(2024) 26 Ecc LJ 1–5
doi:10.1017/S0956618X23000601

ELS Ecclesiastical Law Society
CAMBRIDGE UNIVERSITY PRESS

EDITORIAL

Editorial

Benjamin Harrison

Barrister, Serjeants' Inn Chambers, London
Email: editor@ecclawsoc.co.uk

> The law of the Church cannot be properly understood without something more than a perfunctory knowledge of theology and church history … there is far too little contact and interchange of ideas and points of view between clergy and ecclesiastical lawyers.

So said Bishop Eric Kemp at a conference concerning Ecclesiastical Law held at Corpus Christi College, Cambridge in March 1987.[1] It was in response to that challenge that those who attended the conference resolved to set up the Ecclesiastical Law Society. The then Archbishop of Canterbury, Robert Runcie, gave the following exhortation:[2]

> What matters about the ecclesiastical law of England, as the eminent jurist Lord Blackburn rightly put it some hundred years ago, is that it is 'part of the general law of England – of the common-law – in that wider sense, which embraces all the ancient and approved customs of England.'
>
> Ecclesiastical law is not only a subject that attracts outstanding scholarship, which I hope will continue to be advanced in a distinguished way by the Society. It is also a changing and evolving discipline, reflecting change and evolution in the Church itself, and increasingly vital to it … There has never been such a need as there is today for the law of the Church to develop, and to develop soundly in the light of consistent and distinguished scholarship.

Evolution and change is a key theme in this issue. The recognition of ecclesiastical law as a subject worthy of systematic study had, after much neglect, a renaissance in the late 20th Century. The publication of this *Journal* was part of that renaissance. What started as a pamphlet published twice a year has now, under the careful stewardship of Chancellor Goodman, Professor Hill and Dr Adam, grown to boast a global readership. As we enter a new

[1] 'Launch of a New Society to Study Ecclesiastical Law' (1987) 1 Ecc LJ 1.
[2] 'Message from the Archbishop of Canterbury' (1987) 1 Ecc LJ 1.

Carolean era, it is fitting that the *Journal*'s appearance evolves too – for only the fourth time in its history – into something more contemporary and outward-looking. The updated typeface is more than aesthetic. The new typeface is embedded with software designed to be better picked up by online search engines and indexes. This will ensure that the original peer-reviewed research contained in our articles, comment pieces, book reviews and reports have the best chance of being seen and digested by a wider audience of clergy, students, practitioners and academics – both online and in print. It is anticipated that the reach and influence of the *Journal* will be enhanced and expanded by this change of format. I hope that those who were in attendance at the 1987 conference in Cambridge can look back on their project and smile, recognising that the study of ecclesiastical law captured in these pages, far from being idiosyncratic and neglected, now stands proudly alongside Cambridge University Press's other mainstream humanity subjects in its own right. I wish to record my thanks to the Journal's editorial board, the editorial team at CUP (Emily Redican-Bradford and Charlotte Cotterill), and my long-suffering copyeditor (Diana Jones) for helping to bring this about.

The evolution of the established nature of the Church of England, and its shifting place within the British Constitution, has been covered in detail in recent years.[3] Reflecting back on 2023, the coronation year of King Charles III, we saw the laws and customs of the Church front and centre in the King's solemn accession and coronation oaths where he undertook to uphold both the protestant succession to the throne and, more broadly, the settlement of the Church of England 'as by law established'. This issue continues to explore the questions raised by the nature of establishment today; that is, the significance of the ecclesiastical law of the Church of England being also part and parcel of the civil law of the State.[4]

It is in many respects counterintuitive that, despite having an established church, England (along with the rest of the United Kingdom) has a proud, pluralistic tradition which is rightly celebrated. The King affirmed this tradition in remarks he made to faith leaders on 16 September 2023:[5]

> ... [T]he Sovereign has an additional duty – less formally recognized but to be no less diligently discharged. It is the duty to protect the diversity of our country, including by protecting the space for Faith itself and its practice through the religions, cultures, traditions and beliefs to which our hearts and minds direct us as individuals. This diversity is not just enshrined in the laws of our country, it is enjoined by my own faith. As a member of the Church of England, my Christian beliefs have love at their

[3] See further the collection of essays compiled in B Harrison (ed), 'The Established Nature of the Church of England: A Collection of Essays to Mark the Coronation of King Charles III', which can be accessed here <https://www.cambridge.org/core/journals/ecclesiastical-law-journal/collections/the-established-nature-of-the-church-of-england-a-collection-of-essays-to-mark-the-coronation-of-king-charles-iii>, accessed 21 October 2023.

[4] cf. *Aston Cantlow v Wallbank* [2003] UKHL 37; (2004) 1 AC 546 per Lord Hope at 569D–F.

[5] 'Remarks to Faith Leaders' on 16 September 2023, which can be found here: <https://www.royal.uk/kings-remarks-faith-leaders>, accessed 21 October 2023.

https://doi.org/10.1017/S0956618X23000601 Published online by Cambridge University Press

> very heart. By my most profound convictions, therefore – as well as by my position as Sovereign – I hold myself bound to respect those who follow other spiritual paths, as well as those who seek to live their lives in accordance with secular ideals.'

