

WHERE NOW THE DRAFT CARE OF CATHEDRALS MEASURE?

A personal view

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FJC Report

One of the main areas of concern highlighted in the Faculty Jurisdiction Commission Report (C.I.O. 1984) was the need for clear public accountability by the Church for changes and alterations to its buildings. Whereas parish churches are covered by the faculty jurisdiction, no comparable mandatory system exists for cathedrals. In order to remedy that the FJC proposed changes. Chapter 8 recommended that the Cathedrals Advisory Commission should be placed on a statutory basis and that proposals by cathedral chapters should be referred to the CAC where they involved "any significant work or works to preserve, alter or add to the building or its contents which would materially affect the architectural, artistic, historical or archaeological character of the Cathedral."

The "significance" of particular projects was to be assessed by a newly constituted Fabric Committee, and normally the chapter should only proceed with such proposals when agreement had been reached with the CAC after appropriate consultation. An ad hoc independent Commission of Review could empower the chapter to proceed without the CAC's agreement if that had not been given. The FJC contained suggestions as to the membership of the Fabric Committee. Recommendation 208 of the Report was that each FC should be sufficiently substantial and independent to act on behalf of the CAC but also sufficiently local to be a constant help and protection to the chapter. Para 352 noted that any mandatory system must not be wholly dependent on central decision-making for practical and artistic reasons. Over centralisation could overload the CAC, with consequent delay and frustration. What is required is a system based on local FC's "which will enjoy in equal measure the confidence of the CAC and their own cathedral chapters." Some increase in the cost of operating the system was felt to be inescapable.

Synod Reaction

The General Synod received the Report on 8 July 1984 and asked the Standing Committee *inter alia* "to prepare and bring forward for detailed scrutiny by the Synod the draft legislation necessary to implement the proposals relating to cathedral churches . . . and in due course to prepare and authorise the proposed codes of practice."

The draft measure and synod debate

The draft Care of Cathedrals Measure to give effect to that resolution, was eventually presented to the Synod in February 1988 for general approval. If, as is usual, that had been given then, the draft measure would have been committed to a Revision Committee for detailed consideration before being returned to

the Synod for final approval. The Measure provided in clauses 1-6 and Schedules 1 and 2 for the establishment of the CAC and FC's and the referral and consideration of proposals. Clauses 7–10 dealt with appeals and enforcement. Clauses 11-17 dealt with miscellaneous matters including quinquennial reports and the making of Rules to give effect to the Measure.

In the event the draft Measure was not well received, and the debate was adjourned on the proposal of Professor J. D. McLean, Chairman of the House of Laity. It can, thereafter, only be reintroduced to the Synod with the consent of the Standing Committee. Refusal of general approval is most unusual and the history of the whole matter raises a number of interesting issues.

Public Reaction

The adoption by the Synod in 1984 of the FJC's Report with its emphasis on public accountability and bringing cathedrals into a mandatory system, was one, if not the major, reason for the government being willing to continue to operate the ecclesiastical exemption. Not surprisingly, the result or non-result of the Synod debate provoked an obvious reaction. The President of the Council for British Archaeology and Secretary for the Society for the Protection of Ancient Buildings in separate letters to *The Times* published on 16th March 1988, each expressed deep concern at this turn of events and suggested that the special privileges of exemption should now be removed. In effect, the Synod was reneging on its previous commitments, (a point also made in the Synod Debate).

I do not believe the Synod is unaware of its responsibility in this area or that it is playing fast and loose, and the debate revealed no real disagreement with the principle but rather great concern about the way the measure had sought to embody the recommendations of the FJC. While some of those involved in promoting the Measure would doubtless contend that the Deans and Provosts, who spoke with almost a united voice, (not itself a common feature of Synod debate either), against the draft Measure, had been fully consulted throughout and had left their opposition to a very late stage, (a charge which, I think they recognised, had some force), it is worth recalling, that working out proposals into a legal enactment is not easy and tends to sharpen the mind. Sir Harold Kent GCB, QC, DCL a distinguished Parliamentary Counsel and later Dean of the Arches, has written;

“The translation of recommendations, however well thought out, into the legal instrument which will bring them into effect stimulates thought to a remarkable degree . . . the arrangement and articulation of the document by a draftsman with technical skill and experience in the legislative forms stimulates and facilitates further analysis and examination of the subject in depth.” (In *On The Act 1979* at p44).

The FJC's terms of reference in January 1980 were, of course, far wider than cathedral churches and of the 230 recommendations contained in its report (which was finalised in October 1983) only 24 related specifically to cathedrals. The creation of a new system of control is far more difficult than simply updating and modifying an existing system and is bound to throw up many problems in

deciding how best to reach the desired goals. The Synod's commitment to the aims could not, in my view, bind it to the particular pattern suggested in the Report, if that proved unworkable or could not sensibly be turned into legislative form.

Did The Measure Follow The Report?

Some, as least, took the view that the draft Measure had somehow changed the balance of the FJC Report, which seemed to promote the idea of local decision making. Para 352 recommended that the Fabric Committees should be "sufficiently substantial and independent but also sufficiently local to be a constant help and protection to their cathedral chapters. If these criteria were met we would hope that the CAC would not normally feel the need to enquire further when it knew that a local Fabric Committee supported its Dean and Chapter over a particular project." Somehow this got lost in the Measure.

The combined effect of clauses 4 and 5 seemed to be that any proposal which would "significantly affect" the architectural, artistic, historical or archaeological character of the cathedral or its setting or which would involve the acquisition or disposal of objects of significant religious etc value, was to be referred to the CAC.

