Legal Flexibility and the Mission of the Church: Dispensation and Economy in Ecclesiastical Law

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Dr Adam's excellent book provokes much thought. It begins with a brief chapter entitled, 'Introduction and definition of terms' and then proceeds to consider 'The development of dispensation and economy in the early Church' and 'The development of dispensation in the West'. Having discussed 'Dispensation in the contemporary Roman Catholic Church' and 'Legal flexibility in English Law,' Dr Adam then turns to a general chapter on 'Dispensation in the Church of England'. Thereafter, he tests legal flexibility in three separate chapters: 'The ritual controversy in the nineteenth-century Church of England', 'The proposed revision of the Book of Common Prayer 1927–8' and 'The use of economy in Anglican–Orthodox relations'. The last of these chapters leads on to 'Ecumenism and economy: legal flexibility and inter-church relations', before 'Dispensation, economy and legal theory'. In his conclusion, he argues that 'the concept of [dispensation] has been shown to exist in a number of guises' (p 205), although the extent of its use 'should not be over-estimated' (p 206).

No-one is likely to disagree with the latter summary but the extent of any dispensation still remains open to debate. Dr Adam defines 'dispensation' as 'a legal process by which an individual is dispensed from the duty of complying with a particular law' (p 2). Putting aside the question whether a satisfactory definition can include the matter to be defined within that definition itself, this definition/description is fortunately clarified later, when Dr Adam states: 'The character of a dispensation is that it requires a situation where, but for the dispensation, the act or omission concerned would not be legal but where, with the dispensation, it would be legal' (p 72). And here lies the rub. Who is to decide whether the perceived dispensation is, indeed, legal and whether therefore, in law, it has attained its object? Dr Adam concedes that 'the concepts of legal flexibility, dispensation and economy . . . sit uncomfortably with the legal positivism that has been the prevalent theoretical strand in English jurisprudence' (p 6, expanded in the final chapter). Nonetheless, at least in the foreseeable future, it will be those judges and lawyers trained within that positivism who will ultimately decide whether the 'dispensation' has attained its object or whether the act or omission remains contrary to the law.

The question of definition remains important. When considering the bishops' actions in 'permitting, but regulating, the use of the 1928 [Prayer] book', Dr Adam argues that their actions were 'a clear example of a provisional or temporary setting aside of the law' but then (rightly in this reviewer's view)

concludes that 'they were not … exercising a power of dispensation as understood in the western canonical tradition or in English law' (p 130). He may indeed be right that this attempt was what in eastern canonical tradition would be regarded as *oikonomia* (economy), that is, 'the allowing of a breach in the law for a greater purpose – namely the salvation of souls' (p 130), but that could not have made the bishops' actions legal;[1] it is, of course, unlikely that they could call upon either the doctrine of necessity or any vestigial *jus liturgicum*. As to the salvation of souls, it is worth recalling that Stephen Neill concluded in relation to the 1928 Prayer Book that '[t]he most embarrassing thing of all is that Parliament seems to have judged more correctly than the Church'.[2] If so, where was there any true foundation for 'economy'?

One surprising statement by Dr Adam is that '[a] major and widespread example of dispensation as practised in the Church of England is in the area of the alteration of church buildings' (p 86), although on the next page he goes on to qualify this view somewhat. A faculty is no more than a permission to do an act that would otherwise be unlawful but, as the granting of such a permission is authorised by the law itself, it cannot amount to a dispensation within the definition/description put forward by the author. Dr Adam also seems to regard the delegation by chancellors to incumbents of an authority to permit memorials in churchyards as an example of dispensation (p 89) but this, in fact, is no more than a delegation of an existing power to grant permission. The authority nonetheless remains with the chancellor. As it is mere delegation and not a dispensation there cannot be any 'weakening of the Rule of Law' as Dr Adam suggests (p 89) if Churchyard Rules differ from one diocese to another.[3]

To this reviewer the most interesting arguments put forward by Dr Adam are those in relation to recognition of orders conferred by other Churches and the Porvoo Agreement. He concludes that

> The legal basis for this recognition lies in the authority of General Synod and of the archbishops … However, it should be noted that there is a

1 I do not know whether the Ecclesiastical Judges Association still has in its possession a paper entitled 'Aumbries: memorandum by the Chancellor of Newcastle', which refers to a case where in reliance upon the above national policy the Bishop of Newcastle purported to license an aumbry where a faculty had already been refused by the consistory court. When parishioners applied to the court for the removal of the aumbry the Chancellor made no order, on the grounds that it was a matter for the bishop and not the court. In the Memorandum the Chancellor defended his position on the grounds that he might otherwise condemn the actions of his own bishop in the latter's absence. He nonetheless added that he would have to deal with the legality of any reservation of the Holy Sacrament if any future application were to be made for a faculty for an aumbry.

2 S Neill, *Anglicanism* (Harmondsworth, 1960), pp 397–398.

3 In this regard it may be worth noting that the authority to permit memorials in the shape of a cross or heart is not delegated to incumbents in the Diocese of Oxford because such memorials have in the past proved to be unsafe. Nonetheless, after due enquiry and advice from the Diocesan Advisory Committee, they may be, and are, permitted by the current chancellor by faculty.

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> question as to whether the power of the archbishops to declare a Church 'in communion' is sufficient power to override the statutory requirements of the Act of Uniformity and whether an Act of Synod is sufficiently authoritative to do the same. (p 168)

As yet this question has not been tested in the courts.

In summary, this fascinating book is warmly recommended and deserves to be read by historians and lawyers alike. For those interested in the early history of dispensations further information can be found in J Churchill, *Canterbury Administration* (London, 1933) and D Chambers, *Faculty Office Registers 1534–1549* (Oxford, 1966).

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Islam, Europe and Emerging Legal Issues

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There can be little doubt that the enhanced visibility of Islam throughout Europe has resulted in an emergence of legal issues, grounded in religion, with which individual national courts have had to grapple. Many of these cases, because of the way in which they have been decided, have culminated in hearings before the European Court of Human Rights (ECtHR), a Court that, it is asserted in this book, 'has emerged as the most effective transnational human rights institution on earth' (p 2). That may well be right but the theme apparent from the critical studies collected here is that the jurisprudence of the ECtHR illustrates that the record of the Court, when it comes to balancing principles of Islam with the 'traditional values' of Europe, is not an unblemished one.

This notion of 'balancing' is tackled in the opening chapter, where the author examines whether or not the ECtHR, when dealing with cases related to principles of Islam, has followed the usual doctrine of *stare decisis* vis-à-vis similar cases concerning different religions, or whether it has differed in its approach, simply because the religion that is at the heart of the case is Islam. Having reviewed the relevant ECtHR jurisprudence, the author concludes that in some instances (such as when dealing with the autonomy of Muslim religious communities, or religious instruction in public schools) the Court has 'applied to Islam the same principles that it has applied to other religions' (p 59). The author identifies, however, two provisos: one being described as 'Islam in Turkey' (p 60), the