CHURCH AND STATE

A mapping exercise

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CONTENTS

Summary of Key Points

- Present relationships between the Church of England and the state are to be found based not so much in the Reformation as in the revolutionary settlement of 1688/89 and subsequent action taken, including on the union with Scotland in 1706/7, to preserve a protestant succession to the Crown. 'Establishment' is a portmanteau, elastic term rather than a fixed, immutable concept.

- Whereas initially state and Church were linked in a joint enterprise of governance based on a theory of religious uniformity, over time the state became dominant both in relieving the effects of the harshest civil disabilities imposed for nonconformity and in removing the hegemonic position of the Church in the areas of interpersonal relations and social control for which it had been regarded as chiefly responsible.

- Current arrangements span something more than a merely vestigial residue of the former partnership, especially in the relationship with the sovereign as Supreme Governor of the Church and in episcopal membership of the House of Lords.

- All episcopal and many other senior church appointments are made by the Crown on the advice of ministers. The Church has nowadays more influence in Crown appointments but ultimate Crown/ministerial control remains real.

- The Church retains access to a unique method of legislating for its affairs. Although this still gives Parliament the last word, the Church has acquired the legislative initiative and in practice obtained autonomy over issues of worship and doctrine

- Whilst taxpayer support for its educational and chaplaincy work is substantial, it could not be said that the Church of England is especially or uniquely privileged by the state financially. Not since the first half of the nineteenth century has it received any state subvention not equally available to other denominations.

- Establishment in Scotland has a wholly different character from its meaning in England. The extent to which the Church of Scotland is independent of the state has been thrown into some doubt by a recent House of Lords decision.

- The disestablishments in Ireland (1871) and Wales (1920) were the product of special local circumstances and do not provide models for disestablishment in England. This is because neither had to confront the core of the constitutional settlement fashioned between 1688 and 1707.

- At the Reformation the Scandinavian forms of establishment followed even more erastian models than in the UK, and in societies that were generally more homogeneous and which experienced less religious fracturing subsequently. In most cases, they have been moving to give more autonomy to the churches, though this is least true of Denmark.

- The position in the rest of Europe varies a good deal between countries but not infrequently with a larger engagement of the state than is the case in England. Forms of church tax, for example, are not confined to Scandinavia and there is a good deal more direct subvention by the state than would be contemplated as politically feasible in the UK.

ABSTRACT

This study seeks to describe the nature and extent of current relations between the Church of England and the British state. At the same time, to give depth of field, it looks at analogous arrangements in Scotland and in other European countries, especially in Scandinavia where the relationship between church and state has been historically particularly close. The study shows that in England, although the church/state relationship has greatly changed over the years, what remains is more than an inconsiderable residue. Being confined to a mapping exercise, the study does not enter into argument about the merits of the arrangements or the options for change. It follows that it is not concerned, for example, with questions of disestablishment. On the other hand, it does show that such disestablishment as has occurred – in Ireland and Wales – does not provide viable models for similar initiatives in England.

PREFACE

What follows is the work of many hands. I am particularly grateful to Frank Cranmer and John Lucas for their indispensable contributions on other European churches and the disestablishments in Ireland and Wales. Frank Cranmer also contributed much knowledgeable bibliographical advice.

All of us are also most appreciative of all those who took time to comment on previous drafts of the text. In every case their observations improved accuracy and enriched understanding.

For the remaining errors of fact, judgement or omission the Constitution Unit alone is responsible.

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Introduction

> …there is not any man of the Church of England but the same man is also a member of the commonwealth; nor any man a member of the commonwealth who is not also of the Church of England…(Hooker: 320)

The purpose of this study is to map the current extent of relations between the Church of England and the United Kingdom state. Inevitably, there is much history to be covered. Modern England is obviously not the England of Hooker who died in 1600. Whilst the quotation above asserted what was even at the time only arguably true of the post 1559 Elizabethan state, modern England is a pluralistic society beyond any conception of sixteenth century understanding.