He returned to this theme in a speech at Mansion House on 18 October 2023:[6]

> ... I have often described the United Kingdom as a 'community of communities'; an island nation in which our shared values are the force which holds us together, reminding us that there is far, far more that unites us than divides us ...
>
> ... [T]here is the breathing space we afford one another, leaving us able to think and speak freely. This well carries the politeness and respect we owe to one another; our willingness to put others first and treat them as we would wish them to treat us. To listen to their views and, if we do not agree, to remind ourselves to engage in a way which is passionate, but not pugnacious. This includes the practice of our religious faiths, in freedom and mutual understanding.

In this issue, Bishop Martin Warner examines this paradox through the lens of the ministry of a bishop – both in Parliament, and in civic life generally. He notes the positive contribution made by bishops to the processes of government that shape our nation, and then contrasts this with the contemporary tensions that arise when Parliament stands in a different place away from the theological position of the House of Bishops or General Synod. In the course of this ongoing dialogue between Church and State, there will often be well-meaning, but ultimately misguided, attempts to remove from the Church of England's own institutions of governance the freedom to decide its own doctrine.[7] In this vein Warner identifies – in the secular realm – a 'trend away from tolerance and dialogue ... animated by demands for compliance and conformity'.[8] This rather crystallises the observations made by Colin Podmore some five years ago:[9]

> Many within the apparatus of the State, except perhaps at its highest levels, seem now to regard the Church of England for most purposes as merely one 'faith community' among many, which should not be privileged in any way. And yet – paradoxically – they expect it to conform its teachings and practices to prevailing attitudes in English society to an extent that

[6] 'The King's Speech at Mansion House', 18 October 2023, which can be found here: <https://www.royal.uk/mansion-house>, accessed 21 October 2023.

[7] As noted by Andrew Sealous MP (the Second Church Estates Commissioner) in response to a Bill (introduced in the House of Commons) designed to enable Church of England clergy to conduct same-sex marriages on Church of England premises: HC Deb 21 March 2023, vol 730 c187.

[8] M Warner, 'Episcopacy, Law and Government' (2024) 26 Ecc LJ 56.

[9] C Podmore, 'Self-Government Without Disestablishment: From the Enabling Act to General Synod' (2019) 21 Ecc LJ 312–328, at 328.

https://doi.org/10.1017/S0956618X23000601 Published online by Cambridge University Press

would not be required of other 'faith communities'. For how long the 1919 settlement can survive in such a changed climate is open to question.

Mark Hill KC, in an article reflecting on the 20 years that have followed the decision of the House of Lords in *Aston Cantlow v Wallbank*, traces how our understanding of the constitutional significance of establishment has changed in the 21st century, and predicts how the Church's relationship with the state might evolve in the future in the context of this tension, and the increased influence of secularism. He reminds us that one consequence of the Court of Appeal's earlier determination (had it been left unchallenged) would have left Parochial Church Councils categorised as 'core' public authorities for the purposes of section 6 of the Human Rights Act 1998. In practical terms, this means they would have been left unable to avail themselves of *any* Convention rights at all, including (perversely) the right to freedom of religion and belief under Article 9 of the European Convention on Human Rights ('ECHR').

Linked to the freedoms enshrined by Article 9 of the ECHR, we encounter a further tension inherent in the approach taken by the secular courts when asked to review, in the course of determining civil disputes, the substance and content of religious practices. In *McFarlane v Relate Avon*, Laws LJ expressed what is often referred to as the principle of 'religious neutrality' as follows:[10]

> 22. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.
>
> ...
>
> 25. So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials ...

A joint article from Marco Galimberti and Tania Pagotto discusses the application of the Strasbourg proportionality test which the Court of Session in Scotland and the European Court of Human Rights carried out when reviewing the limitations to worship and public gatherings imposed by governments during the COVID-19

[10] *McFarlane v Relate Avon* [2010] EWCA Civ 880 at para 22. The principle was re-stated in the context of ECHR jurisprudence by the Grand Chamber of the European Court of Human Rights in *Bayatyan v Armenia*, App no 23459/03 ([GC], 7 July 2011) at para 120: 'The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. The State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed'.

https://doi.org/10.1017/S0956618X23000601 Published online by Cambridge University Press

pandemic. They criticise the decision of the Outer House of the Court of Session in *Philip & Ors for Judicial Review of the Closure of Places of Worship in Scotland*[11] for placing too strong an emphasis on the tenets and rituals peculiar to Christianity which thereby led, they argue, to the undermining of the principle of religious neutrality.

Finally, moving away from the focus on establishment, and adding breadth of coverage to this issue, the Court of Appeal has recently handed down its decision in *Re SA (Declaration of Non-Recognition of Marriage)*.[12] Sir Nicholas Mostyn criticises that decision, particularly its treatment of voidable marriages. Unless overturned by the Supreme Court, *Re SA* remains good law. That said, Mostyn argues that the approach adopted by the Court of Appeal is conceptually challenging, based on a misreading of the statutory language, and is directly contrary to long-established and powerful authorities – many of which he marshals from the ecclesiastical courts.

[11] *Philip & Ors for Judicial Review of the Closure of Places of Worship in Scotland* [2021] CSOH 32.
[12] *Re SA (Declaration of Non-Recognition of Marriage)* [2023] EWCA Civ 1003.

Cite this article: B Harrison, 'Editorial' (2024) 26 Ecc LJ 1–5. https://doi.org/10.1017/S0956618X23000601