LAW, THEOLOGY AND HISTORY IN THE JUDGMENTS OF CHANCELLOR GARTH MOORE

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For more than forty years, from his appointment in 1948 as Chancellor of Southwark diocese until his death in 1990, Evelyn Garth Moore was a dominant figure in Church of England legal circles. He taught ecclesiastical law at Cambridge, he wrote a standard introduction to the canon law of the Church of England, became Chancellor of the dioceses of Southwark, Durham and Gloucester, and had many other responsibilities, including the Chairmanship of the Legal Advisory Commission.[2] Hearing an appeal from one of Garth Moore's later judgments, Sir John Owen said of him that whilst there might be some who had as great and encyclopaedic a knowledge of the Ecclesiastical Law of the Anglican Church as he, 'there is nobody who in this subject excels him'.[3] He was considered an authority in his own lifetime.[4]

This study attempts to examine the nature and characteristics of the judgments given by Chancellor Garth Moore, including references to cases in which he appeared as *amicus curiae* or as counsel. Consideration will also be given to the judgments in cases involving appeals from his own decisions. A full list of the cases considered is given as Appendix I below. The focus for analysing Moore's judicial output is derived from his own specification of what is required of a canonist: 'The canonist, therefore, can never be simply a lawyer; he must always be in some measure a theologian, and he will frequently require the assistance of historians'.[5] The present study is our attempt at tracing how Chancellor Moore understood the theory and practice of English canon law, and we shall divide our analysis of his judgments into the triple dimensions of law, theology and history.

1: LAW

Obviously Chancellor Moore was constantly engaged in determining the law relevant to the case in hand and its correct interpretation.[6]. But from time to time larger considerations were raised. In *Re St Mary's, Barnes* his diocesan bishop relying upon a reservation to himself of the power specified in the Chancellor's patent of appointment had granted a faculty for a rebuilding scheme. The Chancellor took the opportunity to reaffirm the doctrine of separation of powers in its ecclesiastical context:

1. Chancellor Timothy Briden, M.A., LL.B., Barrister (Inner Temple), Chancellor of Bath and Wells. Fr. Robert Ombres, OP., S.T.L., LL.B., LL.M., Barrister (Inner Temple), Lecturer in Canon Law at Blackfriars, Oxford.
2. A biographical outline by Chancellor Michael Goodman is in (1990) 2 Ecc LJ 63.
3. Sir John Owen, *St Paul's Church, Jarrow* (1984) Chancery Court of York, unreported.
4. John Holden, in (1988) 1 Ecc LJ (3) 34 considers Garth Moore, and Chancellor Newsom, to stand in the list from Swinburn, Godolphin, Prideaux, Burn, Phillimore, Elphinstone and Wigglesworth: each an authority in his lifetime.
5. T. Briden and B. Hanson, *Moore's Introduction to English Canon Law* (3rd ed. London, 1992) 1. This passage appeared in the first edition (1967).
6. In *Re St Peter* [1951] 2 All ER 53 at 58 he adverted to the need to bear in mind how important it is not to divorce judicial pronouncements from their context.

> 'Whether or not he was, by reason of this unusual patent, ever legally seised of the case, it was, on constitutional grounds, highly undesirable that he should try to deal with it, for to do so involved a breach of the constitutional principle of the separation of the functions of the legislature, the executive and the judiciary, and a return to the absolutism of the Middle Ages condemned in this country since at least the middle of the seventeenth century'.[7]

If a bishop could act unconstitutionally, the integrity of the legal system might also need upholding with respect to Archbishops. In 1900 the two Archbishops of England after inquiry concluded, first, that reservation is doctrinally permissible and, secondly, that it is probably illegal. Chancellor Moore felt he had to pay great attention to the first matter, emanating as it did from so weighty a source on a point of doctrine, whereas on a matter of law he should naturally not be expected to give the same weight to the opinions of the Archbishops.[8] In that same judgment, Moore also remarked that it is too frequently forgotten that pre-reformation canon law is still fully extant in the Church of England and in this realm, save in so far as pre-reformation canon law has been expressly repealed or by necessary implication altered.[9]

The borderland between law and theology was considered more than once in terms of liturgical matters. Inasmuch as the 1928 Prayer Book was rejected by Parliament, Moore was unable to give it any legal weight whatever, but inasmuch as the church gave the seal of her approval to reservation, he believed it to be of great moment when considering the theological propriety of reservation.[10] As for the Book of Common Prayer, he accepted its statutory authority whilst declining to treat it as if a statute. Nor did it mean that it had to be interpreted as one would interpret the statute itself.

