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# EDITORIAL

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The legal status of the Church of England, and its idiosyncratic relationship with the state, is anomalous not merely in a global perspective but in relation to other churches in the United Kingdom, including autonomous provinces of the Anglican Communion in Wales, Scotland and Northern Ireland. But the nature of establishment and its wider consequences are not fully understood. It will be recalled that the Court of Appeal fell into error in the *Aston Cantlow* litigation in finding that a parochial church council was a public authority for the purposes of the Human Rights Act 1998, basing its assessment principally upon the fact that the Church of England is an established church.[1] The House of Lords (Lord Scott of Foscote dissenting in part) unanimously rejected both the reasoning and conclusions of the Court of Appeal.[2] This is how Lord Nicholls of Birkenhead put it:

> Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organization. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organization.[3]

Lord Hope of Craighead recognised that the Church of England as a whole has no legal status or personality, but that its relationship with the state is one of recognition, not the devolution to it of any of the powers or functions of government. Lord Rodger of Earlsferry stated that 'the juridical nature of the Church is, notoriously, somewhat amorphous' but considered that the mission of the Church is a religious mission, distinct from the secular mission of the

1 *Aston Cantlow Parochial Church Council v Wallbank* [2001] 2 All ER 363, CA.
2 *Parochial Church Council of Aston Cantlow v Wallbank* [2004] 1 AC 546; [2003] 3 All ER 1213; (2004) 7 Ecc LJ 364, HL.
3 Per Lord Nicholls of Birkenhead at para 13.



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government, whether central or local. The ties with the state are intended to accomplish the Church's own mission, not the aims and objectives of government. He concluded that the parochial church council exists to carry forward the Church's mission at the local level. Were it to be otherwise, and the component institutions of the Church of England classified as public authorities, then, by virtue of the way the Human Rights Act is drafted, those institutions would lose the status of victim, preventing them from complaining of any violation of Convention rights, including that of freedom of religion. This would be an extraordinary conclusion since, as Lord Nicholls of Birkenhead remarked, the Human Rights Act went out of its way in section 13 to single out for express mention the exercise by religious organisations of the Convention right to freedom of thought, conscience and religion.

The status of ecclesiastical law as part of the law of the land is also of importance. Since the Church of England legislates by Measure and since such Measures are classified under the Act as primary legislation,[4] they are to be interpreted, wherever possible, in a manner compatible with Convention rights. This applies also to subordinate legislation, such as Rules and Statutory Instruments. It was therefore a little surprising that, when the Lord Chancellor spoke to the Ecclesiastical Law Society's Annual Conference on 1 April 2006, he confessed that he was unaware that Church of England Measures were primary legislation. Whilst candour and honesty are endearing characteristics for a cabinet minister, and considered by many to be in short supply, it is of some concern that the Secretary of State for Constitutional Affairs should know so little about the state of affairs of the constitution. I note, parenthetically, that the quality of the speeches delivered in the *Aston Cantlow* case (or in any other case heard by the Judicial Committee of the House of Lords) would not have been any better (or indeed different) had the Lords of Appeal in Ordinary been re-styled Supreme Court Justices and re-located from the Palace of Westminster to Middlesex Guildhall. The adage 'if it ain't broke, don't fix it' is particularly pertinent when the cost is substantial and the current unmet financial needs of the criminal and civil justice systems are immense and growing.

Of more concern, however, was the fact that the Lord Chancellor confessed to having no knowledge that his government had recently passed legislation empowering government ministers by order to amend, repeal or revoke Measures of the Church of England and any orders, regulations or other instruments made by virtue of such Measures. For indeed, tucked away in the dark recesses of the Civil Partnership Act 2004, are two sections which run contrary to the emergent autonomy of the Church of England and to the principles of self-determination which have their origin in the Church of England Assembly

4 Human Rights Act 1998, s 21.

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(Powers) Act 1919 and live on in the legislative powers now exercised by General Synod. Section 255 of the Civil Partnership Act is anodyne enough, limiting this new form of ministerial intervention to Church legislation relating to pensions, allowances or gratuities concerning the surviving civil partners or dependants of deceased civil partners. However, section 259 goes further and states that a minister of the Crown may by order make such further provision as he considers appropriate for the general purposes, or any particular purpose, of the Civil Partnership Act, or for giving full effect to the Act or any provision of it. Such an order may amend, repeal or revoke any Church legislation. Apparently these sections were included with the express knowledge and approval of senior echelons of the Church of England, following assurances that the power would not be exercised without the consent of the Church. This is not the place to speculate upon the value of governmental assurances but, even allowing for such, observers of Church and State will be surprised at the voluntary surrender of autonomy to the executive by a religious organisation. It may only be a partial surrender, with a distinct specificity of purpose, and made in the expectation of benign and consensual exercise in the future, but nonetheless it creates a precedent and establishes a principle that constitutional historians will come to consider as a watershed in the dynamic of re-establishment in the twenty-first century and an erosion of the right to freedom of religion enunciated in Article 9 of the European Convention on Human Rights.

The inclusion in this issue of the paper delivered by the Lord Chancellor at the Society's conference, and of an expanded version of the presentation given by Dr Julian Rivers, together with a spirited alternative view from the Bishop of Winchester, places a strong emphasis upon the position of faith communities in the highly secularised debate on gender equality and individual rights. Also included are full reports of the proceedings of the conference and of the related symposium on same-sex unions and the churches in a European perspective. It is a topical and lively subject, and doubtless one to which this and other journals will return in the future, but it is not the sole concern of ecclesiastical lawyers, as the balance of this issue demonstrates. There are contributions on eschatology, the new system of clergy discipline in the Church of England, religious hate crimes and discrimination, together with the customary book reviews, parliamentary, synod and conference reports, and case notes.

Whilst the breadth of coverage of this issue and the quality of the contributors will be familiar to regular readers, the *Journal* differs in size and appearance from previous issues. And from now on it will appear three times a year – in January, May and September – rather than just two as before. This is because, after twenty years of private publication, the Ecclesiastical Law Society has joined forces with Cambridge University Press, who will henceforward be publishing the *Journal* on behalf of the Society. The Press has an enviable reputation for the production of academic periodicals and is particularly

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strong in the areas of law and religion. I should like to express my thanks to all members of the Editorial Board; to Michael Goodman, my predecessor as editor, for establishing and maintaining the high quality of writing in the *Journal*; and to Michael O'Connor and Peter Moore for their unstinting work in the production process. I thank Ella Colvin, Editor-in-Chief, Humanities and Social Science Journals, Cambridge University Press, for the warmth of her welcome and the professionalism of her approach and look forward to collaborating with her and her colleagues in the future. The partnership between the Press and the Ecclesiastical Law Society will be fruitful in many ways and, I hope, will work to the advantage of this *Journal* as it enters its third decade.

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