WELSH CHURCH COURTS AND THE RULE OF LAW

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INTRODUCTION

'As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law.'

So provided section 3(1) of the Welsh Church Act 1914 which disestablished that portion of the Church of England lying within Wales from 31st March 1920.[1]

Nevertheless, section 3(3) of the 1914 Act went on to provide that:

'The [...] constitution and regulations of the Church in Wales may, notwithstanding anything in this section, provide for the establishment for the Church of Wales of ecclesiastical courts [...], but no such courts shall exercise any coercive jurisdiction [...]'.

Thus, despite the abolition of ecclesiastical courts within Wales by virtue of the Welsh Church Act 1914, the Constitution of the Church in Wales today provides for the working of a whole range of courts, the structure and competence of which are in the main provided for in chapter XI of the Constitution. These courts are now however those of a private unincorporated association, the jurisdiction of which is limited to interpreting and applying the rules of that association at the suit of those who are members and have by virtue of that membership agreed to be bound by those rules and to accept the jurisdiction of the association's courts. The courts of the Church in Wales have no standing under the public law of England and Wales, and the canon law of the Church in Wales is no more part of the law of England and Wales than the terms of any other contract entered into by persons according to private law. Members of the Church in Wales, being its serving and pensioned clergy and those lay persons who have expressly agreed to be bound by its rules by so declaring on assuming office or when having their names entered on electoral rolls in the province, undoubtedly have the right to proceed in the civil courts of England and Wales for breach of contract if the terms of the Constitution are broken and may lawfully expect that the courts set up by the Church conform to the basic tenets of natural justice, but are not able to enforce the internal rules of the Welsh Church other than through the courts of that Church itself.

THE EXISTING COURTS OF THE WELSH CHURCH

The contemporary structure of the Welsh Church courts is best presented in terms of the distinctions of competence among those tribunals. As in other legal systems, the courts can be distinguished according to their territorial, functional and subject-matter competence. The concept of territorial competence is straightforward; a court is only competent to deal with litigation arising in the territorial area which it serves. Thus, archdeacons' courts can only hear and determine causes pertaining to their respective archdeaconries, diocesan courts are limited in competence to their respective dioceses, while the provincial court is competent throughout the entire provincial territory. The functional competence of a court describes whether it may

[1] This was the date of disestablishment provided by the Welsh Church (Temporalities) Act 1919, s 2. The implementation of the provisions of the 1914 Act had been delayed owing to the First World War.

hear cases at first instance, or whether it is limited to determining cases on appeal at second or even third instance. Different functional competence among the courts allows for a hierarchy of courts to be established. Finally, subject-matter competence relates to the division of labour among the courts, particularly at first instance, according to the issues being litigated; thus, competence in faculty applications belongs to the diocesan courts and competence in disciplinary matters to the Provincial Court.

The following courts of the Church in Wales may be identified:

Archdeacons' Courts[2]

There must be an archdeacon's court in every archdeaconry. The judge in this court is the archdeacon or, in accordance with chapter VI, section 7 of the Constitution, one or more lay communicants of the Church in Wales appointed by the archdeacon. The sole function allotted to this court by the Constitution is to hear and determine disputes concerning the entry or removal of names from parish electoral rolls, although any other matters with which the court was competent to deal before disestablishment are saved for it.

While the institution of the archdeacon's court is virtually defunct within the Church in Wales, its potential as a relatively informal and inexpensive tribunal within which to mediate or adjudicate local problems appears considerable. Each such court is to have a registrar, who it is submitted might well be a suitable lay communicant to act as a mediator or adjudicator within the court. Far from phasing out this office, which is currently being contemplated, it is one which might profitably be given a higher profile. The court may sit at any convenient location within the archdeaconry.

