EPISCOPACY AND THE COMMON LAW

AUGUR PEARCE

*Lecturer in Ecclesiastical and Public Law at Cardiff Law School**

1. INTRODUCTION

In the year 1771 a Virginian politician, Richard Bland, wrote to Thomas Adams on issues thrown up by the steadily worsening relations between the legislatures of mainland America and the Imperial government.[1] His letter moved on to the subject of religion, and to the suggestion made increasingly in recent years that colonial worship and ministry according to the English Prayer Book would be strengthened by the introduction of personal episcopacy on the model of the mother country. On this Bland commented:

> I acknowledge myself a sincere son of the established church, without approving her hierarchy which I know to be a relic of the papal encroachment upon the common law.

Though Bland quite clearly overstated his case, it is true that the relationship between personal episcopacy and the common law of England has seldom been a completely happy one. The common law, exemplified at its highest in the constitutional field, has always stood for government by consent and thus for authority 'from the bottom up'. Divine right episcopacy, transmitted by means of the tactile or 'apostolic' succession from one bishop to another, represents a 'top-down' concept of authority as was recognised by James VI and I in his notorious adage 'no bishop, no king'.

This is, of course, an over-polarisation. The common law does not ascribe power to the people alone, but to the prince acting with popular consent, as the enacting words of every Act of Parliament make clear. And even those with the highest view of the bishop's office will often assert that he represents the flock by whom, in an ideal world, he should also be chosen. Each system of government consequently embodies both concepts of authority. But in the course of English political history, the Crown's part in government has become so dependent on popular electoral support that any genuinely royal initiative has practically disappeared. At the same time it would be easy for the casual observer of England's bishops to miss the element of popular acclamation in their appointment.

We are left, therefore, with a tension in our constitution. The law's principal officers of ecclesiastical oversight are bishops. Upon appointment they are consecrated by the laying-on of other bishops' hands, and so linked in a chain reaching back to the early days of Christianity, and to a pre-Reformation church that ascribed spiritual government to the ordained alone, one in

* This paper was first delivered on 19 June 2002 in the Ecclesiastical Law Society's series of London Lectures.

[1] Letter dated 1 August 1771, quoted in Frederick V Mills, *Bishops by Ballot—An Eighteenth-Century Ecclesiastical Revolution* (New York 1978), p 106.

which the sole task of the faithful was to obey. By contrast there is much in the developed common law that pointed, and still points, to the *whole* church—the whole Christian nation—as the source of religious authority under God; and defenders of this principle long felt the need to keep the bishops firmly in their place.

It is the story of this tension that I want to trace, considering six phases of English history from the Reformation. In all but the last of these phases I have taken an historical figure to represent the classical common law position as its champion.

In the course of this paper, we will see a fundamental principle of government established in the reign of Henry VIII; a practical *modus vivendi* spelt out under Elizabeth; and the state of the law in its full development after the courts had drawn out the implications of the Glorious Revolution. The fourth historical phase will see the nineteenth-century episcopate starting to fight back against its relegation to a purely ministerial role in national religious life; and the fifth, set in the mid-twentieth century with the older common law principle now on the defensive, will focus on a figure whom I see as its last effective maintainer.

Tellingly, however, while readers will all have heard of my first three champions of the common law, and many of the fourth, I suspect the champion in phase five will be a name familiar to very few. As for the latest (modern) phase, I myself have not been able to find a serious candidate for the title. Among today's judges, practitioners and legal authors, no significant maintainer of a long-held and once tenacious position can be found. Rather than narrating developments of the last forty years, therefore, I shall conclude by looking at some possible explanations why this should be the case.

2. THE ERA OF SIR THOMAS CROMWELL

To set the scene for my first champion, we need to consider where English law had placed the episcopate by the close of the Middle Ages. Already before the Norman conquest, it had conceded to bishops a very substantial array of powers and prerogatives. They joined with others of the wise and the powerful in advising the king. They might come together in synods and bind their clergy by their Canons. Together with the ealdorman they meted out local justice. Their authority was required for ministry within their dioceses; and the law attached a range of privileges to the Orders which bishops alone conferred. Both clergy and people were subject to their visitation, and power to dispense from certain provisions of the general law was entrusted to them.

Nonetheless, Tudor England looked back to the Saxon period as a sort of golden age of episcopal co-operation in the general work of government. Duke William's conquest marked a watershed, opening England to a fresh wave of European influence just at the time when reform movements, later to crystallise in the Investiture controversy, were gathering strength. Spiritual was detached from general government, but this required a strong

supranational focus to which those who exercised spiritual government could look. The worthy aims of the reform became inextricably confused with papal dreams of a new Roman Empire of the West. As England's common law tradition took shape, spiritual overseers became something suspect, and seeds were sown which would later bind the cause of national autonomy to the emancipation of the laity.

