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CHURCH AUTONOMY IN THE UNITED KINGDOM

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From the point of view of the state, though not necessarily of every religious organisation, the autonomy of churches in any legal system is achieved *actively*, through the express grant and preservation of rights of self-determination, self-governance and self-regulation; and *passively*, through non-interference on the part of organs of state such as national government, local or regional government or the secular courts. In the United Kingdom there is no systematic provision made for the autonomy of churches and, in the main, a self-denying ordinance of neutrality predominates. This paper considers, by reference to the general and the particular, the operation of churches within the United Kingdom[1] and the extent to which the state does – and does not – interfere with their internal regulation.

I. THE HUMAN RIGHTS ACT 1998

Though the first nation state of the Council of Europe to ratify the European Convention on Human Rights on 18 March 1951, and though permitting individual petition to the European Court in Strasbourg since 1966,[2] the

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1 More accurately this paper's consideration is confined to England and Wales. Scotland has a separate legal system whose operation, together with its constitutional conventions, is outwith the knowledge and experience of the author.

2 See generally *A Lester*, Fundamental Rights: The United Kingdom Isolated [1984] Public Law 47 and *A Lester*, UK Acceptance of the Strasbourg Jurisdiction: What

United Kingdom declined to give effect to the Convention in its domestic law until the government recently passed the Human Rights Act 1998. The Act received the Royal Assent in November 1998 and will came into force on 2 October 2000.[3] Broadly speaking, the Act has two purposes. First, it requires the courts to interpret legislation so far as is possible in a manner compatible with Convention rights[4] and, in so doing they must take into account (though not necessarily follow) the decisions of the European Court at Strasbourg.[5] Secondly, the Act renders it unlawful for any 'public authority' to act in a way which is incompatible with a Convention right.[6]

The Church of England, being the established church in England, will be affected in each of these two ways. Since it legislates by Measure and since such Measures are classified under the Act as primary legislation,[7] once the Act comes into force, they will fall to be interpreted, wherever possible, in a manner compatible with Convention rights. Note that such an interpretation applies also to subordinate legislation, such as the Canons of the Church of England and is to be adopted irrespective of when the relevant primary or subordinate legislation was enacted.[8] Commentators have suggested that the effect of this provision is significantly to change the common law principles of statutory interpretation.[9] From the coming into force of the Act, courts

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Really Went On In Whitehall In 1965 [1998] Public Law 237.

3 See generally *J Laws*, The Impact of the Human Rights Act on Judicial Decision-Making [1998] EHRLR 676-682.

4 Section 3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a 'fast-track' system of executive action to bring English law into line with the Convention. See section 4 (declaration of incompatibility) and section 10 (remedial action).

5 See section 2. This jurisprudence includes judgments, decisions, declarations or advisory opinions of the European Court of Human Rights, opinions and decisions of the Commission and decisions of the Committee of Ministers whenever made or given. The latter two ceased to produce such decisions and opinions as from 1 November 1998.

6 See section 6. For a general discussion see *M Hill*, The Impact for the Church of England of the Human Rights Act 1998 (2000) 5 Ecc LJ 431.

7 See section 21.

8 See section 3(2)(a).

9 See for example, *A Smith*, The Human Rights Act 1998: The Constitutional Context, a paper delivered at the University of Cambridge at a conference organised by the Centre for Public Law entitled The Human Rights Act and the Criminal Justice and Regulatory Process, 9-10 January 1999.

will be obliged to use as the first guide to the construction of all primary and subordinate legislation not parliamentary intention[10] but compatibility with Convention rights. If no compatible reading is possible, the court may make a declaration of incompatibility.[11] However, fast track remedial action by ministerial intervention is not available in respect of Church of England Measures[12] in the event that a competent court makes such a declaration.[13] The consistory courts of the Church of England are bound to apply the Act but have no jurisdiction to issue a declaration of incompatibility.[14]