Diocesan Courts[3]

Every diocese must have a diocesan court, of which the chancellor is the judge. Chancellors in Wales are non-stipendiary officers appointed by the bishop, having to be communicants, legally qualified and over thirty years of age, as well as being qualified to be members of the Governing Body.[4] Diocesan courts have competence at first instance within their respective dioceses in relation to applications for faculties, complaints against churchwardens and lay parochial church councillors, including disputes regarding their election, disputes between church members and the diocesan board of finance, the parsonage board, the patronage board, any ruridecanal conference or chapter, any parish vestry or PCC. They are also competent to deal with any other matters specifically allocated to them by the Constitution.

Chancellors may be removed from office only by order of the diocesan bishop, confirmed by the provincial court. This effectively preserves their independence from episcopal influence while preserving their accountability to their bishop. The suggestion that they should be removable by the bishop subject to appeal to the Provincial Court undermines their independence and is for that reason misguided.[5]

The Provincial Court[6]

The Provincial Court consists of four ecclesiastical and six lay judges, each appointed by the Bench of Bishops of the Church in Wales, from among whom the Bench nominates a President. The ecclesiastical judges must have been in Holy Orders for fifteen years, while the lay judges must be legally qualified, over thirty-five

[2] See the *Constitution of the Church in Wales*, chapter XI: section 2–5: also VI. 7.

[3] See *Constitution*, XI. 6–15.

[4] This means they must either reside in Wales or be on the electoral roll of a Welsh parish or, in the case of clerics, hold or have held an ecclesiastical office or licence from a Welsh Bishop: chapter II, sections 10 and 11.

[5] For details of this proposal and a criticism of it, see T.G. Watkin, 'Governing Body of the Church in Wales: Recent Legislation' (1997) 4 Ecc LJ 761. This proposal has since been abandoned. See minute 99/11 of the Governing Body meeting of April 1999.

[6] See *Constitution*, XI. 18–28.

years old and qualified to be members of the Governing Body or of the General Synod of the Church of England. This opens the door to a degree of independence among the judges of the provincial court not to be found among diocesan chancellors. Judges hold office for seven years and can be removed during their tenure only by order of the Bench confirmed by separate majorities of both the order of clergy and the order of laity of the Governing Body, a provision which clearly reflects the parliamentary procedure by which judges of the civil courts of England and Wales are removable from office.

The Provincial Court has competence to hear appeals from any diocesan court, or with reference to institutions, collations, nominations to cures, incapacity and rights of appointment relating to clerics. In addition it has first instance competence in disputes involving the Representative Body, any diocesan conference and over charges against members of the Church in Wales of teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales, neglect of duties of office or conduct giving just cause for scandal or offence, or wilful disobedience to or breach of any provision of the Constitution or the rules of a diocesan conference. It may also hear and determine any charge against a member or body of members within the Church in Wales, other than the Governing Body and the Representative Body, alleging disobedience to any judgment, sentence or order of the Archbishop, a diocesan bishop or any court of the Church in Wales. It is also empowered to hear any other matter referred or reported to it in accordance with the Constitution.

Unlike the diocesan court, the Provincial Court is a collegiate body, always requiring a quorum of at least three judges, one ecclesiastical and two lay. Although the bishop and the chancellor of a diocese in which a member resides or a cleric holds office are expressly prohibited from acting as judges in their cases, no judge is prevented from hearing a case because he is a member of a body which is party to the case. This is expressly stated in section 20 of chapter XI and seemingly permits what would otherwise be a palpable breach of natural justice. In a small province, it reflects a very real difficulty of recruitment to the various legislative, executive and judicial bodies which govern the Church. The provision is nevertheless a serious incursion into the principle of manifest impartiality and will be discussed further below.[7]

Charges of teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales, neglect of duties of office or conduct giving just cause for scandal or offence, or wilful disobedience to or breach of any provision of the Constitution or the rules of a diocesan conference may not however be heard by the Provincial Court where they are brought against a bishop or the archbishop. Special courts exist to deal with such charges.

