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The Ecclesiastical Common Law: A Quarter-century Retrospective

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This article reviews developments in ecclesiastical case law (interpreted widely) over the 25 years since the Ecclesiastical Law Journal *was founded, focusing on four areas, in each of which, in the author's view, there have been significant developments: freedom of religion; the constitution of the Church of England; the protection of listed buildings; liturgy, ritual and doctrine. It notes the role of the* Journal *in reporting consistory court decisions and thus ensuring greater consistency of decision-making. It concludes by mentioning some of the leading cases in various other areas of ecclesiastical law.*

The *Ecclesiastical Law Journal*'s silver jubilee is an appropriate time to look back at the case law of that period. What have the principal themes been? Is there any particular direction in the tide? When I use the word ecclesiastical, I do so widely. The exercise is necessarily inexact. The issues that are litigated will often reflect the state and content of legislation. Thus the dearth of case law relating to clerical misconduct for the majority of the period resulted from the disarray into which the consistory court's disciplinary jurisdiction under the Ecclesiastical Jurisdiction Measure 1963 (EJM) fell prior to its repeal by the Clergy Discipline Measure 2003 (CDM).[1] Some of the most intriguing themes to emerge during the period are the direct result of the Human Rights Act 1998 (HRA) and European Union-inspired non-discrimination legislation, culminating in the Equality Act 2010.[2] Furthermore any selection of themes is necessarily subjective.[3]

According to the Index to the Law Reports, in the period from January 1987 to August 2011 73 cases were reported under the heading 'Ecclesiastical law'; there

1 For the litigation history, including two appeals to the Court of Arches, see *Tyler v UK* (Application 21283/93) (1994) EComHR. There have only been two appellate decisions under the CDM: *In re King* [2009] 1 WLR 873; [2009] PTSR 431, Ch Ct York and *In re Gilmore* (2011) 13 Ecc LJ 382, Court of Arches.

2 The first consistory court decision of which I am aware that considers the application of the Equality Act 2010 to the provision of facilities for the disabled is *Re All Saints' Church, Sanderstead*, (2011) 14 Ecc LJ 144, Southwark Cons Ct. An earlier landmark decision in relation to such provision, *Re Holy Cross, Pershore* [2002] Fam 1, (2002) 6 Ecc LJ 86, Worcester Cons Ct, has the unusual distinction that its key reasoning in para 105 was later adopted by the Court of Appeal.

3 And, of course, any views expressed by the author in this article are expressed in his personal capacity only.

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is no significant numerical difference between the earlier and later parts of the period. There is an element of imprecision, because the Law Reports define ecclesiastical law more narrowly than I have done, largely (though not entirely) confining it to consistory court cases; and some important decisions do not reach the Law Reports for a variety of reasons. Nonetheless this suggests that the ecclesiastical common law is still very much alive – and, dare I say it, well.

It is beyond the scope of this article to consider the contribution made by this *Journal* to the development of the ecclesiastical common law. The *Journal* has provided a forum for discussion of many issues, some (though relatively few) of which arise in litigation from time to time.[4] Without doubt, the summaries of cases in the *Journal* have rendered accessible many unreported cases that would otherwise have passed unnoticed, to the great benefit of an evolving, but coherent and consistent, jurisprudence.

I shall consider four areas, in each of which there have been significant developments. No particular significance attaches to the order in which they are treated. These are: freedom of religion; the constitution of the Church of England; the protection of listed buildings; and liturgy, ritual and doctrine.

FREEDOM OF RELIGION

Until recently (and with the exception of the mid-seventeenth century) no one would have contemplated that freedom of religion might need to be invoked to protect the expression of religious beliefs by members of the Church of England, for such freedom was inherent in its position as the established church. In the past, freedom of religion was invoked to claim freedom of religion for other Christian believers (dissenters and, later, Roman Catholics as well), extending to freedom for other religions (in particular Jews) and eventually to freedom for non-believers also.

The expanding embrace of freedom of religion was given legislative expression in at least three ways during the period 1987–2011. The first of these was the incorporation into domestic law, through the HRA, of Article 9 of the European Convention on Human Rights (ECHR), bolstered by the requirement, in section 13(1) of the HRA, that in any court's determination of any question affecting the exercise by a religious organisation of Article 9, 'it must have particular regard to the importance of that right'.[5] Second, the provision in regulation 3 of the Employment Equality (Religion or Belief)

4 For examples of cross-fertilisation see W Adam, 'Changing Approaches to the Bishopsgate Questions' (2003) 7 Ecc LJ 215, cited in *In re St Mary, Longstock* [2005] All ER (D) 182, Winchester Cons Ct; and P Petchey, 'Exhumation Reconsidered' (2001) 6 Ecc LJ 122, cited in *Re Blagdon Cemetery* [2002] Fam 299.

5 According to J Rivers, *The Law of Organized Religions* (Oxford, 2010), p 339, 'there is no evidence that [s 13(1)] has had any effect at all on the post-Human Rights Act case-law'.

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Regulations 2003 stipulates that a measure that applies equally to the workforce regardless of individual religious affiliation is, nevertheless, indirectly discriminatory if it 'puts or would put persons of the same religion or belief [as the claimant] at a particular disadvantage when compared with other persons'. The third expansion came through the protection afforded to 'religion or belief' by (inter alia) sections 13 and 19 of the Equality Act 2010, and the broad definition given to that phrase by section 10.

Article 9 was successfully (if controversially) applied in two exhumation cases, to the benefit of Jewish and humanist petitioners.[6] Its principal application has, however, been in the secular courts. A wide interpretation of Article 9 was provided by Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment*: 'Freedom of religion protects the subjective belief of an individual … Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.'[7] Therefore the claimant parents' belief that mild corporal punishment was necessary and appropriate, based on fundamental Christian principles, fell within Article 9(1), though the statutory ban was justified under Article 9(2) as a proportionate measure to safeguard the rights of children. There was nothing surprising, or disturbing for most people, about this outcome. Rather more unease should attach to the conclusion in *R (Begum) v Denbigh High School Governors*.[8] There a schoolgirl challenged her school's restriction on the wearing of the jilbab. While her choice of clothing was recognised as constituting a manifestation of religion under Article 9(1), the school's policy was held to be a justifiable interference. This was conventional liberalism eating away at Article 9.

There has followed a stream of cases 'where the tension has been between an individual's Christian beliefs and discrimination law as enacted by Parliament'.[9] With two notable exceptions, involving a Sikh schoolgirl and a Muslim prisoner,[10] freedom of religion has been consistently trumped by non-discrimination considerations. Examples are the Jewish school case,[11] where a divided Supreme Court held that there had been unlawful discrimination on racial grounds; the case of the Islington registrar, who was disciplined for refusing to conduct civil partnership ceremonies – her objection 'was based on her view of marriage, which was not a core part of her religion', and should not be allowed 'to override Islington's concern that

6 *In re Durrington Cemetery* [2001] Fam 33 Chichester Cons Ct; *In re Crawley Green Road Cemetery, Luton* [2001] Fam 308 St Albans Cons Ct.
7 [2005] UKHL 15; [2005] 2 AC 246 at para 22.
8 [2006] UKHL 15; [2007] 1 AC 100.
9 *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin) *per* Munby LJ.
10 *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* [2008] EWHC 1865; [2008] ELR 561 (restriction on Sikh girl's wearing a 'Kara' (bangle) held not to be justified); *R (Imran Bashir) v Independent Adjudicator* [2011] EWHC 1108 (Admin) (prison authorities not justified in interfering with Muslim prisoner's religious fasting, even though it prevented him from providing a urine sample required for drug testing).
11 *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728.

