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COMMENT

How Not To Change Patriarch: A Comment on *Dean v Burne*

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When Theseus returned from Crete, his ship was long preserved in Athens. Over time, individual planks rotted and were replaced, until eventually all the planks had been renewed. Was the Athenian ship still the original one of Theseus? The problem that vexed Greek philosophers can be made more acute if one imagines that the rotten planks had been preserved, restored and eventually reconstructed into another ship. Which is now Theseus' ship? This was the problem facing Blackburne J in the High Court in the case of *Dean v Burne*.[2] In effect, he decided that the ship of new planks is still the original one.

The case arose from ecclesiological and liturgical differences troubling the Russian Orthodox Church in the United Kingdom and Ireland. In 1946 what was then the Orthodox parish of London formally resolved to move itself from the jurisdiction of the Ecumenical Patriarchate of Constantinople to the Patriarchate of Moscow. In subsequent decades, it grew and in the 1970s was constituted the diocese of Sourozh. The Church saw the implementation of a number of liberalising measures in line with reforms which had been initiated in the Russian Orthodox Church, but then abandoned under the pressures of the Revolution of 1917–18. Reform in this country was led by the charismatic Metropolitan Anthony (d. 2003) and made possible by the tenuous control exercised by Moscow before the fall of the Iron Curtain.

After 1991, the large influx of Russians used to older forms of orthodox worship and practice, taken together with the greater degree of oversight now possible from Moscow, gave rise to increasing tensions within the Church. As a result, in early May 2006, Bishop Basil, who had been appointed acting bishop after Metropolitan Anthony's death, sought to be released from the jurisdiction of the Moscow Patriarchate and place himself under that of the Ecumenical Patriarchate of Constantinople. This proved complicated, in that

1 I am grateful to Dr Peter Petkoff for his comments; the views expressed remain my own.
2 [2009] EWHC 1250 (Ch), 5 June 2009.

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although Constantinople was happy to receive, Moscow was not happy to release. Eventually, in June and July 2007, the Diocesan Assembly and the London parish council as constituted in early May 2006 purported to exercise powers contained in clauses in the respective trust deeds of the relevant church property to declare that the successors to the original bodies were, respectively, the Episcopal Vicariate of Orthodox Parishes of Russian Tradition in Great Britain and Ireland and the Orthodox Parish of the Dormition of the Mother of God (Ecumenical Patriarchate). In other words, they constructed a ship out of discarded planks and sought to resolve that it was the original one.

The claimant successfully sought declarations that the parish and diocese under the patriarchate of Moscow remained the beneficiary of the relevant trusts and that these resolutions were void. Blackburne J decided that the condition precedent for the exercise of the power to determine the identity of the successor body had not been fulfilled. The power could only be exercised, '. . .upon all . . . occasions upon which any doubt shall or may arise relating to the continuity of the life of the Parish and the identity of the body community or congregation which shall be entitled to the benefit of this deed. . .' He held that while it was true that many of the original worshippers had found it increasingly hard to worship in their Church and had sought to follow Bishop Basil to the jurisidiction of Constantinople, there was no doubt about the continuity or identity of the Church, which to all external appearances continued to function effectively and without interruption. The internal liturgical and ecclesiological disagreements did not have the necessary triggering effect. The ship of new planks is still the original one.

Although at one level offering an unexceptionable reading of the trust deeds, the judgment is not entirely satisfactory. Canonically, of course, the matter is immensely complex: Orthodox canon law is based on a principle of territoriality which sits ill with the existence of 'gathered' churches in a diaspora. In theory, if not in practice, a diocese is not supposed to change patriarch. The fact that Bishop Basil was not Metropolitan of Sourozh adds an additional layer of complexity. One can hardly blame a judge for seeking to resolve a property dispute without disentangling all of that. However, the clause on which the defendants relied had undoubtedly been drafted with a view to identifying who should decide the beneficial ownership of church property in a case of schism. If an Orthodox church disagrees sufficiently about matters of worship and practice such that one group seek transfer to another patriarchate, while another resist it, it seems hard to deny that a schism is in process. Furthermore, if the parish council and diocesan assembly had simply resolved to follow their bishop and transfer allegiance to Constantinople (thus reversing the decision of 1946) it would be hard for a civil court to accept the effectiveness of the earlier move while denying that of the later. One wonders whether the defendants might have had greater success had they taken legal advice earlier, and followed through their resolve more robustly.

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More broadly the case demonstrates once again the difficulties surrounding the fair resolution of church property disputes in the aftermath of division. English courts have often treated the successor body as that body which maintains doctrinal fidelity (the departure-from-doctrine approach). This is read subject to the power of properly constituted church bodies to resolve questions of this nature within their jurisdiction (deference-to-polity). Indeed, the differences between their lordships in the leading case of *General Assembly of the Free Church of Scotland v Lord Overtoun* are best read as a dispute about the interplay of these two approaches and the extent of the relevant body's powers.[3] Deference to polity looks as if it preserves courts from determining disputed questions of doctrine, but even on this approach courts can be drawn into ecclesiological dispute. Given the extra-canonical context of the Orthodox Church in Western Europe, along with varying degrees of lay involvement in church government, it is not entirely clear that a diocesan assembly can change patriarchate, or how they should go about doing so. In the United States, where courts strain to avoid any taint of the theologically partisan, a third approach has emerged: neutral principles. The deed (if any) is followed and there is an end of the matter. If the deed fails to express the church's theological self-understanding, the fault lies with the lawyers. The court is not prepared to take evidence on the true faith or the true order of the church. The judgment in *Dean v Burne* might suggest that in this country as well, the authority of *Overtoun* is weakening and the allure of 'neutral principles' beckons.

But the truth is that lawyers are not philosophers. They do not really want to decide which ship is the original one. Instead, as *Varsani v Jesani* shows, they are much happier saying that each is – to some extent.[4] Blackburne J was certainly not prepared to consider a scheme cy-près of his own motion. But he was prepared to state that 'the question whether on the facts there is jurisdiction to direct a scheme, and if there is whether it is desirable and practicable to do so, could profitably be considered by the Charity Commission.' Quite what fairness between the parties requires in such circumstances, and in particular whether justice can be done without forming *some* view of the underlying canonical disputes, must remain a debate for another occasion.

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3 *General Assembly of the Free Church of Scotland v Lord Overtoun, Macalister v Young* (1904) 7 F (HL) 1, [1904] AC 515. See the discussion in this journal by Frank Cranmer, 'Christian doctrine and judicial review: the Free Church case revisited' (2002) 6 Ecc LJ 318.

4 *Varsani v Jesani* [1999] Ch. 219; [1998] 3 All ER 273, CA.