

VOICES IN THE WILDERNESS: THE ESTABLISHED CHURCH OF ENGLAND AND THE EUROPEAN UNION

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Introduction

The meaning, effect and future of establishment within the United Kingdom is a complex matter of history, ecclesiology, sociology and politics.² However, the fact that the Church of England is the established Church in England informs an understanding of its legal relationship with the State and the manner of its self-regulation, recently revisited by the Judicial Committee of House of Lords in the light of the provisions of the Human Rights Act 1998. Despite this, anecdotal experience indicates a reluctance on the part of the Church of England aggressively to confront the Government on matters of proposed legislation. But recent initiatives from within the European Union concerning religious organisations place emphasis on the presence of religion at the heart of modern Europe and within the institutions of the European Union itself. There are also religious initiatives from faith communities, individually and collectively, which seek to inform and influence the social and political agenda of the EU. Against this background, there is an apparent anomaly as to why the Church of England seems to lack visibility at the heart of EU institutions. Various considerations can be discerned, including: its lack of resources; its status as an established church; the jurisprudential anomaly of the Diocese in Europe; its numerically small membership; the fact that European legislation, in practice, is centrally declared but nationally applied. This paper will argue that there is merit in exploring how, both unilaterally and collaboratively, the Church of England might improve its position as a lobbyist at both the Westminster parliament and at the institutions of the EU.

The Church of England and the State

¹ I grateful to Frank Cranmer, Fellow of St Chad's College, Durham, and Honorary Research Associate at the Centre for Law and Religion, Cardiff University, for the generous provision of additional material for this paper and for his insightful comments on previous drafts. I must also thank Professor Norman Doe, Director of the Centre, and Russell Sandberg, an Associate, for their assistance in its preparation. A earlier version of this paper was presented to *The European Union and the Religious Dimensions of Law: Issues and Challenges*, a conference held by The Centre for the Study of Law and Religion, University of Bristol, 12-13 January 2007.

² For analysis and commentary see F Cranmer, 'Church-State Relations in the United Kingdom: A Westminster View' (2001) 6 *Ecc LJ* 111; and D McClean, 'The Changing Legal Framework of Establishment' (2004) 7 *Ecc LJ* 292. See also: P Cornwell, *Church & Nation* (1983), S Lamont, *Church and State: Uneasy Alliances* (1989), C Buchanan, *Cut the Connection - Disestablishment and the Church of England* (1994), J Moses, *A Broad and Living Way - Church and State, a Continuing Establishment* (1995), M Furlong, *C of E - The State It's In* (2000), P Avis, *Church, State and Establishment* (2001), T Hobson, *Against Establishment - An Anglican Polemic* (2003), K Medhurst and G Moyser, *Church and Politics in a Secular Age*, and D Ferguson, *Church, State and Civil Society* (2004).

The curtailment of papal authority at the time of the Reformation and the recognition of the Sovereign as Supreme Governor of the Church of England created a discernible unity between the Church and the State, the products of which are evident today.³ In the context of a recent appeal on an obscure point of law under the Chancel Repairs Act 1932, the judicial committee of the House of Lords enjoyed a rare opportunity to consider the constitutional status of the Church of England in contemporary jurisprudence.⁴ Lord Nicholls of Birkenhead observed:

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 organisation. 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 organisation.⁵

Lord Hope of Craighead stated, ‘the Church of England as a whole has no legal status or personality’.⁶ Whilst acknowledging that the Church of England had regulatory functions within its own sphere of activity, he concluded that it could not be considered to be a part of government, observing that the State has not surrendered or delegated any of its functions or powers to the Church: ‘The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.’⁷ Lord Rodger of Earlsferry, in a concurring speech, observed that, ‘the juridical nature if the Church [of England] is, notoriously, somewhat amorphous’.⁸ He concluded,

The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position but they do not make it a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore LJ. In so far as the ties are intended to assist the Church, it is to accomplish the Church’s

³ For an overview of the present position, see D McClean, ‘State and Church in the United Kingdom’ in G Robbers (ed): *State and Church in the European Union*, Second Edition (2005).

⁴ See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, [2003] 3 WLR 283 HL.

⁵ *Ibid* per Lord Nicholls of Birkenhead at para 13.

⁶ *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead. He continued ‘There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibdin, Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said: “A Church which is established is not thereby made a department of state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.” The Church of England is identified with the state in other ways, the monarch being the head of each.’

⁷ *Aston Cantlow* (supra) at para 61 per Lord Hope of Craighead. It is arguable that the Church of England Assembly (Powers) Act 1919, as amended by the General Synod Measure 1969, represents the delegation to General Synod of Parliament’s legislative function. Measures are primary legislation passed by the General Synod, albeit subject to parliamentary approval.

