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Pious Causes: The Boundaries between Charity Law and Ecclesiastical Law

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Charities increasingly make up the body politic of the Church of England. They include parochial church councils, diocesan boards of finance and national institutions. By April 2024 every chapter of a cathedral will be required to register as a charity. Faithful parishioners put their collection money in gummed envelopes which call for them to add Gift Aid to their donations. Individual churches run foodbanks, drop-in centres, baby and toddler groups, and a whole range of charitable activities. The general public could be forgiven for thinking that 'the Church of England' is a national charity. However, it has not always been the case that the work and mission of the Church of England has been through charities, and for much of its history the Church has remained largely independent of charity law. What are the consequences of increasing reliance on charities and where do the boundaries lie between ecclesiastical and canon law on the one hand and charity law on the other?

Keywords: charity law, legal jurisdictions, church polity, Charity Commission, public benefit, property ownership

The 'pious causes' in this article were the lawful and laudable religious and charitable activity, such as the upkeep of churches, the saying of masses for the dead and the relief of suffering that prevailed in England and Wales before the Reformation. During and following the Reformation, certain former religious and charitable practices were prohibited by law. Assets could no longer be applied to fund the saying of masses for a deceased donor or for others. Such uses were prohibited as superstitious during the reign of Henry VIII, with the assets diverted to the Crown.[1] This was a significant watershed in the history of the relationship between ecclesiastical and charity law in that a range of pious causes became incapable of being charitable. Similarly, the charitable provision that the Church monastic foundations had made was put to an end, and the Crown was required itself to make certain provisions for the alleviation of poverty. As Gareth Jones puts it, 'Piety and charity could no longer be to all Englishmen synonymous conceptions.'[2] Nonetheless, religious and charitable activity continued to overlap after the Reformation and into the present day.

1 In particular by the Dissolution of Colleges Acts of 1545 (37 Hen VIII c 4) and 1547 (1 Edw VI c 14).
2 G Jones, *History of the Law of Charity, 1532–1827* (Cambridge, 1969), p 15.

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What was occurring around the time of the Reformation, however, was a clearer bifurcation of charity law from ecclesiastical law, which had previously been less distinct.[3] The aim of this article is not to tell a history of charity law in England and Wales, for which the author is unqualified and for which there are works in circulation.[4] Rather, I want to probe some of the interactions of charity law with ecclesiastical law over time, with a view to showing the earlier independence of ecclesiastical law from charity law and to suggest that the Church in England has become more reliant on charity law since at least the nineteenth century.

CHURCH OWNERSHIP OF PROPERTY SINCE SAXON TIMES

I begin with showing the ways in which early types of church ownership of land pre-date the law of charity. In Saxon times, and surviving the Norman conquest, there was a form of land tenure which the Normans came to call frankalmoign, otherwise known as free alms (*libera elemosina*). Generally, ecclesiastics held their land under frankalmoign and its progenitures. Such land was donated to ecclesiastical corporations, which might be sole (such as the parson of a church) or aggregate (such as a monastic foundation). The land was to be held for spiritual purposes and in perpetuity. When the feudal system of land-holding was introduced with the Norman conquest, land held in frankalmoign was exempted from the requirement that the landowner give services to the king. Instead:

> they which hold in frank-almoign are bound of right before God to make orisons, prayers, masses, and other divine services for the souls of their grantor or feoffor, and for the souls of their heirs which are dead, and for the prosperity and good life and good health of their heirs which are alive. And therefore they shall do no fealty to their lord; because that this divine service is better for them before God, than any doing of fealty.[5]

Some grants were expressed to be to God, not people. As Bracton says, they were made *primo et principaliter* to God, and only *secundario* to the canons or monks or parsons.[6] 'A gift, for example, to Ramsey Abbey would take the

3 In the medieval period the obligations under a charitable trust were often enforced by the ecclesiastical courts, and even that great Elizabethan Statute of Uses of 1601 provided that 'neither this Acte nor any thinge therein contained shalbe any way prejudiciall or hurtfull to the Jurisdiccion or Power of the Ordinarie; but that he may lawfullie in everie cause execute and performe the same as thoughe this Acte had never bene had or made.'

4 See in particular Jones, *History of the Law of Charity*, which is a thorough history.

5 T Littleton, *Litttleton's Tenures in English* (London, 1845), para 135.

6 Bracton, *Note Book*, fol 12, as quoted in F Pollock and F Maitland, *The History of English Law before the Time of Edward I*, second edition, 2 vols (Cambridge, 1923), vol 1, pp 240–251.

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form of a gift "to God and St Benet of Ramsey and the Abbot Walter and the monks of St Benet," or simply "to God and the church of St Benet of Ramsey," or yet more briefly "to God and St Benet."'[7] Such property was also usually consecrated and the ecclesiastical courts claimed jurisdiction. Land held in frankalmoign was not held under a trust. If the grant contained words which required service to the lord who gave the land, this could be enforced, and was not truly held in frankalmoign. Some ancient ecclesiastical corporations may continue to hold land in frankalmoign or a reformed version of it, but no new grants have been capable of being made for many centuries.[8] It remains the case, however, that churches and churchyards are held in a manner which is related to the Saxon prototype. Any building which has been acquired by the Church Commissioners before 1 September 2010 or by the diocesan board of finance (DBF) on or after 1 September 2010 for use as a church or any land acquired for use as a church site or churchyard or burial ground,[9] vests automatically in the incumbent in the incumbent's corporate capacity.[10] Similarly, land adjoining an existing churchyard and intended as an extension to it may be conveyed under the Consecration of Churchyards Act 1867 and vests in the incumbent.[11]

It remains the case that churches and churchyards are held in a manner which is related to the Saxon prototype. Characteristically under the Church Property Measure 2018, for example, parish churches and churchyards will be vested in the incumbent of the benefice. The incumbent of the benefice holds the land as a corporation sole, with perpetual succession. A trust is never in practice declared, although the land is explicitly to be held for a spiritual purpose, namely the worship of God or the burial of the dead. A parish church and burial ground are also typically consecrated and thereby legally set aside for spiritual purposes and made subject to the jurisdiction of the consistory court of the diocese.

Although consecrated church buildings and burial grounds are not, as a general rule, held subject to a trust, whether charitable or otherwise, the ecclesiastical bodies holding them are expressly prevented from falling within the definition of charity for the purpose of the main piece of legislation on charities – the Charities Act 2011 – by the exclusions in section 10 of that Act: 'any ecclesiastical corporation in respect of the corporate property of the corporation, except a corporation aggregate having some purposes which are not ecclesiastical in respect of its corporate property held for those purposes' and 'any trust of property for purposes for which the property has been consecrated'.

