AN HONOURABLE ESTATE†

A personal view of the report by the Working Party of General Synod

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The report entitled "An Honourable Estate" was produced by a working party established by the standing committee of the General Synod of the Church of England and was published in January 1988. At the February 1988 Group of Sessions of General Synod the report was received and the Synod passed a motion by which it endorsed the working party's recommendation that there should be no change in the extent of the Church's responsibility to solemnize the marriage of all parishioners who might request that ministry. An amendment proposed by Prebendary Michael Saward to allow a Church of England minister to refuse marriage to an unbaptised couple or where one of the parties was a practising member of a non-christian religion was rejected. The voting on the Saward amendment was in the House of Bishops seven in favour of the amendment and twenty-three against, in the House of Clergy sixty-one in favour and one hundred and fourteen against, and in the House of Laity fifty-five in favour and one hundred and twenty-two against. The number of votes in favour of the amendment indicated a substantial degree of concern in the Church of England over the present law which requires a parish priest to marry anyone who is resident in his parish (except a divorcee whose previous spouse is still alive or whose proposed wife is in that position).

The working party was established following a motion of General Synod in February 1984 proposed by the Bishop of Chichester that there should be a report on the effect of recent changes in society and in marriage law and of the growing number of divorces, on the doctrine of marriage according to English Law and on the obligation of the Church to marry all parishioners who are not divorced.

A later motion in 1978 in the name of Canon Douglas Rhymes suggesting a change in the law to a system of universal civil marriage was also referred to the working party. The report has chapters entitled: "Theological Considerations", "Historical and International Perspectives", "The Law of Marriage and Divorce in England", "Social Trends" and "The Options". The report is clear in identifying the various issues to be considered and contains a great deal of valuable information and argument.

The English Law of Marriage and the Christian Understanding

In the chapter on "The Law of Marriage and Divorce in England" the report notes the very considerable changes in secular law which have occurred in the last 30 years or so and concludes that these changes have affected public attitudes to marriage by making the partners in a difficult marriage more ready to see divorce as a solution to their problems. Nevertheless the working party concludes that the nature of marriage in English law is still as laid down in the case of **Hyde v Hyde** (1866) in which Lord Penzance said: "I conceive that marriage, as understood in christendom, may be defined as the voluntary union of life of one man and one woman to the exclusion of all others". In addition the parties must have legal capacity to marry each other, they must freely consent to the marriage, and the

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nature of the marriage must be heterosexual and monogamous. The working party says (in para. 122) "We as a group have no doubt that (legal marriage) can be recognised as marriage by the church. The fact that it is now easier to get out of marriage does not, in our opinion, mean that the institution has changed per se. . . We wish to say as firmly as we can that in our view there have been no changes in the law which have fundamentally altered the basic legal character of the institution in England as a lifelong and exclusive union".

The working party thus arrives at a firm and confident conclusion that there is no fundamental inconsistency between the English Law of marriage and the church's understanding of marriage. Are the members of the working party right to express this view with such confidence? It is not the intention of this reviewer to disagree with them, but merely to suggest that debate is likely to continue. While it can readily be accepted that couples enter into secular marriage with the best of intentions, and in the hope that their marriage will endure for a lifetime is it sufficient to assess their intentions solely upon the basis of how they feel at that stage? Ought one also to take into account what their views of the permanency of marriage are when at a later stage difficulties arise? Still further on what is to be said of the views of those who, faced with serious difficulties in their marriage, decide to seek divorce, often in the hope that they will be happier in a subsequent relationship or second marriage? Is it only the intention at the time of the marriage which governs the question as to the quality and nature of marriage according to English Law? Is the christian understanding of marriage different, either in principle or in practice? Does christian marriage result in the partners continuing to view the marriage as permanent even when difficulties arise? If those difficulties reach a stage at which others would think in terms of divorce do the christian partners reject divorce as a solution and, with God's help, continue to live within their marriage? If distinctions **can** be properly made between the understanding of christians in relation to their marriage as it proceeds and the understanding of those who do not have a christian commitment, is the confident statement of the working party justified and has the analysis of the effects of social and legal changes in marriage and divorce law been adequate?

The working party then goes on to consider whether it is desirable that the Church of England should continue to act as an arm of the State in solemnising legal marriages. The basic problem which gives rise to this question is that clergy are not infrequently asked to marry couples who have hitherto had no contact with the Church of England. So long as one of them is resident in the parish there is an obligation to marry them. It is not open to the clergyman to refuse on the grounds that one or both of them is not a baptised member of the Church of England; nor can he refuse on the grounds that one or both of them is a member of some other religion. There is a very interesting historical section in the report (paras. 43 to 71) showing how the law has developed in this way. It is interesting to be reminded that until the passing of Lord Hardwicke's Marriage Act of 1753 the law and practice of marriage in England and Wales were in a sorry state and many marriages took place by social custom or by resort privately to an unbeneficed priest (so called "Fleet" weddings). Lord Hardwicke's Act provided that in future the only marriages which would be legally recognised were those taking place in the Church of England, except for those of Jews and Quakers for whom special provisions were made. It was an inevitable consequence of the Act that parishioners should have the right to be married in their parish church. It was not until 1836 that there was any alternative marriage procedure. In that year the

system of civil marriage before a marriage registrar was set up as an alternative procedure, thus making it possible for Roman Catholics, free churchmen and non-christians to be married elsewhere than in the parish church.