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all its registrars manifest equal respect for the homosexual community as for the heterosexual community';[12] that of the relationship counsellor, who refused to counsel same-sex couples – it was held that to give effect to his position 'would necessarily undermine Relate's proper and legitimate policy';[13] that of the British Airways employee,[14] prohibited from wearing a small cross on a necklace – it was held that she had not suffered indirect discrimination on the grounds of religious belief, and that, even if she had, BA's policy was justified; and most recently the case of potential foster carers, concerned lest they be barred because of their opposition to homosexuality on religious grounds – where such attitudes were held to be 'relevant when considering an application for approval'.[15]

The stark point has been reached where, notwithstanding the fact that the Church of England is the established church, protected in part by the coronation oath[16] and with (alone of religions, and for the time being) placement for Lords Spiritual in the legislature, a divisional court has bluntly stated:

> ... the laws and usages of the realm do not include Christianity, in whatever form. The aphorism that 'Christianity is part of the common law of England' is mere rhetoric; at least since the decision of the House of Lords in *Bowman v Secular Society Limited* [1917] AC 406 it has been impossible to contend that it is law.[17]

Of the protection afforded to religious belief by Article 9, the same court stated, in the light of a case law of high authority, that:

> Article 9 only provides a 'qualified' right to manifest religious belief and ... interferences in the sphere of employment and analogous spheres are

12 *Ladele v Islington LBC* [2009] EWCA Civ 1357; [2010] 1 WLR 955 at paras 52 and 55 *per* Lord Neuberger MR.

13 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 at para 27 *per* Laws LJ. The outcome in *McFarlane* was probably inevitable in the light of the reasoning in *Ladele*; but see the perceptive critique in respect of both cases in R Sandberg, 'Laws and religion: unravelling *McFarlane v Relate Avon Ltd*', (2010) 12 Ecc LJ 361–370, including the observation that Article 9 is rendered 'impotent by allowing other Convention rights to "trump" it with ease' (p 365).

14 *Eweida v British Airways* [2010] EWCA Civ 89; [2010] ICR 890. The decision of the Court of Appeal is subjected to a rigorously effective critique in N Hatzis, 'Personal religious beliefs in the workplace: how not to define indirect discrimination', (2011) MLR 287–305. See also the observation, at an earlier stage of the proceedings, in L Vickers, 'Indirect discrimination and individual belief: *Eweida v British Airways plc*' (2009) 11 Ecc LJ 201, that 'if our law is to provide adequate protection against religious discrimination, then it should protect the manifestation of individual beliefs'.

15 *R (Johns) v Derby County Council* [2011] EWHC 375 (Admin) at para 109 *per* Munby LJ. The case of the claimants was 'couched in extravagant rhetoric', inviting the judicial riposte it received (see especially paras 32–36). It is unfortunate that recent cases on religious freedom have concentrated on the divisive topics of civil partnership and same-sex relationships.

16 Coronation Oaths Act 1688, s 3.

17 *R (Johns) v Derby County Council* at para 39. In *R v Taylor* (1676) 1 Vent 293, Sir Matthew Hale LCJ said that 'Christianity is parcel of the laws of England'.

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> readily found to be justified, even where the members of the particular group will find it difficult in practice to comply.[18]

This of course stands in marked contrast to the view expressed by Judge Bonello in his exceptionally outspoken Concurring Opinion in *Lautsi v Italy*:

> It is the right for each individual State to choose whether to be secular or not, and whether, and to what extent, to separate Church and governance. What is not for the State to do is to deny freedom of religion and of conscience to anyone.[19]

Views can legitimately differ as to the merits or otherwise of a wholly secular state, and as to whether this emasculation of Article 9 that appears to have taken place in our domestic law is legally justified or otherwise desirable.[20] Subject to outstanding applications to Strasbourg, however, the trend appears unstoppable.[21]

THE CONSTITUTION OF THE CHURCH OF ENGLAND

Useful clarification, with likely long-term effects, has been provided by the higher courts in litigation concerned with topics as diverse as the ordination of women to the priesthood and the enforcement of chancel repair liability. On the former topic, Jowitt J remarked:

> The courts could have nothing to say about a decision to ordain woman [sic] made by other Christian denominations. That they have done so in the case of the Church of England is simply as a consequence of its establishment and the laws which govern that establishment.[22]

It arose in this way. Under the Church of England Assembly (Powers) Act 1919 (the Enabling Act), the Church Assembly (reconstituted as the General Synod in

18 *R (Johns) v Derby City Council* at para 102.

19 [2011] ECtHR 30814/06 at para 2.3. By a majority the Grand Chamber upheld the display of crucifixes in Italian schoolrooms. For very different perspectives see P Ronchi, 'Crucifixes, margins of appreciation and consensus: the Grand Chamber ruling in *Lautsi v Italy*', (2011) 13 Ecc LJ 287–297, and J Witte, 'Lift high the cross? An American perspective on *Lautsi v Italy*', (2011) 13 Ecc LJ 341–343.

20 See R Sandberg, 'The right to discriminate', (2011) 13 Ecc LJ 157–181; J Dingemans, 'The need for a principled approach to religious freedoms', (2010) 12 Ecc LJ 371–378; and Rivers, *The Law of Organised Religons*, pp 316–347.

21 Applications to the ECtHR in *Ladele* (Application no 51671/10), *McFarlane* (Application no 36516/10), *Eweida* (Application no 48420/10) and *Chaplin* (Application no 59842/10) have been 'communicated' to the UK government for its observations. The facts in *Chaplin* were very similar to those of *Eweida*.

22 *R v Attorney-General ex parte Reverend Paul Stewart Williamson* [1997] EWHC Admin 691, *per* Jowitt J at para 3.

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1970) was given the right to pass Measures having 'the force and effect of an Act of Parliament', subject to Royal Assent, which cannot be given until both Houses of Parliament have agreed to their submission.[23] 'Thus parliamentary supremacy remains a reality; but in practice the day-to-day legislation of the Church is initiated and carried through by the Church itself'.[24] Church of England Measures are therefore a very superior form of delegated legislation,[25] transformed on receipt of the Royal Assent into the equal of primary legislation, by having the full force of statute. To what extent, if at all, can they be challenged?

This jurisdictional issue arose in connection with what became the Priests (Ordination of Women) Measure 1993.[26] The first challenge to the Measure was dismissed by a Divisional Court in late October 1993, no decision being reached on the jurisdictional aspect.[27] This therefore leaves open, in the case of future Measures, the possibility of challenge brought and heard prior to the Royal Assent.

On 4 February 1994 the Revd Paul Williamson issued an Originating Summons that was eventually struck out on 11 November 1994, a decision upheld on appeal two years later.[28] Then, on 11 February 1994, the same clergyman applied for the more appropriate remedy of judicial review, seeking a declaration that Canon C4B, then in draft, would, if promulgated, be illegal. Leave having been refused, the matter came before the Court of Appeal on 1 March 1994.