In the 2001 UK census, 92% of respondents answered a voluntary question about their religious status. Of those replying, 72% said they regarded themselves as Christians of all denominations, nearly 3% (1.6 million) were Muslim, and a further 3% together were (in order of size) Hindu, Sikh, Jewish and Buddhist – none accounting individually for more than 1%. In addition, about 16% of respondents said that they had no religion.[1] Even what seem small percentages now in a much larger population refer to numbers that Hooker, in an England of perhaps 2.5 million, would have regarded as very large numbers indeed

It is not the object of this study to argue for or against the present form of establishment of the Church of England. Rather, the study tries to explore establishment's present meaning in the political environment. It is therefore principally concerned with the Church of England's structural relationship with the modern state. This means explaining not only what that relationship is but also how it has developed to that point.

One consequence of this limited viewpoint is that the study will not explore all the Church of England's current functions and activities. Whilst on the one hand some may find this results in an attenuated account, on the other hand, to give depth of field to what might be a viewpoint wholly directed at the Church of England, the study includes consideration of church/state relations elsewhere - in some detail in the cases of Scotland and Scandinavia, and more briefly for other parts of Europe.

'Establishment'

An essential preliminary is to tease out the meaning of 'establishment' in the church/state context. Clearly, the term is ambiguous: For example, whilst it is often accepted that both the Church of England and the Church of Scotland are 'established' churches, no-one would argue that they are established in the same way. Similarly, even in the relatively homogenous culture of Scandinavia, establishment has taken different forms. On the other hand, although disestablished, the Church in Wales is often viewed as having many of the characteristics of establishment. One Anglican clergyman has sought to distinguish between 'high' and earthed'

[1] *Religion in Britain,* 13 February 2003. Source: Census April 2001, Office of National Statistics. There is in fact considerable controversy about the various attempts that have been made to measure the extent and quality of religious affiliations, and these figures have been challenged in so far as they can be said to reflect actual belief. Similarly, controversy persists over what is described as the "secularisation" thesis i.e. the extent to which "modernity" necessarily diminishes religious belief, and how far such a process as observed in Northern Europe is to be regarded as normal or exceptional.

establishment as a way, amongst other things, of categorising the meanings currently attributed to establishment in England (Carr 2002).

The four Church of England twentieth century church/state inquiries all, of course, reflected upon establishment. The last of them refused to agonise: 'For us "establishment" means the laws which apply to the Church of England and not to other churches' (Chadwick 1970: 2). Following the rejection by Parliament of the prayer book Measures in 1927 and 1928, the circumstances of the second of the inquiries, however, caused it to consider the question at greater length.

A principal contributor to the discussion was Maurice Gwyer, the Treasury Solicitor. He argued that, even where a church had been brought into being by mutual contract between the members in circumstances where the state had played no part, the state could not entirely disinterest itself:

> The expression 'Established Church' is not, however, a term of art in the sense of connoting a legal status with a well-defined and universally recognised content. The essence of establishment appears to be a recognition of some kind by the state, but the legal consequences and implications of that recognition may vary indefinitely. By recognition is here meant something more than toleration, since otherwise all Churches to which the law has accorded liberty of conscience and worship would become Established Churches; it means that the State has for some purpose of its own distinguished a particular Church from other Churches, and has conceded to it in a greater or less degree a privileged position. (Cecil Report, Vol 2: 171)

In observations that remain relevant, he went on to argue that, on a continuum with state subjection at one end and ceremonial recognition only at the other, the Church of England was nearer the latter than the former. He also pointed out that "The Church has never been 'established' by Act of Parliament. Establishment has been a growth and not a creation, and dates from an age when Church and nation were indistinguishable one from another".

Church and nation

Gwyer's last point draws attention to another layer of ambiguity, that is, the extent to which the state and the (English) nation are often treated as synonymous. Clearly, in a study of the present kind which is concerned specifically with the church/state nexus, it is necessary to bear in mind that the concepts are not the same and need to be distinguished. Similarly, the relationship between the Church of England and the government of the day needs also to be distinguished, for example on the basis that the government is not the state any more than it is the nation.

