoo Common Statement* (1993), and in the United States to the *Concordat of Agreement* (1997).
4. In 1983 Canadian Lutherans and Anglicans met to discuss the implications for the churches in Canada of the ongoing dialogue between Lutherans and Episcopalians in the United States. From this meeting emerged the Canadian Lutheran Anglican Dialogue (CLAD), whose first series of meetings led to the publication of its *Report and Recommendations*, (April 1986). This report gave impetus to the desire of the two churches to produce an agreement which could provide a basis for the sharing of the eucharist between our churches.
5. A second series of discussions (CLAD II) resulted in the agreement *Interim Sharing of the Eucharist*, which was approved in 1989 by the National Convention of the Evangelical Lutheran Church in Canada and by the General Synod of the Anglican Church of Canada. In that agreement, we
 - i. agreed to live in a relationship of interim eucharistic sharing;

- ii. acknowledged one another as churches in which the Gospel is preached and taught;
 - iii. committed ourselves to share a common life in mission and service, to pray for and with one another, and to share resources.
6. The experience of six years of interim eucharistic sharing led the two churches in 1995 to take further steps towards full communion. The National Convention and the General Synod renewed the Interim Eucharistic Sharing Agreement until 2001 and further agreed to request all neighbouring congregations
- i. to undertake joint projects and celebrate the eucharist together annually;
 - ii. to receive one another's lay members, when moving from one church to the other with the same status (baptized/communicant/confirmed) which they held in their first church;
 - iii. to foster the development and implementation of agreements which permit an ordained minister (priest or pastor) to serve the people of both churches, including presiding at the sacraments of the Church, wherever, and according to whichever rite, the local bishop of each church deems appropriate ;
 - iv. to develop structures with the purpose of evaluating and improving the bishop's ministry through collegial and periodic review;
 - v. to call for our two churches to move towards full communion by 2001.
7. Our two churches are using the following definition of full communion.

"Full communion is understood as a relationship between two distinct churches or communions in which each maintains its own autonomy while recognizing the catholicity and apostolicity of the other, and believing the other to hold the essentials of the Christian faith. In such a relationship, communicant members of each church would be able freely to communicate at the altar of the other, and there would be freedom of ordained ministers to officiate sacramentally in either church. Specifically, in our context, we understand this to include transferability of members; mutual recognition and interchangeability of ministries; freedom to use each other's liturgies; freedom to participate in each other's ordinations and installations of clergy, including bishops; and structures for consultation to express, strengthen, and enable our common life, witness, and service, to the glory of God and the salvation of the world."

8. In 1997, the House of Bishops of the Anglican Church of Canada and the Council of General Synod each agreed that they were prepared to view the historic episcopate in the context of apostolicity articulated in *Baptism, Eucharist and Ministry* (paras. 29, 34-38, 51-53), *The Niagara Report* (paras. 53, 94), and *The Porvoo Common Statement* (paras. 34-57).
9. In that same year, the National Convention of the Evangelical Lutheran Church in Canada agreed that it was "prepared to take the constitutional steps necessary to understand the installation of bishops as ordination".

10. In a spirit of thanksgiving for what God has already accomplished in us, and with confidence and hope for what God has prepared for the whole Church, we believe we can now act in visible witness to the unity which is ours in Jesus Christ. We are taking the next step in our common pilgrimage of faith in the belief that it will be of service to a greater unity.

Therefore, we, the Evangelical Lutheran Church in Canada and the Anglican Church of Canada make the following acknowledgements, affirmations, declarations and commitments:

A. Acknowledgements

1. We acknowledge that in each church "the Gospel is preached in its purity and the holy sacraments are administered according to the Gospel" (*Augsburg Confession VII*), that in each church "the pure Word of God is preached, and the Sacraments ... duly ministered according to Christ's ordinance in all those things that of necessity are requisite to the same." (*Article XIX of The Thirty-Nine Articles*), although "we recognize that the Church stands in constant need of reform and renewal" (*The Niagara Report*, para 67).
2. We acknowledge that both our churches share in the common confession of the apostolic faith. (*Report and Recommendations*, CLAD I, 1986)
3. We acknowledge that personal, collegial and communal oversight (episcopate) is embodied and exercised in both churches in a variety of forms, in continuity of apostolic life, mission and ministry. (*The Porvoo Common Statement*, 1993)
4. We acknowledge that one another's ordained ministries are given by God as instruments of divine grace and as possessing not only the inward call of the Spirit, but also Christ's commission through his body, the Church (*An Appeal to all Christian People*, Lambeth Conference, 1920); and that these ministries are the gifts of God's Spirit to equip the people of God for the work of ministry (*Ephesians 4:11-12*).
5. We acknowledge that the episcopal office is valued and maintained in both our churches as a visible sign expressing and serving the Church's unity and continuity in apostolic life, mission and ministry. (*The Porvoo Common Statement*, 1993)

B. Affirmations

In the light of the above acknowledgements, we make the following affirmations:

1. The Anglican Church of Canada hereby recognizes the full authenticity of the ordained ministries of bishops and pastors presently existing within the Evangelical Lutheran Church in Canada, acknowledging its pastors as priests in the Church of God and its bishops as bishops and chief pastors exercising a ministry of *episcopate* over the jurisdictional areas of the Evangelical Lutheran Church in Canada in which they preside.
2. The Evangelical Lutheran Church in Canada hereby recognizes the full authenticity of the ordained ministries of bishops, priests, and deacons presently existing within the Anglican Church of Canada, acknowledging its priests as pastors in the Church of God and its bishops as bishops and chief pastors exercising a ministry of *episcopate* over the jurisdictional areas of the Anglican Church of Canada in which they preside.