⁸ *Ibid* at para 154 per Lord Rodger of Earlsferry.

own mission, not the aims and objectives of the Government of the United Kingdom.⁹

These assertions may seem both obvious and self-evident, but the Court of Appeal had previously reached the opposite conclusion on the specific question of whether a parochial church council is a public authority for the purposes of the Human Rights Act 1998.¹⁰ The Court of Appeal regarded the established nature of the Church of England as imbuing its component institutions with a governmental function sufficient to render them public authorities. The analysis of the House of Lords is much to be preferred, being more cogent and sophisticated and the consequent reversal of the Court of Appeal's ruling accorded with widespread academic opinion.¹¹

However, as with all aspects of the United Kingdom's unwritten constitution, the precise relationship between the Church of England and Her Majesty's government is liable to evolution. One of Gordon Brown's first acts as Prime Minister was to issue a Green Paper, *The Governance of Britain*,¹² in which he put forward proposals for further constitutional change, including the question of senior church appointments. In a statement to the House of Commons he said that 'The Church of England is, and should remain, the established church in England. Establishment does not, however, justify the Prime Minister influencing senior church appointments, including bishops.'¹³ The Green Paper outlined the role which the Prime Minister and the Government should play in Church appointments by reference to four principles:

- the Government reaffirms its commitment to the position of the Church of England by law established, with the Sovereign as its Supreme Governor, and the relationship between the Church and State. The Government greatly values the role played by the Church in national life in a range of spheres;
- The Queen should continue to be advised on the exercise of her powers of appointment by one of her Ministers, which usually means the Prime Minister;
- in choosing how best to advise The Queen on such appointments, the Government believes in principle that the Prime Minister should not play an active role in the selection of individual candidates. Therefore, the Prime Minister should not use the royal prerogative to exercise choice in recommending appointments of senior ecclesiastical posts, including diocesan bishops, to The Queen; and

⁹ Ibid at para 156 per Lord Rodger of Earlsferry. For a full discussion see M Hill, *Ecclesiastical Law* (Third edition, Oxford University Press, 2007) at para 1.19.

¹⁰ [2002] Ch 51 CA, Sir Andrew Morritt V-C, Robert Walker and Sedley LJ.

¹¹ See D Oliver 'Chancel Repairs and the Human Rights' [2002] *Public Law* 651; I Leigh 'Freedom of religion: public/private, rights/wrongs' in M Hill (ed) *Religious Liberty and Human Rights* (University of Wales Press, 2002) 128-158; I Dawson and A Dunn, 'Seeking the principle: chancels, choices and human rights' (2002) 22 *Journal of Legal Studies* 238; S Whale, 'Pawnbrokers and parishes: the protection of property under the Human Rights Act' [2002] EHRLR 67 at 78-79; and M Hill's case note and editorial in the *Ecclesiastical Law Journal* at (2001) 6 Ecc LJ 173 and (2004) 7 Ecc LJ 246-249 respectively. Note, however, the partial dissent of Lord Scott of Foscote in the House of Lords' decision in *Aston Cantlow* at paras 130-132.

¹² Government Green Paper, *The Governance of Britain* (July, 2007: Cmnd 7170).

¹³ HC Deb (2006-07) 3 July 2007 c 817. The Green Paper itself asserts: 'The Church of England is by law established as the Church in England and the Monarch is its Supreme Governor. The Government remains committed to this position'. See *The Governance of Britain* (above) at para 57. Curiously this appears in the Green Paper in a chapter entitled 'Limiting the powers of the executive' (ch 1).

- the Church should be consulted as to how best arrangements can be put in place to select candidates for individual ecclesiastical appointments in line with the preceding principles.¹⁴

The Government's initiative was subsequently welcomed by the General Synod at its July 2007 Session, regarding it, amongst other things, as the prospect of the Church of England achieving the 'decisive voice in the appointment of bishops' for which Synod voted in 1974.¹⁵

The presence of Anglican bishops in the House of Lords is but one part of the broader question of wholesale reform of the Upper House of Parliament which has been on the political agenda since the Labour Government came into power in 1997, although when the matter was last debated in Parliament in March 2007, the two Houses came to precisely opposite conclusions as to the composition of a reformed second chamber.¹⁶ The Minister of Justice and Lord Chancellor is to reconvene the informal cross-party group on Lords reform in the hope of achieving some kind of consensus, but whether there is to a continuing place for Bishops, or additional places for leaders of other faith communities, remains a matter for conjecture.¹⁷

Influencing domestic legislation

Anecdotal experience would seem to indicate a reluctance on the part of the Church of England aggressively to confront the Government on proposed legislation. There are a number of possible reasons for this. First, there is a perennial English reticence. The sophisticated lobbying industry, familiar to Americans on Washington DC's Capitol Hill, is much less developed in the United Kingdom. The Churches Main Committee exists as a consultative body between Parliament and the major religious organisations in the United Kingdom.¹⁸ Its remit is broad but its effectiveness is through gentle influence rather than the adoption of the tactics of the pressure group. There is certainly no culture of the Church of England publicly lobbying Parliament.