The Special Provincial Court[8]

Where such charges are brought against a diocesan or an assistant bishop, the competent tribunal is the Special Provincial Court which exists solely to hear and determine such charges at first instance. It is a collegiate body consisting of the archbishop, the remaining diocesan bishops and the judges of the Provincial Court, with the archbishop, two diocesans and four provincial court judges forming a quorum. There is remarkably no requirement that any of the Provincial Court judges forming the quorum should be lay as opposed to ecclesiastical judges, so that none need be legally qualified. This it is submitted is an astonishing oversight. Moreover, although the Special Provincial Court is the sole judge of the facts of such a case, a bishop cannot be found guilty of an offence unless both the archbishop and a majority of the

[7] For the most recent examination of the application of the principle that no one should be a judge in their own cause, see *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1999] 2 WLR 272.

[8] See *Constitution*, XI. 32.

diocesans assembled in Synod agree that he is guilty. Sentence is pronounced by the archbishop.

The Supreme Court[9]

A charge of teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church in Wales, neglect of duties of office or conduct giving just cause for scandal or offence, or wilful disobedience to or breach of any provision of the Constitution or the rules of a diocesan conference brought against the Archbishop must be tried by the Supreme Court of the Church in Wales. It consists of the Archbishops of Canterbury, York, Armagh and Dublin, and the Primus of the Scottish Episcopal Church, sitting with four non-voting assessors, two of whom must be judges of the Special Provincial Court, which as has been seen does not require that they be legally qualified. The Primus and the archbishops are allowed to nominate diocesan bishops to sit in their place. One of the archbishops or the Primus acts as President and has the right to nominate the assessors. Four members are needed for a quorum.

As well as having first-instance competence in the trial of an archbishop, the Supreme Court also has second-instance competence to hear appeals from the Special Provincial Court and, with its leave, from the Provincial Court. Given that the Special Provincial Court's findings of fact are expressly stated to be final and that that court cannot find a bishop guilty of an offence unless the diocesans in Synod are of that opinion, it is not clear what an appeal from the Special Provincial Court as such involves. Is it in fact an appeal from the verdict of the Synod based on the Special Provincial Court's final findings of fact? As no rules of court exist in relation to either the Special Provincial Court or the Supreme Court, or at least none exist in the public domain, it is not possible to answer these questions. The Special Provincial Court has sat only once, during the 1940s, and the Supreme Court has never sat at all.[10]

CRITICISMS OF THE EXISTING SYSTEM

The most obvious and most frequently uttered criticism of the arrangements described above is that they are top-heavy and composed in large measure of courts that exist only in theory and not in practice.[11] In large measure, this is true. The Supreme Court has never met; the Special Provincial Court has met only once. The Provincial Court itself has met but rarely in the eight decades of the Church in Wales' history, and only twice in the last twenty years. Yet, when it has met, the issues concerned have been serious and it is not immediately apparent what the Church would have done if no such tribunal had been available to hear and determine the matters in question. The criticism is often levelled that the Welsh Church courts are cumbersome in operation and uncertain in their approach to procedure. This is partly the result of the infrequency of their meeting. Things however would be much worse if no structure of courts existed to meet such contingencies.

There is however a substantial measure of anachronism in some of the arrangements. The idea that bishops may be tried only by the Special Provincial Court and an archbishop by the Supreme Court is, in effect, a somewhat literal application to the Welsh Church of the hallowed principle of trial by one's peers.[12] Indeed, when the

[9] See *Constitution*, XI 33.

[10] In relation to appeals to the Supreme Court, the Rules of Court provide that the directions of the Registrar of the Provincial Court are to be followed. Nothing is said of the court's first instance competence: see Rules of the Courts of the Church in Wales: Rules of the Provincial Court: I Rules Applicable Generally, rule 37.

[11] Chancellor Leolin Price QC brought this to the attention of the Ecclesiastical Law Society in his contribution to a round table discussion on ecclesiastical courts at the Cardiff conference in 1991, producing a spirited rejoinder from the then President of the Provincial Court, Chancellor Bruce Griffiths QC. See generally, J. Masding, 'Conference at Cardiff' (1991) 2 Ecc LJ 246 at 247.

