LEGAL IMPLICATIONS OF LAMBETH

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I hope that I shall have the sympathy of the Society in attempting to respond to a request to speak about the legal implications of a body which had no standing in canon, ecclesiastical, civil or common law. The Lambeth Conference was a gathering of persons individually invited by the Archbishop of Canterbury to meet him for three weeks in the University of Kent at Canterbury. Finance for the meeting came from a number of corporate bodies but none of them had any control over what happened. The Archbishop had asked a number of persons to assist him in the organisation of the meeting but the ultimate control of it was in his hands, subject to the willingness of those who were there to fall in with what was proposed. During the last week of the meeting some seventy resolutions were passed, but none of them, with one possible exception, has any legal effect of any kind.

The possible exception is Resolution B concerning the Anglican-Roman Catholic International Commission. The Report of that Commission has been circulated to all the Provinces of the Anglican Communion, discussed and voted on. It has been accepted that the results of these discussions should be collated by the Anglican Consultative Council and presented to the Lambeth Conference and that that Conference should have the authority to say whether or not the Statements on Eucharistic Doctrine, Ministry and Ordination, and their Elucidations are or are not consonant with the faith of Anglicans. This is, I believe, the first and only occasion on which the Lambeth Conference has been authorised to speak on behalf of the Anglican Communion.

I am not, of course, saying that the resolutions of the Conference will be totally without effect. Some of them will be acted upon by the Anglican Consultative Council if it decides that it has the funds to do so. Thus the Conference asked for a number of new ecumenical dialogues to be started. The ACC will have to balance the cost of doing this against other calls on its limited budget.

Resolution 18 is representative of the non-legal character of what the Conference did. It is called: The Anglican Communion: Identity and Authority. In it the Conference resolves that the new Inter-Anglican Theological and Doctrinal Commission be asked to explore the meaning and nature of communion. It urges that a developing collegiate role be given to the Primates' Meeting and that the Crown Appointments Commission be asked to bring the Primates of the Communion into the process of consultation in the appointment of any future Archbishop of Canterbury. It is resolved that the Lambeth Conference shall continue in future and that there shall also be Regional Conferences held in between the Lambeth Conferences. It recommends that the ACC continue to do what it has been doing, and it requests the Archbishop of Canterbury, with all the Primates, to appoint an Advisory Body on Prayer Books of the Anglican Communion.

Other resolutions might be said to have legal implications but only if what they ask were to be acted upon by the relevant civil authorities. In this category are the resolutions on Human Rights, Latin America and Namibia. The Resolution on Human Rights would, if carried into effect, result in the abolition of capital punishment throughout the world.

I feel that it would be tedious both for this gathering and for myself, and not particularly in line with the objects of the Society, if I were to go through all the Resolutions of the Lambeth Conference, picking out those clauses which aim at legal action by various governments. To do so would obscure the biggest question raised by the Conference, namely the nature of the Anglican Communion.

I shall, therefore, devote the rest of this Paper to that subject, concentrating on the legal and canonical questions that have arisen in the course of the development of the Communion, and which lie behind the present problems.

Religion, like trade, has tended to follow the flag. Clergymen of the Church of England went with the Prayer Book, the Articles and the King James Bible to minister where English colonies were established. Those in America were regarded as being under the jurisdiction of the Bishop of London, and it was among the American colonists that the first pressure for having a local bishop was raised.

When, after the Declaration of Independence, the Clergy of the State of Connecticut decided to choose a bishop and sent Dr Seabury to England to seek consecration, the English Archbishops found themselves in great difficulty. They could not act without the consent of the State, and King George III, even if he had been willing to do so, had no power to dispense with the oaths required by the Consecration Service. After sixteen months in England Seabury decided to go to Scotland and in 1784 was consecrated by three Scottish bishops. This led to the passing of an Act of Parliament allowing the Archbishops to consecrate foreign nationals without requiring them to take the oaths of allegiance and supremacy, but they were still required first to obtain the King's licence authorising them to perform the consecration.