¹⁴ Government Green Paper, *The Governance of Britain* (July, 2007: Cmnd 7170) at para 62. See F Cranmer, 'Parliamentary Report' (2008) 10 Ecc LJ 97.

¹⁵ See the motion (of which this forms part) passed by 297 votes to 1 in a debate by the General Synod on 9 July 2007 on the Pilling Report, *Talent and Calling: Report of the Senior Church Appointments Review Group* (GS 1650, 2007).

¹⁶ See *A House for the Future*, the Report of the Royal Commission on Reform of the House of Lords (Cmnd 4534, January 2000) which recommended that the representation of the Church of England remain though cut from 26 bishops to 16 representatives, chosen however the Church itself decides and not necessarily bishops. Alongside these would be five Church representatives from other parts of the United Kingdom, five from other Christian Churches within England, and five from other faiths. This was superseded, *inter alia*, by a White Paper, *The House of Lords: Reform* (Cmnd 7027, February 2007), published shortly before the House of Commons expressed a preference for an entirely elected second chamber (on 7 March 2007) and the House of Lords for one that was wholly appointed (on 14 March 2007).

¹⁷ The Rt Hon Jack Straw MP confirmed, however, that the Government would prefer a second chamber that was fully elected or substantially so, and intended to put that option to the electorate in the next Labour Manifesto: HC Deb (2006–07) c 449. This would leave little (if any) room for the bishops or for other religious leaders.

¹⁸ The Churches Main Committee was set up in 1941 to coordinate negotiations with the Government over compensation for war damage. It is now an ecumenical body that acts as a channel of communication between the churches and government – in the widest sense – on issues of secular law as they affect religion.

Take, by way of example, the Gender Recognition Act 2004. The Act permits transgendered individuals to live under their acquired gender. The right of a religious organisation to regulate its internal affairs in accordance with its doctrine is enshrined under Article 9 of the ECHR and it is a matter to which the court must have particular regard under section 13 of the Human Rights Act 1998.¹⁹ Members of a religious organisation are entitled to ask individuals whether they have undergone or are undergoing gender reassignment. Those individuals are entitled to consent to the member of the religious organisation passing on that information. In the absence of such consent, under the 2004 Act the member exposes himself to criminal penalty and is liable to be fine of up to £5,000 if he passes on that information. The doctrine and polity of many religious organisations make it essential that such information be communicated to other members acting in an official capacity, albeit discreetly and confidentially, and limited to individuals who have a need to know. Such necessity to communicate engages Article 9.

Thus provision needed to be made under section 22(5) prescribing that disclosure of information in such circumstances is not to constitute a criminal offence. Such provision is proportionate and appropriate having regard to competing rights of the transgendered community under Article 8 and Article 12. It is now to be found in the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) Order 2005. The exemption was hard won from the Department of Constitutional Affairs with a coalition of religious organisations, animated by the Mormon church,²⁰ but including the Roman Catholics, Methodists, Baptists, Muslims, Jews, Baha'i, Sikhs, and Buddhists. Several of them had no doctrinal objection to gender re-assignment but wished to show solidarity with other faith communities on the fundamental issue of religious liberty. Noticeable on the fringe, however, was the Church of England, which supported the general religious exemption but was somewhat anxious not to be seen openly to be opposing legislation which had passed through Parliamentary, membership of whose upper house includes Anglican archbishops and bishops. The established status of the Church of England could be seen as emasculating it from effective lobbying. It is arguable that the absence of Lords Spiritual from a reformed second chamber would free the bishops to lobby for specific legislative provision as well as shaping government opinion and policy.²¹ However, this is to overlook the many subtle ways in which bishops help to inform parliament of spiritual concerns across a broad range of issues. The informality of this benign influence, by its very nature, is not widely reported and its impact and effect are not amenable to scientific assessment. Alternative means of bringing religion into dialogue with government are currently merely embryonic and seem to lack the depth of the traditional methods.²²

¹⁹ Note however the Equality Act (Sexual Orientation) Regulations 2007 which now seeks to outlaw discrimination on the ground, amongst other, of gender reassignment.

²⁰ A popular shorthand for the more correctly styled Church of Jesus Christ of Latter-day Saints.

²¹ See generally R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford, 2005) particularly ch 5: 'Is Establishment Consistent with Religious Freedom?' pp 127-154 which concludes, entirely correctly, that 'non-coercive state endorsement of religion is consistent with freedom of religion'.