[12] Based on Magna Carta, cl 39.

Welsh Church was disestablished in 1920, the principle of trial by one's peers still required that members of the House of Lords have the right to be tried by that body rather than by a jury in the criminal courts when charged with felony, and also interestingly for the misdemeanour of disturbing public worship if already twice convicted. However rarely the privilege was asserted, it remained a possibility, a possibility that bore fruit in actuality when in 1936 Lord de Clifford was indicted for manslaughter on account of having caused a death by dangerous driving. The ensuing prosecution cost £700, twenty times the likely cost of a trial in the ordinary courts.[13] On 4th February 1936 Lord Sankey proposed that the entitlement to trial by peers in the House of Lords be abolished, which motion was carried,[14] although the practice was not finally abolished until the Criminal Justice Act 1948 was passed. Ironically, Lord Sankey was of course one of the three architects of the Church in Wales' Constitution, along with Lord Justice Banks and Lord Justice (later Lord) Atkin. It is submitted that half a century after its abolition in the State's legal system this particular anachronism is due for removal from the legal system of the Church in Wales as well.

It is not just that the Special Provincial Court is anachronistic in the twenty-first century. Its composition takes it to the very edge, and arguably beyond, what natural justice permits. The Church in Wales is a small province and its bishops act, as a rule, collegially. The idea of the archbishop and the other four bishops sitting in judgment upon their brother diocesan with any hope that their deliberations would appear impartial, even if in fact they performed the feat of being impartial, is risible. An illustration from recent events in the Church in Wales will provide the basis for an instructive hypothetical example. For sixty years, until 1998, the bishops of the Church in Wales set their face against the remarriage of divorcees according to the rites of the Welsh Church. They instructed, or at least advised, their clergy to refuse to officiate at such weddings, as clergy are entitled to do by statute. In 1995, however, the bishops proposed a relaxation of this discipline so as to allow some such remarriages to take place in church subject to the written permission of the diocesan bishop. The proposal was presented to the Governing Body in the form of a bill but was defeated in the order of clergy.[15] Despite the fact that the Catechism and the rubrics to the Holy Matrimony service, both contained in the Church in Wales' Book of Common Prayer, maintain the Church's teaching on marriage as a lifelong union, the bishops in 1998 collectively issued a statement on marriage and divorce effectively telling the clergy to make up their own minds on the matter and openly encouraging such remarriages in certain circumstances despite their duty to maintain the doctrine of the Church as contained in the Prayer Book and the previous defeat of their less radical proposal on the floor of the Governing Body.[16] Suppose that a member of the Church in Wales had chosen to challenge the statement either on the grounds that it contradicted the official teaching of the Church in Wales or that the bishops, by avoiding the risk of further defeat in the Governing Body, were contravening the Constitution by changing an established discipline other than by bill procedure. How could such a complaint be brought? Either way, whether the charge were disobedience to the provisions of the Constitution or publishing doctrine contrary to the official teaching of the Church, such a charge against a bishop could only be entertained by the Special Provincial Court, composed of the bishops themselves as well as four other judges, but whose findings required confirmation by the Synod of diocesan bishops. In other words, it would have been impossible for such a cause to be determined other than by those who were either equally innocent of the charge

[13] See R.M. Jackson, *The Machinery of Justice in England* (5th edn) (Cambridge, 1967), p 117 and n 2.
[14] See 99 HL Deb. 5. ss 381–418.
[15] This was the Remarriage after Divorce Bill. For details of its discussion and defeat, see T.G. Watkin, 'Governing Body of the Church in Wales: Recent Legislation' (1996) 4 Ecc LJ 600.
[16] See *Marriage and Divorce: A Statement by the Bench of Bishops of the Church in Wales* (February 1998).