This work of emancipation fell in large measure to my first champion, Sir Thomas Cromwell, later Vicegerent in Spirituals of King Henry VIII, under whose direction much of the legislation was drawn to signify and secure the breach with Rome.

Cromwell's strategy of relying on Parliament in the spiritual field was itself both a radical challenge to the bishops and an important milestone in the development of the common lawyers' doctrine of unfettered parliamentary sovereignty. The preambles to the statutes Cromwell secured spelt out the reversal of the hierarchy's gains over five centuries. The principle of authority that underlay his whole programme can be read from what we now know as the Ecclesiastical Licences Act 1533:

> This your Grace's realm, recognising no superior under God but only your Grace, has been and is free from subjection to any man's laws but only to such as have been devised, made and ordained within this realm, for the wealth of the same; or to such other as, 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, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the accustomed and ancient laws of this realm, originally established as laws of the same, by the said suffrance, consents and custom, and none otherwise.

In other words, all human law binding upon Englishmen, in the spiritual no less than any other field, derived its force from adoption by the people 'at their free liberty'. The Act went on to state that dispensation from such laws belonged to the king in Parliament and those officers to whom he chose to delegate it.[2]

Building upon this statement of general principle, Cromwell's legislation whittled away at the expression of episcopal authority in specific areas. Causes which, by the custom of the realm, appertained to the spiritual jurisdiction were to be determined in appropriate spiritual or temporal courts 'within the King's jurisdiction and authority'.[3] The convocations might indeed continue to make Canons, but only if the king authorised their

[2] The special marriage licence jurisdiction exercised by the Archbishop of Canterbury, for example, is not inherent in his office, but exists because he is (as licences themselves state) 'by authority of Parliament lawfully empowered for the purposes herein written'.

[3] Ecclesiastical Appeals Act 1532 (24 Hen 8, c 12), s 1.

assembly and assented to the result.[4] A shortlived concession to the episcopate in the matter of appeals was replaced after a year by a tribunal of royal delegates, before whom archiepiscopal decisions could be challenged.[5] And—a development not always given its full significance—the disappearance of papal peculiars and exempt monastic jurisdictions left a number of English congregations allocated to no bishop at all, but under the direct ecclesiastical oversight of the Crown.[6]

Fundamental to Cromwell's notion of the English constitution was that religious and general authority was *not* distinct. There was, in a Christian nation, no 'law of the church' separable from the law of the land or capable of being set up in opposition to it. There were of course specialist *branches* of the law that dealt with public worship and the sacraments, teaching and preaching, moral discipline, and the revenue and property necessary to support public provision in these areas. Bishops could well function as senior officers of such provision—though this was a point over which reformers under the later Tudor monarchs would have their doubts. What bishops could *not* do was to claim an exclusive prerogative in church government, an authority derived from a wholly separate body of law.

This is the reason why Thomas Cranmer's crucial visitation of 1535 could not be allowed to proceed on metropolitical authority, but had to go forward by licence of the King's Vicegerent. Cranmer, the bearer of an office known to the law in his own right, did indeed possess an independent power to visit the churches of his province; but to let him invoke it so early in the new régime risked sending out the wrong message to the nation at large.[7]

This was equally the reason why the Vicegerent's 1535 Injunctions to the Universities provided for suppression of courses in the *jus commune*. Much of that body of law still applied: its teaching was a practical necessity, but could be handled well enough in the world of the practitioner. Too much theory would risk straying from the rules themselves to the dangerous ground of the rules' authority, a topic on which the universities' traditional answer would conflict with that of Cromwell and now of Parliament.

3. THE ERA OF SIR EDWARD COKE

With the Marian reaction happily behind them, and some of the more extreme aspects of the religious policy of Edward VI's counsellors also abandoned, the time came for the courts to work out the practical consequences of having one source of authority across the whole field of government. That

[4] Submission of the Clergy Act 1533 (25 Hen 8, c 19), s 1

[5] Cp the Ecclesiastical Appeals Act 1532, s 4, with the Submission of the Clergy Act 1533, ss 4, 6.

[6] Monastic jurisdictions to which the Suppression of Religious Houses Act 1539 (31 Hen 8, c 13), s 23, applied were subjected to the bishop of the geographical diocese as Ordinary unless the king otherwise directed; but contrary provision was by no means unusual.