²² In August 2006 the United Kingdom Government set up a Commission on Integration and Cohesion to consider how local areas could make the most of diversity while responding to the tensions it might cause. The Commission's final report, *Our Shared Future*, (www.integrationandcohesion.org.uk) included lots of references to faith-communities, and boldly asserted that, 'Faith communities should be encouraged to work with Government, the LGA, and other relevant agencies to develop a programme to help increase 'religious literacy' on the part of public agencies and the ability of these agencies to establish effective patterns of engagement with religion and belief groups as part of wider

European Union Initiatives

There have been a number of recent initiatives amongst the institutions of the European Union, seeking to focus upon the spiritual dimension of Europe. At the time of the Maastricht Treaty on European Union 1992, for example, a speech by Jacques Delors led to the movement 'A Soul for Europe', its purpose 'to involve religious communities in dialogue with European institutions'. The movement has six members: Commission of the Roman Catholic Bishops' Conferences of the European Community; Church and Society Commission of the Conference of European Churches; Orthodox Liaison Office; Conference of European rabbis; European Humanist Federation; Muslim Council for Co-operation in Europe.

In 1999, on the initiative of President Romano Prodi, one section of the European Commission's Group of Policy Advisers was assigned the task of 'dialogue with religions, churches and humanisms', headed by Dr Michael Weninger. Furthermore, the Charter of Fundamental Rights 2000 (Nice) guarantees for religious, cultural and linguistic diversity; freedom of religion; right to religious education; prohibition against discrimination on religious grounds. The Convention on the Future of the European Union (set up by the European Council in 2001), aiming towards greater integration (moving from an economic to a social and political community), set up a Forum consisting of 'structured networks' or 'organisations representing civil society' which included religious organisations. In 2003 Romano Prodi established a Reflection Group on the Spiritual and Cultural Dimension of Europe to debate on whether there should be a reference to God in the draft EU Constitution. The underlying concept of the EU in its present form is far removed from that of the European Economic Community out of which it has grown.

The ill-fated Treaty Establishing a Constitution for Europe (Treaty of Amsterdam) contained no explicit reference either to God or to Christianity in the main body of the text, but its Preamble referred to religion in its very first sentence: 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law...'. Article I-52 then went on to treat the status of churches and of non-confessional organisations in an even-handed way, juxtaposing harmonisation with diversity:

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

public engagement; to strengthen their engagement with the process of policy development and implementation, and enable local areas to make targeted use of their resources'. As recently as 14 November 2007 the Prime Minister himself made proposals for a new forum of head-teachers to advise on protecting young people from extremism and encourage social cohesion, a Government-sponsored national framework for teaching religious education in schools, including a multi-faith syllabus, and an advisory group to work with local communities to support the citizenship education classes run by mosque schools. The Government also intends to publish a Green Paper to encourage inter-faith groups to come together in every constituency: HC Deb (2007-08) 14 November c 667 ff.

The Chairman of the drafting Convention, Valéry Giscard d'Estaing, deliberately left the issue open when he drafted the document, inviting a petition for the inclusion of some religious reference. 'I have chosen not to insert the reference to the Christian heritage in the constitution,' he was reported as saying. 'Rather, I appeal to you to persuade me of its necessity.'²³

Opinions were divided:²⁴ the Government of Poland was strongly in favour of some specific reference to Christianity while France, with almost a century of *laïcité* behind it, was opposed. The European Conference of Roman Catholic Bishops (COMECE) suggested that '[a]t a prominent place, in the centre between the cultural and the humanist inheritance, the religious inheritance of Europe forms a source of inspiration for the entire Constitutional Treaty'.²⁵ By making reference to the religious inheritance of Europe, argued COMECE, the Treaty implicitly accepted the predominant contribution made by Christianity to the Europe of today and an explicit mention of God or of Christianity would have been a strong signal supporting the identity of Europe.²⁶

Following the abandonment of the proposed EU Constitution, the Reform Treaty of Lisbon,²⁷ which followed in its stead, is somewhat circumspect in its mention of religion. Article 8 of the amends the previous Article 6 to recognise 'the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000'. Article 23 states that 'Article 10 shall be replaced by the following: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."'

The Parliamentary Assembly of the Council of Europe has been concerned with the relationship between religion and society at large for some considerable time. Reports and subsequent recommendations have included *Religion and Democracy* (1999), *Illegal Activities of Sects* (1999), *Russia's Law on Religion* (2002), *Religion and Change in Central and Eastern Europe* (2002), *Education and Religion* (2005) and *Freedom of Expression and Respect for Religious Beliefs* (2006). In June 2007 the Assembly debated three reports – on *New Steps in the Field of Intercultural and Interconfessional Dialogue*, on *The Relations between State, Religion and the Individual*, on *Blasphemy, Religious Insults and Hate Speech* – and an opinion on *European Muslim Communities Confronted with Extremism*. A related report that was not debated in June was on the *Dangers of Creationism in Education*.