or equally guilty of it. Either the case could not be heard at all or else it could not be satisfactorily determined. The Constitution of the Church in Wales in effect places the bishops above the Church's own canon law in such circumstances. Such a situation can only be welcome to those with a higher regard for arbitrary power than for natural justice and the rule of law.[17]

The Bishop of Bangor's problems with the Rector of Benllech also illustrated the difficulties that face a small province in the course of a lengthy, difficult and sensitive period of litigation. Virtually all the judges of the Provincial Court are members of the Governing Body of the Church in Wales. Indeed, two of the three judges who tried the Reverend Clifford Williams were members of the Governing Body. Those two were also members of the Governing Body's Standing Committee; indeed, the presiding judge was its chairman. The Bishop of Bangor is obligated by his office also to be a member of the Standing Committee. It simply would not have been feasible for all three to absent themselves from meetings throughout the period when the case was pending or under review. Indeed, even if they had, there could have been no disguising the fact that they had all previously been working together on those and other ecclesiastical bodies.

Moreover, the Standing Committee has as one of its functions liaison with the Representative Body over the Church's finances.[18] The cost of the Benllech litigation was such that the Representative Body had from time to time to seek the Standing Committee's approval for continued and increasing expenditure. Although the bishop and the judges regularly withdrew during the course of such discussions, nevertheless the impression of the judges being at arm's length from the parties or of both being at arm's length from some of the ancillary issues is far from being achieved.[19]

In effect, the problem attendant upon both of these situations is a common one within the Church in Wales; it is that of the separation of powers. The simple truth is that in a small province it is very difficult to prevent the same individuals functioning in a legislative, executive and judicial capacity within the Church, and the Constitution indeed requires the bishops to do so. The mixture of the legislative and the executive is not germane to this discussion, but the overlap between those powers and the Church's judicial arm is. Increasingly, the Bench of Bishops is seeking to exercise an executive authority outside the workings of the Governing Body, as witnessed both by its statement on marriage and divorce and its earlier publication of the report entitled *The Cure of Souls*, which effectively spelt out for clergy the obligations of their calling, but which in places appeared to call in question the discipline of the Church as contained in its Book of Common Prayer.[20] That the same bishops should also be the ultimate judges of the propriety of their actions is completely unacceptable.

The presence of the Welsh Church's judiciary on its executive and legislative bodies can also pose problems. The judges are entitled to participate in an overtly partisan manner in the making of legislation which they may later be called upon to apply, but worse, where controversy strikes, as with the issuing of the statement on marriage

[17] One way out of the *impasse* would have been to bring a complaint against the Archbishop first to be tried in the Supreme Court, the result of which would be, in fact if not in law, decisive of the verdict against his brother bishops.

[18] See *Constitution*, II. 65.

[19] See for instance the Report of the Standing Committee, September 1998: p 9: para 29. As the Welsh bishops are not corporations sole, the case was technically between the Right Reverend Barry Morgan and the Reverend Clifford Williams. The provincial bodies had no interest other than in providing the judicial mechanisms for its resolution. However, it was agreed that they should pay the costs of both parties with regard to their litigation before the Church courts.

[20] *The Cure of Souls: The Calling, Life and Practice of the Clergy: The Report of a Working Party set up in 1995 by the Archbishop of Wales*. The Report contradicted the Church in Wales' teaching and discipline on the marriage of the unbaptised, despite the fact that the legality of that position had been upheld by both the Faculty Office of the Archbishop of Canterbury and the Office of the Registrar General. The Report was issued to clergy by the Bench of Bishops and never offered to the Governing Body for discussion or debate.

and divorce, they are seen to take sides on an issue in a manner which could compromise fatally their impartiality in any challenge to the constitutionality of the steps taken. This problem is exacerbated by the non-accountability of the Governing Body under the existing Constitution.