That eased matters as far as America was concerned and in February 1787 bishops were consecrated at Lambeth for Pennsylvania and New York. In those colonies which remained subject to the Crown bishops were appointed and the consecration authorised by Letters Patent which contained a clause stating that the bishop should be subject to the Archiepiscopal see of Canterbury in the same manner as any bishop of any see within the province of Canterbury. Between 1787 and 1850 more than thirty bishops were thus consecrated and episcopal care was extended in this way to Canada, India, the West Indies, Australia, New Zealand, South Africa and some other areas.

No particular problem seems to have arisen until Robert Gray, consecrated in 1847 to be Bishop of Capetown, saw the need both to divide this enormous diocese and to establish some system of synods. It was agreed that two new dioceses of Natal and Grahamstown should be carved out of the diocese of Cape Town and two new bishops appointed to them, Gray remaining as bishop of the reduced diocese. Legal questions arose as to how this could be done. The Attorney-General advised that Gray should surrender the Letters Patent which he had received in 1847 and that new Letters Patent should be issued which would create the two new dioceses and appoint bishops to them. Gray would then be reappointed to the reduced diocese of Cape Town. This was done. Gray resigned his Letters Patent early in November, 1853. At the end of the month the two new sees were created and bishops appointed and consecrated who took an oath of obedience to Gray as metropolitan. On 8 December Gray received new Letters Patent appointing him Bishop of Cape Town and Metropolitan Bishop in the Colony of the Cape of Good Hope and its dependencies, and the Island of St Helena. The Law Officers who advised the adoption of this procedure omitted to take note

of the fact that, in between the issue of Gray's original Letters Patent and the new ones of 1853, constitutional government had been established in the Cape Colony and that the Crown could no longer issue Letters Patent creating any jurisdiction ecclesiastical or civil within the colony.

Trouble began to occur in 1856 when Gray established a synodical system in the diocese and summoned the clergy and lay representatives to a synod. The Rev William Long refused to attend himself or summon people to attend. When this happened a second time in 1861 he was summoned to appear before the bishop sitting with five clergymen as assessors. Long refused and repudiated the bishop's authority to pass any sentence on him. He was suspended for three months but when he ignored that he was cited again and deprived of his benefice.

Long then went to the Supreme Court of the Cape and asked for an order to prevent Gray disturbing him in his church. Gray defended himself and the court found in his favour by a majority, Mr Justice Watermayer observing that "in the creation of colonial bishoprics, there has not been the care on the part of the imperial authorities which should have been bestowed on so difficult a matter".

Long appealed to the Privy Council which supported him. It agreed with the Supreme Court of the Cape that the change in constitution of the colony between 1847 and 1853 rendered Gray's second Letters Patent null and void. It also agreed with the Supreme Court that Long, by the terms on which he accepted his incumbency and the oath of canonical obedience that he had taken had subjected himself to the authority of the bishop. The Privy Council, however, then stated that as diocesan synods had not been in use in England for over two centuries, Long recognising the authority of the bishop could not be held to have acknowledged the right on his part to convene one.

Further, the Privy Council stated, the assembly convened by the bishop was not a synod. It was a meeting convened for the purpose of agreeing on certain rules. "Accordingly", the judges said, "the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the Colonial Legislative, to bind persons not in any manner subject to its control, and to establish Courts of Justice for some temporal as well as spiritual matters, and, in fact, the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal."

Judgment, therefore, went for Mr Long and against the bishop, but in some effort to repair the damage for which the Law Officers had been responsible the Treasury contributed £285.5s towards the bishop's expenses of more than £1,600.