²³ Ambrose Evans-Pritchard: '1m Christians sign EU religion plea' *Daily Telegraph* (London 25 November 2004).

²⁴ I am grateful to my colleague Frank Cranmer for this material and its analysis which I draw from his unpublished paper 'The Europeanisation of Church Law and the Common Law of Religion in the EU' delivered in Stockholm in November 2007.

²⁵ COMECE: *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation* (Brussels 11 March 2005) p 14.

²⁶ COMECE: *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation* (Brussels 11 March 2005) p 14. 'As a matter of historical fact, it is Christianity and the Christian message that have built the 'inheritance of Europe' from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality and the rule of law. The Preamble does state that these values have derived from the religious inheritance. The *Constitutional Treaty* draws its inspiration from specific traditions that have shaped Europe, thus implicitly referring to the centre of this tradition, which is Christianity.'

²⁷ IGC 24 July 2007: see

<http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317&lang=en&mode=g> accessed 27 September 2007.

The concerns of the Assembly have centred primarily on social cohesion and religious extremism. In June 2007 the Assembly adopted the Recommendations on the State, Religion, Secularity and Human Rights (Rec 1804) and on Blasphemy, Religious Insults and Hate Speech (Rec 1805). The key points of Recommendation 1804 can be marshalled into three groups.

First, historically, religion has been an important feature of European society; citizens have a right to freedom of religion and faith-communities are also part of civil society with a role to play in the wider national community; the Council of Europe welcomes and respects religious plurality; the separation of church and state is one of Europe's shared values; governance and religion should not be mixed; but the European Court of Human Rights recognises the right of individual countries to organise those relations in various ways so long as they comply with the Convention.

Secondly, however, it recognises that the practice of religion has declined markedly but, at the same time, Muslim communities in virtually all the Council of Europe member states are growing stronger; that religion has become a central issue of debate; that intercultural dialogue and its religious dimension are important but inter-religious dialogue is not a matter for member states or for the Council.

Thirdly, it shows that fundamentalism, terrorisms, racism, xenophobia and ethnic conflicts often have religious aspects; that governments should take account of the special capacity of religious communities to foster peace, co-operation, tolerance, solidarity, intercultural dialogue; that education, especially school education, is crucial; and children should be taught about the origins of all religions; that freedom of religion is protected by Article 9 of the European Convention but must not run counter to other fundamental rights, nor may states allow the dissemination of religious principles which, if put into practice, would violate human rights; and that freedom of expression is one of the most important human rights and cannot be restricted out of respect for religious sensibilities.

The Assembly proceeded to recommend, inter alia, setting up an institute to devise syllabuses, teaching methods and educational material for the study of the religious heritage of the member states and promoting the objective, balanced teaching of religions. More controversially, it proposes that all religious leaders should be required to undertake human rights training, especially those involved in the education of young people – but it fails to explain precisely what is 'a religious leader'.

Religious Initiatives

Religious groups see Europe itself as a particular field of religious activity on a regional basis. For example, the Papal Exhortation: *Ecclesia in Europa* in 2003 ('Jesus Christ alive in his church, [is] the source of hope for Europe'). Several religious alliances have been formed to effect dialogue: The Conference of European Churches (CEC) has an office in Brussels for its Church and Society Commission. The Commission has a number of working groups on EU legislation. There are seven members: Church of England, Church of Denmark Church of Finland, the Netherlands Council of Churches, Council of Protestant Churches of Portugal, Lutheran Church of Slovakia, and the *Evangelische Kirche in Deutschland* (EKD). CEC is 'an ecumenical fellowship of churches in Europe which confess the Lord Jesus Christ as God and Saviour according to the Scriptures and seek to fulfil together their common calling to the glory of the one God, Father, Son and Holy Spirit'. The intention was that the churches are to support one another in the

exercise of the ministry of reconciliation incumbent on them all. At its fourth assembly in 1964 the Conference adopted its first Constitution. The churches seek by the grace of the Triune God to pursue the path of growing conciliar understanding. In faithfulness to the Gospel, as witnessed in Scripture and transmitted in and through the Church by the power of the Holy Spirit, 'they seek to grow in the fellowship (*koinonia*) of faith and love' and to make a common contribution to the church, to the safeguarding of life and the wellbeing of all humankind.²⁸

The Roman Catholic Church has in Brussels a Commission of the (Roman Catholic) Episcopal Conferences in Europe. COMECE meets occasionally with CEC. CEC and COMECE meet with the President of the EU, and specialist work is done by attending meetings, presenting evidence and in lobbying the EU.²⁹ Critics maintain that the Catholic Church is over-represented in the institutions of the EU. It is certainly true that newer religious movements are under-represented, in many instances to vanishing point.

