Church of England

1. What courts, tribunals or other adjudicative structures exist within your religion?

For each diocese of the Church of England there is a court called the consistory court[1]. Consistory courts have been in existence in England since shortly after the Norman conquest and their jurisdiction and operation was essentially unaffected by the English reformations. Originally, the jurisdiction of consistory courts was very wide indeed and covered such matters as defamation, probate, and matrimonial causes as well as a general jurisdiction over both clergy and laity in relation to matters relating to church discipline and to morality more generally and to the use and control of consecrated church property within the diocese. The judge of the consistory court, appointed by the bishop, was the bishop's official principal and vicar-general of the diocese and became known in his judicial capacity by the title "chancellor".

Appeals lay from the consistory court to the provincial court of the archbishop.[2] In the province of Canterbury, the Archbishop's court was known as the Court of Arches and was presided over by the Archbishop's official principal, known as the Dean of the Arches. In the province of York, appeals lay to the Chancery Court of York presided over by the Archbishop of York's official principal, the Auditor. (Until 1532 further appeal lay to Rome; thereafter further appeal was to the Crown.)

By the end of the eighteenth century, the exercise of jurisdiction over the laity in moral matters had fallen into desuetude. But there was no reform of the jurisdiction of the ecclesiastical courts until the middle of the nineteenth century. In 1855 the defamation jurisdiction of the ecclesiastical court was brought to an end and in 1857 the probate jurisdiction was transferred to the newly created Court of Probate and the matrimonial jurisdiction to the newly-created Divorce Court. Both of these new courts were temporal rather than ecclesiastical courts; but their procedure continued (as it continues to this day) to reflect the ecclesiastical origins of the jurisdiction with, for example, matrimonial proceedings being by way of petition and the "citation" of parties in probate proceedings. A major part of the jurisdiction left to the ecclesiastical courts was that which concerned the control of consecrated ecclesiastical property – essentially churches and their churchyards and certain other consecrated places such as municipal burial grounds. The other major aspect of their jurisdiction which remained was their criminal jurisdiction in relation to the clergy – i.e. their jurisdiction to deal with allegations of ecclesiastical offences against the clergy (for example for immoral conduct, neglect of duty or in relation to doctrinal or ceremonial matters).

Following a report in 1954 from the Archbishops' Commission on Ecclesiastical Courts, the ecclesiastical courts were put on a statutory footing by the Ecclesiastical Jurisdiction Measure 1963.[3] Under the 1963 Measure there remains a consistory

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[1] Or in the diocese of Canterbury, "the Commissary Court".

[2] English dioceses belong to one of two provinces – that of Canterbury or that of York – each presided over by an archbishop.

[3] A Measure is a legislative instrument passed by the General Synod of the Church of England which, once it has been presented for and received the Royal Assent on the resolution of both Houses of

court for each diocese presided over by a judge styled "the chancellor" and appeals continue to lie to the respective provincial courts of the Archbishops which continue to presided over by a senior judge, styled the Dean of the Arches in the province of Canterbury and the Auditor in the province of York (both of these offices are held by the same person). The jurisdiction of the consistory courts was not much altered by the 1963 Measure save that criminal jurisdiction over the clergy where the case involved a question of doctrine, ritual or ceremonial was transferred to a new court called the Court of Ecclesiastical Causes Reserved.

A further reform took place more recently when the Clergy Discipline Measure 2003 transferred the criminal jurisdiction over the clergy (other than in relation to matters of doctrine, ritual or ceremonial) to new "bishop's tribunals" with modern tribunal procedure and a revised scheme of statutory penalties.

2. What matters are dealt with?

The jurisdiction of the consistory court includes jurisdiction "to hear and determine ... a cause of faculty for authorizing (i) any act relating to land within the diocese, or to anything on or in such land, being an act the doing of which the decree of a faculty is requisite".[4] As a general rule, land and buildings become subject to the jurisdiction of the consistory court by virtue of being consecrated by the bishop of the diocese. In the case of more recently built churches there will be a formal record of consecration; in the case of ancient churches, there is a legal presumption that they have been consecrated. A faculty is required for any material alteration in such a church or its churchyard or for the removal of human remains from any vault or grave in either. The jurisdiction also extends to all the goods appertaining to such a church, as well as to its fabric and any fittings annexed to the realty, and also to the churchyard.[5] The exercise of the faculty jurisdiction forms the very great majority of the work of the consistory courts today – the rest of the statutory jurisdiction[6] being largely concerned with rather technical matters of ecclesiastical law and only rarely invoked.