3. The Anglican Church of Canada and the Evangelical Lutheran Church in Canada affirm each other's expression of episcopal ministry as a sign of continuity and unity in apostolic faith. We thus understand that the bishops of both churches are ordained for life service of the Gospel in the pastoral ministry of the historic episcopate, although tenure in office may be terminated by retirement, resignation or conclusion of term, subject to the constitutional provisions of the respective churches.

C. Declaration of Full Communion

We declare the Evangelical Lutheran Church in Canada and the Anglican Church of Canada to be in full communion.

D. Commitments

As churches in full communion, we now commit ourselves:

1. to welcome persons ordained in either of our churches to the office of bishop, priest/pastor or deacon to serve, by invitation and in accordance with any regulations which may from time to time be in force, in that ministry in the receiving church without re-ordination;
2. to invite one another's bishops to participate in the laying on of hands at the ordination of bishops as a sign of the unity and continuity of the Church, and to invite pastors and priests to participate in the laying on of hands at the ordination of pastors or priests in each other's churches;
3. to consult with one another regarding developments in our understanding of the ministry of all the baptized, including the ordained ministry;
4. to work towards a common understanding of diaconal ministry;
5. to establish appropriate forms of collegial and conciliar consultation on significant matters of faith and order, mission and service;
6. to encourage regular consultation and collaboration among members of our churches at all levels, to promote the formulation and adoption of covenants for common work in mission and ministry, and to facilitate learning and exchange of ideas and information on theological, pastoral, and mission matters;
7. to establish a Joint Commission to nurture our growth in communion, to coordinate the implementation of this Declaration, and report to the decision-making bodies of both our churches;
8. to hold joint meetings of national, regional and local decision-making bodies wherever practicable, and
9. to continue to work together for the full visible unity of the whole Church of God.

Conclusion

We rejoice in our Declaration as an expression of the visible unity of our churches in the one Body of Christ. We are ready to be co-workers with God in whatever tasks of


mission serve the Gospel. We give glory to God for the gift of unity already ours in Christ, and we pray for the fuller realization of this gift in the entire Church.¹¹²⁸

¹¹²⁸ Signed by the National Bishop of The Evangelical Lutheran Church in Canada and the Primate of The Anglican Church of Canada Wording in sections A.2, 3, 4, 5; and C.1, 2, 3, 4, 5 is derived from The Porvoo Common Statement (October, 1992) © David Tustin and Tore Furberg. Published in 1993 by Church House Publishing for the Council for Christian Unity of the General Synod of the Church of England. Wording in section B is derived from Concordat of Agreement between the Episcopal Church and the Evangelical Lutheran Church in America, rev. January 1997, published for study by the Office of Ecumenical Relations of the Episcopal Church. (Anglican Church of Canada posting of Waterloo Declaration and commentary) Established September, 1995. Page revised May 17, 2004. Copyright © 2004 Evangelical Lutheran Church in Canada.

6. Permission under Canon B43.9 in the Diocese of Ripon and Leeds, 2003.



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 THE CHURCH
OF ENGLAND

DIOCESE OF
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Methodist and Anglican Ministry in Churches within the Diocese of Ripon & Leeds

1. The Methodist - Anglican Covenant, signed on November 1st 2003 encourages us to work together wherever possible in the cause of God's Kingdom.
2. The Covenant will be fulfilled where churches and parishes develop their planning together and take every opportunity to demonstrate their unity in the gospel. (see Resolutions of Diocesan and Leeds District Synods on November 15th 2003).
3. The Covenant will also be demonstrated where Methodist and Anglican ordained and licensed ministers share worship together and become known in each other's congregations.
4. Under Canon B43(9) the incumbent, PCC and Bishop may invite members of another Church to 'take part in joint worship with the Church of England' on specified occasions.
5. This permission applies to all Churches to which the Canon refers. The Covenant between the Methodist Church and the Church of England creates a new situation in which we are called to a still closer relationship.
6. Because of this I am willing to grant permission for Methodist Ministers to be invited to conduct worship, including presiding at Holy Communion, in Church of England Churches in this diocese provided that:
 - a) I am asked by the incumbent, supported by a resolution of the PCC, to grant such permission.

- b) The permission is for a named minister (or ministers) working in that area. The permission will be for a period of three years and applies to all acts of worship during that period, after which I anticipate that it may be renewed. For legal reasons this permission does not extend to conducting weddings.
7. A list will be kept at Bishop Mount of the parishes which have received permission under this arrangement and of the Methodist Ministers concerned.
 8. In these parishes Methodist Local Preachers may be invited to conduct worship regularly (not including presidency at Holy Communion) without further permission from me. Readers likewise may conduct worship regularly in the Methodist churches concerned without my further permission
 9. It is appropriate that in those parishes the Methodist Circuit should be requested to ask the Methodist Conference to confer 'Authorised to Minister' status on the Church of England clergy concerned. I will then give my consent under Canon B43(4) provided the Methodist church involved is geographically within the benefice of the priest concerned.
 10. Incumbents are invited to write to me in accordance with Para 6 above when this has been discussed with both Methodists and Anglicans locally and the right way forward discerned for that particular locality.

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