As was to be expected, but it is welcome to have the clarification, there can be no challenge to a Measure following the Royal Assent. As held by Sir Thomas Bingham MR:

> The language [in section 4 of the Enabling Act] 'shall have the force and effect of an Act of Parliament' is in my judgment to be treated as saying that a Measure which goes through the legislative process and receives

23 Church of England (Assembly) Powers Act 1919, s 4.

24 T Briden and B Hanson, *Moore's Introduction to English Canon Law* (London, 1992), p 7.

25 It may be more accurate to describe the Enabling Act as a 'new way of enacting primary legislation' rather than as delegated, or sub-primary, legislation: see *R (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 in relation to the legal status of truncated procedures under the Parliament Act 1911.

26 The relevant dates were: 12 July 1993: the Ecclesiastical Committee determined to lay the draft Measure before Parliament, which was done later that month; 29 October and 2 November 1993: the requisite resolutions of the House of Commons and the House of Lords were passed approving the Measure; 5 November 1993: the Measure received the Royal Assent; 1 February 1994: the Measure came into force pursuant to an order of both Archbishops appointing that day for that purpose; 22 February 1994: Canon C4B was promulgated by General Synod to implement the Measure.

27 *R v Ecclesiastical Committee of both Houses of Parliament ex parte The Church Society* (unreported, 28 October 1993). The challenge failed on the substantive point, it being held that the Measure was within s 3(6) of the Enabling Act.

28 *Williamson v Archbishop of Canterbury* and others [1996] EWCA Civ 600.

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> the Royal Assent is to be treated to all intents and purposes as if it were an Act of Parliament. I quite agree that it is not in the strictest sense an Act of Parliament, but it is to be treated for all these purposes as if it were. From that it follows that once the Measure has been duly enacted by the Houses of Parliament, and has received the Royal Assent, it enjoys the invulnerability of an Act of Parliament and it is not open to the courts to question *vires*, or the procedure by which it was passed, or to do anything other than interpret it.[29]

The applicant's arguments before the Court of Appeal in a later hearing in 1996 partly relied on the terms of section 3 of the Coronation Oaths Act 1688 and sections 3 and 5 of the Union with Scotland Act 1706 about the maintenance of the established church. On this aspect Morritt LJ said:

> The Church of England is and at all material times has been an established church. As such its doctrines and government were and are susceptible to change by the due processes of law … The references in the Coronation Oath to 'the Protestant Reformed Religion established by law' and 'the settlement of the Church of England and the doctrine, worship, discipline, and government thereof, as by law established in England' evidently refer to such religion, church, doctrine, worship, discipline and government as so established from time to time, thereby admitting of change in accordance with the law by which it is established. It is not disputed that the Measure in question received the Royal Assent and that the resolutions of both houses of Parliament as required by section 4 of the 1919 Act were duly obtained. The supremacy of the Queen in Parliament is a fundamental principle of English law. It is a necessary corollary of such supremacy that the regularity of the consents necessary for the enactment of a statute is not justiciable in these courts.[30]

I do not interpret the final sentence as precluding judicial review of a draft Measure, provided that review takes place prior to the Royal Assent. Indeed, later in his judgment Morritt LJ repeated that the 1994 Court of Appeal decision 'establishes that a Measure *once passed* cannot be questioned as being ultra vires the 1919 Act', where the words I have italicised, in the context of the actual words used by the Master of the Rolls, can only refer to the granting of the Royal Assent.[31]

29 Ibid, p 5. The first Court of Appeal judgment (*R v Archbishops of Canterbury and York, ex parte Williamson*) is only reported in (1994) *Times*, 9 March, but the transcript is reproduced in the first edition of M Hill, *Ecclesiastical Law* (Butterworths, 1995) pp 77–81.

30 *Williamson v Archbishop of Canterbury*, p 7.

31 Ibid, p 11.

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Nor did it matter that the applicant was challenging Canon C4B rather than the Measure itself:

> . . . the terms of the Canon are specifically authorized by the Measure. To suggest that the Canon is in those circumstances devoid of legal effect, because of the prohibition in section 3 of the Suppression of Clergy Act 1533, is simply untenable. The effect of the Measure is pro tanto to override the Suppression of Clergy Act 1533 to the extent necessary to permit the ordination of women in accordance with the Canon specifically authorized by the Measure.[32]

Whereas the challenges to the ordination of women priests directly focused on the constitution of the Church of England, that issue must have been far from the mind of Aston Cantlow and Wilmcote with Billesley Parochial Church Council (PCC) when it started proceedings in the Stratford-upon-Avon County Court to establish the liability of two owners of rectorial property to contribute to the repair of the chancel of the parish church. Only on the lay rectors' initially successful appeal from the Chancery Division to which the case had been transferred, when the Court of Appeal treated the PCC as a public authority that had acted incompatibly with Article 1 of the First Protocol of the ECHR, taken together with Article 14, did the case take on a constitutional dimension.[33] Most unusually the Archbishops' Council provided financial backing to enable the PCC's appeal to be argued. The remarkable consequence is that the decision of a unanimous House of Lords,[34] reinstating the judgment for the PCC at first instance, was the first, and is still the leading, decision of the highest court on the meaning of 'public authority' in section 6 of the HRA. The decision takes some unravelling.

To the non-lawyer it might appear self-evident that the Church of England, as the established church in England, and with its legislative powers contained in the Enabling Act and the Synodical Government Measure 1969, is a 'public authority'. But, as Maitland famously remarked:

> I do not think we can for legal purposes define the Church of England as consisting of a body of persons, or as represented by a body of persons. It is no corporation, it is no self-governing body of persons, consequently it has

32 Ibid, p 8. I have omitted the words 'which has', which appear in the transcript in the first sentence after 'by the Measure'. In 1997 Williamson was declared a vexatious litigant. In this context, one notes Simon Brown LJ's comment, p 12: 'I express no view whatever on what the applicant contends to be the theological heresies arising. I say with confidence, however, that his submissions to this court were full of legal heresies'.

33 *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2001] EWCA Civ 713; [2002] Ch 51.

34 [2003] UKHL 37; [2004] 1 AC 546.