Any local decision-making was presumably either to evolve over time or to be laid down in Rules (clause 14). Perhaps it would happen, but I did find it difficult to see how people of proper authority and expertise could be assembled to form the FC, whose role could be defined as deciding on non-significant matters.

In the debate suggestions were made that some division could be established between "major" and "minor" cathedrals – perhaps the ancient ones and parish church cathedrals in reality – and the latter should be brought into some simpler system, because their particular needs and requirements were also simpler. Possibly, it was said, the Chancellor's role in the faculty jurisdiction could be adapted to this end.

After The Adjournment

Whatever else the Standing Committee will need to find a better way to reflect the Report's desire for strong local decision making by a well qualified FC, whose judgement will be acceptable in the majority of cases to the CAC, with the latter's own role as coordinator and adviser, particularly with the most sensitive cases. To do that it may need to seek a more obvious and clearer criterion than "significance", so as to provide real decisions for the FC to make, not least because what is "significant", may come to mean, what I do not like.

Appeals and Enforcement

Clauses 7-10 of the draft Measure dealt with appeals against the CAC's decisions, enforcement and appeals against injunctions. As the draft Measure made the CAC the determining body – so that "advisory" might appear to be something of a misnomer – provision was made for an appeal to the Arches Court (or Chancery Court of York), to hear appeals. The Court was not only to include the Dean of the Arches and Auditor but two further persons, one who was or had been a Dean, Provost or Residentiary Canon, and one appointed by the Secretary of State for the Environment with special expertise.

Injunctions

Clauses 8, 9 and 10 which ran to over 90 lines of text, provided for the consistory court (but staffed by a different chancellor) on the application of the HBMC, the CAC or other interested persons to issue interlocutory injunctions to the administrative body of the cathedral, if the latter were “jumping the gun” before a proposal had been considered as required by the draft Measure, by the Fabric Committee, CAC or the appeal body.

Further, a final injunction could be granted if the administrative body sought to do work which the CAC had not approved and that decision had not been appealed or not appealed successfully. The court could order the Vicar-General to take steps to restore the position as it should have been and could order any person responsible to pay the costs and expenses. Appeals against injunctions were to lie to the Dean of the Arches and Auditor sitting alone.

One looks in vain in chapter 8 of the FJC Report concerning cathedrals, for anything about “injunctions” or, indeed, enforcement procedures of any kind. Indeed, paragraphs 231-243 (which discuss enforcement in the context of the faculty jurisdiction), never uses the word either, and although it suggests some possible strengthening of the Chancellor’s powers, the nearest it seems to me to get, is to recommend he should have power to forbid the execution of works without faculty, or to order their removal if so executed.

This particular issue is obviously a serious one, but, for my part, I do not think the power to issue injunctions is necessary or useful. If it were, then the draft Measure was unduly restrictive in laying down the circumstances. The secular power to do so where it is “just and convenient” would be far more satisfactory.

After The Injunction

However, the real issue is the need for such powers at all. Even those who think them desirable would have to concede that the elaborate powers and procedures (and personnel) available to the secular court to ensure compliance with its order, or punishment in cases of disobedience, are simply not available. The penal notice on an injunction in the county court means something – you **can** be sent to prison for disobedience. Injunctions of an ecclesiastical court would lack the necessary means of enforcing compliance and would, in the end, be empty threats. (The idea, in the draft Measure, that the Vicar-General would be brought in to put things right where Deans and Chapters have erred and strayed and declined to exhibit works befitting repentance by restoring the status quo ante, seems to me to illustrate another aspect of this problem. Are they to do the work with their own hands? Obviously not, yet where in reality are they to get (or pay) architects, engineers, surveyors or other experts together with builders and contractors, to put things right?)

Compliance

The real question is how to ensure the rulings of the consistory court, (or anyone, or any body exercising regulatory functions in relation to work on cathedrals), are obeyed. In the consistory court the system works – because people know that faculties are needed and are unwilling to flout what is, after all, their bishop’s

court. Knowledge and approval of legal forms and procedures may not be the strong point of most clergy (who would be likely to be the main offenders), whereas disobedience to their bishop's authority expressed through his chancellor in accordance with the ecclesiastical law, would be far more serious in their eyes. The FJC Report says, at para 233, "there is strong factual evidence to show that a firmness of attitude is quite as important as any other single consideration in underwriting the credibility of the law . . . we have sought a procedural back-up which will be neither unduly elaborate nor expensive and which will use the machinery, not of the secular criminal (sic) jurisdiction, but of the faculty jurisdiction itself." That seems to me a far more sensible (and in the end the only practical) approach to problems of ensuring compliance. It is, perhaps, unhappy that the first use of the word "Injunction" is just where new bodies (i.e. Cathedrals) are coming – not wholly unwillingly – into the sphere of public accountability for their decisions concerning the fabric of their buildings. If enforcement procedures are deemed necessary, at least let them be spelled out first for the faculty jurisdiction and then extended to whatever regulatory bodies are eventually set up for cathedrals.

What Now . . . ?

It is, I fear, far easier to criticise proposals, such as those in the draft Measure, than to propose acceptable alternatives. Perhaps the Synod's Standing Committee felt that the relatively few proposals concerning cathedrals could be turned into legislative form fairly easily and so demonstrate the Synod's determination to carry through its earlier approval of the FJC Report and its commitments to government to reform its system of decision-making in relation to its buildings, to take account of both public and informed disquiet. If so, we have, in truth, in Thomas Jefferson's phrase, "a wolf by the ears".