This judgment was delivered on 24 June 1863. On 18 May Gray had cited the Bishop of Natal, Colenso, to appear before him in November to answer "certain charges of false, strange, and erroneous doctrine and teaching" preferred against him by the Dean of Cape Town and the Archdeacons of Grahamstown and of George. On 17 November a lawyer, Dr Bleek, appeared on behalf of Colenso to protest against Gray's jurisdiction in the matter, to read a letter from Colenso giving a brief reply to the charges, and to give notice of appeal if Gray should assume jurisdiction and find against Colenso.

The trial proceeded nevertheless and in December Gray gave judgement that the charges were proved and he sentenced Colenso to be deposed. The operation of the sentence was suspended for four months to give an opportunity

for retraction. Gray added: "If it be desired, as has been intimated, to make a formal appeal to his Grace the Archbishop of Canterbury, I shall consent to forward my Judgment to his Grace for revision, waiving in this particular case, which is itself novel and of great importance to the whole Church, any real or supposed rights of this Church, and feeling that it will be a great relief to submit my decision to the Chief Pastor of the Chuch at home, and to share my responsibilities with him, and, if he should see fit, with the other Bishops of the National Church."

Colenso decided to take his case direct to the Privy Council. The Law Officers were at first doubtful whether the Queen in Council could intervene summarily. If, as the petitioner insisted, there was no sentence of any lawful court or judge then there was nothing to appeal from. If wrong had been done to him in the Cape Colony or Natal by Gray's proceedings he should seek the remedy in the ordinary courts of the colony, from which a regular appeal to the Queen in Council would lie. If the Letters Patent giving Gray jurisdiction were valid then the course of appeal to the Archbishop of Canterbury prescribed by them ought to be pursued. It is interesting that in spite of the Long case there was still doubt about the Letters Patent.

The Law Officers decided that the Privy Council itself should determine whether to hear the appeal. It did so, and in March, 1864 gave judgment that the proceedings of the Bishop of Cape Town and his sentence against the Bishop of Natal were null and void in law.

Certain features of the judgment merit consideration. First, the person by whom it was delivered was the Lord Chancellor, Lord Westbury, of whom another Lord Chancellor, Lord Selborne wrote: "Not very profound as a lawyer, nor serious or earnest as a politician, his independence of mind, and quick mastery of all questions which he had to decide, won for him a judicial reputation greater than that of his rivals and contemporaries, and certainly greater than the quality of his performance as a judge can explain; and it made him effective as a partisan in the House of Commons, beyond all other lawyers of his time. He was not restrained by either caution or reverence from saying anything, however audacious." Westbury had already clashed with Bishop Wilberforce in the House of Lords in a manner which, Lord Selborne writes, "was I suppose without precedent in that House."

Westbury's style can be seen in the opening sections of the judgment in which he says of the two bishops: "Their respective and relative rights and liabilities must be determined by the principles of English law applied to the construction of the grants to them contained in the Letters Patent; for they are the creatures of English law and dependent on that law for their existence, rights and attributes."

He held, as had the judges in the Long case, that the Letters Patent of 1853 were ineffective to confer jurisdiction. He noted that it had been the practice for many years to insert in the Letters Patent creating Colonial Bishoprics clauses which purported to confer ecclesiastical jurisdiction. "But", he said, "the forms of such Letters Patent were probably taken by the official persons who prepared them from the original forms used in the Letters Patent appointing the East Indian Bishops, without adverting to the fact that such last mentioned Letters Patent were granted under the provisions of an Act of Parliament."

I do not know whether Lord Westbury, intended to include himself among the 'official persons' referred to, but he had been at the time Attorney General and responsible for recommending the procedure that was followed in 1853.

Westbury then considered the contention that, if Gray had no jurisdiction, his judgment was a nullity and that no appeal could lie from a nullity to the Crown. He held that there was an important question to be decided, namely whether the proceedings of the Bishop of Cape Town had had the effect of depriving Colenso of his see. "The important question", he said, "can be decided only by the Sovereign as head of the Established Church and depository of the ultimate Appellate jurisdiction. Before the reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope; but all appellate authority of the Pope over members of the Established Church is by Statute vested in the Crown."