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> no rights and no duties. . .We may speak if we will of the church as a legal organization, but we must not think of it as of a legal person or as a definite body of persons.[35]

In *Aston Cantlow* Lord Rodger described 'the juridical nature of the Church [as,] notoriously, somewhat amorphous'.[36] Lord Hope, however, confirmed that 'the Church of England has no legal status or personality', and there is nothing to suggest he was alone in this view.[37] The House of Lords rightly considered that the relevant question under section 6 of the HRA was not whether the Church of England as a whole was a 'public authority' but rather whether a PCC, enforcing chancel repair liability, was one, whether a core authority, or a hybrid authority 'certain of whose functions are functions of a public nature'.[38]

Indubitably various parts of the Church of England have a legal identity and perform public functions. As Maitland pointed out:

> a clergyman of the Church of England in reading the service is performing a statutory duty . . . church services are statutory . . . The legal position of a clerk in the orders of the Church of England differs radically from that of the priest or the minister of any other religion. The one, we may say, has in the strictest sense of the term a legal status, the other has not. The duties of the clerk in holy orders are directly imposed upon him by law . . . and there are special courts which can enforce those duties.[39]

The House of Lords reached three clear conclusions in *Aston Cantlow*. First, their Lordships had no difficulty in agreeing that a PCC was not a core public authority, all of whose actions were those of a public authority, giving rise to duties under section 6(1) of the HRA. Second, all but one of their Lordships agreed that in enforcing chancel repair liability the PCC was engaged in a purely private act, 'seeking to enforce a civil debt'.[40] Therefore there could be no question of acting incompatibly with the Convention property rights of the lay rectors. Third, three of their Lordships concluded that in any event there had been no interference with the human rights of the lay rectors, who had no Convention right to be relieved of their liability.[41] On a fourth issue, no clear conclusion emerged as to whether any of a PCC's functions were such

35 F Maitland, *The Constitutional History of England* (Cambridge, 1950), p 526.
36 *Aston Cantlow*, at para 154.
37 Ibid, at para 61.
38 HRA, s 6(3)(b).
39 Maitland, *The Constitutional History of England*, pp 512 and 525.
40 *Aston Cantlow*, at paras 63–64 *per* Lord Hope; at para 16 *per* Lord Nicholls; at paras 89–90 *per* Lord Hobhouse; at para 171 *per* Lord Rodger. This part of the reasoning was critical to the later decision in *YL v Birmingham City Council* [2007] UKHL 27; [2008] AC 95.
41 *Aston Cantlow*, at para 91 *per* Lord Hobhouse; at para 72 *per* Lord Hope; at para 134 *per* Lord Scott.

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as to make it a hybrid public authority. Therefore that issue remains formally undecided, though it is reasonably safe to work on the basis that a PCC is never a public authority.[42]

The case is important in the longer term not for the narrow point that chancel repair liability can be enforced,[43] nor for its implications for PCCs more generally, but for three reasons of wider scope. First, the same argument – that 'the nature of the act is private' (the phrase used in section 6(5) of the HRA) – will be potentially available to all legal entities within the Church of England in appropriate cases. If the Court of Appeal's decision had stood, there was a real danger that clergy (including bishops), as well as organisations at diocesan and central level, would have been perpetually under challenge, merely for acting in ways that would be commonplace in the case of the acts of private persons.

Second, and as part of their reasoning on the 'public authority' question, two of their Lordships drew a distinction between those of a Church of England priest's functions that were 'governmental' or 'of a public nature' and those that are 'simply carrying out part of the mission of the Church' and 'certainly not public'.[44] Both placed performance of the marriage service within the former category, into which one of them also placed 'responsibility for … burials'. But both also placed normal 'conducting of services' and 'supervision of the liturgies used' into the latter private and non-governmental category. In a recent consistory court decision, the distinction thereby drawn has been held to have implications for the application of the disability discrimination provisions in the Equality Act 2010 to churches.[45] A priest celebrating Holy Communion was held not to fall within the ambit of section 29(7)(b) of the Equality Act, since the priest was not thereby exercising a public function.[46] There are several problems with this conclusion. First, their Lordships' attention was never directed to section 8 of the Sacrament Act 1547, by which a priest is not

42 Lord Hobhouse at ibid, para 88 and Lord Rodger at para 179 could identify no public function to make it a hybrid public authority; Lord Scott at paras 130–132 considered that the enforcement of chancel repair liability was itself a public function, for which purpose therefore the PCC was a hybrid public authority; Lord Nicholls at para 16 and Lord Hope at para 63 did not find it necessary to reach a conclusion, since the enforcement of chancel repair liability was a private act in respect of which it would not be a hybrid public authority in any event, as a result of HRA, s 6(5).

43 Subsequent litigation against the Wallbanks regarding the assessment of repair liability led to a satisfactory outcome for the Parochial Church Council, and for others in a similar position: *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* (2007) *Times*, 21 February.

44 *Aston Cantlow*, at para 86 *per* Lord Hobhouse; at para 170 *per* Lord Rodger.

45 *Re All Saints' Church, Sanderstead* at paras 59–74.

46 The Equality Act, s 29(7) provides that:

> a duty to make reasonable adjustments applies to –
> (a) a service-provider …
> (b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.

By section 31(4), 'A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998'.

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entitled without lawful cause to deny the sacrament to a person who devoutly and humbly desires it, nor to the common law right of a parishioner to attend divine worship in his parish church.[47] Therefore there is much to be said for the view (to which the chancellor 'absent authority … would incline') 'that a priest is fulfilling a function of a public nature in respect of the celebration of Holy Communion'.[48] Second, and in any event, given section 8 of the Sacrament Act 1547, it is arguable that a priest celebrating Holy Communion is a 'service-provider' for the purposes of section 29 of the Equality Act (whether or not the priest is also a exercising a public function), contrary to what the chancellor held.[49] Whatever the answers to these questions (which are likely to be lively ones as the Equality Act settles in), they illustrate the influence of the *Aston Cantlow* case.

Third, there may be occasions when legal entities within the Church of England wish to invoke the protection of the ECHR themselves against other public authorities, principally (but not exclusively) under Article 9, by bringing (or threatening) proceedings themselves or relying on the Convention rights in legal proceedings, including those brought against them by a public authority.[50] Such reliance can only be made by a person 'if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that Act'.[51] Article 34 limits applications to 'any person, non-governmental organisation or group of individuals claiming to be [a] victim'. Thus it was important to ensure that scope was left to argue that Church of England entities could in appropriate circumstances be 'non-governmental organizations', and that there was no blanket disapplication of Convention rights, as is the case with local authorities.[52]

In short, the *Aston Cantlow* litigation marked a significant landmark in the constitutional protection of the Church of England, albeit in respect of only some aspects of its functions.

THE PROTECTION OF LISTED BUILDINGS

It is hard now to recall the days before the making of the Faculty Jurisdiction (Amendment) Rules 1987 and 1989, the passing of the Care of Churches and

47 *Cole v Police Constable 443A* [1937] 1 KB 316 at 333. In *Aston Cantlow* at para 86 Lord Nicholls mentioned 'that parishioners have certain rights to attend church services *and* in respect of marriage and burial services' [emphasis added].
48 *Re All Saints Church, Sanderstead*, at para 66.
49 Ibid, at paras 62–63.
50 HRA 1998, ss 7(1)(a) and (b), and (6).
51 Ibid, ss 7(1) and (7).
52 '… a local authority cannot bring itself within the definition of a "non-governmental organisation"': *R (Westminster City Council) v Mayor of London* [2002] EWHC 2440 (Admin); [2003] LGR 611 at para 96 *per* Maurice Kay J.