At this point it may be objected that the structures of the Welsh Church do no more than mirror those of the British Constitution, where the Lord Chancellor is a member of the legislative, executive and judicial branches of government. Moreover, it is not unknown for senior judges to contribute to debates on legal matters in the House of Lords while serving in high judicial office. Indeed, it is fairly obvious that some of the anomalies faced by the Church in Wales in its consitutional arrangements are probably the result of the framers of its first Constitution following the Westminster model somewhat too closely. Eighty years later, when the requirements of impartiality and natural justice are rather more fully appreciated and thoroughly applied, it is arguably time for the Church in Wales to reassess its structures in the light of what modern society and contemporary law require in the interests of fairness and open government.

Another hypothetical situation, based loosely on recent events, may serve by way of illustration. When the bishops brought their statement on marriage and divorce to the Governing Body, they did so not for it to be discussed or debated, but seeking its welcome. The motion which proposed that it be welcomed was successfully challenged on a point of order. The point of order had to be decided by the chairman. The President of the Governing Body was at that time actually in the chair, that is the decision was that of the archbishop who was a signatory of the statement being challenged. Honourably, he accepted the advice of his assessor that there was substance to the point of order and the motion was withdrawn.[21] However, suppose he had not accepted that advice and had ruled that the motion was in order. Could anything have been done by those who sought, in their view, to uphold the Constitution by challenging the constitutionality of the bishops' actions?

Currently, the answer to that question is a resounding 'No',[22] and it is submitted that such a state of affairs is no longer acceptable. The courts of the Church in Wales have no jurisdiction over the Governing Body and its decisions. Were the Governing Body to purport to do by simple motion what the Constitution requires be done by bill, the ordinary members of the Church in Wales would have no means of redress. The problem here is a very real one. The Governing Body is both created by and governed by the Constitution. Yet there is no mechanism for ensuring that it conforms to the Constitution. In effect, it has been created as a sort of sovereign legislature, the actions of which are not to be reviewable before the courts of the Church. The model was clearly that of the Westminster parliament and the national courts. However, the Church in Wales, unlike the United Kingdom, has a written constitution and its legislative body is required to operate within its bounds. A judicial mechanism to ensure that it does so and which can enforce the Constitution on behalf of the membership in the event of a breach is required. After all, the members have promised to accept and be bound by the Constitution, not the decisions of the Governing Body nor of the Bench of Bishops. Even the clergy, who owe a duty of canonical obedience to their diocesans, have a prior obligation to accept and be bound by the Constitution, for their declaration of canonical obedience limits that duty to what is lawful and honest.[23]

The truth is that while the guiding principles of the Westminster model of government are clearly discernible in the workings of the Welsh Church's constitutional

[21] For details see T.G. Watkin, 'Governing Body of the Church in Wales: Recent Legislation' (1998) 5 Ecc LJ 125.

[22] The *Constitution*, II. 48; 50–51, provides that the Chairman is to rule on such matters. Such a wide discretion on such important issues is completely unacceptable in a constitutionally governed body.

[23] See *Constitution*, VII. 66.

structure, the principle of the separation of powers has been but poorly embraced. The one area in which it regularly features in Governing Body business is when alterations to the procedural rules of the Church courts are perceived to be necessary. Almost instantly, the Governing Body will be reminded it has no control over the doings of the courts as that would be a breach of the doctrine of the separation of powers. Yet the Rules of Court are nothing more than the procedural rules of the Welsh courts, and substantive law has, in Sir Henry Maine's telling phrase, been known to be secreted in the interstices of procedure. In most civil law countries, the codes of both civil and criminal procedure are legislative enactments passed by the state legislature. The separation of powers does not require that procedural rules be excluded from the purview of the legislature nor that they should be devised solely by the judicial authorities. Indeed, such matters as entitlement to costs and the financial support available to poor litigants seem pre-eminently suitable topics for decision by a legislative body, representative of and accountable to the people.