7 Ibid, pp 243–244, citing Ramsey Cartulary, i, 159, 160, 255, 256.
8 For the preservation of frankalmoign see *Halsbury's Law of England*, vol XXIV (Corporations) (2019), para 554.
9 Ie acquired under the Church Property Measure 2018, s 28(1).
10 Ibid, s 32(1).
11 Consecration of Churchyards Act 1867, s 5.

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That is not to say that the High Court could not claim jurisdiction if it held that such property was charitable, but the jurisdiction of the Charity Commission and the provisions of the Act are curtailed. Consecrated churches and churchyards are an example of Church ownership of property falling entirely outside the regulation of charities. Another example is glebe land, land which was until 1978 held by the incumbent for his personal benefit, and is now held by DBFs to generate income or to sell for capital monies to pay for the stipends of clergy. Glebe land was held for a spiritual purpose: the maintenance of the parson. While the motive of the donor of such land may well have been 'charitable' in the normal sense of the word, such land is not typically held upon charitable trust. It is another example of what I might call the 'vestigial' parts of the Church of England which pre-date the development of charity law and which were established at an early time in the history of the Church. Other examples include the parsonage house, also vested in the incumbent, and formerly tithes.

Ecclesiastical property was not donated into a void. In terms of governance, it was incipient in the Saxon Church that ecclesiastical corporations aggregate, collegiate churches, cathedrals and monastic houses would have statutes or some other constitution or rule of life which would determine how they would be run. From the early days of the Church it was the role of the Visitor, the ecclesiastical superior to the corporation, to investigate the conduct of all inferior institutions, and to correct and reform abuses where they were found.[12] Parish clergy, cathedrals and monastic houses were subject to visitations by diocesan bishops, who in turn were subject to visitation from the metropolitan bishop. By a constitution of Otho, archbishops and bishops were to go about their dioceses at fit seasons, correcting and reforming the churches and consecrating and sowing the word of life in the Lord's field.[13] Thus when William, Bishop of Lincoln came to visit Daventry Priory in 1442 and made 'anxious inquiry touching the state of the priory' and its clergy, and 'found almost no good among you; nay, verily, religion among you is altogether dead and your temporalities, without which this present life cannot be carried on, are on their way to lose their being' and 'desiring therefore the revival of religion among you and the more fruitful governance of your temporalities', he suspended the prior, who was elderly and incapable and was rendering no account of the goods of the priory in accordance with the rule of the Benedictines, from all administration of any temporalities, and vested the

12 The obligation to conduct visitations was evidently by this time an important duty of a bishop, as is illustrated by a letter of Pope Gregory I to a diocesan bishop dated 592, in which he enjoined the bishop to carry out a solemn visitation of certain specified churches in his locality to see that the incumbents of the churches lived in accordance with the canons: P M Smith, 'Points of Law and Practice Concerning Ecclesiastical Visitations', (1991) 2:9 *Ecclesiastical Law Journal* 189–212 at 190.

13 R Burn, *Ecclesiastical Law*, ninth edition, 4 vols (London, 1842), vol IV, p 12.

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administration in the sub-prior. Detailed arrangements were made for the better administration of the goods of the priory and the reformation of the conduct of the monks according to the rule of the house.[14]

Visitation remains a legal mechanism to inspect the fabric of church buildings, to check the inventories of movable property and to ensure that the institution is being governed properly and in accordance with the rules that pertain to it, that the clergy are following a godly and edifying life and that religion is flourishing in that place. In that context, churchwardens were and remain accountable for the movable property of the parish church. They are required to keep inventories of this property, are subject to inspection and visitation by the archdeacon and hold property in a quasi-corporate capacity. These functions preceded the development of the law of trusts, and the core duties of churchwardens in relation to assets were subject, in the main, to ecclesiastical, not charity, law. That said, since 2001 with the passing of the Churchwardens Measure, a person is disqualified from being chosen for the office of churchwarden if they are disqualified from being a charity trustee and are not subject to a waiver from the Charity Commissioners.[15]

THE GROWTH OF CHARITY LAW I: TESTAMENTS AND LIFETIME GIFTS

Over time, however, charity law has become more influential and integral to the way that the institutions of the Church operate. For the early Church, while charitable activity was an important outworking of Christian mission, particularly in the giving of alms to the poor and the provision of hospitals for the sick, there was little in the way of a 'law of charity' as such. Charitable activity was the outcome of benevolent religion and of Christian men and women following virtuous and pious lives. It belonged to the domain of morality and did not require regulation, except to the extent that the faithful needed to be exhorted to be generous by those in authority. To that extent, the canon law did, in the words of Richard Helmholz, set out 'some basic principles of the law of charity'.[16] But, as Helmholz has also identified, neither Gratian's Decretum (1140) or the *Decretales Gregorii IX* (1234) contained any book or title dealing expressly with charitable institutions or with the law of charity generally. Where charity was dealt with, it was not claimed as part of the jurisdiction of the Church.[17] That

14 A Hamilton Thompson (ed), *Visitations of Religious Houses in the Diocese of Lincoln*, 2 vols (Horncastle, 1918), vol II, pp 65–67 (translated from the Latin).

15 Churchwardens Measure 2001, s 2.

16 R H Helmholz, 'The Law of Charity and the English Ecclesiastical Courts' in P Hoskin, C Brooke and B Dobson (eds), *The Foundations of Medieval English Ecclesiastical History* (Woodbridge, 2005), pp 111–123 at p 112.

17 Ibid, p 113.

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is not to say that charity law does not owe a debt to the Church in terms of the development of the principles of charity law but that Church law in England did not itself develop or rely upon an endogenous law of charity.

Where the law first began to intrude was in the field of testaments, where the Church had obtained jurisdiction over charitable bequests (of money or chattels) by the reign of Henry III (1216–1272), a jurisdiction that was to some extent overlapping with the Court of Chancery.[18] Where testamentary gifts benefited the Church, they might be held on charitable trust or outright. This depended on whether the gift was worded in such a way as to bestow it with the nature of a charitable trust. If the gift was to be held outright, the property was held by an ecclesiastical corporation or the churchwardens under the ecclesiastical law. Property belonging to a parish church and held by the churchwardens was subject to the jurisdiction of the consistory court, as it is now. If given on charitable trust, then the vicar, churchwardens or others would hold the property as trustees, as now, and the property would be protected under the law of charities.

