

to split into at least two separate bodies; at least some court cases involving church property are likely to come out of that split.

The neutral principles standard has not been consistent or effective in its application over the past 40-plus years, and the deferential standard exemplified by the US Supreme Court's decisions from *Watson* to *Milivojevic* is the best approach to these cases. Such an approach raises the fewest First Amendment concerns, in relation to both the Free Exercise Clause and the Establishment Clause. Given that the Supreme Court is moving in that direction in other areas, it should hear a case on appeal involving TEC sometime in the near future. Hearing such a case (or combining a group of cases on appeal) would settle the issue for the foreseeable future, providing consistency, predictability and clarity on a question that remains important and relevant to twenty-first-century American society and culture.

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'And Who Is My Parishioner?' Residency, Human Rights and the Right to Burial in the Parish Churchyard

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When asked by an expert in the law, 'And who is my neighbour?', Jesus answered with the parable of the good Samaritan (Luke 10:25–37). This was a radically inclusive answer: your neighbour could be anyone. By contrast, a priest who asks an ecclesiastical lawyer 'and who is my parishioner?' may be given a far less clear or satisfying answer.

1 This comment is based on the moot problem set for the inaugural Inner Temple Ecclesiastical Law Moot in which the author participated in spring 2021. The author would like to thank the Inner Temple Mooting Society for organising the competition, all the participants and Morag Ellis QC, Araba Taylor and Caroline Harris, who presided over the final. Special thanks are given to Mark Hill QC for advising on an early draft of this article. More information about the moot can be found in *Newsletter of the Ecclesiastical Law Society*, no 3 (2021), pp 3–4, <<https://ecclawsoc.org.uk/wp-content/uploads/2021/06/ELS-newsletter-May-2021-v-FINAL.pdf>>, accessed 18 August 2021.

Parishes are the basic building blocks of the Church of England, dividing the country into around 12,300 units.² The incumbent of each parish (usually styled ‘vicar’ or ‘rector’) shares with the diocesan bishop a ‘cure of souls’: the pastoral responsibility to care for every parishioner. Being able to identify one’s own parishioners is not merely of practical benefit. All parishioners, regardless of faith, possess certain rights at common law, including the right to be married in the parish church and to be buried in its churchyard if there is room.³

An incumbent’s parishioner is someone who resides in their parish.⁴ Yet this raises another question: what does it mean to reside in a parish? The answer matters most in relation to the right to burial in the parish churchyard.⁵ As Newsom Ch explains in *Re West Pennard Churchyard*, there are five ways to secure a burial space:

- i. Every parishioner has a common law right to be buried in the parish churchyard unless it is closed;
- ii. This common law right extends to anyone who dies in the parish;
- iii. By statute, the right also extends to people on the parish’s electoral roll;⁶
- iv. Anyone without a right under (i)–(iii) must secure the consent of the incumbent,⁷ who must have regard to any guidance given by their parochial church council (PCC);⁸
- v. The consistory courts have the discretion to grant a faculty so that a person may reserve a particular grave space for a period.⁹

However, claiming a burial plot under (iv) or (v) will become increasingly rare. As churchyards fill up, the consistory courts will become less willing to reserve the remaining grave spaces, so fewer parishioners will be able to protect their burial rights should they leave the parish.¹⁰ Similarly, fewer incumbents will agree to bury non-parishioners so as not to deprive those with a legal right to one of the remaining spaces.

2 Church of England Research and Statistics, ‘Statistics for mission 2019’, October 2020, <<https://www.churchofengland.org/sites/default/files/2020-10/2019StatisticsForMission.pdf>>, accessed 31 July 2021.

3 *Re St Thomas à Becket and St Thomas the Apostle, Heptonstall* [2021] ECC Lee 2 at para 4.

4 See, for example, the wording used in the Synodical Government Measure 1969, sch 3 (‘Church Representation Rules’), r 1(3)(b).

5 The common law right to be married in one’s parish church has declined in importance since the Church of England Marriage Measure 2008, s 1, created several new statutory rights to have a marriage solemnised in a parish church. Applicants need only prove that they meet one of five ‘qualifying connections’, including, for example, that they at any time had their usual place of residence in the parish for at least six months.

6 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 88(1).

7 *Ibid*, s 88(4).

8 *Ibid*, s 88(5).

9 *Re West Pennard Churchyard* [1992] WLR 32 at 33C–H.

10 *St Thomas à Becket* at para 7.