PROPOSALS FOR REFORM

It is submitted that the courts structure of the Church in Wales deserves to be thoroughly re-examined and reformed. There are indeed proposals in the form of a bill currently before the Governing Body seeking to withdraw from the Provincial Court its first instance competence in disciplinary matters and confer them instead upon a new disciplinary tribunal which will be established to hear and determine such cases.[24] In effect, however, this will add to the number of courts, and the primary reform that is required, it is submitted, is to streamline the administration of justice within the Church by reducing the number of courts and rationalising their competence.

As has been indicated earlier, the time is more than ripe for the Special Provincial Court and the Supreme Court to be abolished. The Provincial Court and the new Disciplinary Tribunal should be competent to consider charges against bishops and the archbishop. Moreover, it is completely unacceptable that bishops should act as judges in relation to their brothers on the Bench as such a scenario is completely at variance with modern requirements of manifest impartiality.

While it might be useful to retain the archdeacon's court as an informal tribunal to mediate and resolve parish disputes such as those involving applications to be on the electoral roll, the abolition of the Supreme Court and the Special Provincial Court would in effect leave the Church with only three courts: the Diocesan Courts, with their largely 'civil' competence at first instance; the new Disciplinary Tribunal, with its quasi-criminal competence at first instance, and the Provincial Court, which would in the main be an appellate body receiving cases on appeal from the other two courts. This, it is submitted, would be a simpler and more acceptable structure. The one problem would be those 'civil' matters which currently belong to the Provincial Court at first instance, such as complaints against provincial bodies such as the Representative Body. There appears to be no good reason why such cases might not be reallocated to the Diocesan Courts at first instance, territorial competence depending upon where the property concerned was situate or else the residence of the other party to the dispute.

However, more is required to make the Church in Wales' courts acceptable by modern standards than a simple reallocation of business. Something also needs to be done about the Governing Body's standing above and beyond the reach of the Church courts. The modern legal world no longer proceeds on the basis that honourable men can be assumed to have acted fairly; it requires that all men be seen to

[24] This was proposed in the *Cure of Souls* (see note 21 above), and is currently before the Governing Body in the form of the Bill to Establish a Disciplinary Tribunal of the Church in Wales which had its first reading in April 1999.

act impartially and that when their actions affect the rights of others they should be answerable for the manner in which they have acted so as to ensure the fairness of their conduct. The decisions of the Governing Body or the Bench of Bishops with regard to such questions as whether certain issues should proceed by bill or simple motion, or whether the Governing Body need be consulted at all, ought to be reviewable before an impartial tribunal. It is submitted that that tribunal should be a reconstituted Provincial Court. Its reconstitution should ensure that it is staffed by judges independent of the other arms of Church government. Therefore, a judge of the Provincial Court should be ineligible for election to either the Governing Body or the Representative Body and could not simultaneously hold any office which could present him or her with a conflict of interest. Thus, no bishop, archbishop or other prelate should be eligible. All the judges should be legally qualified. It might remain desirable for them to call on the services of appropriate assessors in certain cases, but these should only advise and play no part in the decision of the court, as is currently the case with the role of the assessors permitted in the Supreme Court. The Provincial Court should continue to be the second instance tribunal competent to hear appeals from diocesan courts, but also from the new Disciplinary Tribunal.

In addition to this competence, however, it should also have the power to review decisions of the Governing Body on the grounds of procedural irregularity or excess of power. It should also have the right to adjudicate upon questions of whether executive action by committees of that body or by the Bench of Bishops were within the Constitution or not. In short, it should act as a modern constitutional court, with power to invalidate or at least to declare unconstitutional resolutions of the Governing Body or decisions by the Bench which contravened the Church's basic rules. This would overcome one of the most serious problems which has beset the legal order of the Church in Wales in recent years, that of how to overcome a conflict of opinion with regard to the constitutionality of certain actions. Over the last few years there has been a distressing tendency for the executive to 'window-shop' for favourable legal opinions with no method of testing them authoritatively against contrary views. A restructured Provincial Court could provide the necessary mechanism.