> 'It is the work of clergymen and its rubrics are directives written by clergymen for clergymen, in language which, for a directive, is clear enough, but which from a lawyer's angle leaves many loose ends and much to be desired. . .'[11]

Could a faculty be granted for something which was illegal? Moore would not lightly subscribe to a theory that it could be proper to grant faculties for what was illegal, but in the same case he was able to invoke the doctrine of necessity, a doctrine which has its place in the common law of England, though its limits have never been exactly defined.[12] It has an even older place in the *jus commune* of the church and is, if anything, there more firmly entrenched.[13] The Chancellor invoked the doctrine of necessity in other judgments of his.[14] It had

7. *Re St Mary's, Barnes* [1982] 1 All ER 458. The same principle was expressed in the first edition of the *Introduction to English Canon Law,* 132.
8. *Bishopwearmouth (Rector and Churchwardens) v Adey* [1958] 3 All ER 443.
9. Ibid.
10. *Bishopwearmouth,* supra and *Re St Peter and St Paul, Leckhampton (Rector and Churchwardens) v Barnard and Others* [1967] 3 All ER 1059.
11. *Bishopwearmouth,* supra 444.
12. *Buckoke v Greater London Council* [1971] 2 All ER 254 where the dictum of Lord Denning MR at 258 reflects the *Introduction to English Canon Law* (3rd ed), 58.
13. *Bishopwearmouth,* supra 446; N. Doe, 'Toward a Critique of the Role of Theology in English Ecclesiastical and Canon Law' (1992) 2 Ecc LJ 328-346 at 339.
14. *Re St Nicolas* [1961] 1 All ER 298 at 299; *Leckhampton,* supra 1060.

also to be said that something could be unlawful and yet theologically permissible – as when in a 1967 judgment, Chancellor Moore stated that reservation was theologically permissible in the Church of England, though, as the law existed until that year, it was *prima facie* not legally permissible by reason of one rubric in the 1662 Book of Common Prayer.[15]

Still in the field of liturgy, Chancellor Moore made repeated references to the *jus liturgicum*. It was within the exercise of the bishop's *jus liturgicum* lawfully to authorise a pyx to be used for reservation.[16] As for the rubrics in the Alternative Services (second series) they were extremely widely drawn, no doubt of set purpose in order to leave as much to the discretion of the officiating minister as is possible, and a great deal more was left to his discretion than ever before. But, significantly, no direction whatever was given as to the method of reservation. Being left quite at large by the rubrics, it could be taken to fall within the *jus liturgicum* of the bishop and the discretion of the consistory court.[17]

Chancellor Moore found himself having to apply ecclesiastical law to various aspects of church life, some of them novel. A petition concerning the installation of a Copeman-Hart electronic organ led him to reflect on a judge's suitability to adjudicate on technical points. He concluded that throughout the land judges, in both the Temporal and the Spiritual courts, do hear such cases; not because they claim any special expertise but because they determine where the balance of the actual evidence leads, when experts differ.[18] In terms of the functions proper to a Consistory Court, he laid down that, subject to law, liturgical practices are primarily for the incumbent and the P.C.C. and not for the judge.[19] He was prepared to try and state the object of the legislature in imposing a prohibition on the erection of buildings in disused burial grounds although it was nowhere explicit; indeed his liberal interpretation of the statutory restrictions contributed in no small measure to the growing use of burial grounds as sites for buildings connected with the mission of the Church.[20] In a criminal case he compared the use of 'neglect of duty' in the 1963 Ecclesiastical Jurisdiction Measure with negligence at common law, only to have this comparison rejected by the Court of Arches.[21] It is, however, questionable whether his direction at the trial was not more favourable to the accused than the law as expressed by the Court of Arches.