From the 1400s the jurisdiction of the ecclesiastical courts in respect of wills began to wane in favour of the Court of Chancery, although at this time chancellors tended to be bishops. By the end of the sixteenth century the chancellor had taken exclusive jurisdiction over charitable trusts. In time charitable giving generally became the favoured way in which to re-endow the Church and to regulate many of its affairs. From the testator or donor's point of view it had the advantage of enforceability: if the property was given on trust for a particular charitable purpose, it was incumbent on the church to apply the property according to those stipulations. This gave rise to a species of charity which we would now call ecclesiastical charities, namely charities established for ecclesiastical purposes.

The increase in differentiation between gifts for pious causes and those for other causes is apparent in the initial formulation of charitable purposes in the Statute of Charitable Uses of Elizabeth I. Here, gifts to churches were not mentioned, aside from those for the repair of church buildings, but clearly gifts for a range of ecclesiastical purposes, such as to maintain a preaching minister, were capable of being charitable, and in 1891 in the *Pemsel* case, Lord Macnaughten confirmed that 'the advancement of religion' was one of the four principal heads of charity.[19] It remains one of the stated charitable purposes in the present Charities Act. From Tudor times a range of charities – both ecclesiastical and non-ecclesiastical were administered by the churchwardens or the vestry meeting. With the birth of local government in the nineteenth century, functions of the vestry and churchwardens were removed to the new parish

18 Jones, *History of the Law of Charity*, p 4.

19 *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531. See *Pember v Kington (Inhabitants)* (1639) Duke 82 for the authority that the maintenance of preaching ministers is charitable.

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councils and meetings.[20] However, the vestry retained any such 'ecclesiastical charities' for which they were trustees, and any powers, duties and liabilities relating to the 'affairs of the church'.[21] The churchwardens retained any charities of which they were trustees, whether ecclesiastical or not, and their responsibilities relating to the affairs of the church, aside from their maintaining closed churchyards where the expense of that fell upon the public purse. The legislation contains a non-exhaustive definition of ecclesiastical charity which is helpful to us to this day:

> The expression 'ecclesiastical charity' includes a charity, the endowment whereof is held for some one or more of the following purposes:—
>
> (a) for any spiritual purpose which is a legal purpose; or
> (b) for the benefit of any spiritual person or ecclesiastical officer as such; or
> (c) for use, if a building, as a church, chapel, mission room, or Sunday school, or otherwise by any particular church or denomination; or
> (d) for the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of divine service therein; or
> (e) otherwise for the benefit of any particular church or denomination, or of any members thereof as such
>
> ... [and] any building which in the opinion of the Charity Commissioners has been erected or provided within forty years before the passing of this Act mainly by or at the cost of members of any particular church or denomination.[22]

Such ecclesiastical charities are common. Seldom are parishes without them and they might be held by the incumbent, or churchwardens, the parochial church council (PCC), or named individuals or a mixture of them. They might help repair churches, pay stipends, promote church music or religious education. They sit alongside the non-ecclesiastical charities for which the officers of the church are often the trustees as well, commonly with the parish as the area of benefit. Such non-ecclesiastical charities include almshouses and village schools. Locally based charities, often established by the testaments of the faithful, or through subscription or generous lifetime gift, sit alongside the ecclesiastical corporations that keep the core property of the Church – its churches,

20 Local Government Act 1894, s 5.
21 This was to include the distribution of offertories or other collections made in any church: see ibid, s 75.
22 Local Government Act 1894, s 75(2).

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churchyards, parsonages and glebe–and help animate the workings of the Church in each parish. These non-ecclesiastical charities were and remain outside the strict regulation of the ecclesiastical law, being subject to the control of the High Court (before 1875 the Court of Chancery) and the Charity Commissioners, not the consistory court nor the diocesan bishop. As such, they sit alongside and are additional to the core church structures, and have a degree of autonomy from the ecclesiastical law.

THE GROWTH OF CHARITY LAW II: THE NINETEETH CENTURY

In addition to locally based ecclesiastical charities, charities were founded at the diocesan and national level. It was and remains common for diocesan bishops and archdeacons to administer charitable funds for church purposes. At the national level, particularly in the nineteenth century and afterwards, charities such as the National Society for Promoting Religious Education had a profound effect on the way in which the Church of England could change society. Through the auspices of the National Society, facilitated by new legislation and supported by generous benefactors, Church schools were established in hundreds of villages and towns, normally with trust deeds which took a standard format and which appointed the incumbent and churchwardens as the charity trustees. The Society for the Promotion of Christian Knowledge (SPCK), the Church Mission Society and many others had a significant part to play in re-evangelising the nation and beyond.

However, the official Church structures remained largely independent of charity law. The legislation establishing the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy (1704[23]) and the Ecclesiastical Commissioners for England (1836[24]) were both independent of the jurisdiction of the Charity Commissioners. What such national Church bodies did do, however, was to concentrate Church resources in bodies administered by a mixture of clergy and laypeople who would work strategically to promote the mission of the Church in a manner that was national, not solely diocesan or parochial, in a way that prefigured the national, diocesan and parochial charity structures that now exist. They went beyond the independence of the older ecclesiastical corporations, bishops, cathedral chapters and parish priests, whose roles were largely governed by ecclesiastical law, and created a superstructure over them of national bodies which bear resemblance to the seven national charitable institutions of the Church of England that operate today.

At the diocesan level it was not until the nineteenth century that experimentation in using charitable trusts to pool and administer diocesan funds began. In

23 The Queen Anne's Bounty Act 1703 (2 & 3 Anne c 20).
24 Ecclesiastical Commissioners Act 1836.

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the second part of the nineteenth century, with population growth, the development of new towns and the need to build new churches, new diocesan structures came to be founded which could hold land and buildings on charitable trust and channel funding to needed projects. At the Annual Meeting of the Church Congress in 1880 the Honourable Wilbraham Egerton MP narrated that:

> During the last half century, the growth of population, and the consequent necessity for providing more adequate spiritual ministrations for the masses in our large towns, have forced upon the Church the duty of increasing its financial resources, and perfecting its machinery for collecting funds. Besides these normal wants, a new difficulty has lately arisen. When the rights of the Church of England to its property are challenged, and its endowments are claimed, by a minority of the nation, it is time for the Church to consider in what way it can best meet the pressing claims of its members for greater support to its growing institutions, and invest the funds collected for these objects with the greatest security for the future.[25]

Furthermore, he commented, the Church of England was wanting in comparison with such religious bodies as the Roman Catholics, the Wesleyans and the Free Church of Scotland, in having no central bodies to administer funds and to steward property. Aside from the funds and property administered by the Queen Anne's Bounty and the Ecclesiastical Commissioners and bodies such as the Missionary Society, the Society for the Propagation of the Gospel, SPCK and the Church Building Societies, 'the organisation has been wholly parochial, and but little has been done by the collection of small sums, except through the offertory'.[26] He advocated for diocesan finance bodies which could properly realise the potential for financing the Church, rather than mainly relying upon the liberality of past generations.