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Ecclesiastical Jurisdiction Measure 1991 and finally the revision of the Faculty Jurisdiction Rules in 1992, all stemming from the 1984 Report of the Faculty Jurisdiction Commission. The first and second editions of Newsom's *Faculty Jurisdiction of the Church of England* in 1988 and 1993 straddle the changes. As stated in the latter:

> Among the changes ... are provisions designed to make sure that the public interest in churches, as part of the aesthetic possessions of the nation, is properly attended to by the consistory courts. These provisions give more opportunities for informed critics from outside the parish to comment on proposals which they think will affect adversely the aesthetic appearance of a church, while leaving the decision of each question firmly in the hands of Her Majesty's ecclesiastical courts, where it has always been ...
>
> Aided by these new provisions, it remains for all concerned to ensure that the faculty jurisdiction is effectively enforced, lest Parliament think it necessary to secure the public interest in churches by removing or modifying the ecclesiastical exemption.[53]

In the same context, Newsom warned against excessive conservatism:

> ... development is essential to life, and insights and aesthetic tastes vary as the years pass. In a church change is essential as liturgical patterns and understandings evolve. Few old churches look today as they did in the seventeenth or eighteenth centuries. But perhaps rather too many do look as they looked at the end of the nineteenth century, since public opinion, which is intensely conservative, has been brought to bear on those responsible for churches more than it used to be.

This 25-year period has been one when the evangelical wing of the Church of England has been more prominent than others, with its greater emphasis on teaching, group music-making and congregational participation.[54] Latterly the vogue has been for Fresh Expressions, even for Messy Church,[55] along with a widespread request for flexibility of layout and for user-friendliness within

53 G Newsom *Faculty Jurisdiction of the Church of England* (London, 1992), p 10.

54 For example, in *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217, Southwark Cons Ct, the Area Bishop of Woolwich gave evidence that the concept of a robed choir at that church was 'otiose and anachronistic', as did the vicar that 'coffee after the services and relaxed chat have proved over the years to be of inestimable value in making newcomers feel at home and willing to return'.

55 Fresh Expressions encourages new forms of church for a fast-changing world, working with Christians from a variety of denominations and traditions. Messy Church is a core ministry of the Bible Reading Fellowship, with some 100,000 people attending Messy Church sessions in 2011.

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churches. How have the ecclesiastical courts reacted to the challenge posed to listed churches?[56]

There have been two clear strands in the cases. The first has been that of equivalence, seeking to ensure that the consistory court is as stringent in its approach as secular listed building control would be. Newsom credits the origins of this approach to remarks of Boydell Ch in *Re St Mary's, Banbury*:[57]

> This is a grade A listed building and any proposal to alter the structure of such a building must be approached with the same care and be subject to the same detailed consideration as would be necessary if churches were to lose their ecclesiastical immunity and if, therefore, this were an application for listed building consent pursuant to the provisions of the Town and Country Planning Act 1971.[58]

Reference was made in *In re St Stephen's, Walbrook* to Department of Environment Circular No 23/77, *Historic Buildings and Conservation Areas: policy and procedure*,[59] and both Sir Ralph Gibson and Sir Anthony Lloyd favoured an approach of 'ensur[ing] that churches of special architectural or historic interest are as fully protected in the interest of the general public as are secular buildings in the secular context'.[60] As the Court of Arches observed in *In re St Luke the Evangelist, Maidstone*,[61] referring to the replacement Circular No 8/87, 'the essential and difficult balancing exercise' that has to be made in exercise of the faculty jurisdiction is, for secular listed buildings, 'the same balancing exercise'. This was particularly so when references to 'necessary' and 'need', hitherto absent as criteria for changes affecting the character of secular listed buildings, appeared for the first time in Circular No 8/87.[62] The same theme of following secular planning guidance was extended to archaeological remains by the Court of Arches.[63]

56 For a perspective as at the turn of the century see S Cameron, 'Re-ordering historic churches', (2001) 6 Ecc LJ 26–35.

57 Newsom, *Faculty Jurisdiction*, p 323.

58 [1985] 2 All ER 611 Oxford Cons Ct at 618. Boydell Ch soon after appeared as leading counsel for the successful appellant in *In re St Stephen's, Walbrook* [1987] Fam 145 where a similar issue arose.

59 Ibid, at 173 *per* the Bishop of Chichester.

60 Ibid at 192. See also p 198. The Court of Ecclesiastical Causes Reserved expressly rejected a higher test of 'necessity' in circumstances where 'Listed building consent is given every day in ordinary cases which fall short of "clearly proved necessity"', *per* Sir Anthony Lloyd at 198. In *In re St Mary's, Banbury* [1987] Fam 136 at 145 reference was made to a necessity test, something only later incorporated into secular planning guidance.

61 [1995] Fam 1 at 7.

62 See also the replacement PPG 15 (September 1994) and most recently PPS 5 (March 2010). The latter will be replaced by the National Planning Framework. As noted in *Re St John the Evangelist, Blackheath* at para 10: 'Thus, whilst secular listed building control may still be more tolerant than the faculty jurisdiction of change that is merely desirable rather than necessary, it is clear that the differences of approach have lessened'.

63 *In re St Nicholas, Sevenoaks* [2005] 1 WLR 1011 at para 24, referring to PPG 16, since replaced.

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This approach accords with the view of the present government:

> The internal procedures for such exempt denominations must be as stringent as the procedures required under the secular heritage protection system. Equivalence of protection is a key principle underpinning the Ecclesiastical Exemption and will be kept under review … in order to ensure that those denominations which benefit from the Ecclesiastical Exemption maintain the required standards of protection.[64]

As that passage indicates, there are two aspects: procedural equivalence and substantive equivalence. The former was one of the concerns of the Court of Arches in *In re Eccleshall*,[65] where rule 13(4) of the Faculty Jurisdiction Rules 2000 (requiring newspaper advertisement of the substance of petitions in certain circumstances) was described as 'an essential counter-part to [the regulation] which operates in the secular system'. The latter aspect, substantive equivalence of protection, shaped the approach of the consistory court in a recent, strikingly cogent, decision, upholding the objection of the local planning authority and refusing relocation of the central section of a rare fifteenth-century rood screen that contributed substantially to the character of a Grade II* listed church.[66]

Herein lies a dilemma. For if the ecclesiastical exemption merely means that equivalent procedures leading to equivalent protection will be applied as the precondition of exemption, the principal beneficiary may be the state, which escapes the costs of administering listed building control while achieving equivalent results. The true benefit to exempt places of worship is that chancellors, as the decision-makers, 'will certainly see far more proposals for [works to mediaeval and other church buildings] than would ever come the way of the planning committee of a local authority in a decade (even if the ecclesiastical exemption were to be withdrawn)', and they have access to a wide range of expert consultees, including local planning authorities.[67] Moreover, a chancellor, even within the straight-jacket of 'equivalence', should be better able than a secular system of listed building control would be to 'have due regard to the role of a church as a local centre of worship and mission',[68] although, when 'the

64 *The Operation of the Ecclesiastical Exemption and Related Planning Matters for Places of Worship in England: guidance* (Department for Culture, Media and Sport, July 2010).

65 [2011] Fam 1 at para 50, where express reference was made to the Code of Practice attached to the same DCMS guidance.

66 *Re St Mary Magdalene, Reigate* (29 September 2010, unreported) Southwark Cons Ct at paras 44 and 174. This was an Interim Judgment, but the final judgment (13 July 2011, unreported) dealt solely with outstanding matters.

67 *Re Holy Cross, Pershore* at para 93. Mynors Ch is a former local planning officer.