The *Charta Oecumenica* (2001): 'The Charter is a set of 'Guidelines for the Growing Cooperation among the Churches in Europe'. It was established by the Conference of European Churches (CEC) and the (Roman Catholic) Council of European Bishops' Conferences. *The nature and purpose of the charter*: 'In this spirit, we adopt this charter as a common commitment to dialogue and co-operation. It describes fundamental ecumenical responsibilities, from which follow a number of guidelines and commitments. It is designed to promote an ecumenical culture of dialogue and co-operation at all levels of church life, and to provide agreed criteria for this. However, it has no magisterial or dogmatic character, nor is it legally binding under church law. Its authority will derive from the voluntary commitments of the European churches and ecumenical organisations. Building on this basic text, they can formulate their own local addenda, designed to meet their own specific challenges and resulting commitments'.³⁰

The form and subjects of the charter: The Charter consists of: a preamble and three Parts: each part consists of the statement of an objective and commitments: called together to unity in faith; proclaiming the gospel together; moving towards one another; acting together; praying together; continuing in dialogue; participating in the building of Europe; reconciling peoples and cultures; safeguarding the creation; strengthening community with Judaism; cultivating relations with Islam; encountering other religions and world views. The document is commended to the churches 'to be adopted and adapted to each of their local contexts'. *Proclamation of the Gospel*: 'The most important task of the churches in Europe is the common proclamation of the Gospel, in both word and deed, for the salvation of all'. 'The widespread lack of corporate and individual orientation and falling away from Christian values challenge Christians to testify to their faith, particularly in response to the quest for meaning which is being pursued in so many forms'.³¹ *Inter-church conflict*: 'In the event of conflicts between churches, efforts towards mediation and peace should be initiated and/or supported as needed'.³² *Common (social) responsibility in Europe*:

²⁸ Preamble to the Constitution of the Conference of European Churches (adopted 1992).

²⁹ For their work see: D McClean, 'Letter from Brussels', (2002) 6 Ecc LJ 375.

³⁰ *Charta Oecumenica* (2001) Preamble.

³¹ This witness requires increased dedication to Christian education (eg catechism classes) and pastoral care in local congregations. It is important 'for the whole people of God together to communicate the Gospel in the public domain, which also means responsible commitments to social and political issues'.

³² The churches commit themselves: 'to act together at all levels of church life wherever conditions permit and there are not reasons of faith or overriding expediency mitigating against this; to defend the rights of minorities and to help reduce misunderstandings and prejudices between majority and minority churches in our countries': CO (2001) II.4.

‘Christianity constitutes an empowering source of inspiration and enrichment for Europe’.³³ *Reconciling peoples and cultures*: Diversity of regional, national, cultural and religious traditions is enriching; the churches are called upon to serve together the cause of reconciliation among peoples and cultures.³⁴

Several other churches also have an individual presence in Brussels. The Brussels Bureau of the *Evangelische Kirche in Deutschland* has a small full-time staff to act as a channel of communication between the EU and the EKD (including making formal and informal representations). Britain’s Yearly Meeting of the Religious Society of Friends maintains a small office: the Quaker Council of European Affairs. There is also a European Network of Health Care Chaplaincy which has issued Standards for Health Care Chaplaincy in Europe (2002): its areas of activity include: to proclaim and defend the infinite value and dignity of every person; to be a reminder of the existential and spiritual dimension of suffering, illness and death; to endeavour to see that the spiritual needs of people from different religious or cultural backgrounds are met, respecting everyone’s beliefs; to provide research, advocacy, and to assess and evaluate the effectiveness of provision for spiritual care.

In the Autumn of 2007, the Church of England created a new post based at the Anglican chaplaincy at Holy Trinity, Brussels whereby the Archbishop of Canterbury would have a representative at the European Institutions in Brussels. This is an important pioneering initiative, the impact of which will be monitored with interest, when the post is taken up in 2008. The focus for the appointee, in the first instance, will be issues of climate change but it is to be hoped that a broader remit and a more animated mode of intervention will be carved out over time.