Each diocese moved at its own pace in establishing a range of legal entities which could steward diocesan and parochial property. The Diocese of Ely had a diocesan fund started in 1864 which, through offertories and subscriptions, was able to make grants for such matters as paying the stipends of additional curates. It was estimated that in 1880 at least 450 out of 550 parishes in the diocese were sending the fund an offertory.[27] In 1873 or thereabouts a limited liability company was incorporated under the Companies Act 1867 for the diocesan finance of the Diocese of Chester with the object 'to assist members of the Church of England in providing for the maintenance and furtherance

25 D J Vaughan (ed), *The Official Report of the Church Congress Held at Leicester … 1880* (London, 1881), p 619.
26 Ibid, p 620.
27 As recounted by the Archdeacon of Ely, recorded in ibid, pp 633–634.

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of the Church of England within the diocese' and with the principal role of supporting four charities established for church building, education, augmenting benefices and the relief of poor clergy and their dependants. The ex officio members were the bishop, the dean, the chancellor and the two archdeacons, with other members elected and nominated to represent the rural deaneries and the four charities, and further life members who had donated at least £5. It was reported that before the 1870s had ended, the income of the Chester charities had increased as a result of having a central finance body and in both the Diocese of Chester and the Diocese of Liverpool (which had itself been removed from Chester) 'it has been found that legacies have been given to the financial Boards which might have been lost to the Church if no such responsible body had existed'.[28]

It was a period of exploration and different dioceses tried different devices. The Diocese of Manchester incorporated its DBF under the Companies Act 1862 in 1874 but with unlimited liability.[29] Lichfield first set up a diocesan church trust based upon the provisions of the Trustee Appointment Act 1850.[30] Salisbury got its DBF in 1882, incorporated under the Companies Act 1867, and obtained a licence from the Board of Trade. In 1895 Worcester was settling upon a general trust deed that would allow property to be vested in a diocesan trust for the general purposes of the trust or for any special purpose. The donor of the property would refer in the deed to the general trust, and its provisions would apply by extension. The property would be vested in diocesan trustees but they could appoint administrative trustees who would be persons residing in the vicinity of the trust property. While it had been a problem that solicitors' fees were incurred on the appointment of new trustees, and trustees did not have the protection of a general indemnity, by the time of the Worcester plans the Trustee Act 1894 had removed these problems.[31] The York Diocesan Trust was constituted in 1896 to look after existing and new trusts founded in the diocese.[32] Lincoln incorporated its DBF in 1908 and Canterbury in 1916, these incorporated bodies taking over functions which had been administered by predecessor bodies.

Thus the combination of demographic and economic change in England, the entrepreneurialism and philanthropy of the Church membership and changes in the law which allowed new legal entities to be created led to the establishment of diocesan charities in the late nineteenth and early twentieth centuries. Added

28 Ibid, p 622.
29 Ibid, p 623.
30 13 & 14 Vict c 28. This Act had been passed for rendering more simple and effectual the law by which dissenting churches hold property, but which appeared to be limited to buildings used for religious worship or education, or for rooms for the meeting or transaction of the business of a society or congregation or body of persons to whom they belong.
31 *Church Times*, 24 May 1895, p 583.
32 A Buchanan, *A Guide to Archival Accessions at the Borthwick Institute, 1981–1996* (York, 1997), p 18.

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to this was a change in approach from the legislature, which began in the nineteenth century to repeal the legal provisions which made it difficult for large landowners to give property to the Church, and indeed to incentivise such donations.[33] One of the early legislative acts of the Church Assembly was to enact the Diocesan Boards of Finance Measure 1925 to give these diocesan bodies a uniform structure as charitable companies limited by guarantee with common constitutional characteristics. At the parish level, the Church Assembly passed the Parochial Church Councils (Powers) Measure 1921, which created statutory charities with a corporate status for each parish. Both these measures gave rise to, or condoned existing, bodies which operated largely outside the ecclesiastical law, aside from the extent to which their constitution and practice was set out in the legislation itself. They were and are evidently ecclesiastical corporations, with trustees appointed from church members and established for ecclesiastical charitable purposes. But the Canons of the Church of England, which were largely those of 1604 with some updates, made little or no mention of them. When the Revised Canons Ecclesiastical were promulged by the Convocations of Canterbury and York in 1964 and 1969, those Canons also gave little mention to DBFs and PCCs, despite their importance in today's church polity. The consequences of this will be considered below.

COMPARISON OF CHARITABLE AND NON-CHARITABLE ENTITIES

Let us compare the characteristics of charitable property from ecclesiastical property to try to find where the dividing lines might be. Distinguishing features of charity property are that:

i. There is a separation of legal interest from the beneficial interest in the property. That is to say that the legal owners do not hold the property for their own benefit, but for someone else – the beneficiaries of the trust, being the public at large or a section of the public;
ii. The property is held exclusively for a purpose which is considered by the law to be charitable;
iii. The property is applied in the public benefit, and private benefit can only be incidental. That is to say that the trustees cannot apply the property for solely their own benefit or for a particular family or club, but only for the benefit of a section of the public;

33 Previously the law had thrown up many obstacles, from at least the time of Magna Carta, to prevent land from being held in 'mortmain', ie by the church or a charity, and thereby lost from the feudal system (the original concern) or thereby disinheriting the heir (the later concern).