68 Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 1. In *In re St Luke the Evangelist, Maidstone* at 7, the Court of Arches (rather surprisingly) held that s 1 'cannot be said to apply to chancellors', even though 'it would have added nothing to the existing duty and practice of chancellors'.

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competing requirements of mission and heritage … come … into direct conflict … it cannot be assumed that the direct needs of mission will prevail'.[69]

There is, however, one respect in which the faculty jurisdiction may apply a stricter test than secular listed building control. Although one chancellor has opined that 'there is no presumption against change as such', this is a controversial view. Indeed, earlier in the same consistory court decision the old Court of Arches case of *Peek v Trower* was correctly analysed as laying down 'the simple rule … that there is a presumption in favour of "things as they stand"'.[70] That presumption will usually be relatively easy to discharge, but it is a presumption nonetheless.

The second clear strand in relation to listed buildings has been the adoption of the *Bishopsgate* questions, an approach first formulated by Cameron Ch,[71] and endorsed by the Court of Arches as 'the correct approach not only in that and this case but also in other similar cases'.[72] This standardisation of approach to the evaluation of the evidence in respect of listed churches has been beneficial. The suggestion[73] that 'necessity' and 'necessary' in the *Bishopsgate* questions mean 'something less than essential, but more than merely desirable or convenient; in other words something that is requisite or reasonably necessary' seems to have been accepted.[74] Nevertheless, with the experience of well over a decade, some questions do arise.

First, even in the case of works that will adversely affect the character of the church, is reference to 'necessity' needed, and would not a simple reference to 'proving a strong reason for some or all of the works' be sufficient, with a consequential amendment to the wording of the third question? It is not simply the problem of what is meant by 'necessity'.[75] The reference to 'other compelling

69 *Re St Mary Magdalene, Reigate* at para 188. Petchey Ch found such 'direct conflict' and said that he shared the concern of the petitioners 'that the church "plant" of the past should not inhibit the mission of the church in the present'.

70 *In re Great Malvern Priory* [2009] PTSR 1408 Worcester Cons Ct at paras 33 and 19. See also the conventional treatment of burden of proof in *In re St Mary's Churchyard, White Waltham (No 2)* [2010] PTSR 1689 Oxford Cons Ct at 27.

71 *In re St Helen's, Bishopsgate* London Cons Ct (26 November 1993, unreported). The three questions are:

(1) Have the petitioners proved a necessity for some or all of the proposed works, either because they are necessary for the pastoral wellbeing of St. Helen's or for some other compelling reason?

(2) Will some or all of the works adversely affect the character of the church as a building of special architectural and historic interest?

(3) If the answer to (2) is yes, then is the necessity proved by the petitioners such that in the exercise of the court's discretion a faculty should be granted for some or all of the works?

72 *In re St Luke the Evangelist, Maidstone* at 9. Cameron Ch was a member of that Court of Arches.

73 *Re St John the Evangelist, Blackheath* at para 12.

74 See for example *Re Holy Cross, Pershore* at para 78.

75 In *Re Great Malvern Priory* at para 34 the example is given of works 'which are only just necessary, or only necessary when considered from a certain point of view, or which are arguably needed but not necessarily in the form or at the location proposed'.

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reason' is also problematic, since the third question makes it plain that there can be 'compelling' reasons that still do not necessarily compel the grant of a faculty.[76] Considerations of equivalence mean that careful attention will need to be given to the wording current in secular planning guidance.[77]

Second, surely the need to ask the first (and third) *Bishopsgate* questions should only arise where some or all of the works adversely affect the character of the church as a building of special architectural and historic interest? So why not reverse the order of the first two questions? In a later case,[78] the Court of Arches accepted that 'logic demands that this [second question] should be the first question', but then said that:

> The present order of questions emphasizes that for listed buildings the presumption is heavily against change. To change the order of questions would, we believe cause confusion and might seem to some to indicate a relaxation of the requirements before change will be authorized. No such relaxation is intended or desired by this court.

There is, however, in secular planning law no presumption (heavy or otherwise) against change to a listed building that does not adversely affect its character. There is a presumption in favour of the conservation of designated heritage assets (which phrase includes listed buildings), and 'the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be'. But where the proposed change is neutral or beneficial in terms of the character of the heritage asset, no presumption arises. It is only 'loss affecting any designated heritage asset [which] should require clear and convincing justification', while 'substantial harm' to a grade II listed building 'should be exceptional' and to a grade I or II* listed building 'should be wholly exceptional'.[79]

The position in respect of listed churches should not be any different. In *In re St Luke the Evangelist, Maidstone*, in a passage immediately preceding the approval of the *Bishopsgate* questions, the circumstances where the 'strong presumption' arose were said to be where 'change . . . would adversely affect its character as a building of special architectural or historic interest', and a distinction was drawn between 'works . . . which are compatible with the historic character

76 But see *Re St Mary, Newick* (2009) 11 Ecc LJ 127, Chichester Cons Ct, where Hill Ch said of 'Necessity' that it 'should be read in its clear context which imports the wider concept of pastoral well-being or some other compelling reason'.

77 A single reference to 'necessity' survives in HE9.2 of PPS 5, which itself is soon to be replaced.

78 *In re St Mary the Virgin, Sherborne* [1996] Fam 63 at 77–78. Again Cameron Ch was a member of the Court.

79 PPS 5 (2010), Policy HE9.1.

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and appearance of the church' and 'cases where the works will adversely affect the character of the building'.[80]

In *Re Great Malvern Priory* Mynors Ch expressed the view that when the Court of Arches in *Sherborne* stated that 'for listed buildings, the presumption is heavily against change', 'the word "change" in that extract must be read as "adverse change" … Only on that basis are the two judgments of the Court, in *Maidstone* and *Sherborne*, reconcilable.'[81] If he is right, this appears to strengthen the argument for a re-ordering of the *Bishopsgate* questions, although the same chancellor now regards the order in which the questions should be asked as 'not to be particularly significant'.[82]

It is also arguable that the *Bishopsgate* questions are simply unnecessary, given the four matters listed in *In re St Luke the Evangelist, Maidstone* in the paragraph that immediately precedes the Court of Arches' first reference to those questions.[83] The observations of McLean Ch in *Re Eadsley Parish Church*, that 'I do not think it would be helpful to develop a *Bishopsgate* catechism and so impose an unduly prescriptive framework on the balancing process chancellors must perform',[84] described in *Re Great Malvern Priory* as 'wise',[85] may also turn out to be prophetic. A further question that has recently arisen is whether the *Bishopsgate* questions have any application at all when a faculty is sought to erect a building in the curtilage of a listed church, but where, in the absence of the ecclesiastical exemption, no listed building consent would be required.[86]

This is enough to show the influence and debate that there has been over the *Bishopsgate* questions and to suggest that a time may come to revisit them, on appeal in an appropriate case.

LITURGY, RITUAL AND DOCTRINE

In some areas there has not been the development that might have been expected in 1987 when the Society and *Journal* were established. For example, the Court of Ecclesiastical Causes Reserved – to which appeal lies in causes of faculty involving matters of doctrine, ritual or ceremonial – had occasion to sit in 1984 and in 1986[87] but it did not sit on a single occasion in the period 1987–2011. This should not occasion great surprise, since that court had not sat in the previous 20 years following its creation under the EJM.

