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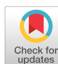

EDITORIAL

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Readers will find that a theme running through this issue of the *Journal* is authority: the authority to make law, interpret it, purport to act under it, and (if necessary) enforce it. Hill explains that '[t]he purpose of the law of and for the church is much the same today as it was in the days of the early church. It is to regulate the functioning of the church and its individual members by a combination of commands, prohibitions, and permissions'.[1] This speaks to ecclesiastical law's *normative character*. Like any other legal system, it claims to have a special kind of authority which imposes obligations upon the laity, the clergy, and various other institutions, and thus inform them what they 'ought' to do or refrain from doing.[2]

Debates rage about the way in which law claims this kind authority. HLA Hart, in his groundbreaking work 60 years ago, set about dismantling the argument that the normativity of law is explained simply because we comply with rules to avoid the threat of *sanction*.[3] Hart's explanation of laws' normative demands – what sets certain rules apart from mere social habits – can be summarised in this way:[4]

> 'What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the

1 M Hill, *Ecclesiastical Law*, 4th edn (Oxford, 2018), para 1.03.

2 N Simmonds, *Central Issues in Jurisprudence*, 4th edn (London, 2013), 149.

3 Prior to Hart, the mainstream view was that we comply with rules that we acknowledge to be law because we do not want to be punished, or pay compensation to others when things go wrong. That is part of the answer when it comes to discerning why certain rules have what we accept as bearing a special kind of *legal* authority. But it is not a complete answer. Hart rightly asks, instead of focusing our analysis on the perspective of a 'bad man', 'Why should not law be equally if not more concerned with the "puzzled man" or "ignorant man" who is willing to do what is required, if only he can be told what it is? Or with the "man who wishes to arrange his affairs" if only he can be told how to do it?'. See HLA Hart, *The Concept of Law*, 3rd edn (Oxford, 2012), 40 and, further, NJ McBride and S Steel, *Great Debates in Jurisprudence*, 1st edn (London, 2014), 25–30.

4 Hart (note 3), 57. See further TRS Allan, *The Sovereignty of Law: Freedom, Constitution and the Common Law* (Oxford, 2013), 44.

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> normative terminology of "ought", "must", and "should", "right" and "wrong".'

All rules, Hart explains, have both external and internal aspects: the (external) regular behaviour of citizens and officials which we can observe, coupled with an (internal) acceptance that such behaviour is *obligatory* (rather than optional).[5] Arguments continue in jurisprudential circles as to *why* subjects of a legal system might feel compelled to follow certain rules in order to explain this phenomenon.[6] But Hart's observations about the 'internal' and 'external' nature of rules is generally regarded as pointing to the way in which rules are treated as valid – and so worthy of obedience – by officials and citizens.[7]

In this issue of the *Journal*, Bishop Pete Broadbent and Professor Alison Milbank debate the problem of authority, which they perceive the Church of England to be facing. They disagree when it comes to the proposed reforms to the Mission and Pastoral Measure 2011[8] and the merits of the recommendations of the governance review group[9] (Broadbent offering a defence of the proposals, and Milbank a critique). But they join together to criticise the Church of England's response to the COVID-19 pandemic when the House of Bishops issued instructions in March 2022 purporting to prohibit clergy from accessing their churches for the purposes of worship. Both observe that such a direction, falling as it did outside the powers given to individual diocesan bishops under Canon B14A (and in the absence of any other authority to issue the direction), stood in direct conflict with the legal obligations placed on clergy to make provision for services in church pursuant to Canons B11 and B14.

Notwithstanding the fact that the direction from the House of Bishops was *ultra vires* (and subsequently recast only as 'advice'[10]), anecdotal experience suggests that many clergy felt the need to comply with it anyway. The Church witnessed a paradoxical situation where the canonical *obligations* under Canons B11 and B14 (which remained in force as a matter of law) were simply over-ridden by the *extra-legal* imperatives contained in the House of Bishops' direction. Canons B11 and B14 lost (to use Hart's label) their 'internal aspect' and, with it, for a period, their normative force. The fact that basic principles of legality broke down so easily, such that Canons duly made were so overtly

5 Hart (note 3), 55–56.
6 See McBride and Steel (note 3), 30–35.
7 Allan (note 4), 19–20.
8 'Church of England Mission in Revision: A Review of the Mission and Pastoral Measure 2011', GS 2222, 14 June 2021, available at <https://www.churchofengland.org/sites/default/files/2021-06/GS%202222%20-%20Mission%20in%20Revision%20-%20A%20Review%20of%20the%20Mission%20and%20Pastoral%20Measure%202011.pdf>, accessed 13 November 2022.
9 'Report of the Governance Review Group', GS 2239, September 2021, available at <https://www.churchofengland.org/sites/default/files/2021-10/GS%202239%20Governance%20Review%20Group.pdf>, accessed 13 November 2022.
10 P Broadbent, 'Reflections on the Workings of General Synod' (2023) 25 Ecc LJ 19–31, 20.