Conversely, from the standpoint of the Church of England, it does not follow that its every action flows from establishment. For example, the fact that the Church of England expresses a mission to the English nation as a whole is not a condition of establishment but, rather, the result of the Church of England's own volition. As the Chadwick Report put it in 1970, 'No amendment of the laws could alter the vocation to a national mission.' It is from this position that the Church of England continues to assume responsibility - without prior conditions of active or formal membership - for ministering to the whole population whenever members of that population come to it. Without the intervention of any state official, everyone is entitled by law to be

baptised and married according to its rites in its churches, and interred in its burial grounds. Pastoral succour is available to all.[2]

It is this commitment to a national mission in partnership with the state which results in the Church of England's involvement with public affairs in a variety of ways. Notably, it leads not only in the grand ceremonial of anointing new monarchs at coronations, but also in a whole range of occasions responding to significant events in the nation's life. Whereas the bishop of London leads the national high profile annual commemoration of Remembrance Day at the Whitehall Cenotaph, Anglican clergy officiate at local memorials and public services throughout the land. St Paul's Cathedral and Westminster Abbey are the settings for state events which mark the great moments of the nation's passage through the world. The relationship with the monarchy where the sovereign, for example, normally opens the Church of England's Synod, reflects the national roles of both institutions.

But the Church of England does not regard its public involvement as simply an involvement in the ceremonial life of the nation: it also shoulders significant and effortful social functions. For example, approximately one quarter of all primary schools in England are Church of England schools educating about one fifth of the school population. It has also a smaller proportionate engagement at secondary and tertiary levels. Further, the Church of England offers chaplaincy services (discussed further below) across public life on a considerable scale. In none of these cases does it operate exclusively: there are other religious schools in the public system, for example Roman Catholic, Jewish and Muslim. On the other hand, with the exception of Roman Catholic schools which outnumber Church of England schools in the secondary system, the scale of effort made by other religious providers is very much smaller.

All these engagements are supported by the state, but they are not required by establishment, and the Church of England "benefits" only on the same grounds and in the same way as other providers. In addition, it maintains its own advisory and support services for the schools. It also acts as in effect the gateway for all providers to government in the case of the disciplined services, where it is required to provide chaplaincy services by law, for example, under prisons legislation. In the same spirit, as noted below, Archbishop Carey made it clear that the Church of England regarded its representation in the House of Lords to be available to all religions as a conduit into the legislative affairs of the nation, and that the Church of England would, moreover, welcome a broadening of religious representation in the Lords.

At the same time, mission to the nation is not the same as operating as an agency of the state or of the government of the day. Anglican clergy may lead daily prayers in the legislature and offer public prayers for the head of state and members of the government, but they do not see themselves as the mouthpiece of the government. Indeed, on occasion members of the clergy have been severely critical of government policy. Bishop Bell of Chichester questioned the ethics of indiscriminate aerial bombing at the height of the desperate conflict of World War II and in the teeth of sentiment which equated patriotism with silent acquiescence. Archbishop Runcie refused to be triumphalist at the national service for the Falklands War, and risk appearing to collude thereby in any government wish to expect such an occasion to deliver political advantage. The Church of England's *Faith in the City* initiative was regarded as deeply critical of

[2] True, there are members of the Church of England who question whether that mission should continue in exactly the same way. However, to date their views have not prevailed: in so far as the Church of England continued to regard itself as a national church, it could not presumably permit them to do so. Conversely, if the state sundered its link with the Church of England, then the latter would presumably be free to reconsider the extent of its commitment.

a government's urban policies. Moreover, rather than resting on criticism, by means of the ensuing Church Urban Fund it saw to it that money was invested in projects to help ameliorate the conditions the initiative had observed.

More could no doubt be said on these points. For present purposes, it is enough that they may be in the mind of readers for what follows during a study which concentrates only on aspects of the engagement of a particular religious organisation with the state.

I THE LAW

The following describes the requirements of the law affecting the Church of England's constitutional relationships with the principal organs of the state viz. the monarchy, the legislature, the executive and the judiciary. The account does not attempt to describe the church's general legal structure or internal procedures except in so far as they mesh with state concerns.

Monarchy

Constitutionally the UK's sovereign is a Parliamentary monarch: Parliament prescribes the monarch's relations with the Church of England and the rules of succession to the throne.