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iv. There is (normally) more than one trustee, the trustees to watch over each other;
v. The charity is subject to the control of the High Court and the Charity Commission concurrently. The monarch is the *parens patriae;*[34]
vi. It is subject to charity law, including the Charities Act 2011. This brings with it reporting and accounting requirements;
vii. The property holding does not fall foul of the law on perpetuities, the law which prevents property being tied up for a particular purpose for too long:[35] in theory charity trustees and their successors could hold the property for ever; and
viii. The disposal of property is regulated, in particular to prevent trustees from disposing of property without a power to do so or imprudently.[36]

For non-charitable ecclesiastical entities on the other hand:

i. The possibility of holding the property for the benefit of the owner is not precluded. In the case of glebe land before 1978 it was the case that the land could be for the private benefit of the incumbent. This is still the case for parsonage land;
ii. There is no necessity for there to be a trust at all;
iii. Ecclesiastical corporations have perpetual succession and thus can in theory hold property for ever. There is no problem around perpetuities. Indeed, such corporations preceded the development of the law of perpetuities;[37]
iv. Most kinds of ecclesiastical property are subject to restriction on disposal:

 (a) In the case of all consecrated land vested in the incumbent of a benefice, the fee simple is in abeyance, from the French *bayer,* to expect: that is, belonging to him next to enjoy it, which limits their ability to dispose of it;[38]

34 *A-G v Brown* (1818) 1 Swan 265 at 291 per Lord Eldon LC; *A-G v Compton* (1842) 1 Y & C Ch Cas 417 at 427 per Knight Bruce V-C.

35 The modern statute on perpetuities is the Perpetuities and Accumulations Act 2009. Under section 18 it is expressly stated that the Act does not affect the rule of law which limits the duration of non-charitable purpose trusts. In *Re Bowen* [1893] 2 Ch 494 at 495 it was held that a charitable trust may be made to enure for any period which the author of the trust may desire.

36 See for example the restrictions on disposition imposed by the Charities Act 2011, ss 117–124.

37 Until the enactment of section 180 of the Law of Property Act 1925, a corporation sole (eg bishop, incumbent) could not hold chattels or any other kind of personal property in succession (Grant 629; see also *Fulward's Case* 4 Rep 64 b).

38 As Burn, *Ecclesiastical Law,* vol II, p 297, says: 'this was provided by the wisdom of the law, for that the parson and vicar have the cure of souls, and are bound to celebrate divine service, and administer the sacraments: and therefore no act of the predecessor shall make a discontinuance, to take away the entry of the successor, and to drive him to a real action, whereby he might be destitute in the mean time. 1 Inst. 341'.

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(b) through a combination of the ancient canon law[39] and legislation, there are specific prohibitions on disposal. In former times, when the bishops held their own episcopal estates, Acts of Parliament required that leases be for no longer than prescribed;

v. Property which is consecrated is held for a sacred purpose, for example the burial of the dead;
vi. Consecrated property is under the jurisdiction of the consistory court and alienation is highly regulated;[40] and
vii. Ecclesiastical corporations are subject to the regulation of the Visitor, who can investigate to ensure that property is being cared for, that the corporation is following the rules it is subject to, and that the life of the church concerned is healthy and godly.

The categories of non-charitable ecclesiastical property pre-date modern charity law, and the way the ecclesiastical law developed was such as to create durable, stable, prudential and certain property holdings that did not require the assistance of charity law. The Church and its law had their own ways of regulating the holding of property and monitoring and correcting the health of its institutions that existed and still do, to a large degree, exist.

CONCEPTUAL DIFFERENCES

There are conceptual differences in the way in which assets are held under the ecclesiastical law as opposed to charity law. This mainly comes down to the notion of public benefit, which is now part of the litmus test for what makes a charity charitable. Prior to the Reformation, property was often donated to the Church for the saying of prayers for the donor, and for having masses for the soul of the donor after death. No public benefit was necessary, whether or not in fact the property of the Church was used for the public good; that did not need to be the intention. At the Reformation, it became unacceptable and indeed illegal for masses for the souls of the deceased to be said, and the practice was classified superstitious and lacking efficacy. Charity lawyers are well aware of the 1949 House of Lords case of *Gilmour v Coats*, where a gift of money to a cloistered community of Carmelite nuns was held not to be charitable because the priory concerned could not have any public benefit.[41] The benefit of

39 See for example the Canons of Stephen in J Bullard et al (eds), *Lyndwood's Provinciale* (London, 1929), pp 59–60.
40 Charity property can also be consecrated: see, for example, the hospital chapel in *Sutton v Bowden* [1913] 1 Ch 518.
41 [1949] 1 All ER 848.

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intercessory prayer to the public was held not susceptible of legal proof. Further, any benefit from the nuns providing an edification to the public by example was too vague and intangible to satisfy the test of public benefit. Michael Blakeney argues that the decision is an example of the English law of charities exhibiting a Protestant bias.[42] That the law of charities requires that there be public benefit to be demonstrated belies a utilitarian approach which was incipient in the Elizabethan Charitable Uses Act 1601. He notes that gifts to pious causes had originally been the principal object of charitable benefaction, but that after the Reformation in England gifts to monastic houses were void as against the policy of the law. The Statute of Charitable Uses was a chauvinistic Protestant assertion of the duty to perform 'good works' which had coloured the English judicial definition of valid religious charities. This was inherent in the very phrase 'the advancement of religion', which became one of the main established heads of charity.

If we apply this analysis to the different charitable and non-charitable bodies which make up the Church of England, it is possible to recognise (although it is something of a trite dichotomy) that what separates the older ecclesiastical structures from the newer charity law ones is that the older ones were not founded on the express intention of providing public benefit but the newer ones are. An incumbent, bishopric, consecrated church, cathedral and the like are not established to do 'good works' for humanity, but as servants of God.[43] The benefit to humankind flows from that, but is not the primary purpose. Churches are consecrated and dedicated to the glory of God, not for the service of people. DBFs, PCCs and other charities, however, are required to advance religion in such a way as to carry out good works for the public. In the case of PCCs this is co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical.[44] Mission is at the forefront.

THE PRESENT ADMIXTURE

The present state of the Church of England is that its institutions are partly the vestigial parts of the Saxon and Norman church that have survived, namely the ecclesiastical corporations holding onto large parts of the property of the Church and governed by the ecclesiastical law, and wholly or mainly clerical; and partly the charitable trusts that have sprung up, particularly in the nineteenth century and onwards, the PCCs, DBFs and national institutions, in which the laypeople

42 M Blakeney, 'Sequestered piety and charity: a comparative analysis', (1981) 2:3 *Journal of Legal History* 207–226.

43 Although the registration of cathedral chapters with the Charity Commission, as required by the Cathedrals Measure 2021, will alter this position.

44 Parochial Church Councils (Powers) Measure 1956, s 2(2)(a).

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are members with the clergy, and which are governed by both ecclesiastical and charity law but with charity law being the dominant form of regulation. Whether the mix is a healthy one depends on perspective. Is the mix like a seemingly smooth and comfortable mattress, whose rusty iron coils beneath come thrusting up to jab the unsuspecting sleeper in the back? Or is it a rich and complex ecosystem which is more resilient and flexible for the fact of having the different components?