Simultaneously, with greater reliance on residential care in later life, more people will be staying outside the parish they call 'home' when they die. If they were on the parish's electoral roll and were regular churchgoers before moving, they will often retain their burial rights in their 'home' parish under option (iii), as they may still be habitually worshipping there or may be able to show that they are prevented from doing so by illness or other sufficient cause.¹¹ However, if people not on the electoral roll want to be buried in their 'home' parish, their relatives may have to rely on option (i) by claiming that the deceased remained a parishioner until death and did not lose this status upon moving away. Consistory courts may have to rule on whether they are residents of their 'home' parish, the parish where the care home is situated, or both.

DEFINING RESIDENCY

When faced with such cases, what definition of residence should the consistory courts adopt? Recent consistory court cases offer little guidance. The courts could, therefore, borrow from other areas of ecclesiastical law. An Opinion on the Church Representation Rules published by the General Synod's Legal Advisory Commission contains one of the few statements that Synod has made on the meaning of 'residence'. One of the three ways that a baptised lay person aged 16 or over can be added to a parish's electoral roll is by making a declaration that they are a member of the Church of England (or a church in communion with it) and that they are 'resident in the parish'.¹² The commission opined that:

What amounts to residence is in each case a question of fact and degree, from which it follows that there must be many borderline cases. A person may have more than one residence if he or she has more than one residence which is of some permanence and can be described as a regular abode or home.¹³

Thus, students may be enrolled at both their term-time and parental residences and a person may be enrolled in two parishes if they use one address during the week and another at weekends, but not if the address is a hotel.¹⁴ The advantage of using this guidance for burial issues too is that it would promote consistency within ecclesiastical law. As people on the electoral roll have a statutory right to

¹¹ Church Representation Rules, r 4(6)(c).

¹² Church Representation Rules, r 1(3).

¹³ Legal Advisory Commission of the General Synod, 'Legal opinions concerning the Church of England', ninth edition, 2020, <<https://www.churchofengland.org/about/leadership-and-governance/legal-services/legal-opinions-and-other-guidance/legal-opinions>>, accessed 27 July 2021.

¹⁴ Ibid.

burial in the parish churchyard, adopting this guidance would ensure that the test of residence is the same for both the common law and statutory rights to burial.¹⁵

Yet, the phrases the commission used—‘some permanence’ and ‘regular abode or home’—are open to interpretation. When does a stay become permanent or regular? Is permanence determined objectively or by reference to the intentions of the deceased? Questions like these are bread-and-butter issues for secular courts who deal regularly with residence issues and the consistory courts could draw from their precedents.¹⁶ However, the recent Court of Arches case of *St Giles Exhall*¹⁷ throws up a new perspective, with the judgment discussing the impact of the European Convention on Human Rights (ECHR) on church burials.

Drawing on that discussion, this comment argues that incumbents, when burying parishioners, are performing a public function and must act compatibly with Convention rights when doing so. This does not prohibit the Church of England from imposing residency requirements, but incumbents may not discriminate based on religion by being more lenient towards church members. Consequently, given that church members who leave the parish retain their burial rights, potentially for several months, incumbents and the consistory courts may have to show a similar latitude to parishioners not on the electoral roll.

WHY BURYING PARISHIONERS IS A PUBLIC FUNCTION

The Human Rights Act (HRA) 1998, section 6(1), provides that ‘It is unlawful for a public authority to act in a way that is incompatible with a Convention right.’ In *Aston Cantlow v Wallbank*,¹⁸ the House of Lords explained what is meant by a ‘public authority’, identifying two types. ‘Core’ public authorities are bound by section 6(1) in all their actions. They usually possess special powers, receive public funding and are accountable to the public.¹⁹ By contrast, ‘hybrid’ public

15 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 88(1). The commission’s definition is also similar to guidance issued by the House of Bishops on the meaning of ‘residence’ within the Church of England Marriage Measure 2008, ss 1(3)(b) and (d). The guidance defines a ‘usual place of residence’ as the person’s ‘home base . . . even if he or she has been temporarily absent for part of the time e.g. on holiday or for work’: ‘Church of England Marriage Measure 2008: guidance from the House of Bishops’, para 49, available at <<https://churchsupporthub.org/house-of-bishops-guidance-on-the-marriage-measure.php>>, accessed 27 July 2021.

16 See, for example, *Holliday and Anr v Musa and Ors* [2010] EWCA Civ 335, [2010] FLR 702, a case about whether the deceased was domiciled in England and Wales at the date of his death for the purpose of the Inheritance (Provision for Family and Dependents) Act 1975, s 2.

17 *Re St Giles Exhall* [2021] EACC 1.

18 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37, [2004] 1 AC 546.