Secondly, since the Church of England and its institutions[15] are public authorities, a failure to act in a way that is compatible with Convention rights will be rendered unlawful under the Act[16] unless the authority, pursuant to primary legislation,[17] could not have acted differently.[18] A 'victim' of such unlawfulness may initiate proceedings seeking redress or may rely upon Convention rights in other proceedings.[19] Whether institutions within non-established or disestablished churches are public authorities and whether the Act will have general application to other religious organisations remains to be seen.[20] Recent High Court decisions have suggested that the Provincial Court and the Governing Body of the Church in Wales, which is not established, do not have a sufficiently 'public'

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10 Note the extent of the search for legislative intent as discussed in Pepper v Hart [1993] AC 593 HL.

11 See section 4(4).

12 See section 10(9).

13 Competent courts include the High Court, the Court of Appeal, the House of Lords and the Privy Council. See section 4(5).

14 See section 6(3)(a). The Human Rights Act was discussed in a case in the consistory court of the diocese of Chichester concerning the exhumation of the remains of a Jew buried in the consecrated past of a municipal cemetery for reinterment in Jewish cemetery under Jewish law. See Re Durrington Cemetery (2000) Times 5 July per Hill Ch.

15 Synods, councils, commissions, courts, tribunals and committees.

16 See section 6.

17 For example a Measure, the meaning of which was apparent on its face.

18 See section 6(2)(a) and (b).

19 See section 7(1).

20 The only assistance afforded by the Act is under sub-section 6(3) which declares that 'public authority' includes (a) a court or tribunal and (b) any person certain of whose functions are functions of a public nature.

element for the purposes of obtaining relief by way of judicial review,[21] nor do decisions concerning the discipline of Rabbis[22] or Imams.[23]

What then are the Convention rights relevant to religious organisations? As will be familiar to European jurists, Article 9 of the Convention which is entitled "Freedom of thought, conscience and religion", provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

In responses to concerted lobbying from various religious organisations within the United Kingdom, a statutory concession – the value of which remains doubtful – was introduced into the Act, section 13 of which now reads

1. If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

2. In this section 'court' includes a tribunal.

It remains to be seen how this section which appears to create a statutory hierarchy of rights will, in practice, affect the balancing of freedom of

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[21] See R v The Provincial Court of the Church in Wales ex parte Williams (1999) 5 Ecc LJ 217, Latham J; and R v The Dean and Chapter of St Paul's Cathedral and the Church in Wales ex parte Williamson (1998) 5 Ecc LJ 129, Sedley J.

[22] R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann [1992] 1 WLR 1306. See also R v London Beth Din ex parte Bloom [1988] COD 131. Note however R v Rabbinical Commission ex parte Cohen (1987, unreported) where the decision of the commission as to licensing matters under the Slaughterhouses Act 1974 was deemed to have the necessary public element for judicial review.

[23] R v Imam of Bury Park Jame Masjid Luton ex parte Sulaiman Ali [1994] COD 142.

religion against, say, freedom of expression.[24] The experience of continental Europe and the jurisprudence of Strasbourg seems to indicate a reluctance on the part of the European Court and the Commission to enter into the internal affairs of religious organisations in member states whether established or not.[25] Only time will tell whether the approach of the English judiciary, not themselves versed in a 'rights-based' jurisprudential culture, will be the same. This paper now turns to a review of the autonomy of religious organisations under the law as it currently is.

II. THE UNIQUE POSITION OF THE CHURCH OF ENGLAND

Any discussion on this subject starts, inevitably, with the Church of England as the established church in England.[26] As previously discussed at the Inaugural European/American Conference on Religious Freedom,[27] establishment of the Church of England in a twentieth century context is more concerned with the imposition of burdens rather than the conferral of privileges. Equally, in the main, the existence of an established church does not lead to emasculation or lack of autonomy in other churches. The common law principle of neutrality assists in preserving the recognised autonomy of individual churches.