Lord Selborne points out that it had already been decided that there was not any Established Church in the Cape Colony, or any ecclesiastical court having lawful jurisdiction, and consequently there was nothing to which the English ecclesiastical statutes of the sixteenth century could apply.

That was not the end of interpretation of the Letters Patent of 1853. The Council of the Colonial Bishoprics' Fund withheld from Colenso the income of the see of Natal and he therefore brought an action in Chancery in 1866. It was argued now that since the Letters Patent appointing Colenso to the see of Natal were null and void following the judgment on the nullity of those re-appointing Gray, Colenso could not be Bishop of Natal and therefore had no right to the income of the bishopric. Lord Romilly, giving judgment in Colenso's favour, said that it was only the clauses which purported to confer coercive jurisdiction which were null and void, but that the rest of the Letters Patent held good.

The story of legal muddle and confusion which I have set out explains some of the hostility to the Judicial Committee of the Privy Council or anything like it as the Final Court of Appeal in ecclesiastical cases, which led eventually to the passing of the Ecclesiastical Jurisdiction Measure. It is also part of the background of suspicion with which many churchpeople still regard lawyers and their operation in the life of the Church, a suspicion which has still to be reckoned with in the drafting of new legislation.

It will not, I hope, have escaped the notice of my hearers that 1866 was the year before the meeting of the First Lambeth Conference, 1867. The various influences bringing about that meeting have been set out very fully by Dr Alan Stephenson in his book on the Conference, including a proposal from Canada for a national or general synod. Among these influences, however, I believe the Long and Colenso cases to have had a special place. They provided markers or warnings for different groups of churchmen. For some, the Erastians and the Broad Churchmen, they emphasized the secular courts as safeguards against the intolerance of clerical courts and they provided a warning against synods. For others, chiefly the High Churchmen, they were an awful example of the doctrinal chaos that could follow from Erastianism, and they showed the importance of synodical government properly established on primitive models and independent of the State. These two views clashed when the holding of an assembly of Anglican bishops from all over the world was mooted.

The first formal proposal for a Council of bishops of the Anglican Communion seems to have come from an American bishop, Hopkins of Vermont, who wrote to the Archbishop of Canterbury to that effect in 1851. Ten years later the matter was raised in the revived Convocation of Canterbury. There were other calls for a convocation that should legislate for all Anglican churches throughout

world. The Broad Churchmen were, however, appalled at the idea. The controversy which developed over the Privy Council's reversal of the Dean of the Arches' judgment in the "Essays and Reviews" case strengthened their conviction that liberal theologians needed the protection of the Privy Council against ecclesiastical tribunals of any kind.

Archbishop Sumner of Canterbury died on 6 September, 1862, and six weeks later C T Longley, Archbishop of York, was nominated to succeed him. Colenso's theology as expounded in his book on the Epistle to the Romans, published the previous year, was already causing discussion. Bishop Gray had come to England to confer with his brother Bishops. In the month of Longley's nomination the first part of Colenso's "The Pentateuch and Book of Joshua critically examined" appeared and the following month the new Archbishop received a letter from the SPG enclosing a number of letters received demanding the SPG withhold funds from Colenso. The entire English episcopate was drawn into the controversy, and Irish and Welsh bishops were also involved. An account of the various meetings and documents produced can be read in Dr Stephenson's book.

There followed the Cape Town trial and the Privy Council judgment. Gray demanded support for the consecration of a bishop to replace Colenso and he had the sympathy of many in England. Discussions took place in Convocation and at meetings of bishops as to whether the Church of England was still in communion with Colenso. Archbishop Longley said that he could not see how the bishops of the province of Canterbury could pronounce with whom the Church of England held communion, since the province of York might hold a different opinion.