Although it is not formally one of the sovereign's titles, the sovereign is - as described in the preface to the Thirty-Nine Articles - "Supreme Governor" of the Church of England and, when doing homage, new bishops are required to acknowledge that position.[3] In addition, the surviving part of the Elizabethan Act of Supremacy 1558 (1 Eliz 1 c 1s.8) read with Canon A 7 makes it clear that, as spelled out in the Canon, the sovereign has supreme authority 'over all persons in all causes, ecclesiastical as well as civil'. The monarch is also styled 'Defender of the Faith', a title originally bestowed by a Pope on Henry VIII but subsequently appropriated permanently by the donee in circumstances very different from those of the original grant.[4]

As to the succession, the present rules have remained unchanged since the early eighteenth century and were devised from the revolution of 1688 to ensure the continuation of a Protestant succession to the exclusion particularly of Roman Catholic claimants. Thus, in addition to the monarch being qualified by primogeniture descent from a former Electress of Hanover, he or she is required by s. 3 of the Act of Settlement 1700 (12 and 13 Will. III c 2) to 'join in communion with the Church of England as by law established. The requirement was confirmed by the Act of Union in 1706 (Article II of 5 & 6 Anne c. 8) which repeated and thus further entrenched the anti-Roman Catholic provision first introduced in effect by the Coronation Oath Act 1688 (1 Will & Mary c. 6), stated explicitly in 1689 by the Bill of Rights which excluded even Protestants from the succession if they married Roman Catholics, and restated in s.2 of the Act of Settlement.[5]

The requirement to be 'in communion with the Church of England' does not mean that the sovereign has necessarily to be a *member* of the Church of England itself. The first two Hanoverian monarchs were, of course, Lutherans. Rather, the requirement may be satisfied wherever a successor is a baptised and communicant member of Protestant churches 'which subscribe to the doctrine of the Holy Trinity, and who are in good standing in their own Church' – the combined effect of the Church of England's Admission to Holy Communion Measure 1972 and Canon B 15A. These provisions comprehend potentially most Protestant denominations (including, of course, the Church of Scotland) but not non-Trinitarians like Unitarians or the non-eucharistic Quakers.

[3] The Sovereign is not "Supreme Head", an obsolete title used in the earliest Tudor legislation and long since repealed. - 26 Hen VIII c 1 and 1 Eliz I c 1.

[4] A discussion of these and related issues arising from the Fabian Society pamphlet *The Future of the Monarchy* (London, 2003) may be found in Leigh 2004.

[5] The requirement does not have effect where a male monarch or a person otherwise eligible for the succession has a wife who, subsequent to marriage, converts to Roman Catholicism.

These provisions are variously reflected in the oaths required of the sovereign on accession. (The very first oath – dealt below in the section on the Church of Scotland - in the order of their being taken is in fact the Scottish oath under the Act of Union.) So far as the Church of England is concerned, these oaths are the coronation and accession oaths as follows.

Coronation Oath

The original form of the oath as prescribed by s. 3 of the Coronation Oath Act 1688 (1 Will and Mary c 6) is as follows:

> Will you solemnly promise and swear to govern the people of this Kingdom of Great Britain and the dominions thereunto according to the statutes in Parliament agreed on, and the respective laws and customs of the same?
>
> I solemnly promise so to do
>
> Will you to your power cause law and justice in mercy to be executed in all your judgements?
>
> I will
>
> Will you to the utmost of your power maintain the laws of God, the true profession of the Gospel and the Protestant reformed religion established by law? And will you maintain and preserve inviolately the settlement of the Church of England and Ireland and the doctrine, worship, discipline and government thereof as by law established, within the Kingdoms of England and Ireland, the dominion of Wales, and the town of Berwick on Tweed, and the territories thereto belonging? And will you preserve unto the bishops and clergy of England and to the churches there committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them?
>
> All this I promise to do.

The Act requires the oath to be administered by either of the Archbishops or a bishop.

The original form of the oath was, of course, unable to anticipate subsequent political changes such as the union with Scotland and alterations in the relationship with Ireland. The form of the oath was subsequently amended at later coronations to accommodate such changes though without formal Parliamentary authority. The wording used in 1953 was as follows:

> Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern \Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon, and of your Possessions and other Territories to any of them belonging or pertaining, according to their respective laws and customs?
>
> I solemnly promise so to do.
>
> Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?
>
> I will.

> Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will you preserve unto the Bishops and Clergy of England, and the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or any of them?
>
> All this I promise to do.

Accession Declaration

This is prescribed by the Accession Declaration Act 1910 as follows:

> I do solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the throne of my Realm, uphold and maintain the said enactments to the best of my powers according to law.

This oath falls to be made at the first Parliament of the new reign or at the Coronation. In recent reigns it has been taken at the State Opening of the first new Parliament of the reign rather than at the Coronation.

The former version of the oath, originating in a loyalty oath required of Parliament and Crown servants in 1678 in the hysteria of the “Popish Plot”, was extended by the Bill of Rights 1689 to the Sovereign and read as follows:

> I, A.B., do solemnly and sincerely in the presence of God, profess, testify and declare that I do believe that in the Sacrament of the Lord’s Supper there is not any Transubstantiation of the Elements of Bread and Wine into the Blood and Body of Christ, at or after the consecration thereof by any person whatsoever; and that the Invocation or the Adoration of the Virgin or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous. And I do solemnly, in the presence of God, profess, testify and declare, that I do make this declaration and every part thereof in the plain and ordinary sense of the words read unto me, as they are commonly understood by *English Protestants,* without any Evasion, Equivocation, or mental Reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope, or any other person or authority whatsoever, or without hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration or any part thereof, although the Pope or any other person or persons or power whatsoever should dispense with or annul the same or declare that it was null and void from the beginning.

At the time of the accession of Edward VII some concern was expressed about language bound to be deeply offensive to the new King’s Irish subjects, and a Bill was introduced but not pressed home. Subsequently, however, the new Prince of Wales (later George V) raised the issue with Church and ministers making it clear that he hoped for suitable amendment. The drafting problem was to find a formula which pleased Roman Catholics without displeasing Anglicans and other Protestants. The government’s first attempt

achieved the former but not the latter. The Archbishop of Canterbury's draft was sent to the Prime Minister on 27 July (the day of the Bill's Second Reading), and incorporated into the Bill which passed through all its stages and received Royal Assent on 3 August 1910.

The question of further amendment is sometimes raised, and there would be opportunity as in 1910 to enact change between accession and Coronation. On the other hand, as the then Prime Minister pointed out in 1910, it is for consideration whether the Declaration is necessary at all.[6]

The position of Roman Catholics

If to some extent mitigated by the reformed Accession Declaration, the present law nonetheless maintains disqualifications in respect of Roman Catholicism. This fact has occasionally in recent times led to Parliamentary questioning whether they should not be eradicated. In a modern society generally devoted to the extirpation of all forms of discrimination, for example, it is argued that it is anomalous for such features to remain.

A number of attempts have been made to proceed by way of Bills introduced by private Members of both Houses (House of Commons 2005). There was also a debate in the Scottish Parliament in 1999 which endorsed a resolution in favour of eliminating the discrimination (Winetrobe 1999). More recently still, Cardinal O'Brien (the senior Roman Catholic cleric in Scotland) has pressed the Scottish First Minister to support repeal of the Act of Settlement: "It is difficult for a First Minister to tell people you shouldn't discriminate against people on the grounds of their religion when we have an Act of Parliament that does exactly that."[7]

In practice, however, both legislatures have accepted that, because of the complexity of the intertwined legislation involved, there are larger constitutional issues which would have to be weighed before change could be brought about; and that, by the same token, such issues can be addressed only by government sponsored legislation rather than by private members of either House. For example, any change would have to negotiate the requirements of the 1931 Statute of Westminster (22 Geo V c 4) for the concurrence of the Commonwealth monarchies in any "alteration in the law touching the succession to the throne or the royal style and titles".[8]

The difficulties have so far been presented as difficulties of practice rather than of principle. In his sole formal statement on the position, the present Prime Minister responded to a 1999 approach as follows:

> *Ms Roseanna Cunningham*: To ask the Prime Minister if he will make it his policy to seek to amend the law to (a) allow members of the Royal family to marry a Catholic without losing their right to inherit the throne and (b) allow Roman Catholics too inherit the throne; and if he will make a statement.
>
> *The Prime Minister*: The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and will continue to do so.