In *Re Flenley,* Moore had the unusual task of presiding over the Canterbury Appeal Tribunal for the purpose of determining the rights to compensation of a clergyman removed from office pursuant to the Incumbents (Vacation of Benefices) Measure 1977. The Appeal Tribunal was divided as to the proper construction of the applicable provisions, and in delivering the judgment reflecting the more liberal approach of the majority he remarked:

> 'So obscure have we found the relevant legislation to be that it is our unanimous hope that General Synod will take an early opportunity of reviewing the legislation relative to the compulsory vacation of benefices. . .'[22]

15. *Leckhampton,* supra 1059.
16. *St Nicholas,* supra 301.
17. *Leckhampton,* supra 1060; see also *Bishopwearmouth,* supra 445.
18. *St Peter, Monkwearmouth* (unreported).
19. *St Oswald* (1988) (unreported).
20. *St Ann's Kew* [1976] 1 All ER 461 at 464.
21. *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012 at 1015.
22. *In re Flenley* [1981] Fam 64 at 70.

Moore was concerned to uphold the dignity and effectiveness of ecclesiastical law, and once warned that if the petitioners in a particular case, who had carried out work without a faculty, imagined that they could face everyone concerned with a *fait accompli* then that was very foolish of them. They should have known that the law was not without teeth and that those teeth would if necessary bite.[23] In another case he showed himself sympathetic towards the innocent customer involved but not the stonemasons, who had erected a monument without lawful authority. In each of these cases the offending party was penalised in costs. The awarding of costs was again deployed in a later case on the basis that objectors should not be permitted to increase the costs by entering an appearance and then escape all possibility of liability by seeking to withdraw at the eleventh hour.[24]

2: THEOLOGY

Garth Moore stood in the Anglo-Catholic tradition of the Church of England, and was ordained in 1962. His churchmanship may have made him suspicious of the use of the word 'superstitious' in Church matters.[25] His judgments as Chancellor repeatedly show a keen awareness of the theological issues involved in ecclesiastical law, and contain some striking observations. His remark in a 1958 judgment of the Durham Consistory Court is indicative: 'It is, I think, desirable to begin from first principles, and in the first instance to consider the theological implications of reservation'.[26]

He believed the basic principles that guide the Church to be unchanging. Yet, within the framework of those principles, the Church in her wisdom adapts herself and her trappings to ever changing conditions. In a memorable passage, he said:

> 'She is the Body of Christ, and the Body of Christ is not a mummy. It is a living organism. It is not a mummy, held together only by the restricting folds of a winding-sheet which permit of no further changes than those wrought by slow decay. It is a living organism requiring freedom to grow and move, and, when the clothes of yesterday no longer fit, it is as well to discard them'.[27]

The reference to the Church as the Body of Christ was no mere rhetorical flourish devoid of practical implications. In a later case, Chancellor Moore had this to say in the context of a dispute about the siting of an organ in a particular church building;

> 'It must be remembered that the very existence of a church is solely for the advancement of the Kingdom of God and that the advancement of the Kingdom of God calls for co-operation between what St. Paul would call the different members of the body, and this lays a heavy obligation on both parishioners and incumbents with the cure of souls. . .'[28]

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23. *St Mary's Balham* [1978] 1 All ER 993 at 996. In *St Andrew & St Anne, Auckland* (1983) (unreported) he held that the closure of a churchyard by Order in Council did not oust the faculty jurisdiction.
24. *St Michael & All Angels* (1989) (unreported).
25. '. . . or, to employ the technical language forced on me, whether there is danger of their becoming the objects of superstitious reverence'; *Re St Peter,* supra 59. The expression 'superstitious reverence' was 'unfortunate' (ibid 60). A decade later Chancellor Moore added in brackets after the word 'superstitious', '(whatever that may mean)'; *St Nicholas,* supra 301.
26. *Bishopwearmouth,* supra 443.
27. *St Peter,* supra 62.
28. *St Oswald* (1986).

This is a good example of what might be treated as merely human rights and duties being placed in their ultimate theological context.