Whereas provision may be made for bodies within churches to comprise corporations sole, quasi-corporations or partnerships, churches generally are considered to be unincorporated associations or clubs and are free to regulate themselves by their own constitutions. The Church of England, however, lacks the freedom enjoyed by other churches since both Measures and

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24 Arguably, the principle of non-interference enunciated elsewhere in this paper will be unaffected by the Act. For a general discussion see *M Hill,* Judicial Approaches to Religious Disputes in *R O'Dair* and *A Lewis* (eds), Current Legal Issues IV: Law and Religion (2001, Oxford, forthcoming).

25 I am particularly grateful to Prof Cole Durham, Prof Roland Minnerath and Dr Sophie van Bijsterveld for their helpful observations during the course of the conference in Trier.

26 The Welsh Church Act 1914 removed four dioceses from the Province of Canterbury with effect from 31 March 1920 thereby creating the non-established Church in Wales.

27 See *N Doe* and *M Hill*, Comparative Analysis of European and American Laws on Religious Organisations: the United Kingdom Contribution, presented to the First European/American Conference on Religious Freedom at Columbus Law School, Catholic University of America, 24-27 June 1998.

Canons – which together make up what would otherwise be the constitution of the church – require the approval of the Sovereign and the former have a status equivalent to Acts of Parliament. The capacity of the Church of England to legislate by Measure is qualified by the right of either House of Parliament to veto any Measure having regard to the constitutional rights of Her Majesty's subjects.[28] Equally Canons may not be contrary or repugnant to the royal prerogative or the customs, laws or statutes of the realm.[29]

III. THE GENERAL PRINCIPLE OF NON-INTERFERENCE

Other churches have no such restrictions imposed by Parliament upon their self-governance.[30] State financial support for churches in the United Kingdom
– including the Church of England – is extremely limited.[31] As nothing is given, little is expected in return. The courts have shown a marked reluctance to interfere with the internal management and administration of churches.[32] They regard them as essentially private matters, although a

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28 Church of England Assembly (Powers) Act 1919, section 3(2). In recent months a proposed Measure dealing with the appointment of churchwardens has run into difficulties with the Ecclesiastical Committee of both Houses of Parliament because it is deemed to give to the bishops too great a power to discipline lay office holders elected by individual parishes.

29 Submission of the Clergy Act 1533, sections 1 and 3, and Synodical Government Measure 1969. Note the exception in respect of doctrinal and liturgical matters provided for by the Church of England (Worship and Doctrine) Measure 1974 where the device of permissive legislation removes the perceived contrariness. In this regard, the Church of England is no different from any other church whose internal regulation may not be contrary to the law of the land. See generally *N Doe*, The Legal Framework of the Church of England (Oxford, 1996) at pp 73-74.

30 A stark exception to the principle of neutrality is the requirement that the Sovereign be in communion with the Church of England. See the Act of Settlement 1700 s 3; the Bill of Rights 1688 s 1, and the Accession Declaration Act 1910 s 1. Note also the disqualification upon those professing the Jewish or Roman Catholic religion from advising the Crown in matters concerning appointments within the Church of England or the Church of Scotland. See the Roman Catholic Relief Act 1829, the Jews Relief Act 1858 and the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974.

31 The exception is in relation to the maintenance of historic buildings. See the Redundant Churches and Other Religious Buildings Act 1969.

32 For a general discussion see *D McClean*, State and Church in the United Kingdom,

balance has to be struck. In essence there are three broad categories of case. First, the *declaration* of faith through creedal statements, into which secular law ought not to trespass at all; secondly, the *expression* of faith through liturgy and worship where the law will only interfere to the extent that it is absolutely necessary for public order, health or safety; and thirdly, the *witness* of faith through schools, hospitals and other social concerns in which the state has legitimate interests. Defining these categories and the penumbral regions where they meet is no easy task.