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dispensed with – even at a time of national crisis – should be a source of concern to all who practise, study and administer ecclesiastical law.

Carrying on with the theme of authority, Neil Patterson, in his comment piece discussing the decision on jurisdiction in *Re Evans* (concerning the Clergy Discipline Measure 2003), opines that the purpose of the Ecclesiastical Jurisdiction Measure 1963 is now in serious doubt.[11] The clear implication from his review of the case law is that the 1963 Measure is rather difficult to take seriously, as the jurisdiction it confers (in respect of disciplinary cases concerning matters of doctrine, ritual and ceremonial) is rarely (if ever) invoked and, in light of *Evans*, seems to have been largely subsumed by the 2003 Measure. If Patterson is right, then we find in the 1963 Measure a set of rules which appear to be losing their normative force by the sheer passage of time and the gradual loss of their 'external aspect' – that is, the failure of officials to use them. Whether this will feature in the ongoing review of the clergy discipline regime remains to be seen.

In respect of those who administer ecclesiastical law, and their authority to do so, Clive Hogger adds to the growing scholarship available concerning the role of archdeacons, and the tensions we encounter in trying to define their role and functions. He suggests that much of an archdeacon's power appears to stem from *delegated* authority, and discusses their surprisingly varied functions and powers, as determined by local custom (as opposed to any kind of codified, coherent, legal framework).[12] If this is right, it suggests a failure in some instances of rules to crystallise *at all* (arguably casting doubt on their normative force).[13]

Araba Taylor offers us a critique of the decisions in *Rustat*[14] and *Re St Peter, Dorchester*,[15] both of which concerned contested heritage. Taylor argues that both decisions indicate that the current *Duffield* framework applied by consistory courts is in need of reform, and she questions whether it is still appropriate to permit the prioritisation of 'property over people' in this context.[16] The present faculty jurisdiction clearly retains its normative force (insofar as it is routinely used and complied with). But the pastoral consequences arising from this discussion, and whether the present system is sustainable in the context of contested heritage, will be of concern to the wider Church from the perspective of moral, rather than legal, authority.

11 N Patterson, 'All Mouth and No Trousers: Observations Arising from the Decision on Jurisdiction in *Re Evans*' (2023) 25 Ecc LJ 51–59.

12 D Hogger, 'The Definition of an Archdeacon: Legal, Pastoral, or Neither?' (2023) 25 Ecc LJ 5–18.

13 I am grateful to Julian Rivers for this observation.

14 *Re Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 2.

15 *Re St Peter, Dorchester* [2022] ECC Sal 4.

16 A Taylor, 'The Case of the *Rustat* Memorial-Does *Duffield* Pose all the Right Questions?' (2023) 25 Ecc LJ 37–51, 39 and 50.

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Finally, Russell Dewhurst provides the inside story to the revision of the *Principles of Canon Law Common to the Churches of the Anglican Communion*. As Dewhurst notes, the authority of the *Principles* derives from the fact that they reflect the legislative activity of over 40 autonomous churches in the Anglican Communion, and are descriptive rather than prescriptive in nature.[17] But that is not to underestimate their *potential* to take on a more potent kind of normative force over time: as Garth Blake notes, the *Principles* formed part of the reasoning of the minority opinion in the *Wangaratta* and *Newcastle* references considered by the Appellant Tribunal of the Anglican Church of Australia, which was called upon to determine the legality of synodical legislation.[18] The potential for the *Principles* to shape the interpretation and application of ecclesiastical law across the wider Anglican Communion appears to warrant further exploration.

17 R Dewhurst, 'The 2022 Revision of *The Principles of Canon Law Common to the Churches of the Anglican Communion*' (2023) 25 Ecc LJ 59–64.

18 G Blake, 'The Constitutionality of Diocesan Legislation Relating to Same-Sex Blessings and Marriage in the Anglican Church of Australia: A Case Note' (2022) 24 Ecc LJ 209–232. See the minority opinions of Ms Gillian Davidson in the *Primate's References re Newcastle Discipline Ordinance*, 11 November 2020, 30–31, paras 64–65 (available at <https://anglican.org.au/wp-content/uploads/2020/12/AT-Newcastle-formatted-11112020-FINAL.pdf>, accessed 3 November 2022) and the *Primate's Reference re Wangaratta Blessing Service*, 11 November 2020, 70–71, para 12; and 110, para 173 (although this reliance on the *Principles* was specifically deprecated by the majority in the *Wangaratta* reference: 64–65, para 289) (available at <https://anglican.org.au/wp-content/uploads/2020/11/AT-Wangaratta-formatted-11112020FINAL.pdf>, accessed 3 November 2022.

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