The built-in tension of an established Church having a legal system which is also part of the law of the land shows itself periodically in the exercise of the faculty jurisdiction. In one case, Moore had to adjudicate on a sharp conflict, indeed 'an irresolvable conflict' as he put it, between pastoral requirements and conservationist needs. He decided that the conservationist interest must prevail. If what a parish has is part of our national heritage, its immediate custodians are custodians, not only for the parish, but for the whole nation. Conscious of the larger issues at stake, he added; '. . . were the Faculty Jurisdiction to fail in this duty, the ecclesiastical exemption would soon be removed. If this case had to be settled in Whitehall, I am pretty sure that, in far more arbitrary a fashion, these proposals would have been dismissed'.[29] But it was to be a case involving the size and setting of the Royal Arms that led to possibly the most far-reaching comment on Church/State relations in Chancellor Moore's judgments. It is worth quoting in full, especially as the case is unreported:

> 'It is proper that so long as the Royal supremacy exists the mark of that supremacy should appear in churches, but it must be borne in mind that the place of the Monarch is quite clearly set out in the Thirty-Nine Articles. The Monarch is supreme governor on earth, governor of the church in this realm and the authority of the Prince is inescapable whether you have an establishment or not, and the Prince varies from state to state and you will find the authority of the Prince more in evidence in Soviet Russia than you will in this country. It is inevitably inescapable, but that does not mean, as the Thirty-Nine Articles indicate, that there is accorded to secular sovereigns the right to pontificate on matters of doctrine, and so although the Royal Arms should be in the church, they should not be the focus of attention during acts or worship'.[30]

Consideration of Chancellor Moore's judgments illustrates in various ways the desirability of the canonist being in some measure a theologian. Complicated issues as well as the exegesis of the New Testament Greek text were raised by the use of Stations of the Cross in a church,[31] and the correct understanding of the Thirty-Nine Articles required some precise study.[32] He was also called on to assess the theological consequence of west-ward facing celebration,[33] and the implications of placing near a baptismal font a plaque depicting the washing of the Babe of Bethlehem in the stable. Before deciding this latter case, *In re St Edward the Confessor, Mottingham,* Chancellor Moore consulted two or three theologians. He stated that the juxtaposition of the scene with the font could well suggest that our Lord's baptism took place during his infancy. It could further suggest that an ordinary washing can be equated to a solemn initiatory baptism – which was not Anglican doctrine.[34]

29. *St Mary, Beddington* (1987) (unreported). Compare *St Brandon, Brancepeth* (1984) (unreported) where a similar conflict was resolved in favour of altering a 17th century re-ordering by Bishop Cosin on the grounds that 'the needs of the living church carry the greater weight'. J. Holden has reflected that Garth Moore, together with Chancellor Newsom, has contributed by his administrative office and academic writings to the development and strengthening of a jurisdiction which might, otherwise, have lapsed or been abolished; (1987-1988) 1 Ecc LJ (2) 34.
30. *St Oswald* (1986). The text has been slightly amended. See also the observations concerning the establishment in the *Introduction to English Canon Law* (3rd ed) 14, 15 and 143.
31. *St Peter,* supra.
32. *Bishopwearmouth,* supra 443-444.
33. *Re St Matthew's, Wimbledon* [1985] 3 All ER 670 at 672-673.
34. *St Edward* [1983] 1 WLR 364.

One of the most striking features of the theology brought to bear on ecclesiastical law by Chancellor Moore must surely be its ecumenical character. Prophetically so. In deciding one case he made reference to reservation in a tabernacle on an altar in a side chapel as adopted in Westminster Cathedral, London,[35] and in a 1961 judgment in the Southwark Consistory Court he was at pains to point out that although his decision was contrary to the law and practice of Rome, he trusted that it would not be taken to have any doctrinal significance at a time of dramatic though tentative rapprochement.[36] Remarkably, as counsel he once suggested the adoption of a distinction based on canon 1187 of the Roman Catholic 1917 Code of Canon Law – the court declined to follow him on the grounds that the canon has its origins in the Council of Trent and is not therefore part of the medieval canon law retained at the Reformation.[37] In another case, Chancellor Moore referred to the fact that a very large part of Christendom has reservation, both in the Western Church and in the Eastern Church.[38] In the case of *Re St Peter, St Helier, Morden. Re St Olave, Mitcham,* he commented that, as he had had occasion to remark before, the fact that the Church of Rome does something is by itself no reason why the Church of England should not also do it:

> 'Indeed, in these days, when suspicion is less strong and there is what might be described as an oecumenical feeling in the air, one might have thought that the more one could find in common between the severed parts of Christendom the better'.