The first point that is worth making is that the older ecclesiastical corporations serve different functions from the newer. In a parish church, it is the minister who has conduct of all ministerial functions. That minister is in charge of the conduct of services, the administration of the sacraments, the burial of the dead and so forth. Thus, most ministerial and leadership functions fall outside the strict PCC functions and are only governed by ecclesiastical law, not charity law. The PCC, however, is responsible for the financial affairs of the church, including the collection and administration of all moneys raised for church purposes and the keeping of accounts in relation to such affairs and moneys, and the care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments.[45] The PCC has a right to be consulted on a range of matters;[46] generally its primary charitable purpose is co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical.[47] In its administration the PCC is governed by its members, who are charity trustees.

In the case of a diocesan bishop, it is the bishop who has the discretion whether to give licence or permission to officiate to a cleric, who may license buildings for worship and marriages, consecrate churchyards and generally to be the chief pastor of the diocese. Such matters are wholly within the ecclesiastical law, not charity law. The role of the DBF is to hold property and funds, and it is empowered to employ the staff fulfilling diocesan functions, to collect contributions from the parishes and to provide central services. It is administered by trustees and company directors, owing duties in both company and charity law.

The second point is that the pure ecclesiastical corporations and the modern charity bodies are connected. The incumbent, who is the corporation sole in which the property of the benefice is vested, who has the cure of souls and superintendence of all the ministerial functions and who is beholden to canon law, is ex officio a member of the PCC and its chair. The diocesan bishop, who has the cure of souls of the diocese as a whole and who discharges his or her multifarious functions under the ecclesiastical law, is ex officio president of the diocesan

45 Parochial Church Councils (Powers) Measure 1956, s 4(1).
46 Such as in the choice of which authorised form of service is to be used, otherwise than in the case of occasional offices. The minister and PCC are to act jointly: *Revised Canons Ecclesiastical*, Canon B3.
47 Parochial Church Councils (Powers) Measure 1956, s 2(2)(a).

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synod, chair of various diocesan boards and a director and charity trustee on the DBF. This is the sweetness of the present combination of the old and the new. Clerical office-holders keep going the ministry of their forbears and are plugged into modern charitable governance bodies that take care of the resourcing of ministry and provide advice, support and a check to what would otherwise be an overweening clerical power. Where matters get a bit blurred is in remembering where the pure ministerial functions stop and the charity governance functions start. In both PCCs and DBFs, the minister and the bishop respectively are first among equals: they chair those bodies but they are not supposed to dictate to them. Each trustee is themself responsible for ensuring that the charity as a whole is conducted in such a way that ensures the best possible promotion of the objects of the charity, exercising such care and skill as they have.

The third point is that the mixed economy of the ecclesiastical corporations and the modern charity bodies is not always well understood by church leaders, nor properly mapped out in the Canons of the Church of England. Partly this is because large parts of what makes up the Church of England are contained in measures and have not been recognised in the Canons themselves; sometimes – in the case of parish share, for example – it is contained neither in the Canons nor in church legislation. Additionally, as the newer charity bodies such as PCCs and DBFs have taken over running large parts of the Church, the ecclesiastical law has not always been amended to recognise that fact. Take visitations for example. As mentioned, these were one of the key investigative and enforcement mechanisms of the Church. But it is doubtful whether a diocesan bishop has a right of visitation over a PCC. In Canon G6 it provides that the minister and churchwardens of every parish are to answer such articles of inquiry that are sent by the archdeacon. It makes no mention of the members of the PCC or the PCC corporately. The archdeacon's rights are derived from customs and laws which pre-date the establishment of PCCs in 1921. While the bishop's jurisdiction over the incumbent and churchwardens is well established, nothing since the establishment of PCCs has similarly subjected them to the same jurisdiction.[48] The 1921 Measure which established PCCs provided for them to inherit the powers, duties and liabilities of churchwardens which stemmed from enactments (not custom) only, and contained a proviso that the 'powers duties and liabilities with respect to visitations' which belonged to the churchwardens in relation to church movables remained with the churchwardens. Therefore, when diocesan bishops proceed to hold PCCs to account through the visitorial process, such as in the recent case of the Bishop of

48 There is a separate power under section 47 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 for the archdeacon to inspect the fabric of a church and relevant articles in a church for which the PCC is responsible, but that is a more modern power (formerly in the Inspection of Churches Measure 1955). It is not part of the visitorial power.

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Norwich and Wymondham PCC, the enforceability of such a process other than via the incumbent and churchwardens is doubtful. While there are some supervisory powers over PCCs, such as the archdeacons right to inspect minutes and to call for an extraordinary meeting, these bodies are independent charities run by charity trustees which owe duties to their beneficiaries and who might be undermining that independence should they abdicate what they think is prudent out of deference to the directions of the diocesan bishop.

It is in areas such as this – that is to say, governance – that the dividing lines between ecclesiastical law and charity law can get blurred. Most PCCs in England are still unregistered as charities. They do not need to be registered unless their annual income exceeds £100,000 because the law still has a category of certain church charities being excepted from the duty to register where the income is below that value. The deadline by which PCCs will have to register with the Charity Commission keeps on being put back and is now March 2031: it seems that there is little appetite at the Commission to bring the thousands of small PCCs onto the register. While this makes life easier for smaller PCCs – they do not need to register and then submit annual returns with the Commission, for instance – it does lead to some confusion about the charitable status of these bodies. It is common for PCC members not to know that they are agreeing by taking up office to be charity trustees and that they owe all the same charity trustee duties as a registered charity, save complying with certain reporting requirements. Thus, there is more risk of PCC members failing to appreciate that they must watch out for conflicts of interest, actively further the purposes of their charity, steward their funds prudently and hold their fellow trustees to account.

While most PCCs are prudently and conscientiously run, problems do arise, for example in relation to the employment of PCC members to do work in the parish. When employing a member of the PCC, the PCC is obliged to ensure:

i. That before entering into the contract it is satisfied that it would be in the best interests of the council for the services to be provided by the person concerned for the amount, or maximum amount, of remuneration set out in the contract;
ii. That the total number of any persons employed at any time, and any person who is connected to any such person, constitute a minority of the members of the council;
iii. That the terms of the contract, including the remuneration paid, are set out in an agreement in writing between the council and the member concerned;
iv. That the amount or maximum amount of the remuneration does not exceed what is reasonable in the circumstances for the provision by that member of the services in question; and

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v. That before entering into a paid contract, the members of the council must have regard to any guidance given by the Charity Commission concerning the making of such agreements.[49]

This sometimes gets a little confusing when the question is not whether a PCC should employ one of its own but whether an existing paid employee can later come onto the PCC as a trustee. That is not strictly covered by the rules but the PCC will still need to ensure that the same ground is covered and, for example, avoid the paid members being in a majority. The rules around the employment by PCCs of their members are more permissive than for other charities because the Charities Act is applied differently through Church of England legislation. This is an example of the General Synod taking charity legislation and applying it but in a modified form.