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[6] Asquith questioned the need during the Second Reading of the 1910 Bill – see Hansard, Commons, 27 June 1910, col 2133.

[7] *Scotland on Sunday*, 13 February 2005.

[8] In addition to the 17th/18th century constitutional legislation, four other Acts are also thought relevant: Princess Sophia's Precedence Act 1711 (10 Anne c 8), Royal marriages Act 1772 (12 Geo III c 11), Union with Ireland Act (39 & 40 Geo III c 67) and the Regency Act 1937 (1 Edw VIII & Geo VI c 16).

> The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would raise other major constitutional issues. The Government has no plans to legislate in this area.[9]

Clearly, there are no easy or comfortable answers. For example, permitting the sovereign to be a Roman Catholic would produce difficulties both for the sovereign and the Church of England in a situation where the sovereign's church was not in communion with it and moreover denied the validity of Protestant orders. There is the important point that the discrimination – if that is the right word – is not uniquely directed against Roman Catholics but affects all non-Christians in addition to certain Christian denominations.

The disqualification is not that anyone is prevented from practicing any religion they want, rather it is that the character of the United Kingdom state is predicated on a particular kind of Christian assumption.

Legislature

The discussion here deals first with legislative procedures, secondly the role of the Second Church Estates Commissioner, and thirdly with episcopal membership of the House of Lords. (The system of episcopal appointment is dealt with under the section below on the Executive.)

Legislation

Just as the monarchy is a Parliamentary monarchy, so for many purposes does the Church of England remain a Parliamentary church, though since the Worship and Doctrine Measure of 1974 it has had effective autonomy on those core matters,

A major exception is the status of the canons of the Church of England which since a King's Bench judgement of 1736 have been directly binding on the clergy alone, though they have some potentially indirect effect against laity in certain limited circumstances. Originally, canons were dealt with exclusively in the Convocations. However, since the Convocations became part of the General Synod on its creation in 1969, canons are now made by the Synod. Canons fall to be approved by the sovereign without any Parliamentary procedure. However, on the basis that the sovereign does not act except on the advice of ministers, in practice canons need the approval of ministers, themselves accountable to Parliament.

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[9] Hansard, Commons, 13 December 1999, col 57. A *Guardian* report of 5 June 2001 claims that the Prime Minister, in an interview with the Glasgow *Herald*, subsequently "promised to look again at the 300-year-old law banning Roman Catholics from succession to the British throne." However, the enthusiasm here appears to have been the newspapers' and not the Prime Minister's. In the most recent Parliamentary discussion (a Bill introduced by Lord Dubs), the Lord Chancellor expressed government sympathy with those who felt strongly on the issues but pointed out the implications for "major constitutional changes, requiring consultation throughout the Commonwealth" concluding the Bill was "not needed at the moment since there is no practical discriminatory effect on the current line of the royal succession." (Hansard, Lords, 14 January 2005, col 512).

Under the Church Assembly (Powers) Act 1919 – the Enabling Act – Parliament has given a unique right of legislative initiative to the Church of England Synod. In theory the right of initiative is not exclusive and there is no legal reason why legislation affecting the Church of England cannot be introduced by any member of either House under the normal procedures. In practice, however, Parliament has so far ceded the right of initiative on matters wholly internal to the Church of England. What is in effect a convention has been established that the government will not itself seek to legislate in such areas other than under the 1919 Act procedure, or, in other words, without the Church of England's consent.[10]

On the other hand, Parliament does legislate in ways which may affect the Church of England. The extent to which this might be appropriate was, for example, discussed during the passage of the Human Rights Bill in 1998.[11] Similarly, the effect on traditional forms of clerical tenure has been under discussion in the course of the implementation of a European Union Directive on employment rights via the Employment Relations Act 1999.[12] Similarly, there has been recent discussion about how possible changes in charity law should affect the Church of England. But these are issues affecting all churches and not the Church of England alone. Even the Church of Scotland's special status under the Church of Scotland Act 1921 does not free it entirely from taking on board the consequences of action by the civil power not dreamt of in the very different social and political circumstances of 1921. Indeed, as explained in the section on Scotland below, legal proceedings before the House of Lords have recently challenged the scope of the 1921 Act.