He noted that the full set of fourteen Stations of the Cross is nowadays to be found throughout the world in churches outside the Church of England, but within the Anglican communion as well as in churches of the Roman communion. He went on to say, and this was in 1951; 'I am reluctant to do anything, in however small a matter, which would appear to create yet another point of obligatory differentiation between the Church of England and other branches of Christendom'.[39]

3: HISTORY

Chancellor Moore's judgments show him to be acutely aware of the historical dimension to much of ecclesiastical law and its application. This awareness took different forms. The first was the establishing of what had been the case at some stated time in the past. He thus referred to the kind of Stations of the Cross used internationally at different periods,[40] the practice of reservation in pre-reformation England and in the 17th Century,[41] and the historical fact that tabernacles, unlike pyxes, were never in general use in England.[42] He denounced a return to the absolutism of the Middle Ages condemned in this country since at least in the middle of the 17th Century.[43] The topic of the *jus commune* of the Church appears repeatedly in his judgments: as the justification for the doctrine of necessity,[44] as the source of canon 68 of the Canons of 1604,[45] and in a case

35. *St Matthew*, supra 672.
36. *St Nicholas*, supra 301.
37. *Re St John's, Chelsea* [1962] 2 All ER 850 at 858.
38. *Bishopwearmouth*, supra 443.
39. *St Peter*, supra 61.
40. *St Peter*, supra 55.
41. *Bishopwearmouth*, supra 443-444.
42. *St Nicholas*, supra 301.
43. *Re St Mary's, Barnes* [1982] supra 458.
44. *Bishopwearmouth*, supra 446.
45. *Bland*, supra 1017.

concerning the erection of a building on a disused burial ground.[46] Some historical questions are mixed, concerning as they do both fact and law. Thus pyxes, on the assumption that they are ornaments, are unlawful unless pyxes were in use by the authority of Parliament in the second year of the reign of Edward VI.[47]

As well as establishing what was the case, there is also present in ecclesiastical law a historical dimension in the sense of taking account of what changes there have been. In a case involving the use of a baldachino, Chancellor Moore noted that much water has flowed between Southwark and London since 1913 when Chancellor Kempe made certain observations and, had he been alive today, he might well have been of a different view, convinced by the body of judgments in other courts in favour of reservation.[48] In another case, he supposed that the bishops were faced in 1928 with a very difficult situation as regards reservation. Nearly forty years later, in different circumstances, he saw no reason why he should be bound to follow the views expressed for the purpose of keeping peace within the Church in 1928, which at that time was threatened with disintegration.[49] Moore recognised that over the years the courts have been progressively more liberal in their interpretation of what amounts to an enlargement of a church.[50] He also thought that sentiments had changed concerning the resting-place of human remains, and that what is today considered decorous behaviour in a church is more in accord with the views of our medieval ancestors than with those of our Victorian forebears.[51]

Finally, an awareness of history also gave to Chancellor Moore an appreciation of the needs of the future. He remarked that the present fashion for a westward-facing celebration in close proximity to the congregation was quite likely to be superseded by another fashion in, say, twenty years time, and it was the duty of the consistory court to have regard to future generations as well as to the present one.[52] He returned to the same theme in *Re St Oswald's, Durham n.3* where he referred to the modern, and perhaps by now out-dated and ephemeral, fashion for nave altars, and the incumbent's apparently deep conviction that the celebrant should face westward.[53] It was his considered view that changes in liturgical practices are delicate matters, and very considerable weight and responsibility rests on every incumbent to go gently in such matters.[54]

CONCLUSION

Such then in outline is the judicial output of the late Chancellor Garth Moore. It is hoped that from this study there has emerged his concern not only to state the ecclesiastical law accurately, but also to present it within its dimensions of theology and history. A judge's reputation is inevitably affected by the