There are two other risks with smaller PCCs. The first is lack of capacity. Many smaller PCCs struggle to recruit and can often fail to have the people with the right skill sets. This is particularly the case with rural parishes with very small congregations. Finances tend to get stuck with the same treasurers, sometimes husband and wife teams, and there is little ability to ensure succession planning. Should the parish have the means to employ an organist or administrator, the danger is that the PCC will not provide the required particulars of employment mandated by employment legislation, nor comply with other requirements around national insurance and pensions. One solution to help struggling parishes would be to set up a joint council with other parishes in the same benefice, and delegate some or all of their functions to that joint council, which will then do some or all of the heavy lifting. There is provision to set up these joint councils now, and the national Church has consulted on whether it should be possible to set up such joint councils *ab initio* when parishes are reorganised into bigger benefices.[50]

The other main risk is an over-dominating chair or other PCC member, which makes it difficult for decisions to be made collectively. This might be the parish priest, who assumes that, as the leader of their church, they should be calling the shots at PCC meetings. It takes a wise minister to realise that there are certain aspects of church life where there needs to be healthy debate and challenge and that, when it comes to charity law, each trustee has an independent responsibility to actively participate in the decision-making. A chair of a charity should not act autocratically, nor hoard information from the charity trustees that they need in order to make informed decisions. These problems are not confined to the

49 Charities Act 2011, s 185, as modified by the provisions of the Parochial Church Councils (Powers) Measure 1956, s 7A, as inserted by the Church of England (Miscellaneous Provisions) Measure 2018, s 14(1).

50 See GS 2222, *Church of England, Mission in Revision: A review of the Mission and Pastoral Measure 2011* (June 2021).

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smaller PCCs and it will be interesting to see what the dynamic will be for cathedrals, which are being required to register as charities and to have a lay majority on their governance body, the chapter. While the dean is the lead minister with superintendence of worship, he or she will be one of a body of trustees, and it will be important to know which issues are ones where the dean takes an executive decision, perhaps in tandem with the residentiary canons, and which are governance issues for the charity, where there needs to be consensus at chapter level. In parishes, the problem could equally come from an overbearing member of the PCC such as a long-standing churchwarden who appropriates to themself too much of the airtime and does not allow a healthy environment for managed but free discussion as equals. There are also those churches, found in parts of the Church of England and outside it, where there is a clique of individuals who as 'the elders' or standing committee form a separate power structure from the PCC and make key decisions without reference to the church council itself.

Finally, another outcome has been a homogenisation of charitable property by the Church of England. In a comment by Philip Petchey on the faculty jurisdiction as relates to Church silver, he mused whether some of the communion plate that churches wish to sell might be held on specific charitable trusts imposed by the donor.[51] One would need to inspect the will or other document under which the property was donated to identify whether any trusts were stipulated. Parsonage houses could conceivably have been given on charitable trust, as could glebe land. Successive Church legislation has smoothed the edges under which such property is held and many charitable trusts have been forgotten.

CONSEQUENCES

Why does any of this matter? Is it just an exercise in taxonomy, labelling the different flora and fauna in the Church of England's ecosystem, and discovering their origins? Personally, I find the ecclesiastical and charity law so often conflated, ignored or confused that it is helpful to start to stick labels on the different parts and see how it all fits together. This is the *Ecclesiastical Law Journal* and it is worth taking stock of how much of what church members work with is pure ecclesiastical law made by the Church, and how much is outside law which has flowed in and often been modified in the process. One consequence of the division between ecclesiastical and charity law is jurisdiction. Ecclesiastical law is Church-made and Church-controlled: for example, consecrated churches are regulated by the consistory courts, and clergy are disciplined

51 P Petchey, 'Hidden treasure: the Church of England's stewardship of its silver plate', (2018) 20:1 EccLJ 16–50.

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by church courts. Charity property, however, is under the jurisdiction of the High Court and the Charity Commissioners. While the bishops of the Church are not as interested as they once were in maintaining the independence of the Church from control by the State and by the secular courts, it remains the case that supervision by the High Court is supervision by an outside tribunal.

The related consequence is that the Church does not write charity law: it exists for all charities, whether ecclesiastical or not, and is influenced by legislative change, case law and policy considerations. High-profile campaigning around independent fee-paying schools and whether these should have charitable status has shown how political the question of public benefit can be. While, ultimately, a fee-paying school could seek to cease to be a charity and thereby act independently of public benefit advice issued by the Charity Commission, if by statute all PCCs, DBFs and cathedral chapters have to be charities, that does not give the Church much room to manoeuvre if charity law were to be steered in a direction that compromised the tenets and practices that the Church holds to. The approach of the Commission has been benevolent and slow to intervene: they had to be cajoled into intervening in the dispute between the Governing Body of Christ Church in the University of Oxford with its former dean. But all seven of the national institutions of the Church of England are subject to regulation by the Commission and charity law.

While the registration of cathedral chapters as charities, a requirement of the Cathedrals Measure 2021, may have the mere ring of going through some formalities to have cathedrals on a register and required to comply with some additional accounting and reporting requirements, the transformation is rather more significant than that. It represents the first time that an old-style non-charitable ecclesiastical body has been converted into a new-style charitable one. Until now cathedral chapters have never been registered charities and have been exempted from the regulation of the Charity Commissioners (to the extent to which they may have been charities at all) since the Charitable Uses Act 1601. To get them into a state where they become compatible to be registered, it has been necessary to determine what charitable purposes they act in. The purpose of a cathedral has never before been fixed; when Norman Doe came to catalogue what each cathedral thought its purpose to be, he did not find that there was a common view.[52] One of the key functions – that the cathedral be or contain the 'seat' or 'cathedra' of the diocesan bishop – has been made an 'ecclesiastical purpose' of the cathedral. Thus, section 1 of the Measure states that:

> A person on whom a function is conferred by or under this Measure must, in exercising that function, have due regard to—

52 N Doe, *The Legal Architecture of English Cathedrals* (London, 2017).

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(a) the fact that the cathedral is the seat of the bishop and a centre of worship and mission, and
(b) the importance of each cathedral's role in providing a focus for the life and work of the Church of England in the diocese.