[7] Margaret Bowker, 'The Supremacy and the Episcopate—the Struggle for Control 1534-40', (1975) 18 *Historical Journal* 227.

one source was not the episcopate; but neither was it simply the Crown. It was, as the Cromwellian preamble had spelt out, the joint action of prince and people, expressed either in the popular adoption of binding custom with tacit royal consent, or more formally in the monarch's enactments with the concurrence of a representative Parliament.

Common lawyers were to spend the next century-and-a-half getting this message across, and would find kings and bishops easily the most difficult people to persuade. Elizabeth I and Charles I, in particular, had problems with the notion that their personal prerogative was itself an aspect of the common law, subject to the restrictions that law imposed. The bishops resented the involvement of Parliament in religious matters and the use of the writ of prohibition to enforce unwelcome limits on their jurisdiction. From the time of Bancroft onwards some of them began to claim for their office an authority directly attributable to divine institution.

Kings too found it expedient to regard the spiritual jurisdiction as something distinct, to which different principles of government applied. We may contrast the title that Charles I arrogated to himself (without legal warrant) in his Prayer Book Declaration, 'Supreme Governor of the Church of England', with the title which statute actually gave to the monarch, 'the only Supreme Governor of this Realm, as well in all spiritual or ecclesiastical things or causes, as temporal'.[8] The willingness of some prelates, like Whitgift under Elizabeth and Laud under Charles, to let their authority be invoked as a way of by-passing Parliament's responsibility for the public liturgy, added to the common lawyers' hostility.

It was in this second period that Richard Hooker, himself well read in the common law, added to the constitutional basis of the Cromwellian authority principle an ecclesiological one. Thanks to the fusion of civil and Christian societies at the conversion of the English kingdoms, Hooker taught, prince and people together constitute the 'whole church' of a Christian nation,[9] which is why it is in them—and not merely in the Crown or the clergy—that ecclesiastical authority truly resides.[10]

Yet Hooker saw a rightful place for bishops in England, not only as God's *preferred* form of church oversight where circumstances allowed, but as the form which this particular Christian nation, seeing less reason than Germany or Switzerland to make changes, had chosen to adopt and retain.[11]

[8] From the oath prescribed in the Act of Supremacy 1558 (1 Eliz 1, c 1), s 9.
[9] *Lawes*, VIII, 326: 'When we oppose the Church and the Commonwealth in a Christian societie, we meane by the Commonwealth that societie with relation to all the publique affayres thereof, only the matter of true religion excepted. By the Church, that same societie with only reference unto the matter of true religion ...'. Page references to Hooker's *Lawes of Ecclesiastical Politie* are to the Folger Library Edition, Binghampton, N.Y., 1977–93.
[10] *Lawes*, VIII, 318-19, 386, 393, 403: the wisdom of clerical councils, without 'the general consent of all', 'could be no more unto us than the counsels of physitions to the sick'.
[11] *Lawes*, VII, 147, 167.

By taking this view, Hooker set himself against Romanist, Calvinist and later Laudian alike. With his local difficulties in the Temple Church, doctrinaire Calvinism probably seemed to him the greater threat. But in fact in this area all three schools were agreed: Christ's authority in the church must be mediated through church office-bearers, who—even in a Christian society—did not owe their rôle to any public decision.

Hooker remained extremely influential for later thinking in the English mainstream, including legal thinking; and he had on his side our champion for this period, his contemporary Sir Edward Coke, judge of the Queen's Bench under Elizabeth and Chief Justice at the accession of King James.

Coke held that the common law steered a middle course between bishops' claims of a wide-ranging original authority and those who wanted to see them stripped of all disciplinary power. He is well known for his granting of prohibition with a frequency that he was forced to defend to the king against Bancroft's protests. Yet in his commentary on *Caudrey's Case*[12] Coke defended the allocation of causes, according to subject-matter and remedy, between the courts of Westminster Hall and those of the Ordinaries.

> As in temporal causes the King, by the mouth of the judges in his courts of justice, doth judge and determine the same by the temporal laws of England, so in causes ecclesiastical and spiritual ... (the conusance whereof belongs not to the common laws of England), the same are to be determined and decided by ecclesiastical judges according to the King's ecclesiastical laws of this realm.

Coke listed examples of spiritual causes—which I have not quoted—and his views proved invaluable in later years to those defending the episcopal courts' proper competence in the listed fields. I believe it is wrong, though, to read into them—as some do—any retreat from Cromwell's principle of a single source of authority in government.