46. *St Ann's* supra 463.
47. *St Nicholas,* supra 300. Moore also said in this case that where the distinction is to be drawn between furnishings and ornaments is one of the great mysteries of Anglicanism.
48. *St Nicholas,* supra 300.
49. *Leckhampton,* supra 1060.
50. *St Ann's,* supra 463.
51. Ibid. 464, 465.
52. *St Matthew's,* supra 672; see D. Harte, 'Doctrine, Conservation and Aesthetic Judgment in the Court of Ecclesiastical Causes Reserved' (1987-1988) 1 Ecc LJ (2) 22-32 at 30.
53. *St Oswald* (1988).
54. *St Oswald* (1986).

quality of the cases which come before him; and in this respect Garth Moore was fortunate in being given the opportunity to expound and develop the law. His decisions upon the various issues connected with reservation[55] probably show him at his most erudite and creative. Written in an almost literary style, the judgments contain many elegant expressions;[56] and a perusal of *Re St Mary's, Balham* will show several specimens of Garth Moore's dry wit.[57] Underlying his approach was a humane pastoral concern for those involved in Consistory Court proceedings,[58] coupled with a desire to achieve, through the vehicle of legal reasoning, what he perceived to be the right outcome.

APPENDIX I

This is a list of the known judgments involving Garth Moore as Chancellor, *amicus curiae* or counsel. The texts of the unreported cases are available from the Middle Temple Library (London) or Chancellor Timothy Briden; some of them have been noted briefly in the *Ecclesiastical Law Journal.*

REPORTED JUDGMENTS

1951 *Re St Peter, St Helier, Morden. Re St Olave, Mitcham* [1951] 2 All ER 53.

1957 *Re Woldingham Churchyard* [1957] 2 All ER 323.

1958 *Bishopwearmouth (Rector and Churchwardens) v Adey* [1958] 3 All ER 441.

1961 *Re St Nicholas, Plumstead (Rector and Churchwardens)* [1961] 1 All ER 298.

1967 *Re St Peter and St Paul, Leckhampton (Rector and Churchwardens v Barnard and Others* [1967] 3 All ER 1057.

1976 *Re St Ann's Church, Kew* [1976] 1 All ER 461.

1978 *Re St Mary's, Balham* [1978] 1 All ER 993.

1981 *Re Flenley* [1981] Fam 64.

1982 *Re St Mary's, Barnes* [1982] 1 All ER 456.

1983 *St Edward the Confessor, Mottingham* [1983] 1 WLR 364.

1985 *Re St Matthew's, Wimbledon* [1985] 3 All ER 670.

UNREPORTED JUDGMENTS

1983 *Re St Andrew & St Anne, Auckland*

1984 *Re St Brandon, Brancepeth*

1986 *Re St Peter, Stockton* [1991] 2 Ecc LJ 252

1986 *Holy Trinity, Pelton*

1986 *St Peter, Monkwearmouth*

1986 *Re St Oswald's Durham*

1987 *Re St Mary, Beddington* [1987] 1 Ecc LJ (2), 36

55. See the review of the authorities on this topic in *Re St John the Evangelist, Bierley* [1989] 3 All ER 214.
56. For example, the reference to the watch-dog at Kew in *St Ann's* supra, was inspired by a couplet from Pope.
57. *St Mary's,* supra.
58. *St Mary's,* supra 998. In *Re Woldingham Churchyard* [1957] 2 All ER 323 at 324 he stated that he was prepared in the present case, though only out of consideration for the family of the deceased, to grant a confirmatory faculty.

1988 *Re St Oswald's, Durham no. 3.*

1989 *Re St Michael & All Angels, Norton* [1990] 2 Ecc LJ 3.

1989 *Re Christ Church, Brixton* [1990] 2 Ecc LJ 4.

APPEALED FROM

1972 *Bland v Archdeacon of Chelthenham* [1972] 1 All ER 1012.

1984 *St Paul's Church, Jarrow* unreported.

COUNSEL & *AMICUS CURIAE*

1961 *Re St James', Bishampton. Re St Edburga's, Abberton* [1961] 2 All ER 1.

1961 *Re St Edburga's, Abberton* [1961] 2 All ER 429.

1962 *Re St John's, Chelsea* [1962] 2 All ER 850.