It is because of the existence of the faculty jurisdiction that the "ecclesiastical exemption" from listed building control was first provided for in heritage protection legislation, Parliament taking the view that there was already in place, in relation to the buildings and land of the Church of England that were in ecclesiastical use, a satisfactory legal regime controlling their use and alteration. (The benefit of the exemption is now, of course, extended under the current heritage protection legislation to the buildings of other denominations who have satisfied the Secretary of State that they have established adequate regimes for preserving the historic and

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Parliament, has "the force and effect of an Act of Parliament": section 4, Church of England Assembly (Powers) Act 1919. The text of Measures can be accessed on the Statute Law Database.

[4] Section 6(1)(b)(i) of the Ecclesiastical Jurisdiction Measure 1963

[5] This was the position at common law: *Lee v Hawtrey* [1898] P. 63, 74; *Re St Gregory's, Tredington* [1972] Fam. 236, 240. It received statutory recognition in section 11(1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

[6] The jurisdiction of the consistory court is set out in section 6 of the Ecclesiastical Jurisdiction Measure 1963. That jurisdiction was recently extended by the Pastoral Amendment Measure 2006 to include the determination of "any question relating to the interpretation or enforcement of any term of any lease granted under" the provisions of that Measure (which amended section 56 of the Pastoral Measure 1983 to enable leases to be granted of parts of churches and of land belonging to or annexed to a church).

architectural character of their listed ecclesiastical buildings.) Most of the work of the consistory courts today involves applying principles of ecclesiastical law to applications ("petitions") for faculties to make alterations to listed church buildings. Those legal principles have been developed in recent years expressly to take account of the desirability of preserving the historic and architectural character of the Church's listed buildings but in such a way that the needs – particularly those that relate to the mission of the Church – are fully taken into account in determining faculty petitions that seek the making of changes to listed churches[7].

As mentioned above, bishops' tribunals constituted under the Clergy Discipline Measure 2003 deal with allegations of misconduct against the clergy. (Some of their recent decisions have attracted press attention!)

The Church of England does not have any courts or tribunals for determining disputes between its members in relation to temporal (i.e. non-ecclesiastical) matters. As a result of the historic position of Christianity in England during the period that the common law developed – and because the common law enshrined Christian principles of justice – it has always been assumed that members of the Church will be able to obtain justice in the temporal courts in relation to temporal matters with which they are concerned (such as disputes over property ownership, debt, damage for injury etc.) That remains the case today.

In particular, unlike the Roman Catholic Church, the Church of England does not maintain any arrangements of its own in relation to matrimonial matters. The marriage law applicable to the Church of England – like the rest of the ecclesiastical law – is simply part of the general law of England.[8] There is one system of law in England – some of which is ecclesiastical and some of which is temporal in nature – and matters requiring a legal determination are dealt with in the courts that are best equipped to do so: the ecclesiastical courts in the case of ecclesiastical matters and the temporal courts in the case of temporal matters. That being so, the Church of England has not sought to duplicate the work of the temporal courts with tribunals of its own dealing with the same subject matter.

3. Is legal representation permitted/encouraged?

Legal representation is strongly encouraged in contested cases in the ecclesiastical courts and tribunals. Until the latter part of the nineteenth century there were legal practitioners in England known as "Advocates" who practised solely in ecclesiastical and admiralty law and formed an chartered institution called Doctors' Commons. After the transfer of much of the jurisdiction of the ecclesiastical courts to new, temporal courts in the 1850s, Doctors' Commons declined and was eventually closed. Thereafter, counsel (i.e. barristers) were permitted to appear in the ecclesiastical courts and nowadays solicitors also appear. The only limitation that exists in relation to representation is the issue of funding. The General Synod maintains a legal aid fund but this is only available in relation to a limited range of proceedings (essentially

[7] See *Re St Luke's, Maidstone* [1995] Fam. 1 and *Re St Mary, Sherborne* [1996] Fam. 63, both decisions of the Court of Arches.

[8] There is, however, statutory provision in the parliamentary marriage legislation allowing individual clergy of the Church of England (and the Church in Wales) to decline to solemnize the marriage of a divorced person who has a former spouse still living: section 8(2), Matrimonial Causes Act 1965.

misconduct proceedings) and does not cover faculty proceedings. Where commercial interests are involved in contested faculty proceedings (e.g. a petition to allow the grant of a way leave to a utility undertaker) legal representation is usually engaged by the petitioners. Where the petitioners are private individuals or parochial church councils they may not have the resources to instruct solicitors and counsel; though it is not uncommon for counsel to appear pro bono.