The Obligation to Marry a Parishioner

The working party considered the possiblity that it might no longer be the law that a parish priest is required to marry a resident of the parish who is not a baptised memeber of the Church of England, but it rejected that solution. It is difficult to quarrel with the working party's conclusion. Shortly after the Act of 1753 the question arose in **Argar v Holdsworth (1758) 2 Lee 515** whether a minister was required to marry a Jew and a baptised person both of whom were resident in the parish, and it was held that if he did so refuse he would be committing an ecclesiastical offence. The position did not alter after the 1836 Act and in **R.v Dibdin (1910) P.57 C.A.** Lord Justice Fletcher Moulton said at p.117: "One of the duties of clergymen within this realm is to perform the ceremony of marriage and parishioners have the right to have the ceremony performed in their parish church". In 1857 the Matrimonial Causes Act made divorce available through proceedings in the secular court and, because that would have resulted in conscientious difficulties for a clergyman being required to marry a divorcee resident in the parish, the Act contained a proviso that no clergyman should be compelled to solemnize the marriage of any person whose former marriage had been dissolved on the ground of his or her adultery. A similar conscience provision has been incorporated into later matrimonial causes legislation. Because this proviso only relates to the marriage of a divorcee, and says nothing about the marriage of non-christians, it is to be inferred that the obligation to marry those in the latter category continues. In 1975 the Lichfield Commission accepted that "baptism is not an essential qualification for the solemnization of marriage in church".

While accepting that this is the strict legal position, deriving its basis from the 1753 Act, is it proper to argue that the law is now in an unsatisfactory state and ought to be changed? If so this would of course be a matter for Parliament as marriage law (including the question of how it should be solemnized) is for the State to decide. The 1753 Act was passed in order to regularise the scandalous lack of marriage descipline which then existed in society and it was enacted at a time when the law required all parishioners to attend their parish church and when Roman Catholics and free churchmen were under disabilities. Can it be argued that both the reasons which brought about the 1753 Act and the religious climate in which it was enacted, have altered radically, so that it is no longer appropriate to give to parishioners a right to be married in their parish church which was in 1753 the corollary of their obligation to attend the church?

Chancellor Garth Moore in his "Introduction to English Canon Law" (1967) says "In strict law a parishioner is under an obligation to attend the parish church on all Sundays and holy days unless he has a reasonable excuse for his absence or unless he dissents from the doctrine and worship of the Church and usually attends some place of worship other than that of the established church. The Book of Common Prayer further directs that every parishioner shall communicate at least three times a year of which Easter shall be one . . . As a corollary of his obligation to attend divine worship a parishioner has a right of entry to the parish church at the time of public worship . . . He has a right to the burial of

his body in the burial ground of the parish regardless of religion. He has a right to be married in the parish church at any rate if one of the parties to the marriage has been baptised. In general it is apprehended that, whatever his religion, as a parishioner he has a right to the ministrations of the church so far as they are appropriate to his condition". As previously indicated the working party did not agree with Chancellor Garth Moore in thinking that the right to marriage in the parish church might depend upon one of the parties being baptised and the authorities quoted above would indicate to the contrary. Nevertheless the importance of Chancellor Garth Moore's analysis of the position is that it shows that the right to marriage in the parish church arose as a corollary to the statutory duty to attend divine worship in the parish church. This duty was imposed by Section 1 of the Act of Uniformity 1551. Originally it applied to all parishioners. It was relaxed by legislation in the early 19th century in relation to free churchmen, Roman Catholics and Jews and eventually the whole of the Act of Uniformity 1551 was repealed. The question therefore arises whether there is still an obligation on parishioners to attend worship (even though that obligation may not be enforced) and, if so, is it still a proper basis for the corresponding right to marriage recognised by the 1753 Act?

First it must be said that in **Cole v Police Constable 443A [1937] 1 K.B. 316** the view was expressed by Goddard J. (later Lord Goddard L.C.J.) that a corresponding right of a parishioner to enter his parish church and to participate in divine worship was a common law right not dependent on the statutory obligation in the Act of Uniformity. On that basis the right of a parishioner to be married in his parish church may be a common law right not depending on the Act of Uniformity 1551, so that the repeal of that Act would be irrelevant. As indicated above Chancellor Garth Moore appears to suggest that the obligation to attend the parish church is still in existence, notwithstanding the repeal of the 1551 Act, so that perhaps that is a common law obligation carrying with it the corresponding common law right. On that interpretation the 1753 Act which effectively gives the statutory right for a parishioner to be married in church is to be seen as confirming an existing common law right. If this is an ancient common law right is it one which has been diminished by social changes, including the non-enforcement of the obligation to worship in the parish church and the provision of an alternative method of marriage through the registrar? Perhaps there is an argument that the common law has gradually changed to the point where the right for a parishioner to be married in his parish church would no longer be enforceable in a Secular Court. If not is it desirable that there should be a statutory restriction on this right?