19 *Ibid* at paras 7–8.

authorities are entities that perform some public functions and are bound by the Convention rights only while exercising those functions.²⁰ In *Aston Cantlow* the court unanimously held that a PCC is not a core public authority, and a majority held that chancel repair liability is not a public function. However, in *obiter* remarks, Lord Nicholls of Birkenhead noted that ‘some of the emanations of the church discharge functions which may qualify as governmental’.²¹ Lord Scott of Foscote agreed, noting that ‘The church is, therefore, a public building’ because, *inter alia*, ‘Members of other denominations, or even other religions are, if parishioners, entitled to burial in the parish churchyard.’²²

The consistory courts appear to acknowledge that these comments imply that burying parishioners is a public function. Thus Hill Ch states that the right to burial, ‘though highly personal to the individuals concerned, [has] a public element to [it]’.²³ It is a function performed by incumbents in consequence of their legal duties under Canon B 38, paragraph 2, to bury parishioners, as well as people who die in the parish and anyone on their parish’s electoral roll.²⁴ Consequently, it is submitted that incumbents are hybrid public authorities bound by the ECHR.²⁵ While the consistory courts play no role in permitting or restricting the common law or statutory rights to burial,²⁶ they may clarify those rights so that they may be applied correctly in future.²⁷ In so doing, they too are bound by Convention rights, as they are public authorities as provided by the HRA 1998, section 6(3)(a).²⁸

THE RISK OF DISCRIMINATION

If the consistory courts adopt a tight definition of residence, incumbents risk indirectly discriminating based on religion in favour of church members. This discrimination may arise because, as mentioned above, members of the parish electoral roll have a statutory right to be buried in the parish churchyard.²⁹ All enrolled people must be baptised, aged 16 or over, and a member of the

20 Ibid at para 11; HRA 1998, s 6(3)(b).

21 *Aston Cantlow* at para 13.

22 Ibid at para 130.

23 *St Thomas à Becket* at para 4.

24 *Re St Mary’s Woodkirk* [2020] ECC Lee 3 at para 11.

25 When performing public functions, incumbents may also have duties under the Equality Act 2010, eg those in ss 29 and 149(2), as the definition of ‘public functions’ is the same: ss 31(4) and 150(5). Exceptions exist for doing anything required by a Measure of General Synod (sch 22, para 1) and for religious organisations seeking to discriminate on religious grounds in certain circumstances (sch 23, para 2).

26 *Re Blidworth Churchyard* [2021] ECC S&N 2 at para 58.

27 Ibid at para 68.

28 The ecclesiastical courts have consistently recognised that they are public authorities: eg *St Giles Exhall* at para 9.2; *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308 at para 6; *Re Durrington Cemetery* [2001] Fam 33 at 37A.

29 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s88(1).

Church of England or a church in communion with it.³⁰ However, residents of the parish are exempt from the final requirement, which is to habitually attend public worship in the parish during the preceding six months.³¹ Parishioners will only lose their eligibility if they leave the parish and fail to continue ‘to habitually attend public worship in the parish during any period of six months’ without sufficient cause, such as illness.³²

However, since January 2020, parishes may only remove names from the electoral roll during the annual revision of the roll which must be completed between 15 and 28 days before the Annual Parochial Church Meeting (APCM).³³ Consequently, as the statutory right to burial crystallises ‘at the date of the person’s death’, enrolled people no longer resident in the parish thus retain their right to burial until the next revision of the roll.³⁴ Given that parishes have a five-month window in which to hold their APCM, this ‘grace period’ could be as short as no months or as long as 17.³⁵ By contrast, should the consistory courts adopt a strict definition of residency, non-enrolled parishioners—including all under-16s and clerks in holy orders—could lose their common law right to burial immediately upon leaving the parish.

One could argue that non-enrolled parishioners do not ‘lose’ their right but merely ‘transfer’ it to a different parish. However, the right is not equally valuable in all parishes. It is of no use in a parish where the churchyard has been closed and it is of little comfort to people who leave the parish where their family members are buried and are unable to secure a faculty.

BURIAL AND THE CONVENTION RIGHTS

The impact of the ECHR on church burials was discussed by the Court of Arches in *St Giles Exhall*. The court considered two ways in which the Convention rights could be invoked. First, church burial issues could engage and interfere with a Convention right directly, most likely Article 8 (‘right to respect for private and family life’).³⁶ It is submitted that residency requirements per se do not engage the article. Article 8 exists only to protect ‘the private space, both physical and psychological’.³⁷ By contrast, a churchyard is a public space. Just as families

30 Church Representation Rules, rr 1(2)(a)–(b), 1(3)(a), 1(4)(a) and 1(5)(b). Note, however, that clerks in holy orders cannot be enrolled.