4. How are the decision makers selected?

Chancellors are appointed from among persons who have a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990, or persons who hold or have held high judicial office or the office of circuit judge, and who are communicant members of the Church of England. The appointment is made by the bishop of the diocese after consulting the Lord Chancellor and the Dean of the Arches and Auditor.[9] The Dean of Arches and Auditor is appointed by the Archbishops of Canterbury and York acting jointly and with the approval of Her Majesty signified by warrant under the sign manual. To be eligible for appointment as Dean, a person must have a 10-year high court qualification under the 1990 Act, or who hold or have held high judicial office, and be a communicant member of the Church of England. [10]

5. How detailed are rules of practice or procedure?

There are detailed procedure rules in relation to the faculty jurisdiction which are made pursuant to statutory provisions and take the form of a Statutory Instrument.[11]

6. What provisions exist for appeal and enforcement?

Appeals from the consistory court are generally to the relevant provincial court as explained above. There is an exception for cases which involve a question of doctrine, ritual or ceremonial in which case an appeal lies to the Court of Ecclesiastical Causes Reserved (which is made up of two persons who hold or have held high judicial office and are communicant members of the Church of England, and three persons who are or have been diocesan bishops). An appeal lies from the provincial court to Her Majesty in Council (with leave) and from the Court of Ecclesiastical Causes Reserved to a Commission of Review appointed by Her Majesty.[12]

Any act or omission in relation to proceedings before an ecclesiastical court that would amount to contempt of court if it had taken occurred in relation to proceedings before the High Court is a contempt of court and the judge of the ecclesiastical court may certify the act or omission to the High Court by instrument under his hand. The High Court may then inquire into the act or omission and, having heard the matter, exercise the same jurisdiction and powers as if the person guilty of the act or omission

[9] Section 2, Ecclesiastical Jurisdiction Measure 1963
[10] Section 3, ibid.
[11] Rules are made pursuant to section 26 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1963. For an example of rules made under the section see the Faculty Jurisdiction Rules 2000 (SI 2000/2047).
[12] See sections 7 -11 of the Ecclesiastical Jurisdiction Measure 1963 for details of the appellate structure.

had been guilty of contempt of the High Court.[13] A consistory court will often make the grant of a faculty (i.e. a judicial permission to do any act for which a faculty is required, such as the making of changes to a church building, or the disinterment of human remains) subject to conditions. Failure to comply with such conditions is contempt of court.

Where, in relation to a church etc., subject to the jurisdiction of the consistory court any act is carried out unlawfully (i.e. without the authority of a faculty) the archdeacon may petition the court for a faculty to deal with the situation (which may involve regularising what has already happened, or might involve reversing it, depending upon the circumstances). Additionally, the court has power to issue injunctions restraining the commission of unlawful acts in relation to a church or churchyard; and to make what is called a “restoration order” requiring a person who has committed an unlawful act in relation to a church or churchyard to take such steps as the court may specify for the purpose of restoring the position. Breach of an injunction and failure to comply with a restoration order is contempt of court, any such contempt being enforced in the manner described above. The consistory court also has the power to make an order for costs against persons in default (the power to make such an order covering both the costs of proceedings and the costs incurred in carrying out any work occasioned by that persons default).[14]

7. To what extent have these processes been subject to review or examination by the secular courts?

The Judicial Committee of the Privy Council is a temporal court and is the final court of appeal in faculty cases that do not involve a question of doctrine, ritual or ceremonial. The ecclesiastical courts are subject to the supervisory jurisdiction of the High Court upon an application for judicial review and prohibition (now known under the CPE as a “prohibitory order” will issue if an ecclesiastical court acts in excess of jurisdiction. Mandamus (A “mandatory order”) may issue if it refuses to act at all in relation to a matter over which it has jurisdiction. The conventional view is that certiorari (a “quashing order”) will not issue to an ecclesiastical court. The reason conventionally given is that this is because certiorari involves bringing a matter up into the High Court with the intention that it be quashed, but that the High Court is not qualified to deal with the subject matter of causes in the ecclesiastical courts and will not therefore enquire into them.[15] However, in the light of the development of the principles of judicial review during the twentieth century and the move away from the old distinctions such as that of excess of jurisdiction as opposed to substantive review, it may well be that the Administrative Court would not nowadays consider that certiorari was completely ruled out in relation to the decision of an ecclesiastical court. That said, it is unlikely that the Administrative Court would be prepared to become involved in determining questions that were essentially religious in nature.

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[13] Section 81(2) and (3) ibid.
[14] Section 13, Care of Churches and Ecclesiastical Jurisdiction Measure 1991.
[15] See Halsbury’s Laws of England, vol. 14, paras. 1267 - 1269