When Coke said that the cognisance of causes ecclesiastical and spiritual 'belongs not to the common laws of England', the key word was 'cognisance'. His parenthesis spoke not of the authority behind rules, but of the forum in which they are normally applied. It was left to Lord Blackburn, in a judgment of unrivalled lucidity nearly three centuries on, to distinguish the narrower and wider senses of the expression 'common law': Coke having referred in a narrow sense to the law administered in Westminster Hall, but the wider sense still comprehending the king's ecclesiastical law within its scope.[13]

4. THE ERA OF LORD HARDWICKE

Hooker, with the luxury of hypothetical speculation denied to a judge, and less immediately vulnerable to royal displeasure than Coke, had drawn out

[12] *Caudrey's Case* (1591) 5 Co Rep 1a, at 8b-9a.
[13] *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446, HL.

more explicitly the logic of their common views as regards the claims of the monarch and the episcopate. To the latter he had given a solemn warning:

> lest bishops forget themselves, as if none on earth had authority to touch their states, let them continually bear in mind that it is rather the force of custome ... doth still uphold ... them in that respect, than ... any ... true and heavenly law,

and counselled them:

> to use their authority with so much the greater humility and moderation, as a sword which the church hath power to take from them.[14]

The bishops ignored this warning under Laud's leadership, and the sword was indeed taken away in 1640.[15] Parliament restored it twenty-one years later,[16] albeit with a reminder that the bishops would not necessarily have the last word on the new Prayer Book.

Royal and episcopal church government enjoyed a further brief heyday as the bishops' courts and convocations went back to work repressing non-conformity, and preparations were made for a See of Jamestown to extend episcopacy to the colonies.[17] Episcopal ordination was required for English preferment, and confirmation for admission to communion.[18] As the later Stuarts sought to push out the boundaries of dispensation, it may have seemed likely that the Cromwellian principle of authority had again been forgotten. But the principle was firmly reasserted in 1688, and in the sister church north of the border the bishops' sword was taken away for good.[19]

My third champion of the common law tradition was active in the so-called 'long eighteenth century' that followed. Lord Hardwicke presided in the King's Bench at a time when the courts of Westminster Hall were digesting the lessons of the Civil War and Glorious Revolution and spelling out their impact in various fields.

Lord Hardwicke's 1736 judgment in *Middleton v Crofts* took Cromwell's authority principle and applied it not to pre- but to post-Reformation Canons, those made with the king's licence and assent in England's clerical

[14] *Lawes*, VII, 167.
[15] Abolition of High Commission Court 1640 (16 Cha 1, c 11), and Clergy Act 1640 (16 Cha 1, c 27).
[16] Ecclesiastical Jurisdiction Act 1661 (13 Cha 2, St 1, c 12).
[17] Draft letters patent for the erection of such a See were prepared in 1660 but never sealed; text in William S. Perry, ed., *Historical Collections relating to the American Colonial Church*, vol. I (1870).
[18] These requirements were imposed respectively by the Act of Uniformity 1662 (14 Cha 2, c 4), s 10, and the rubric following the 1662 Prayer Book's Confirmation service. The rubric had no counterpart in earlier Prayer Books, and it has been suggested that section 10 also imposed a requirement not previously universal in the reformed English Church.
[19] Bill of Rights 1688 (1 Will & Mar, Sess 2, c 2), s 1; Prelacy Act 1689 (June 5, c 4) (Parliament of Scotland).

convocations. The authority which stood behind such Canons was that of king and bishops, precisely that over which the recent conflicts had been fought. Hardwicke stated once and for all that such authority was not enough to bind the generality of Englishmen in their religious practice. It might bind the clergy, who were as an order represented in convocation; but that was all.[20]

Middleton v Crofts has naturally come under sustained attack from supporters of a high episcopalianism, from the contemporary Edmund Gibson to Eric Kemp and Richard Helmholz in our own day. Helmholz, in his essay 'The Canons of 1603—the Contemporary Understanding', has argued political motives for the decision and suggested it was contrary to how both episcopal courts and Westminster Hall had been treating the Canons' authority up to that time.[21]

Helmholz may well be right as regards the episcopal courts; but this was after all a prohibition suit, designed to enable the King's Bench to put right what other jurisdictions were doing wrong. His arguments from prior Westminster Hall decisions, on the other hand, all seem to me to have been addressed and answered by Lord Hardwicke himself. *Middleton v Crofts* to my mind stands squarely within the common law authority principle represented by Cromwell, Hooker and Coke, and its correctness was confirmed 130 years later by the House of Lords.[22]