31 *Ibid.*, r 1(3).

32 *Ibid.*, r 4(6).

33 Church Representation and Ministers Measure 2019, sch 1; The Church Representation and Ministers Measure 2019 (Commencement) Order 2019, SI 2019/1460. Church Representation Rules, rr 3(1) and 4(10).

34 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s88(1).

35 Church Representation Rules, r M1(1).

36 *St Giles Exhall* at para 7.3.

37 *R (Countryside Alliance and others) v Attorney General and another* [2007] UKHL 52, [2008] 1 AC 719 at para 116, cited in *St Giles Exhall* at para 10.5.

mark graves with headstones ‘to make a public statement about their deceased relative’, choosing to bury the deceased in consecrated ground may be a public statement about their beliefs or affinity with the church or local area.³⁸ Even if Article 8 is engaged, it is unlikely that residency requirements per se violate the article. In *Dödsbo v Sweden*, the European Court of Human Rights (ECtHR) held that ‘States should be afforded a wide margin of appreciation’ in issues concerning exhumation and the sanctity of graves.³⁹ A similar margin may well be afforded in other burial matters.

Secondly, the circumstances could engage Article 14 (‘prohibition of discrimination’) because they discriminate based on religion.⁴⁰ Article 14 is a ‘parasitic right which only comes into play when a set of circumstances is within the “ambit” of one or more of the [other] Articles’.⁴¹ To be within an article’s ‘ambit’ is a far lower threshold than to ‘engage’ the article. Citing *Smith v Lancashire Teaching Hospitals*,⁴² the Court of Arches held that burial issues were within the ambit of Article 8 because they had ‘more than [a] merely tenuous’ link with the article.⁴³ The court did not explain well what this link was. Fortunately, the link has been found in many previous domestic and Strasbourg cases. In *Dražković v Montenegro*, the ECtHR summarised that Article 8 ‘may, in principle, be invoked by relatives in relation to disputes that arise regarding burials and other funeral arrangements’.⁴⁴ Cranston J in *R (Ghai) v Newcastle City Council* reached a similar conclusion.⁴⁵

The next step is to identify if the circumstances constitute discrimination under Article 14. The Court of Arches adopted the ECtHR’s interpretation of Article 14 in *Carson v UK*:⁴⁶

in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations . . . Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁴⁷

38 *St Giles Exhall* at para 10.15.

39 *Elli Poluhas Dödsbo v Sweden* App no 61564/00 (ECtHR, 17 January 2006) at para 25.

40 *St Giles Exhall* at para 7.2; HRA 1998, sch 1, pt 1, art 14.

41 *St Giles Exhall* at para 9.3.

42 *Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916, [2018] QB 804 at para 48.

43 *St Giles Exhall* at para 9.8. For a discussion of the meaning of ‘ambit’ within the context of religious liberty cases (Article 14 read with Article 9), see *The Church of Jesus Christ of Latter-Day Saints v United Kingdom* App no 7552/09 (ECtHR, 4 March 2014), esp para 25.

44 *Dražković v Montenegro* App no 40597/17 (ECtHR, 9 June 2020) at para 47.

45 *R (Ghai) v Newcastle City Council* [2009] EWHC 978 (Admin), [2011] QB 591 at para 141.

46 *St Giles Exhall* at para 9.5.

47 *Carson and others v United Kingdom* App no 42184/05 (ECtHR, 16 March 2010) at para 61.

A strict definition of residency could easily give rise to a difference in treatment based on religion. Two people, one on the electoral roll, one not, die outside the parish. Neither are habitual attendees of the church concerned. Until the electoral roll is next revised, the former has a right to be buried in the old parish but the latter does not. While this disadvantages non-enrolled parishioners regardless of their religious beliefs, parishioners cannot claim the variable 'grace period' unless they are baptised, aged 16 or over and lay members of the Church of England.

Is there an 'objective and reasonable justification' for this discrepancy? Given that membership of the Church of England is 'self-defining' (you are a member if you declare that you are one),⁴⁸ secular courts may question why membership should be the basis of special treatment when members who are parishioners may not have even attended public worship.⁴⁹ Additionally, the courts may view the discrimination as an unintended consequence of what is now the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, section 88 (1).⁵⁰ The primary purpose of that provision was to extend the right to burial to enrolled *non-parishioners*, not to create different rights for enrolled and non-enrolled parishioners.