Procedure under the 1919 Act is as follows:

> The Church of England Synod transmits any Measure (the formal title applied to Church of England legislation under the Act) it has approved via its Legislative Committee to the Ecclesiastical Committee of Parliament.
>
> The Ecclesiastical Committee is a statutory joint committee of both Houses consisting of 15 members from each nominated by the Lord Chancellor and the Speaker at the beginning - and for the duration – of each new Parliament. It may continue its business even in a Parliamentary recess, and proposed Measures do not therefore fall at the end of each session if all the necessary procedures remain uncompleted. Although a statutory rather than a Parliamentary committee, the Ecclesiastical Committee has in practice adopted Parliamentary joint committee procedures. The Committee's chair has always been a peer and, since 1947, a Lord of Appeal. The Commons' representatives always include the Second Church Estates Commissioner who answers for the Church Commissioners in the Commons.
>
> On receipt of the Measure, the Ecclesiastical Committee has to prepare (after conferring if it wishes with the Legislative Committee) a report to Parliament. This report has to set out the nature and legal effect of the Measure and the Ecclesiastical Committee's views 'as to the expediency thereof, especially with relation to the constitutional rights of all [Her] Majesty's

[10] For a recent ministerial citation of the convention, see the proceedings on the draft Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc. Amendments) Order 2005 before the First Standing Committee on Delegated Legislation, Commons, 20 October 2005, col 4. There is nothing, on the other hand, to prevent *Parliament* legislating for the Church of England without is consent. However, no Bill introduced by an MP for such purposes has ever made progress. It follows that that is likely to be the outcome of the Bishops (Consecration of Women) Bill recently introduced by Mr Andy Reed MP – Hansard, Commons, 21 March 2006, cols 170-174.

[11] Hansard, Lords, 19 January 1998, cols 1282-1289. For a general discussion about the religious issues raised by the Act, see Cumper 2000. For a view that the Act has the effect of moving the UK from a model of Christian toleration to one of religious pluralism see Rivers 2000.

[12] See Parts I and II of the Review of Clergy Terms of Service (GS 1527 and 1564).

subjects.' If there has been a conference, the transcript is attached to the report, but the Ecclesiastical Committee does not otherwise take evidence.

During this process, neither Committee has any power to vary the text of the Measure. The Legislative Committee may, however, withdraw the Measure – for example, after receipt of the Ecclesiastical Committee's draft report which the latter is required to show the former during the considerative process.

A Measure may deal with any Church of England matter, and may amend or repeal any act of Parliament except those provisions of the 1919 Act itself relating to the composition, powers or duties of the Ecclesiastical Committee. A Measure may confer powers for Synod to make subordinate legislation which may, though not automatically, be brought within the requirements of the Statutory Instruments Act 1946 and become subject to Parliamentary scrutiny before entering into full effect. The Synod's own Standing Orders require Measures to provide for subordinate legislation to be laid before Parliament for approval if it affects the legal rights of any person.

Following submission of the Ecclesiastical Committee's report to Parliament, a resolution of each House is required to present the Measure for Royal Assent whereupon the Measure attains the force and effect of an act of Parliament.

Granted that what in an analogous voluntary association would be purely internal adjustments without recourse to a public, let alone statutory, procedure, the Church of England has made regular but not prolific use of the 1919 Act arrangements. In the last two decades, for example, only 1986 has seen as many as four Measures approved; and in some years – 1984, 1985, 1987, 1989, 1996 and 2002 - there have been none.

The scrutiny of the Ecclesiastical Committee is no mere formality or necessarily Parliament's last word. Whilst the rejection of the Prayer Book Measures in 1927 and 1928 are the best known occasions of Parliamentary rejection, there have been others. For example, in 1984 the Commons voted against approving the Appointment of Bishops Measure even though the Ecclesiastical Committee had – as in 1927 - certified it expedient; and in July 1989 it initially declined to approve the Clergy (Ordination) Measure before finally agreeing to do so in February 1990. In a more recent, the Ecclesiastical Committee's 217th Report dealt with the Church of England (Pensions) Measure which, amongst other things, sought to continue for a further seven years the ability of the Church Commissioners to expend capital in support of their pension liabilities that had been granted in a Measure of 1997. Whilst the Ecclesiastical Committee had no objection of principle to the proposal, they felt unable in April 2002 to certify as "expedient" a new proposal that further extensions beyond 7 years could be accomplished by subordinate Synodical legislation without further reference to Parliament. The upshot was that the Measure in its original form was withdrawn and a fresh Measure submitted in a revised form in November 2002.