80 *In re St Luke the Evangelist, Maidstone*, at 8.
81 *Re Great Malvern Priory* at para 43; see also C Mynors, 'Ecclesiastical buildings: constraints and opportunities', (2009) 11 Ecc LJ 279–280.
82 *Re Great Malvern Priory* at para 40; also Mynors, 'Ecclesiastical Buildings', p 279.
83 *In re St Luke the Evangelist, Maidstone* at 8.
84 (2001) 6 Ecc LJ 172, Sheffield Cons Ct at para 24.
85 *Re Great Malvern Priory* at para 42.
86 *In re St Mary's Churchyard, White Waltham (No 2)* at paras 24–29.
87 *Re St Michael and All Angels, Great Torrington* [1985] Fam 81; *In re St Stephen's, Walbrook* [1987] Fam 146.

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In the Preface to *Liturgy, Order and the Law,* Rupert Bursell wrote that 'it is necessary to have [liturgical] rules [and] essential that those rules are understood by those involved'. He continued that 'in these days when the clergy may once again be faced with the possibility of being sued in the civil courts for a delay in celebrating a wedding or taking a funeral, the advisability of understanding the law becomes even more apparent'.[88] But towards the start of our 25-year period a chancellor had observed (in a tabernacle case and with reference to liturgical matters) that 'as we progress towards the end of the century the freedom of choice has become wider than ever before'.[89] Whether because the rules have been properly understood or because of a relaxed attitude to occasional non-performance, the apprehended civil actions have not in fact occurred. It has very recently been observed that 'it is not easy to envisage any prosecution of a priest for these sorts of infraction of the ecclesiastical law … both because there are jurisdictional issues … and because of the general tolerance that exists within the Church of England'.[90]

Building on earlier decisions, such as *Re St Peter and St Paul, Leckhampton*[91] and *In re St Matthews, Wimbledon,*[92] Bursell Ch (in two consistory court decisions reported in 1995) thinned through the theological thickets, setting aside the previously rigorist approach to the prayer book and its rubrics. In *In re St Thomas, Pennywell,*[93] the long-standing debate on tabernacles reached its quietus. Reservation of the sacrament was confirmed to be lawful, notwithstanding what was said in some of the earlier cases; a tabernacle (or sacrament house) was held permissible; and (*obiter*) that this was so even if placed immediately behind or above a holy table. He also (and again *obiter*) said that the ceremonial use of candles was 'regarded as legal'. That view was then adopted as part of the same chancellor's *ratio decidendi* in *In re St John the Evangelist, Chopwell,*[94] where altar standards and a pair of seven-branch candelabra were held permissible, as well as acolytes chairs, a thurible for the ceremonial use of incense, sanctuary bells and two holy water stoups. In the course of his judgment the chancellor said that:

> … now that the rigorist interpretation of the Book of Common Prayer is past, the lifting of the sacrament higher than strictly necessary in order to raise them [sic] from the table, for example, in a dramatic gesture would seem now to be legal in any Rite unless by so doing the minister

88 R Bursell, *Liturgy, Order and the Law* (Oxford, 1997), p vii.
89 *In re St John the Evangelist, Bierley* [1989] Fam 60, Bradford Cons Ct at 70.
90 *Re All Saints' Church, Sanderstead* at para 56, n 29.
91 [1968] P 495, Gloucester Cons Ct.
92 [1985] 3 All ER 670, Southwark Cons Ct.
93 [1995] Fam 50, Durham Cons Ct.
94 [1995] Fam 254, Durham Cons Ct.

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> was intending to convey, or promote, a doctrine contrary to the tenets of the Church of England . . .[95]

Matters of ritual and ceremonial have for the most part ceased to be contentious. As remarked in the same case, 'although particular liturgical practices remain understandably dear to particular congregations, there is indeed now a greater toleration of the liturgical practices of others'.[96] In the same spirit he had concluded his earlier judgment on a confident note:

> If the end result is that many of the earlier cases relating to ritual or ceremonial (but not, it should be noted, matters of doctrine) have little more than historical interest, that is not necessarily a bad thing with the modern church.[97]

However, faculty cases have continued to arise where chancellors have needed to look anew at vexed matters of liturgy and ritual, though the occasions seem to have become fewer and fewer. Two examples illustrate the consistency of the trend.

Early in our period, it was decided by Newsom Ch that there was no rule of law that there might only be one font in a church; that on the plain meaning of Canon F1, even one font did not need to be by the entrance to the church, though this was the norm; but that while provision could lawfully be made for baptism by immersion and submersion there must also be provision for baptism by affusion, particularly to cater for the continuance of infant baptism.[98] Very recently, Petchey Ch has conducted a detailed examination of whether there remains any legal (or as he termed it theological) objection to standing, rather than kneeling, to receive Communion, with the (to be expected) negative conclusion, an answer that did not depend on the particular rite being used.[99]

The divide between liturgy and ritual, and that between ritual and doctrine, are both fine ones. For example it was impossible to determine the lawfulness of sacramental reservation without engaging with Article 28 of the Thirty-Nine Articles, which ends with the words 'The Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up or worshipped.' Similarly in connection with the required postures for receiving

95 Ibid, at 265.
96 Ibid, at 262.
97 *Re St Thomas, Pennywell* at 69.
98 *In re St Barnabas, Kensington* [1991] Fam 1, London Cons Ct.
99 *Re All Saints' Church, Sanderstead* at paras 42–58. The key matters were considered to be the revocation of Canon 27 of 1603, together with the wording of the new Canon B9 para 2 and the guidance as to 'Posture' given in *Common Worship* (2000).

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Communion, it was necessary to address a possible link between kneeling, adoration of the sacrament and concepts of real presence, all contained in Cranmer's celebrated Black Rubric.[100] However, doctrinal cases have been rare in the period being considered. Only two deserve mention.

Just before the start of the 25-year period doctrinal issues emerged during the consistory court hearing into the proposal for a retrospective faculty in respect of the solid, circular stone altar, the work of Henry Moore, that had been installed, under licence, in St Stephen's, Walbrook. Newsom Ch, who was bound by previous decisions such as that in *Westerton v Liddell*[101] (which were not binding on the Court of Ecclesiastical Causes Reserved[102]), held that:

> The distinction between 'altar' and 'table', when the words are correctly used, is in itself essential and deeply founded, since 'altar' signifies a place where a sacrifice is to be made, a repetition at every Mass of the sacrifice of our Lord at Calvary. This was the view of the Mass as held in the unreformed Church in England immediately before the Reformation … The Reformers took the other view, viz, that the Holy Communion was not a renewed sacrifice of our Lord, but a feast to be celebrated at the Lord's table. The latter view prevailed, at least from the Prayer Book of 1552, with the result that 'altars' were removed from churches and 'tables' substituted.[103]

Having set out the *Shorter Oxford English Dictionary*'s definition of the word 'table' as 'a raised board at which people may sit', the chancellor, using memorable words, said:

> Mr Henry Moore's beautiful sculpture is not within this definition and accordingly it is not a table. Someone looking at it might say: 'That is a fine piece of sculpture'; or possibly he might say: 'That is a fine altar', if he recognized the primitive object which the rector had asked Mr. Moore to create, or he might merely say that it was a fine piece of marble. But it seems difficult to suppose that an ordinary educate speaker of the English language would say 'that is a fine table' or even 'that is a table'. On this ground, I am of the opinion that this petition must fail, not as a matter of discretion but of law.[104]

100 To be found at the end of the Order for Holy Communion in the *Book of Common Prayer.*
101 (1857) Moo Special Rep 133, a decision of the Judicial Committee of the Privy Council.
102 See EJM, s 45(3), referred to in *In re St Stephen's, Walbrook* at 167 *per* the Bishop of Chichester and adverted to at 193 by Sir Anthony Lloyd.
103 *In re St Stephen's, Walbrook* at 152.
104 Ibid, at 154.