On the other hand, the charitable purposes that must be in the constitution of every cathedral chapter are in section 4 and include the purposes 'to advance the Christian religion in accordance with the faith and practice of the Church of England, in particular by furthering the mission of the Church of England' and to care for and conserve the fabric of the building. Thus the Measure neatly lists the ecclesiastical purpose, derived from canon law, in the first section, and prescribes the charitable purposes of the controlling mind of the cathedral, its chapter, in the fourth. This helps to embody the separate ecclesiastical and charity law elements which go into making 'the cathedral'.

One of the remarkable aspects of the Cathedrals Measure 2021 was that it linked eligibility to act as a charity trustee to the right to hold an ecclesiastical office. It inserted a new section 3A into the Ecclesiastical Offices (Terms of Service) Measure 2009 which stipulates that, if an ecclesiastical office-holder (for example, a dean or residentiary canon) is, by virtue of that office, a charity trustee of the chapter of a cathedral, but is disqualified from being a charity trustee under the Charities Act 2011, then the diocesan bishop must remove that person from office. While the office-holder may remain in office pending an appeal under the Charities Act, or pending an application to the Charity Commission for a waiver, neither the bishop nor anyone exercising ecclesiastical jurisdiction has any discretion in the matter. The bishop must remove the office-holder as soon as reasonably practicable and in any event before the end of 30 days, beginning with the day the appeal or application for a waiver is determined, and during that time must suspend the cleric.

This is a serious inroad into the protections afforded to clergy on common tenure as to the security of office and makes the clerical office subject to the disqualification provisions under charity law. While there is some internal logic here, it makes clergy far more vulnerable to removal than before and removes the authority of the Church to determine who should be removed from an ecclesiastical office. There is no compensation for loss of office. Although most of the disqualification grounds relate to serious matters, they do also include some matters which would not necessarily amount to clerical misconduct: for example, those who are undischarged bankrupts under the Insolvency Act 1986. It also makes the Charity Commission the arbiter of who should be given a waiver.

Who knows how the disqualification rules may be altered in the future to expand the net wider? It reduces the independence of the Church to determine who is fit to hold an ecclesiastical office. It is admitted that similar

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disqualification rules already exist for churchwardens and for members of a PCC but those are unpaid voluntary roles.[53] Even for those priests and deacons who have been found guilty of a criminal offence such as murder to which a custodial sentence is attached, or those clergy who are put onto a barred list, there is a procedure under the Clergy Discipline Measure 2003 for representations to be made to the bishop as to why a penalty of removal from office or prohibition should not be imposed, and the bishop's decision is subject to review by the archbishop of the province.[54]

When the Cathedrals Measure was in draft the original proposal was that this provision should apply to all ecclesiastical office-holders, for example incumbents who are on the PCC ex officio. It was only when the then Dean of Arches made representations that this would be an inappropriate provision to put at the back of a draft measure concerning cathedrals that it was dropped, pending inclusion in a more appropriate measure. Admittedly, cases involving the disqualification of clergy as charity trustees will be few and far between. Canon Andrew White, the former so-called 'Vicar of Baghdad', was disqualified by the Charity Commission from acting as a trustee and/or holding any office or employment with a senior management function in all charities for a period of 12 years from 2020, due to a range of faults including a failure to observe conflicts of interest and proper stewardship of charitable funds of a charity established for the support of the education, health, spiritual and welfare of Iraqi Christians who have had to leave their home country and relocate to Jordan, for which he acted as an ambassador.[55] While in most cases, the decision of the Commission will be a highly relevant consideration for whether the cleric should continue to hold their ecclesiastical office, the Cathedrals Measure, by making the removal near automatic, increases the importance of charity law to the internal governance of the Church and constitutes a significant inroad into the independence of the ecclesiastical jurisdiction.

There is a danger of overreliance on a body of law other than that written by and emanating from the ecclesiastical powers. Principally this is because the jurisdiction is different: it is the High Court and the Commission as front-line regulators which interpret and enforce charity law, not the church courts. Additionally, charity law is liable to be changed by political factors which affect all charities – the independent school sector has been mentioned as a sector buffeted by such factors. Further, it makes the secular courts more liable to intervene in intra-church disputes if, instead of the Church being governed by its own law, it is governed by the law that applies to other

53 Churchwardens Measure 2001, s 2; Charities Act 2001, ss 178–184A.

54 Clergy Discipline Measure 2003, s 30.

55 Charity Commission, 'Decision Charity Inquiry: CAWRM Ltd' (23 October 2020), <https://www.gov.uk/government/publications/charity-inquiry-cawrm-ltd/charity-inquiry-cawrm-ltd>, accessed 15 June 2022.

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institutions generally.[56] The present call for 'simplification' in Church law, should not therefore be answered by the stripping out of ecclesiastical law.

Take, for example, the use of bishop's mission orders, hailed as a way of setting up new mission communities and initiatives outside traditional parochial structures. Legal practitioners with experience of new mission initiatives endorsed under bishops' mission orders will attest that such initiatives do not obviate the need for law. Instead, especially with the more substantial mission communities which hold money or property, a need arises to set up charitable companies or charitable incorporated organisations with limited liability, or else allow unincorporated associations to shoulder the liabilities. Questions around payment into parish share, representation on diocesan synod, and employment and property rights come to the fore. Charity law flows in from the outside, and the practitioner may look wistfully at the traditional PCC model which required no solicitor to draft the constitution, because it and the rules pertaining to it exist in ecclesiastical legislation. Any knowledge of the internal life of unestablished or disestablished churches or other religious bodies will be aware that the absence of ecclesiastical law which has force at a state level does not necessarily make the organisational and administrative life of such bodies simpler.

The borders between ecclesiastical and charity law are not like a thin line of watchtowers and coiled wire, with jumpy ecclesiastical lawyers putting their heads above the parapet to pick off charity lawyers encroaching from the other side. In practice, ecclesiastical law and charity law have come to be treated as something of a family of laws, as in the old days matrimonial law and ecclesiastical law would have been. The constitutions of charitable bodies have been infused with spiritual purposes and put into the hands of trustees who are actual communicant members of the Church of England. But boundaries do exist jurisdictionally, and the internal laws which apply – depending on whether the body is governed by charity law, by ecclesiastical law or by both – differ.

56 The issue of justiciability in religious charities was considered by the Supreme Court in *Shergill and Others v Khaira and Others* [2015] AC 359.

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