In *R v The Provincial Court of the Church in Wales ex parte Williams*[33], Latham J stated,

> ... the Church in Wales is a body whose legal authority arises from consensual submission to its jurisdiction, with no statutory or *(de facto* or *de jure)* governmental function. It is analogous to other religious bodies which are not established as part of the State. This Court has consistently declined to exercise jurisdiction over such bodies.[34]

Indeed, in considering the law as it relates to churches, the judiciary frequently adopts the analogy of the sporting body – unincorporated association or members' club. The analogy has also been returned. Hoffman LJ, in giving judgment in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*[35] indicated that,

> The attitude of the English legislator to racing is much more akin to his attitude to religion [...] it is something to be encouraged but not the business of government. [...] I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.[36]

There is a discernible reticence on the part of the English courts to become involved in adjudicating disputes within churches. This reticence may be elevated to a principle of non-interference. Certainly Simon Brown J saw it as such in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth ex parte Wachmann*[37] when he stated,

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in: *G Robbers* (ed.), State and Church in the European Union (Baden-Baden, 1996) at pp 307-322.

33 23 October 1998, Divisional Court, Latham J unreported but noted in (1999) 5 Ecc LJ 217.

34 See transcript at page 8.

35 [1993] 1 WLR 909.

36 Ibid at p 932G-H citing ex parte Wachmann and also p 933F.

37 [1992] 1 WLR 1036.

> ... the court is hardly in a position to regulate what is essentially a religious function –the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state.[38]

In a number of cases, the courts have restated the principle of neutrality as between religions. Scrutton J in *Re Carroll* asserted: "It is, I hope, unnecessary to say that the Court is perfectly impartial in matters of religion."[39] A little more recently, Cross J, in giving judgment in *Neville Estates Limited v Madden*, put the matter in very bald terms as follows: "As between different religions the law stands equal."[40] Morritt LJ regarded it as fundamental that, "The law of charity does not favour one religion to another".[41] It has been argued, however, that there is a lack of even-handedness towards the Roman Catholic church in that the support of contemplative orders and the saying of masses for the dead are not recognised as charitable.[42]

IV. RECOGNITION OF CHURCHES

Whilst preserving the principle of neutrality, the law nonetheless recognises churches. Religious organisations, as discussed above, are treated in law as unincorporated voluntary associations[43] whose members are bound together

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38 Ibid at p 1042H-1043A. Note that the sporting analogy will be harder to sustain with the Human Rights Act 1998 in force which by section 13 (discussed above) accords a special status to the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion.

39 [1931] 1 KB 317 at page 336.

40 [1961] 3 All ER 769 at page 781. For a contrary view, which seeks to explode the myth of neutrality, see *A Bradney*, Religion, Rights and Laws (Leicester, 1993) passim.

41 Versani and others v Jesani and others [1998] 3 All ER 273 at 287g-h relying upon Lord Reid in Gilmour v Coats [1949] AC 426. Morritt LJ further stated at 280a that "... the Attorney General and the court are agnostic in the sense that all religious charities are treated alike irrespective of the nature of the faith they are established to profess".

42 See *R Ombres*, Charitable Trusts: The Catholic Church in English Law (1995) 126/127 Law & Justice 72.

43 See Halsbury's Laws of England (Fourth edition reissue, London, 1991), Volume 6, pp 61-190.

for the purpose of advancing religion as a matter of private agreement. Churches have no separate legal identity under state law and are not treated as juridic persons. They cannot sue or be sued nor can they hold property. However institutions within churches, such as incumbents, bishops, parish councils, diocesan committees etc, may be the legal owners of property.

The internal rules of churches exist as a contract between the members and will be enforced by the secular courts. The rules of certain churches have received statutory recognition. The Baptist and Congregational Trusts Act 1951 recognises the 'constitution' in the Baptist handbook. Equally the Methodist Church Act 1976 gave statutory recognition to and made further provision for the internal 'constitution' of the Methodist Church and its deed of union and model trusts deeds.