5. THE ERA OF LORD LYNDHURST

To our fourth champion of the common law belongs the credit for making high episcopalians realise how impossible it was to reconcile their views with the developed English religious constitution. Lord Lyndhurst, who presided in 1850 at the Judicial Committee's hearing of *Gorham v Bishop of Exeter*, delivered a judgment in which the authority of the 'whole church' speaking through Parliament triumphed over the respondent bishop's claims of an authority inherent in his office and ultimately resting on divine commission. The only relatively new ground that *Gorham* broke was in applying this general Cromwellian logic to the sensitive specific issue of the boundaries of ministerial orthodoxy.[23]

Gorham had implications for two distinct, though closely intertwined questions. (1) What is the task of the church in the field of doctrine—is it to answer every question, or simply to lay down a framework within which reasonable Englishmen may worship together, relying on private conscientious judgment (and perhaps therefore agreeing to differ) wherever the framework is silent? And (2) by what voice does the church speak in performing its doctrinal task?

[20] *Middleton v Crofts* (1736) 2 Atk 650.
[21] Doe, Hill, Ombres, eds., *English Canon Law* (Cardiff 1998).
[22] *Bishop of Exeter v Marshall* (1868) LR 3 HL 17.
[23] *Gorham v Bishop of Exeter* (1850) Moo Sp Rep 122, PC.

Our concern here is with the second question. But the answer to the first could hardly be ignored. For while one *might* indeed ascribe to an assembly dominated by lay Christians without specialist training the power to rule on new theological issues as they arose,[24] it is very much easier to envisage such a body as agreeing on the recognition of minimal standards of teaching to be required from ministers.

This, I suggest, is clearly what Lyndhurst and the Committee majority were doing in *Gorham*. It explains why they insisted on testing the appellant's opinions only against the Liturgy and Articles—both approved by Parliament, as other doctrinal sources were not. They applied the usual canons of statutory construction because the meaning of a term to theological specialists was irrelevant. What mattered was how it would have been read by the peers and members of Parliament who had approved it. A court which, by its own admission, had no competence to declare what ought to be taught in church could nonetheless determine Gorham's appeal because such a declaration *had already been made*—namely by monarch, Lords and Commons in 1571 and 1662.[25]

A debate in the House of Lords, three months after Lord Lyndhurst read the judgment, illustrated vividly the polarisation of views on this point.[26] Blomfield's assertion, supported by Wilberforce, of: 'the inherent and inalienable right of the bishops to be the judges of questions of doctrine' was disowned by their fellow-bishop Thirlwall, who 'could not assent that there resides in the body of bishops ... any such pre-eminent and exclusive qualification'. The Earl of Harrowby condemned a Bill whose principle was that 'the interpretation of the standards of our church should be determined solely by the clerical portion of the church'.

One needed judges to interpret the standards, but a judge should not be a legislator, and that was a good reason to keep bishops—whose learning might lead them to fancy themselves as legislators—out of the doctrinal tribunals. An indignant Wilberforce suggested this would be a good argument for the final doctrinal court to consist wholly of Jews; but the vote still went Harrowby's way.

6. THE ERA OF SIR THOMAS BARNES

From the time of the *Gorham* judgment, the gloves were off in the struggle between the Cromwellian and high episcopalian views of ecclesiastical authority. Though the Judicial Committee stood at the apex of the episcopal court hierarchy, it was dominated by common lawyers and the common law

[24] The provision for defining heresy contained in the Act of Supremacy 1558 (1 Eliz 1, c 1), s 20, indeed did so, although it also stipulated the concurrence of the convocations. This provision for identifying new heresies was never invoked.
[25] Parliamentary approval of the Articles of Religion was implied in the Ordination of Ministers Act 1571 (13 Eliz 1, c 12); and of the 1662 Prayer Book, by the Act of Uniformity 1662 (14 Cha 2, c 4) introducing it.
[26] *Hansard* sess 1850, cols 598ff.

doctrine of precedent provided the basis on which provincial and consistory courts were expected to follow its lead.

The Committee itself became a symbol of a legal tradition which heirs of the Oxford Movement now saw as foreign to the church. The demise of the civilian profession and Doctors' Commons did not end learning in the Continental *jus commune*, but writing on 'the law of the church' became for a while the province of parish incumbents rather than of practitioners.[27] In consequence the new scholarship became, it must be said, increasingly divorced from English reality; the lack of any consensus as to common legal ground was one of the factors that landed extreme ritualists in Horsmonger Lane Gaol.