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To the Court of Ecclesiastical Causes Reserved, the doctrinal issue was non-existent. Neither the Bishop of Chichester nor Sir Anthony Lloyd (who alone gave judgments on the doctrinal issue) had any doubt that the Henry Moore altar could be regarded as both a table and a Holy Table. Drawing on various doctrinal statements, including that most scholarly of bishops, Lancelot Andrewes, the Bishop of Chichester held:

> It is clear, in my view, that a doctrine of the Eucharistic sacrifice which is not that of a repetition of the sacrifice of Calvary can lawfully be held in the Church of England and that the Holy Table can lawfully and properly be called an altar.[105]

Thus the saga of the Henry Moore altar is a further reminder that, in the words to the Preface to the *Alternative Service Book* (1980), 'Christians have become readier to accept that, even within a single church, unity need no longer seem to entail strict uniformity of practice.'

The second important intrusion of doctrine into the faculty jurisdiction was, improbably, in relation to exhumation. The actual decision in *Re Blagdon Cemetery*[106] was to allow exhumation. However, the judgment of the Court of Arches set a slightly different, and higher, test than that set previously by the Chancery Court of York (substituting a requirement to show 'special circumstances', in place of the former one which was to show 'a good and proper reason … that reason being likely to be regarded as acceptable by right thinking members of the Church at large').[107] Although the Court of Arches expressly stated that exhumation cases do not 'involve a question of doctrine, ritual or ceremonial',[108] the Court explained that the basis of the 'general presumption of permanence arising from the act of interment' lay in the Christian theology of burial.[109] For the appeal the Dean of the Arches requested a paper on the theology of burial from the Rt Revd Christopher Hill, then Bishop of Stafford. This paper, extracts from which are set out in the judgment, explained that:

> The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their 'journey'), entrusting them in peace for their ultimate

105 Ibid, at 168 and 170 *per* the Bishop of Chichester; at 194 *per* Sir Anthony Lloyd. The more surprising aspect of the appeal decision was the unanimous reversal of the chancellor's conclusions on the aesthetic and architectural considerations.

106 [2002] Fam 299.

107 Ibid, at para 35, rather than the test in *In re Christ Church, Alsager* [1999] Fam 142 at 149.

108 *Re Blagdon Cemetery* at para 22.

109 Ibid, at paras 20–21.

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> destination, with us, the heavenly Jerusalem. This commending, entrusting, resting in peace does not sit easily with portable remains, which suggests the opposite: reclaiming, possession, and restlessness: a holding on to the 'symbol' of a human life rather than a giving back to God.[110]

Over the past decade, this passage (or parts of it) have been cited and relied upon in numerous consistory court decisions in both provinces. This is a timely reminder that the exercise of the faculty jurisdiction (unlike the common law of England) is overtly permeated by Christian doctrine, something that will continue so long as consistory courts themselves continue to function.[111]

CONCLUSION

There are several other themes I might have covered in this article, particularly the way in which secular activities have increasingly been permitted to co-exist alongside traditional sacred uses in the use of church buildings.[112] Here there is plainly a tension between, on the one hand, the rule that by reason of consecration a building 'is dedicated thenceforth to sacred uses, and the law precludes it from being ever capable of use for ordinary secular purposes',[113] and, on the other hand, the increasing preparedness of chancellors to permit secondary, secular use of churches, so long as this complies with 'the principle that a church must be treated in a reverent and seemly manner consistent with its use as a place of worship'[114]. Other important areas that might have been addressed relate to such dry but important matters as the employment status of the clergy,[115] memorials (in both churches and graveyards),[116] the maintenance

110 Ibid, at para 23. For a fuller and updated version see C Hill, 'A note on the theology of burial', (2004) 7 Ecc LJ 447–451. Judgments that have referred to parts of this note not reproduced in *Blagdon* include *In re Holy Trinity, Bosham* [2004] Fam 125, Chichester Cons Ct, at 135, and *Re St Andrew, Alwalton* (2011) 13 Ecc LJ 374, Ely Cons Ct, the latter of which contains a detailed review of the human rights implications of exhumation.

111 See A McGregor, 'Religion, doctrine and ecclesiastical courts', (2011) 13 Ecc LJ 333–341.

112 This is the subject of my article 'Shared use of church buildings *or* is nothing sacred?', (2002) 6 Ecc LJ 306–317, but there have been further developments since that time, particularly in relation to mobile phone equipment: see *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39 and *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67 (both decisions of the Court of Arches).

113 *Wright v Ingle* (1885) 16 QBD 400 *per* Bowen LJ.

114 *In re St Peter and St Paul's Church, Chingford* at para 23. This tension was referred to in an Opinion of the Legal Advisory Commission, *Wedding receptions on church premises* (2011).

115 See Rivers, *The Law of Organized Religions* pp 116–117 for a critical analysis of *Percy v Board of National Mission for the Church of Scotland* [2005] UKHL 73; [2006] 2 AC 28.

116 Probably the most erudite consistory court judgment of the 25-year period is that of Bursell Ch in *In re St Mary the Virgin, Oxford* [2009] Fam 38, Oxford Cons Ct (regarding a memorial tablet to Reformation martyrs, including unpardoned traitors), another example of increasing flexibility and tolerance in ecclesiastical law.

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of churchyards,[117] the disposal of heritage assets[118] and the categories of special reasons justifying exhumation.[119] In all these areas there has been considerable litigation and consequent development of the ecclesiastical common law.

By the time this *Journal* reaches its half-centenary, as it surely will, no doubt new themes will have emerged; some of the case law that I have mentioned will survive only in the memory of the growing band of ecclesiastical legal academics; but some of it, so I hope and believe, will illuminate over a longer period.

117 *In re Welford Road Cemetery, Leicester* [2006] Fam 62, and *In re Hutton Churchyard, Hutton* [2009] PTSR 968 (both Court of Arches); *Re Church of St Paul, Drighlington* (2007) 9 Ecc LJ 239, Wakefield Cons Ct.

118 *In re St Peter's, Draycott* [2009] Fam 93 Ct of Arches; *Re St Michael and All Angels, Withyham* (2011) *Times*, 27 July, Chichester Cons Ct; *Re St Ebbe with Holy Trinity and St Peter Le Bailey, Oxford* (2012) 14 Ecc LJ 143, Oxford Cons Ct.

119 *In re Blagdon Cemetery.*

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