Gradually the discussion widened to include bishops from North America. At the annual meeting of the English and Irish episcopate together with such overseas bishops as were in England in February, 1867, the metropolitan of Canada presented a request for the holding of a Pan-Anglican Synod. He was supported by the Bishop of Illinois. At the end of the meeting a resolution was passed unanimously asking the Archbishop to invite a meeting of all the bishops of the various Churches holding full communion with the United Church of England and Ireland.

The resolution was unanimous but not all the English bishops were present. Absentees included the Archbishop of York and the Bishops of London, Durham and Winchester. Some were absent because they objected to what was being discussed.

At the end of the month Longley made up his mind and sent a letter to all bishops "who are avowedly in communion with our Church" requesting their attendance at a meeting to be held under his Presidency at Lambeth on 24 September and the three following days. He referred to some of the letters and meetings and said: "Such a Meeting would not be competent to make declarations, or lay down definitions on points of doctrine. But united worship and common counsels would greatly tend to maintain practically the Unity of the faith, whilst they would bind us in straighter bonds of peace and brotherly Charity."

The Archbishop of York, the Bishop of Durham and four other English bishops refused to attend, thinking that confusion could only result from the Meeting. The invitation was accepted by 76 of the 140 or so to whom it was sent. Most of the absentees were prevented by age, illness or the fact that they had only recently been away from their dioceses. One, the Bishop of Madras, said that he had no liberty to leave India in under fifteen years' service. The hostility of Broad Churchmen to what was happening was shown by Dean Stanley's refusal to allow Westminster Abbey to be used for the closing service.

The Archbishop's careful statement about the limitations of the Meeting did not prevent a prolonged discussion about Bishop Colenso though he ruled out of order a motion of condemnation proposed by the Presiding Bishop of the American Church. He did, however, allow a resolution proposed by Bishop Selwyn of New Zealand and carried nem con. This would have been of real importance had it been followed up.

It read: "That, in the opinion of this Conference, unity of faith and discipline will be best maintained among the several branches of the Anglican Communion by due and canonical subordination of the synods of the several branches to the higher authority of a synod or synods above them." Although this question was raised from time to time in later Conferences resistance to any idea of a central or supreme authority in the Communion has so far prevailed.

In spite of the apparently small achievements of the Conference of 1867 it was felt to have been of such value as a meeting that there was a great desire, even among some who had had doubts earlier, that there should be another Conference. Archbishop Tait was prevailed upon to summon one for 1878, this time with the support of the Northern Province.

The subject of the organisation of the Anglican Communion has constantly appeared on the agenda and in the reports of the Conferences from the first. Certain practical steps have been taken such as the appointment of an Executive Officer and the setting up of the Anglican Consultative Council. The Conferences have also adopted resolutions which have influenced the policies of the various Provinces in relations with other churches. The nearest the Communion came to a crisis before 1968 was over the question of the recognition of ordinations performed in the Church of South India, on which the 1948 Conference was divided. In England the division was reflected in the Convocations which wisely postponed a decision for five years at the end of which agreement was reached.

The issue of the ordination of women has proved a larger source of division and has created a situation in which the full communion which had hitherto existed between the various Provinces is now impaired.

For the source of all this we have to look back to the choice which was stated by Lord Romilly in his judgment confirming Colenso's right to continue to receive a stipened from the Colonial Bishoprics' Fund. He said:

"The members of the Church in South Africa may create an ecclesiastical tribunal to try ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved the civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association – that is, against all the persons who had agreed to be bound by these decisions, and it would do so without inquiring into the propriety of such decisions. But such an association would be distinct from, and form no part of, the Church of England, whether it did or did not call itself in union and full communion with the Church of England. It would strictly and properly be an Episcopal Church, not of, but in South Africa, as it is the Episcopal Church in Scotland, but not of Scotland.

"But if the Episcopal Church in South Africa chose to remain part of the United Church of England and Ireland, then no such irresponsible tribunals could exist, and when recourse is had to the civil tribunal to enforce obedience to these decisions, they must be subject to revision to the extent I have already pointed out as laid down by the judgment in the case of Long v The Bishop of Cape Town.