V. CHURCH BUILDINGS

The Liberty of Worship Act 1855 conferred on religious groups the right to use places of worship certified in writing to the Registrar General for England and Wales and registered under the Places of Worship Registration Act 1855.[44] Although registration is not compulsory, it does confer an exemption from local council tax.[45] The temple of the Mormon church in England which is open to Mormons 'of good standing' has been held not to be a place of public worship.[46] No meeting for religious worship may take place with doors locked, bolted or barred to prevent entry of any person.[47] Any person guilty of public disorder within a registered place of worship commits a criminal offence under the Ecclesiastical Courts Jurisdiction Act

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[44] As to what comprises worship, see R v Registrar General ex parte Segerdal [1970] 3 All ER 886.

[45] Local Government Finance Act 1992, s 117; Local Government Finance Act 1988, s 51; sch 5 para 11.

[46] Church of Jesus Christ of Latter-Day Saints v Henning (Valuation Officer) [1963] 2 All ER 733.

[47] Places of Worship Act 1812, section 11.

1860.[48] Further, the place may be registered for the solemnisation of marriages.[49]

The Court of Appeal[50] refused leave to appeal a decision of Kennedy J[51] controlling the use of a building housing a *mundir* (Hindu temple) and *math* (training institute for Hindu priests) and the European Commission rejected the contention that such decision amounted to a violation of Article 9 of the Convention.[52]

The erection of or substantial alteration to any building including those used as places of worship require planning permission from the Local Authority. However, works involving listed buildings of historical or architectural importance and/or buildings situated in designated conservation areas require, in addition, listed building consent, which is also regulated by local authorities.[53] Since its inception,[54] the scheme requiring listed building consent has excluded from its statutory regime ecclesiastical buildings which for the time being are used for ecclesiastical purposes.[55] This ecclesiastical exemption presently applies to the Church of England,[56] the Church in

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48 This Act is far from obsolete. On Easter Day, 1998 Peter Tatchell, a campaigner for homosexual rights, entered the pulpit at Canterbury Cathedral and disrupted the Archbishop of Canterbury who was delivering a sermon. He was arrested, prosecuted, convicted and duly fined £18.60.

49 Marriage Act 1949, section 41. Note also section 67 concerning the certification of persons to keep registers. See now also the broad provisions of the Marriage (Registration of Buildings) Act 1990.

50 ISKON v Secretary of State for the Environment and Hertsmere Borough Council, (1992) 16 March, (unreported).

51 (1992) 64 P&CR 85. A full discussion of this case is to be found in *S Poulter*, Ethnicity, Law and Human Rights – The English Experience (Oxford, 1998) at pp 243 et seq.

52 ISKON v United Kingdom (1994) 76-A Dec & Rep 90.

53 See the Planning (Listed Buildings and Conservation Areas) Act 1990.

54 The first relevant act was the Ancient Monuments Consolidation and Amendment Act 1913.

55 It is now to be found in section 60(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. See also the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771. For an explanation of its operation see The Ecclesiastical Exemption: What It Is and How It Works (Department of National Heritage and Cadw: Welsh Historic Monuments, September 1994).

56 The faculty jurisdiction, operated on a diocesan basis by the consistory court,

Wales, the Roman Catholic Church, the Baptist Church, the Methodist Church and the United Reformed Church. A recent report commissioned by the government[57] was critical in varying degrees of the different systems operated by each of the churches and made a number of specific recommendations. Despite spirited defences of such systems,[58] a further review is likely to take place in the year 2000. Were the construction, alteration and internal ordering of church buildings to be brought within secular control, this would mark a significant reduction in the autonomy of churches.[59]

VI. EMPLOYMENT OF MINISTERS

In line with the broad principles set out elsewhere in this paper, the laws of the United Kingdom and her courts evince a marked reluctance to interfere with the employment of church ministers and their dismissal. Uniquely within the Anglican Communion, however, the Church of England does not elect its diocesan bishops. Instead they are appointed by the Crown on the advice of the Prime Minister who, by convention – though not always[60] – makes a selection from two names with which he is presented.[61] Ministers

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provides the alternative system within the Church of England. For a description see *GH* and *GL Newsom*, The Faculty Jurisdiction of the Church of England (second edition, London, 1993) and *M Hill*, Ecclesiastical Law (London, 1995) at pp 384-410.