The efforts of Blomfield and Wilberforce to replace the Judicial Committee, at least in its doctrinal rôle, by a less common-lawyer dominated body were continued by later campaigners. When it became clear that no immediate success was to be expected, the bishops invoked the power they had acquired in 1840 to prevent disciplinary proceedings from ever reaching the courts. The *impasse* between common lawyers and canonists, the former now hamstrung by the bishops' veto while the latter remained mere theorists, urgently needed to be resolved.

To keep this paper to a reasonable length I must soon move on to my penultimate phase of history, the revision of the Canons in the mid-twentieth century. Doing so requires leaping over decades of dramatic change in the bishops' understanding of their rôle. As models of episcopal leadership developed in the colonies began to feed back into the thinking of the mother country,[28] bishops began to exploit in their dioceses rights long neglected, and succeeded in exercising others that were not, or only doubtfully, ascribed by the law at all.[29]

Meanwhile, a Parliament which had once put a brake on all of this found it now had neither the time nor the interest to continue doing so, and approved a streamlined procedure for enacting religious legislation that an Assembly representative of clergy and the active conformist laity would frame.

The Enabling Act of 1919,[30] however, was a masterpiece of compromise between the points of view of the high episcopalians and of the common

[27] A typical example being Edward Wood, *The Regal Power of the Church, or the Fundamentals of the Canon Law*, 1888, republished with an introduction by Eric W Kemp (London 1948).

[28] Occasionally the courts might still restrict the significance of this: see e.g. *Long v Bishop of Cape Town* (1863) 1 Moo PCC NS 411, indicating the limited significance of the oath of canonical obedience (whether at home or in a ceded colony), and *Merriman v Williams* (1882) 7 App Cas 484, PC, distinguishing the non-legal concept of 'communion with the Church of England' from the 'connexion' enjoyed by religious structures created by the colonial application of English law.

[29] During the nineteenth century the revived practice of visitation fell into the first category; the summoning of the first diocesan conferences, the admission of Readers and the requirement of theological college training into the second.

[30] I.e. the Church of England Assembly (Powers) Act 1919.

lawyers. Those who considered the bishops, and hence the revived convocations, as the true channel of church authority could obey Measures because the convocations' members had approved them. Those who stuck, now somewhat defensively, to the Cromwellian approach could see in the same Measures the authority of Parliament and hence of the 'whole church'. Where such overlapping authority was not present—as in the law of liturgy and of marriage—tension remained high.

Resolving such tension, by rules all would willingly obey, was one of the motives for the canonical revision project which finally got under way as the Second World War broke out. Archbishop Garbett and his team, who reported to the convocations in 1947, concluded that they would have to accept *Middleton v Crofts* as stating the current position; but that Parliament's help could be invoked once more to allow the making of Canons in the contentious fields which would thereafter bind laity and clergy alike, obedience becoming a condition of receiving church ministrations.[31] From the Garbett proposals on ecclesiastical discipline, filtered through a second commission,[32] came the blueprint for a re-ordered judicial structure, to culminate in a bishop-dominated final doctrinal court.

By then, however, Geoffrey Fisher was Archbishop of Canterbury. Fisher was himself no Cromwell; but he took good relations with the government seriously, and was keen that no canonical proposal should go forward to the point of a public confrontation. In 1951, therefore, as the first batch of Canons completed initial consideration in convocation, he had asked Clement Attlee to be 'put in informal touch with someone acting for the government' who could give 'advice and guidance'. What he got, on Home Secretary Chuter Ede's suggestion, was a committee of government lawyers led by the Treasury Solicitor, Sir Thomas Barnes.[33]

Barnes was to prove a stalwart advocate of the Cromwellian principle of authority, our fifth and final champion of the common law tradition. He was already interested in the revision proposals, and he offered to remain involved even after retiring from his Civil Service post.[34] He rapidly gained Fisher's full confidence and developed from an external vetting agent into an in-house adviser. The joint steering committee piloting the Canons through the convocations and House of Laity took its legal advice predominantly from Barnes, and when a drafting committee was set up to turn the ecclesiastical court proposals into a Measure, Fisher placed Barnes on it as a full member.

[31] *The Canon Law of the Church of England—Report of the Archbishops' Commission* (London, 1947), 77, 84.
[32] The Garbett Commission's draft Canons cxii–cxxv formed the starting point for the work culminating in the Lloyd-Jacob Report, *The Ecclesiastical Courts—Principles of Reconstruction* (London, 1954).
[33] Letters Fisher to Attlee, 3 July 1951; Ede to Attlee, 10 July 1951; Public Record Office, London, CAB 21/3880.
[34] Permanent Secretary's memorandum to Home Secretary 26 January 1948; PRO HO 45/21648.