"In one case it is one church in all the colonies each, association being part of the church of the United Kingdom of England and Ireland; in the other case they are separate and distinct episcopal churches, each existing separate in each colony, and distinct from every other church, bound by their own canons only, and no more bound by the canons of any other church than they would be by the canons of the Episcopal Church in Scotland, according to their final settlement by the last synod held in Edinburgh in 1860 for that purpose, and all of them rejecting the thirty-seventh of the Articles of the English Church, which puts the sovereign at the head of the church."

Stated like that it is not surprising that in the course of the century and continuing into this century the churches overseas have one after another adopted the first course described by Lord Romilly, but in doing so they have gone some way towards fulfilling a prophecy contained in a further passage of his judgment where he said that if each Church could make rules and ordinances for itself and its bishops had power to enforce such rules with no appeal save to the forum domesticum of the Archbishop of Canterbury, "it requires but little foresight to predict that in the course of a very short time, humanly considered, the colonial churches, though calling themselves in union and in full communion with the Church of England, would in forms and ordinances, and in matters of Church government differ widely from each other and from their parent church. Nor is it too much to say that some alteration of doctrine would probably in many cases follow upon the alteration in the discipline and government of the church."

The situation which has developed as a result of the course chosen was stated bluntly by the Presiding Bishop of the American Church in the debate at Lambeth 1988 on a Resolution proposed by the Archbishop of Sydney calling for restraint in the matter of the election of women to the episcopate. Bishop Browning argued that such a Resolution would be ultra vires because it would be an attempt to interfere with the legal rights of the electoral bodies.

The question remains whether the Anglican Communion is prepared to accept an authority above its separate Provinces. Some of the principles and issues raised are discussed in the two Statements on Authority of the Anglican-Roman Catholic International Commission and they occur in the context of other dialogues on Christian Unity. What kind of organs of authority would a united and universal Church require?

The Lambeth Conference has raised the question in another form by admitting as participants in the Conference, though not as members of the Anglican Communion, bishops of other churches such as the Old Catholics and the Mar Thoma Church of India with which we are in full communion.

The Old Catholic Churches do, indeed, provide an interesting contrast in development to that of the Anglican Communion. The oldest of them is the Church of Holland which is in direct legal continuity with the medieval Dutch Church but was excommunicated by the papacy in 1723 for electing an archbishop and having him consecrated without papal permission. That Church continued in isolation, doctrinally and liturgically unchanged, until the time of the first Vatican Council. The Archbishop of Utrecht was then approached by a group of German Catholics who had refused to accept the decrees of the Council and had formed themselves into an independent body. One of the Dutch bishops consecrated a bishop for them and he subsequently consecrated a bishop for a similar group in Switzerland. Another group in Austria received a bishop some years later.

A hundred years ago the various groups of Old Catholics came together to make a common declaration of faith and to form the Union of Utrecht. This Union consists of those churches which accept the Declaration of Utrecht. They

are independent churches of different countries, each with its own constitution and synod, but the bishops meet regularly in what is called The International Bishops' Conference and they have bound themselves not to consecrate any bishop who does not adhere to the Declaration and does not have the approval of the other bishops in the Conference. Since 1889 a group of Polish dioceses in the United States of America and in Poland have been admitted to the Union.

These churches, though legally self-governing, have agreed to surrender their independence to the extent that I have just described. The consent of the International Bishops' Conference is required for any significant new development affecting faith or order and for establishing communion with any other churches. If the Anglican Communion had adopted a similar policy during the last hundred years many difficulties might have been avoided.

Obviously in this matter of authority there is great scope for theological discussion and this will go on for a long time. What has happened over the ordination of women to the priesthood, and now to the episcopate, raises the quesions of the need for a central authority more acutely, how such authority can be related to the constitutions of independent churches and, in England, to the Royal Supremacy.

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