One could argue, however, that the 'grace period' does have a reasonable justification, namely that only revising the electoral roll once a year makes the rules 'less burdensome to the clergy and laity in the parishes who have to operate them'.⁵¹ However, it is submitted that reducing administrative burdens is not a reasonable justification for the discrepancy in treatment. Even if it is a legitimate aim, the test in *Carson* requires the means used to be proportionate to the aim sought.⁵² When evaluating proportionality, the courts must consider 'whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective'.⁵³ In this situation, the discrepancy could be removed simply and quickly if enrolled ex-parishioners had their eligibility for the roll on the date of their death re-evaluated, should their family

48 M Hill, *Ecclesiastical Law* (fourth edition, Oxford, 2018), para 3.03.

49 This is not to say that alternative criteria for membership of the Church of England would be practical or desirable. Basing membership on a particular course of behaviour, such as regular attendance at public worship, would be inconsistent with the Church's affirmation that justification is by faith alone: see Article XI of the Thirty-Nine Articles of Religion. The new Christian is then welcomed into membership of Christ's Church through the sacrament of baptism: Archbishops' Council, *Common Worship: services and prayers for the Church of England* (London, 2000), p 345.

50 Previously the Church of England (Miscellaneous Provisions) Measure 1976, s 6.

51 'Church Representation Rules online—introduction', <<https://www.churchofengland.org/about/leadership-and-governance/legal-services/church-representation-rules/introduction>>, accessed 25 August 2021.

52 *Carson* at para 61. On the legitimacy of the aim, see, for example, *Darby v Sweden* App no 11581/85 (ECtHR, 23 October 1990) at para 33, where the ECtHR held that a discrepancy in treatment could not be justified by the aim of preventing the administration of tax law from becoming 'more complicated'.

53 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at para 74.

seek to exercise the statutory right to burial.⁵⁴ Consequently, should the consistory courts adopt a strict definition of residency, it would violate Article 14 read with Article 8 if non-enrolled parishioners lost their right to burial immediately upon leaving the parish while enrolled parishioners maintained this right for a significant period of time.

How can incumbents and consistory courts avoid this outcome? The solution suggested above—re-evaluating the eligibility of enrolled ex-parishioners upon their death—is not permitted by law. Names may only be removed from the electoral roll ahead of the APCM and the deceased’s right to burial will have already crystallised on the day of their death.⁵⁵ Consequently, incumbents have no option but to give full effect to the statutory right to burial, including the variable grace period. They will not act unlawfully when doing so.⁵⁶ Therefore, unless General Synod legislates to remove the discrepancy, it falls to the consistory courts to elaborate the common law. Under their duty to act compatibly with the ECHR,⁵⁷ they should adopt a more flexible definition of residence that enables non-enrolled people who have only recently left the parish to retain the right to be buried there.

CONCLUSION

What it means to be a parishioner in the context of the right to burial in the parish churchyard is more complex than might at first appear. The definition used could have significant consequences for people who spend their final few weeks away from the place that they typically called home. The Legal Advisory Commission’s guidance, which emphasises permanence and regularity, provides a useful starting point for defining ‘residence’. However, a consequence of extending the right to burial to people on the electoral roll is that enrolled people who are also parishioners retain this right after they leave the parish until the electoral roll is revised, which could be up to 17 months away. Unless the courts recognise a similar ‘grace period’ for non-enrolled

54 While this re-evaluation may pose some practical challenges, had the person concerned not died, the electoral roll officer would have had to re-evaluate their eligibility anyway during the annual revision of the roll. This is because names on the roll ‘must be removed’ during the revision if they are no longer entitled to be there: Church Representation Rules, r 4(1)(b). Revising one entry on the roll is far simpler and quicker than requiring electoral roll officers to keep the entire roll continually up to date.

55 Church Representation Rules, rr 3(1) and 4(10). Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 88(1). The solution would also be pastorally insensitive, leaving families, funeral directors and clergy uncertain about where the deceased will be buried until the electoral roll officer has conducted the re-evaluation.

56 A public authority does not act unlawfully if it could not have acted differently because of provisions of primary legislation: HRA 1998, s 6(2). ‘Primary legislation’ includes Measures of General Synod: *ibid*, s 21(1).

57 *Ibid*, s 6(3)(a).

parishioners, incumbents will be indirectly discriminating based on religion, contrary to Article 14 of the ECHR.⁵⁸ As churchyards fill up and when questions of residence are eventually litigated in the consistory courts, chancellors should bear the Convention rights in mind.

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58 Their actions may also be contrary to the Equality Act 2010 (see note 25 above).