Throughout the Fifties, Barnes's influence on ecclesiastical legal developments was immense. In May 1953 he secured the dropping of Garbett's proposal for the Archbishops conclusively to determine the content of pre-Reformation canon law;[35] three years later his advice sealed the abandonment of Canons on divorce, nullity and remarriage.[36] In November 1956 Barnes carried through the Ecclesiastical Jurisdiction Measure drafting commission, against the sustained opposition of Eric Kemp, a proposal (reaffirmed three years later) to reverse the majority on the final doctrinal court, giving certainty of the law as the main reason why Lords of Appeal, rather than bishops, should have the ultimate say in any case carrying serious penal consequences.[37] In July 1957 he recommended excising Garbett's draft Canons 7 and 8 entitled 'the law of the Church of England'; and this gave others the opportunity at the same time to delete draft Canon 9 for sanctions against the laity.[38]

Perhaps on the remarriage question Barnes was doing what he had originally been recruited to do—advising on the political acceptability of an avowed change in the law. But on most other issues he spoke as a lawyer, and it was perhaps his comment on draft Canon 7 that gives the best indication of his underlying legal philosophy. This Canon sought to remedy the perceived inflexibility of ecclesiastical law, especially after *Gorham*, by allowing courts to consult a wide variety of sources including learned writing. Barnes commented:

> 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 in force from time to time; and it would seem unnecessary to state this.[39]

One could hardly give a clearer restatement of the Cromwellian authority principle of 1533.

7. REFLECTIONS ON THE MODERN ERA

The modern era is the sixth and final phase of my survey. It is one in which the tensions of the fourth phase seem virtually forgotten, and even Sir Thomas Barnes appears something of a dinosaur. Few today consider the maintenance of a greatly enhanced episcopal authority unbecoming to an exponent or practitioner of the common law.

Yet it is not the bishops who have closed the gap. Today's bishops do not consider their authority derived from the decision of prince and people to adopt an episcopal form of government. They do not expect their activities

[35] Canon Law Steering Committee minutes 14–15 January 1953, in Fisher Papers, Lambeth Palace Library.
[36] (1956) *York Journal of Convocation* 60–63, *Chronicle of Convocation* 49–50, 81.
[37] Wand/Chase drafting commission minutes, 19 October 1956, 29 November 1956, 26 May 1959 (Fisher Papers).
[38] Canon Law Steering Committee Executive minutes 23 July 1957 and annexed 'Document K' (Fisher Papers).
[39] 'Document K': see previous note.

to be regularly judicially reviewed, nor think of the system they administer as 'the Queen's ecclesiastical law'. They hold disregard of the Canons to be disloyal, even when committed by lay people. They think of themselves, rather than Parliament, as the guardians of doctrine. How is it, then, that common lawyers have become the allies of an authority that so challenges the assumptions of Cromwell, Coke, Hardwicke, Lyndhurst and Barnes?

One answer that may spring to mind is 'synodical government'. The Church Assembly, now the General Synod, was designed to accord at least the active conformist laity a say in religious legislation. Insofar as the bishops act in this synodical context, it can be argued that a major concession is being made to the 'bottom-up' principle so dear to the common law. This is undeniable, but cannot be the whole answer. Both in theory and in practice, much authority still remains concentrated in the bishops' own persons. The high episcopalian view was that the Church Assembly was only a legitimate vehicle of church government because the (wholly clerical) convocations had created it. New Canons may now be made with lay participation,[40] but the power to make them remains the same power whose limitations were spelt out in *Middleton v Crofts*.

So I will offer four further explanations, three of them relating to the lawyers themselves.

First, of course, one cannot expect lawyers as citizens and churchgoers to be isolated from shifts in popular understanding or theological fashion. The Oxford Movement left its mark on such influential common lawyers as Sir David Knight-Bruce, the Privy Counsellor who refused to sign the Board's Opinion in *Gorham* and stayed at home when it was delivered, and his relatives by marriage Sir Robert and Sir Walter Phillimore, who together produced one of the nineteenth century's most influential works on ecclesiastical law.[41]

The younger Phillimore gave judicial respectability in *Marshall v Graham*[42] to the post-Tractarian view of 'establishment' as an arm's-length relationship between two distinct entities, the one making its own rules and the other giving them coercive sanction. This was hardly the understanding of Hooker and the classical tradition, but it is the one with which the modern generation of practitioner has grown up.