57 A Review of the Ecclesiastical Exemption from Listed Building Control conducted for the Department for Culture, Media and Sport and the Welsh Office by John Newman (September, 1997) ('the Newman Report').

58 See, inter alia, *M Hill*, Losing One's Faculties: A Personal Reflection on the Workings of the Consistory Court in the Light of the Newman Report (1999) 5 Ecc LJ 164.

59 For a more general discussion see *M Hill*, The Fabric and Contents of Church Buildings in the Anglican Communion, in: *J Fox* (ed.), Render Unto Caesar: Church Property in Roman Catholic and Anglican Canon Law (Rome, 2000) at pp 93-104.

60 Shortly after taking up office in 1997, the Rt Hon Tony Blair MP declined to accept either of the names presented to him for the vacant See in Liverpool.

61 See the Report of the Working Party established by the Standing Committee of the General Synod of the Church of England, 'Senior Church Appointments' (1992) GS 1019. For a discussion of the practicalities of this system see *M Hill*, Ecclesiastical Law (op cit) at page 235.

are not in law considered to be 'employees'[62] and thus lack the advantages afforded by the Employment Protection (Consolidation) Act 1978.[63] The position of a Sikh priest depends upon whether the wording of the relevant documents is sufficient to demonstrate an intention to create legal relations but the presumption militates against the existence of a contract of employment.[64]

On two recent occasions, the High Court has been invited to consider granting injunctions to prevent services of ordination from taking place.[65] Each decision favoured the church authorities.

It remains a secular offence for a Roman Catholic minister to assume the name, style or title of an Archbishop, Bishop or Dean already operative in the Church of England.[66] Questions concerning the disciplining of a Rabbi are not *prima facie* subject to judicial review[67] nor are the clerical disciplinary processes of the Church in Wales.[68] The European Commission on Human Rights has declined to interfere with a similar process in the Church of England, rejecting the petitioner's claim of a breach of Article 6 of the Convention.[69] The Commission did not regard the charge of 'conduct unbecoming a priest' as criminal under Article 6(1) of the Convention.[70] It also considered the Consistory Court to be an independent and impartial tribunal. An Imam's decision that persons were not eligible to vote at an

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62 For the Church of England, see Coker v Diocese of Southwark [1998] ICR 140 CA, (1998) 5 Ecc LJ 68. For Islam, see Birmingham Mosque Trust Limited v Alavi (1992) ICR 435.

63 Note also certain exemptions afforded to churches and other religious groups by Sex Discrimination Act 1975 s 19 and the Race Relations Act 1976.

64 See Santokh Singh v Guru Nanak Gurwara [1990] ICR 309 and Guru Nanak Temple v Sharry (1990) EAT 21/12/90 (145/90) but note also Birmingham Mosque Trust Limited v Alavi (op cit) which suggests that the presumption may be irrebutable.

65 Williamson v Dow (1994) 16 April, Arden J (unreported); Gill v Davies and others (1998) 5 Ecc LJ 131, Smith J.

66 Ecclesiastical Titles Act 1871. Other disabilities upon Roman Catholics holding property in connection with worship was removed by the Roman Catholic Relief Act 1829 and the Roman Catholic Charities Act 1832.