Five Options for the Future Role of the Church – The Unbaptised

Of the five options considered by the working party, the third option was "to restrict marriage in the Church of England to couples where at least one of the parties is baptised". The working party came down against this option, arguing as follows:

(a) That a baptismal requirement would lead to artifical baptisms before marriage;
(b) That the divine gift of marriage may properly be received whether or not the participants are baptised;
(c) That the Church of England's traditional approach (exemplified by the Book of Common Prayer) does not require baptism as a pre-requisite for marriage;
(d) That there are considerable pastoral opportunities arising from contact with parishioners who are not baptised but seek marriage in church.

These are powerful arguments and it is not intended to join issue with the conclusion of the working party. However that conclusion does not provide any satisfactory answer to the problem arising from an application for marriage by parishioners who may have no regard for christian principles in relation to their marriage and/or who may be adherents of some other religion or of some organisation whose objects are inherently incompatible with christianity. The working party's conclusion will perpetuate a situation of the greatest tension for clergy in having to reconcile their legal obligation to marry with the necessity of maintaining the witness of the Church and the support of the worshipping community. While it is understandable that the Church itself would not wish to initiate legislation giving it power to discriminate against those who are not baptised, would such a change be equally unacceptable if the process were to be initiated outside the Church as a result of public consideration of the problems which arise followed by appropriate parliamentary legislation?

Universal Civil Marriage?

The last of the major topics considered by the working party was whether the Church of England should give up its role in solemnising marriages in favour of a system of universal civil marriage. The report points out that there are other Commonwealth countries, some of which have a strong Anglican presence, where universal civil marriage applies (for example Nigeria). The working party rejects this option because of its conviction that there is no fundamental inconsistency between civil marriage and the christian understanding of marriage and also because a move to universal civil marriage would promote the notion of two understanding of marriage. Furthermore the working party believes that the Church should continue to take advantage of the opportunities offered by being one of the agencies of civil marriage. "In our view it would be disastrous for the church even to appear to wish to distance itself from ministering to any and all who might seek its ministry at such a crucial moment in their personal development and relationships". Again this states the working party's conclusions in uncompromising terms. This review does not intend to join issue with the conclusion but perhaps comment can be made that, if the Church of England continues to be one of the agencies for secular marriage, it must do so with its eyes open and in the knowledge that tensions will continue between this marriage function and the need to witness to the christian understanding of marriage. It would be foolish to think that there are no theological problems, no social problems and no practical problems.

Some will wish to give greater thought to the theological position. If the church needs to teach its own adherents about fidelity, perseverance, forgiveness and love in the marriage relationship, will that ministry be hindered by the church's encounter (at their time of their marriage) with individuals whose attitudes towards these matters are different? Then there is the whole question of the Church's obligation to minister to the world outside the committed christian community. Are there any practical limits to the extent to which the church should be involved in the needs of the wider community? Can the church always and in all circumstances combine a ministry to those who have hitherto shown no inclination to respond to its ministry with its responsibility for those who **have** responded already and have begun to live as christians. The ministry, through

marriage, to the unbaptised, the unconcerned or the adherent of another religious faith is undoubtedly profitable, challenging and theologically well-founded, but the demands on those involved are great. If the report reaches the right conclusions on these matters does it at the same time sufficiently draw our attention to the demands which will be made on the church in future years? Is it reasonable for further debate to take place as to whether the church has the strength, the resources and the courage to cope with these tensions?

SEPTEMBER CONFERENCE AND AGM

Members will already have received application forms for the One Day Conference and AGM to be held on **Saturday, 17th September, at Church House, Westminster, SW1 from 10 a.m. to 4 p.m.**

If you have not already sent in your application form, please do so without delay to assist the Conference Organiser, Mr Brian Hanson, in assessing total numbers.

If you wish to join the Society and be able to attend, please write to the Membership Secretary, Mr Augur Pearce, at 1 The Sanctuary, Westminster, SW1., who will be pleased to send you details.

Apart from the paper by the **Very Revd Robert Ombres O.P.** on the approach of the Roman Catholic Church to Canon Law and the **Annual General Meeting,** there will be meetings of the **Working Groups** which all are welcome to attend and an opportunity to meet informally.

The Conference fee will be £12.00 and it may be possible to arrange cheap travel with British Rail.

Any further information about the Conference can be obtained from Brian Hanson at Church House, Great Smith Street, London SW1P 3NZ.