Secondly, it must be said that lawyers in this field are less independent of the episcopate than once they were. The departure of the 'civilians' left the episcopal courts, despite their decimated workload, still needing advocates and chancellors. Common lawyers trained in the Inns of Court filled this gap. True, as is often pointed out, this allowed a further convergence of principles and procedure with those of Westminster Hall. But it also opened the way

[40] Revised Canons Ecclesiastical, Canon H1; Synodical Government Measure 1969.
[41] Robert J. Phillimore, *Ecclesiastical Law* (2nd Edn, ed Walter Phillimore, London, 1895).
[42] *Marshall v Graham* [1907] 2 KB 112 at 126.

for the common lawyers so recruited into episcopal service to 'go native', their judgments and writing taking an increasingly high episcopalian view. The fact that the Ecclesiastical Law Society was founded for the 'provision of assistance' to bishops and synods, as part of its more neutral goal of 'promotion of the study of ecclesiastical law', is perhaps symptomatic.[43]

One development worth mentioning in this context is the 1976 merger of the posts of bishop's legal secretary and diocesan registrar.[44] Previously, while the legal secretary had been 'the bishop's man', relating to him as lawyer to client and wholly dedicated to his interest, the registrar had been a tenured court officer, loyal primarily to the law, whether that was for the bishop or against him. The merger created a combined officer who indeed took on the registrar's specific duties, but whose relationship resembled much more closely that of the legal secretary. This left one fewer source in a position to advise bishops that some proposed courses of action might be not merely inadvisable but legally impossible.

A third factor, which is perhaps the other side of the same coin, is that lawyers specialise in areas called for by their clients; and those who might once have instructed them to challenge the bishops are simply not as interested as they were. After excommunication lost its terrors and inheritance, marriage and tithe cases went elsewhere, most practical interest in setting limits to episcopal jurisdiction disappeared. Much of the old learning on prohibition was lost, and the High Court began to be surprised if any ecclesiastical matter was brought before it.[45] In 1912 someone might yet go to court if his vicar refused him communion; but after the war he would simply go elsewhere.[46] The Prayer Book crisis of the 1920s stirred up the embers of interest, but after a while even the Church Society's readiness to litigate flagged. Today if practitioners cannot make a living from appearing on the side of the bishops, they most certainly cannot live from appearing against them.

The primary explanation, though, for the modern alliance between episcopacy and the common law must be that from 1919 onward the bishops played what the lawyers had themselves to recognise as a trump card. Earlier I described the Enabling Act as a compromise between two views of authority; and in a theoretical sense, so it was. But it was far from even-handed in its practical consequences, because it enabled most drafting and certainly most debate of religious legislation to take place in circles where belief in a distinct church and in episcopal leadership was dominant.

[43] Constitution of the Ecclesiastical Law Society, art. 1.2, (1988) 3 Ecc LJ 41.
[44] Ecclesiastical Judges and Legal Officers Measure 1976.
[45] For example the reluctance with which Smith J granted an injunction to restrain an illegal ordination in *Gill v Davies* (19 December 1997); judgment in full in Mark Hill, *Ecclesiastical Law* (2nd edn) (Oxford, 2001), p 707.
[46] Bruce S Bennett, '*Bannister v Thompson* and afterwards—the Church of England and the Divorced Wife's Sister Marriage Act' (1998) 49 *Journal of Ecclesiastical History* 668.

Parliament's authority was thereby attached to language and institutions explicable only in such terms, and a steady stream of Measures expanded episcopal discretion in liturgy, patronage, pastoral reorganisation and numerous other fields. Whether high episcopalians or not, common lawyers, trained to respect parliamentary enactment even above their own unwritten tradition, could do little but capitulate.

The modern developments I have described will no doubt sound to many of my readers like matter for celebration rather than regret. If the classical outlook of the common law was rigid, hampered mission and was liable to abuse by public officers hostile to the spirit of the Christian nation, then indeed it needed replacement by something new or, as some will claim, the revival of something older. Leadership with a strongly personal focus is undoubtedly in accord with the modern trend (and the requirements of the media), as prime-ministerial has replaced Cabinet government, authority within some presbyterian polities has passed from synods to moderators (no longer always elected by the bodies over which they preside), Universities concede ever greater power to administrator Vice-Chancellors and elected Mayors dominate collegiate local authorities. Even in vacant sees, guardianship of the spiritualities historically undertaken by cathedral chapters is being steadily whittled away by the statutory allocation of functions to metropolitical delegates in bishop's orders.

I finish simply with the thought that every institution requires some checks and balances, and so long as the law is still to feature in the life of the worshipping community this is bound to be an important place to seek them. There may accordingly be something to be said for practitioners at least considering, and perhaps adapting rather than wholly abandoning, the ways in which their forebears once sought to meet this need.