67 Ex parte Wachmann (op cit).

68 Ex parte Williams (op cit).

69 Tyler v United Kingdom (1994) 4 April, ECHR 21283/93.

70 The allegation was one of adultery.

election of the executive committee of a mosque has been held not to be subject to judicial review.[71]

VII. EMPLOYMENT OF OTHERS

Churches have occasion to employ a variety of persons – secretarial, administrative, musical and menial. Further, organisations run wholly or in part by churches – hospitals, schools, youth clubs, hostels – need to engage the services of all manner of persons. Here, certain fetters on autonomy may be seen. Decisions of the Rabbinical Commission, chaired by the Chief Rabbi, in exercising statutory licensing functions under the Slaughterhouses Act 1974 are subject to judicial review in the secular courts.[72]

Industrial tribunals have been called upon to adjudicate upon the dismissal of lay persons employed by the church. A virger at St Paul's Cathedral alleged unfair dismissal and sexual discrimination.[73] The latter claim failed but the former succeeded, the tribunal being critical of "... an almost complete lack of proper disciplinary rules and procedures in the cathedral at that time".[74] Where the religious obligations of an individual impinge upon his employment, the court must balance these against the ill-feeling which may result from additional duties falling on fellow employees.[75] A majority of the Court of Appeal held that a Muslim school teacher who absented himself for part of Friday for prayers in the mosque had no right to such time off without loss of pay as his employer's need to have him present at all times in the day took precedence.[76]

A highly publicised case concerning the organist of Westminster Abbey involved a detailed examination of the role and duties of cathedral employees.[77] Dr Martin Neary appealed to the Queen, as the abbey's visitor,

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71 R v Imam of Bury Park Jame Masjid, Luton, ex parte Sulaiman Ali (1994) COD 142.

72 R v Rabbinical Commission ex parte Cohen (1987) (unreported).

73 Ivory v The Dean and Chapter of St Paul's Cathedral (1995) 6 November (unreported) 10316/93/S.

74 See paragraph 51 of the tribunal's decision.

75 See, for example, Esson v United Transport Executive [1975] IRLR 48 concerning a bus conductor not wishing to work on Sundays.

76 Ahmad v Inner London Education Authority [1978] QB 36.

77 Neary and Neary v The Dean of Westminster noted at (1999) 5 Ecc LJ 303, Lord Jauncey of Tullichettle acting as special commisioner appointed by Her Majesty the Queen as Visitor to Westminster Abbey and as arbitrator.

against his dismissal. The commissioner appointed by Her Majesty with the consent of the parties also acted as arbitrator in relation to Dr Neary's wife's dismissal from her part-time secretarial post with the abbey. The commissioner held that the fact that the abbey was a religious foundation required a spirit of openness and integrity on the part of its employees of a higher level than one might expect of a commercial organisation. As to what justified summary dismissal, the commissioner held, "conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment".[78] A detailed examination of the evidence *de novo* clearly showed that Dr and Mrs Neary were complicit in the taking of secret profits and that their dismissal by the abbey had been justified. Thus the appeal failed.

VIII. UPHOLDING OF DOCTRINE

Earlier in this paper, reference was made to the burdens and restraints imposed upon the Church of England by virtue of its status as the established church. With regard to its doctrine, its position might be regarded as advantageous. First, since its Measures enjoy the same invulnerability from challenge as Acts of Parliament,[79] the Church of England may seek to 'opt out' of secular legislation. For example, the Priests (Ordination of Women) Measure 1993 excluded the operation of the Sex Discrimination Act 1975 thereby permitting bishops, should they so wish, lawfully to refuse to ordain, license or appoint women priests. Secondly, the Church of England (Worship and Doctrine) Measure 1974 renders it lawful for general synod to make provision by canon notwithstanding that the canon may be inconsistent with any of the rubrics of the Book of Common Prayer.[80]

The secular law of blasphemy serves to protect Christianity but not other religions[81] by making blasphemy a criminal offence. Prosecutions are rare

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78 See transcript at page 15.

79 Church of England Assembly (Powers) Act 1919, s 3(6), s 4; Synodical Government Measure 1969, s 2(2). See also R v Archbishops of Canterbury and York ex parte Williamson (1994) Times 9 March per Bingham MR reproduced in *M Hill*, Ecclesiastical Law (op cit) at page 77 et seq.

80 Since the Book of Common Prayer comprises a schedule to the Act of Uniformity 1662, this is a rare example of secondary legislation having supremacy over primary.