The visibility of the Church of England

In the light of the religiosity which permeates the European Union and contributes substantially to the concept of identity, why does the Church of England seem to lack visibility in Europe? A number of possible reasons may be ventured:

1. *Resources*: it does not have the funds to maintain a diplomatic mission at the institutions of the European Union³⁵ nor does it have the skills constructively to feed into its legislative agenda;
2. It is a *state church*, or more accurately the established church in one part of the geographical territory of the state. The Diocese in Europe, being a creature of statute,³⁶ is a jurisprudential anomaly consideration of which is beyond the scope

³³ The parties undertake to work towards ‘a humane, socially conscious Europe, in which human rights and the basic values of peace, justice, freedom, tolerance, participation and solidarity prevail’; and ‘reverence for life, the value of marriage and the family, the preferential option for the poor, the readiness to forgive, and in all things compassion’. They commit themselves: ‘to seek agreement with one another on the substance and goals of our social responsibility, and to represent in concert, as far as possible, the concerns and visions of the churches vis-à-vis the secular European institutions; to defend basic values against infringements of every kind; to resist any attempt to misuse religion and the church for ethnic or nationalist purposes’: CO (2001) III.7.

³⁴ They ‘value the person and dignity of every individual as made in the image of God’ and ‘defend the absolutely equal values of all human beings’; they join forces in *the process of democratisation in Europe*; and non-violent resolution of conflicts: CO (2001) III.8.

³⁵ It remains to be seen whether the recently advertised appointment of a representative of the Archbishop of Canterbury to the European Union institutions in Brussels will have any significant in raising the profile of the Church of England and increasing its influence.

³⁶ Diocese in Europe Measure 1980.

of this paper.³⁷ The Church of England's interests are national and not supra- or trans-national.³⁸

3. It is a *numerically small church*. The number of Anglicans whose names are on the rolls of the various chaplaincy councils scattered throughout the Diocese in Europe³⁹ are statistically few in number. Even factoring in the Old Catholics, the Spanish Reformed Episcopal Church, the Lusitanian Church, and members of congregations of the Episcopal Church of the United States of America, their number is modest. Most EU Anglicans reside within the UK.
4. European legislation, in practice, is centrally declared but nationally applied. Unlike Regulations, automatically binding on EU member states, Directives need to be brought into force by domestic legislation in each such state. Dr Julian Rivers highlights specific techniques of accommodation – ways by which EU law making is localised.⁴⁰ The *religious element is felt at a local level* and, arguably, it is here that the effective lobbying on the part of religious organisations should be happening. If finance is limited, it is best spent where it can be most effective. However, the logic of combining with faith communities Europe-wide to influence the content of the Directive, would greatly ease the pressure on all churches at national level to cajole their own Governments.⁴¹
5. There seems to be a tacit assumption that all religious organisations will want the same concessions from both EU and national legislators. Most likely they will not. Their interests are not necessarily coterminous, nor may they be in agreement as to the strategy and profile to be adopted in any negotiation. But, as the UK transgender experience indicates, they all have an interest in the promotion of religious liberty and tolerance: and this can produce some unexpected, almost unholy, alliances.

Equal treatment directive

³⁷ Its governing instrument is a constitution, paragraph 2 of which declares that the diocese 'shall be deemed to be within Province of Canterbury'. Paragraph 22(a) makes provision for the canons and ecclesiastical law of the Church of England to apply in the diocese 'so far as the local law of any state or country shall permit' and 'with such modifications or exceptions as ... are deemed appropriate by the Archbishop of Canterbury acting with the concurrence of the vicar general of the Province ...'.

³⁸ However if one speaks in terms of the Anglican Communion, autonomous Churches throughout the globe each of whom are is formerly in communion with the See of Canterbury, then there is a universality of issues to be considered and Europe-wide matters legitimately be addressed. The Anglican Communion maintains a permanent observer and modest mission at the United Nations in New York.

³⁹ The territorial jurisdiction of which extends far beyond EU states.

⁴⁰ See Dr Rivers' paper presented at *The European Union and the Religious Dimensions of Law: Issues and Challenges*, a conference held by The Centre for the Study of Law and Religion, at the University of Bristol, School of Law on 12-13 January 2007. For a summary of the conference see J Rivers, 'The European Union and the Religious Dimensions of Law' (2007) 9 Ecc LJ 221.

⁴¹ A number of Church of England bishops of differing churchmanships and, presumably, political beliefs, together with several participants in this conference, attended *Same-Sex Unions and the Churches: Problems and Responses in an European Perspective*, an invited symposium organized by the Ecclesiastical Law Society in London, 31 March 2006. For a full summary, see C Hill, 'Same-Sex Unions and the Churches: Problems and Responses in a European Perspective' (2007) 9 Ecc LJ 120. The theme was the manner in which religious organisations respond to the gay marriage legislation in EU states. Each of the bishops commented that they wished they had attended such a symposium before, rather than after the legislation had been framed. As Professor Cole Durham of Brigham Young University observed at the Bristol conference (n 00 above), what is needed is an 'early warning' system giving notice of flash points where the Churches are likely to have a legitimate interest.