While the judges of the Provincial Court should not be members of the Governing Body, they might nevertheless have a role to play in its deliberations. It would, for instance, be useful for a judicial committee of the court to review all motions before the Governing Body prior to its meetings to give an opinion as to their constitutionality. Likewise, all bills could be scrutinised by such a committee to ensure they were in order prior to being introduced for consideration and debate. The judges would also be a ready-made body of independent assessors to advise the Governing Body chairmen on both procedural and substantive constitutional matters during debates. Chairmen's rulings could still be challenged before the full court in cases of dispute, but the presence of one or two judges acting as assessors would substantially increase confidence in both the reliability and the impartiality of the advice given. It might even be suitable to employ the judges as independent chairmen for debates on particularly sensitive issues.

CONCLUSION

The proposals for reform suggested above could, it is submitted, be taken one step further with advantage. In effect they call for an independent judiciary and courts system for the Church in Wales. Already in faculty matters diocesan chancellors are required to act independently of the bishop of the diocese. This ended in effect the concept of the chancellor's powers being derived by delegation from the bishop and replaced that concept with one of an impartial judge whose powers derived from the Constitution, as was already the case with the judges of the Provincial Court. There

seems no legitimate reason therefore why the Constitution should not provide for one court only for the Church in Wales, a Provincial Court, the judges of which would be appointed by representatives of the bishops, clergy and laity and who would exercise all of the functions given to the separate courts under the existing hierarchy.

The Provincial Court could therefore consist of a panel of judges, any one of whom would be competent to sit in a diocese at first instance to hear and determine matters, such as faculty applications, that currently go before the diocesan courts. The judges would also be competent to serve on the Disciplinary Tribunal, where they might be joined by lay judges, that is 'lay' in the sense of 'not legally qualified', to hear and determine disciplinary matters against church officers and clergy regardless of seniority. From both the first instance decisions of the erstwhile Diocesan Court and from the Disciplinary Tribunal there would be the possibility of an appeal to a collegiate court of second instance, drawn from those judges of the Provincial Court not involved at first instance. Cases of exceptional difficulty from a legal or constitutional point of view might be referred to a full court of five or more of the Provincial Court judges for determination of the point of law or constitutional interpretation involved. The full court would also be charged with considering challenges to decisions of the Governing Body, its chairmen, the Bench of Bishops and similar cases of manifest importance.

The decisions of the full court and of the collegiate court of second instance would clearly need to be recorded and would be a source of case law for the Welsh Church. The problems of authority alluded to earlier would therefore be overcome. It should be open to bodies, and possibly members, of the Church to refer matters of importance relating to the Constitution and canon law of the Church in Wales to the court for interpretation and application in situations of difficulty. All members and bodies would be bound by lawful decisions of the court.

Further, it is submitted that the legal services of the Welsh Church should be organised under the aegis of the court, thus ensuring that the legal advice given to the bishops, Governing Body, the Representative Body and their committees, would be independent and impartial. While the legal staff concerned would continue nominally to be employed and paid by the Representative Body and would continue to be available to advise other branches of the Church's government, their loyalty and accountability would be to the court and to the Constitution. The fact that the court might convene as a tribunal but infrequently would not affect this arrangement, for its essence would be that in the event of the legal staff having to give unpopular or even barely acceptable advice to a body or committee within the Church, including the Governing Body, the Representative Body or the Bench, they would have the authority and impartiality of the court behind them and the knowledge that in the event of conflict it would be the court that would act as ultimate arbitrator of the question. Thus would the separation of powers within the Church in Wales be achieved and the rule of law upheld, as well as ensuring that the courts themselves complied fully with the requirements of natural justice. As the Welsh Church moves towards its second century, such aims must not only be achieved, they must be seen to be achieved. The Church should and must be a leader in exhibiting fairness and openness in its institutions and procedures, and its adherence to its own Constitution and canon law must always be beyond question.