81 See R v Chief Metropolitan Magistrate ex parte Choudhury [1991] 1 All ER 306

but not unknown.[82] It is unnecessary to prove an intention to attack Christianity or to offend believers. The Law Commission has commended abolition of the crime of blasphemy and its replacement with an offence of using insulting words in a place of worship.[83]

In relation to the Church of England, as with other churches, there remains a marked reluctance on the part of the state courts to involve themselves in questions of doctrine.[84] Note also *Varsani and others v Jesani and others*[85] in which the Court of Appeal declined to determine a dispute relating to alleged misconduct of a successor to Muktajivandasji in declaring himself to have divine status amongst those of the Swaminarayan faith, a Hindu sect, being a reincarnation of its founder. This led to a factional division amongst its adherents. Morritt LJ, in his judgment referred to the speech of Lord Davey in *General Assembley of Free Church of Scotland v Overtoun, Macalister v Young*[86] and cited the following:

> My Lords, I disclaim altogether any right in this or any other Civil Court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question.[87]

Morritt LJ did not regard an inquiry into the leader's divinity or misconduct as necessary. It was apparent that the original purpose (which was clear) had ceased to provide a suitable and effective method of using property, regard being had to the spirit of the gift. The resultant impasse could not be resolved as a matter of faith. Thus the court assumed jurisdiction under

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which concerned the publication of The Satanic Verses by Salman Rushdie.

82 See Whitehouse v Gay News Limited and Lemon [1979] AC 617 HL concerning a publication of a poem by Prof James Kirkup concerning Christ which was homoerotic in nature.

83 Law Commission Report No. 79 of 1981. Note also offences under the Ecclesiastical Courts Jurisdiction Act 1860 discussed under Church Buildings supra which applies to all registered places of worship not merely those where Christianity is practised.

84 See the section entitled The General Principle of Non-Interference, above.

85 [1998] 3 All ER 273 CA.

86 [1904] AC 515 HL.

87 Ibid. at 644-645.

section 13 of the Charities Act 1993 and directed a cy-pres scheme for the division of the property of the charity between the competing groups.

IX. Restrictions on Autonomy

In the investment of charitable funds, churches – in common with all registered charities – are regulated by the Charities Act 1993. This precludes churches from nominating as trustees persons within certain specified categories. Further, even though it is axiomatic that charity trustees are concerned to further the purposes of the trust, they must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees.[88]

The self-regulation of any church is not predicated upon the recognition by the state of the existence of such a church. The Church of Scientology, though denied religious status, is nonetheless autonomous. For the Muslim, however, whose religious status is recognised, the continuing struggle to introduce Islamic personal law creates a fetter on self-regulation and a limit on autonomy. Note also the examples given elsewhere in this paper of occasions where it appears that the principle of neutrality is compromised by laws discriminatory to Roman Catholicism.[89]

X. Conclusions

There is no systematic provision made within the laws of England to establish and preserve the autonomy of churches. Much falls to be inferred from silence. The following general and tentative conclusions are postulated:

- The law adopts a principle of non-interference with churches;
- The law imposes few restrictions or prohibitions on churches;
- With the exception of the Church of England the law imposes few duties on churches;

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88 See the judgment of Nicholls V-C in Harries v The Church Commissioners for England [1992] 1 WLR 1241.

89 The Sovereign's declaration of assent; the role of Lord Chancellor and other advisers; the use of certain ecclesiastical titles; and qualification for charitable status.

- With the exception of the Church of England the law does not seek to regulate the internal rules of churches;
- There is no single body of laws applicable to the autonomy of churches;
- There remain a few laws which serve to disadvantage the Roman Catholic church over other churches.

In a nation whose guiding light is an unwritten constitution and whose governance is largely by way of informal convention, religious liberties and the autonomy of churches are but the consequence of legislative, executive and judicial silence and indifference, rather than systematic and principled safeguard.