A further example, this time derived from the Employment Equality (Sexual Orientation) Regulations 2003,⁴² provides a real-life illustration of the working out of these issues. In *R v Secretary of State for Trade and Industry ex parte Amicus and others*,⁴³ Mr Justice Richards was asked to consider challenges brought by seven public sector unions in relation to several of the Regulations. The challenges were targeted against regulations that allowed exceptions to the general prohibition against discrimination on the grounds of sexual orientation where employment or vocational training is for the purposes of an organised religion.

The Judge was being asked to rule on the correct balance to be struck between these two competing rights: the right of non-discrimination on the grounds of sexual orientation and the right to manifest one's religion or beliefs. At the core of the case were submissions put before the Court by CARE (Christian Action Research Education), the Evangelical Alliance and the Christian Schools Trust who were permitted to intervene in the litigation. They submitted that their ability to hold their religious beliefs and to carry on their teaching and practices would be undermined if forced to employ persons whose sexual practices and beliefs about those sexual practices were at odds with their own beliefs, teachings and practices. It was argued, employees working for Christian organisations were expected to behave in accordance with a Christian ethos and belief. Employing those who did not share this ethos would fatally undermine such an organisation's ability to achieve its objectives.

The public service unions was maintained that the exclusions contained within the Regulations permitting religious organisations to discriminate against potential or existing employees or trainees on the grounds of sexual orientation were too wide and, therefore, were incompatible with the obligations imposed on the United Kingdom by an EU Directive and with Articles 8 and 14 of the European Convention on Human Rights.

The Judge held that the exception was intended to be a very narrow one and, on its proper construction, was very narrow, affording an exception only in very limited circumstances. He said that the tests set out were objective not subjective and were going to be far from easy to satisfy in practice. He held it unlikely that this exception would apply to the various situations put forward on behalf of the Applicant unions to illustrate their concerns, namely a church unwilling to employ a homosexual man as a cleaner; a Catholic school for girls dismissing a science teacher on learning that she had been in a lesbian relationship; a shop selling scriptural books and tracts unwilling to employ a lesbian as a sales assistant; or an Islamic institute unwilling to employ as a librarian a man appearing to be homosexual.⁴⁴

There is now a second wave of EU legislation, this time concerning sexual orientation discrimination in the provision of goods and services.⁴⁵ Religious organisations mounted

⁴² SI 2003/1661, giving effect to Council Directive 2000/78/EC.

⁴³ [2004] EWCA 860.

⁴⁴ For an analysis of the judgment see L Samuels, 'Sexual Orientation Discrimination and the Church: Balancing Competing Human Rights' (2005) 8 Ecc LJ 74. A high profile decision, albeit only at employment tribunal level has been the case of *Reaney v Bishop of Hereford* (1602844/2006), judgment 17 July 2007 noted at (2008) 10 Ecc LJ 131, considered the ambit of the exemption is a fact-specific case.

⁴⁵ The Northern Ireland High Court recently gave consideration to the particular legislation brought into force in the Province, namely the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (Statutory Rule 2006 No 439). The decision of Mr Justice Weatherup is lengthy and finely nuanced: *R (on the application of the Christian Institute and others) v The Office of the First Minister*

much-publicised protests outside the Palace of Westminster, supported, in the columns of the *Times* newspaper by a former Lord Chancellor.⁴⁶ In this instance the protest was in vain, and the legislation was confirmed,⁴⁷ but it emphasises, however, the real need for greater dialogue and earlier intervention on the part of religious organisations.

Postscript

Religion presents a problem for national governments and for the institutions of the EU. Whilst content to afford respect to the tradition of faith bodies informing the structure of society and governance as a matter of historic fact, contemporary pluralism places a severe strain on the dynamic tension between Church and State particularly where establishment gives rise to benefits and burdens for a particular denomination. The difficulty lies in protecting a voice for religion, albeit plurally, and in resisting the hegemony of secularism. These voices need to be heard in the heart of the EU just as much as in the Westminster parliament and the Church of England must become more adroit so as to operate to best effect both at home and abroad.

© Professor Mark Hill, May 2007 (November 2007)

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and Deputy First Minister (unreported) Weatherup J. For the position in England and Wales, see the Equality Act (Sexual Orientation) Regulations 2007, and the treatment given to this legislation in R Sandberg and N Doe, 'Religious Exemptions in Discrimination Law' (2007) 66(2) *Cambridge Law Journal* 302.

⁴⁶ Lord MacKay of Clashfern, *Times* 9 January 2007.

⁴⁷ For Ireland at least – the battle is yet to be fought in England and Wales. A Statutory Instrument is expected in April 2007.

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