Role of the Second Church Estates Commissioner

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No government minister is responsible for the Church Commissioners. When the Ecclesiastical Commissioners were created in the 1830s, relations with Parliament were catered for because there were always Commissioners who were MPs. Increasingly from 1866, however, a convention, became established that the government used its powers to appoint the Second (unpaid) Church Estates Commissioner to give that post to a senior government backbencher in the House of Commons, also nowadays appointed to the Ecclesiastical Committee under the Enabling Act 1919.[13] Gradually, and especially after 1926, the Second Church Estates

[13] Whilst it is true that holders of the office are always of the same stripe as the government, they are not strictly *members* of the government.

Commissioner came to be regarded as the Parliamentary spokesman for the Ecclesiastical/Church Commissioners (Best: 418-9).

The present position is that the government business managers arrange that Parliamentary time is made available on about eight times a year to the MP to answer Questions concerning the Church Commissioners' activities. The MP is briefed by the Church Commissioners for these purposes. (There is no equivalent arrangement in the House of Lords, because only the Commons may deal with financial matters.) The rationale for an arrangement where the only other non-ministerial MPs who take Questions are the chairs of certain Commons committees is that the Church Commissioners dispose of funds with historic origins partly in Parliamentary grants. The arrangement also reflects the established status of the Church of England.

Bishops in the House of Lords

42 diocesan bishops are eligible to sit in the House of Lords as Lords Spiritual by ancient usage.[14] The number actually permitted to sit at any one time has, since 1847[15], been limited to 26 – the number existing at the time of the legislation which that year created additional bishoprics. Of the 42 bishops, the archbishops of Canterbury and York and the bishops of London, Durham and Winchester have seats automatically. The remainder are admitted when vacancies occur in order of seniority of consecration. The episcopal membership constituted 4% of the House at the time of the review by the Wakeham Royal Commission (Wakeham: 150). (In Tudor times before the Reformation, the Lords Spiritual - who included abbots and priors - actually outnumbered the much smaller lay peerage of the day. One calculation concerning the assembly summoned by Henry III in 1265 puts the spiritual peers outnumbering the lay by 5 to 1.)

The United Kingdom Parliament is the only national legislature in Europe which has explicit religious representation. A majority of the Wakeham Commission recommended that that representation should be widened to include other Christian denominations, and that room be found for such appointments by reducing the Church of England's share from 26 to 16 seats in a reformed upper chamber. Of the 10 seats thus made available, 5 should go to other denominations in England and 5 to representatives of Christian denominations in Scotland, Wales and Northern Ireland. Over and above the 26 Christian representatives, the Commission recommended that a further 5 members of the chamber should be 'specifically selected to be broadly representative of the different non-Christian faith communities (Wakeham: 155-159)[16].

The Church of England was at pains to stress in its own evidence to the Wakeham Commission that it would welcome a wider representation of the nation's spiritual life in the second chamber and 'remains ready and willing to speak in Parliament for its Christian partners and for people of other faiths and none' though without pretending any exclusive claim to do so.[17] The previous Archbishop, Lord Carey, reinforced the point when speaking of a "hospitable establishment" in the same sense three years later (Carey 2002a).

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[14] It has been argued that the usage stemmed not from consideration of any spiritual dignity but solely from regard for the lands they held in barony from the sovereign (Pike: 151-168). By the same token, the bishop of Sodor and Man is not included with the English bishops on the grounds that the temporalities of his bishopric were not originally received from the Crown. On the other hand, he is a member of the Manx Parliament.

[15] Section 2 of 10 & 11 Vict c 108, and repeated in all subsequent acts creating new bishoprics.

[16] For a commentary on these recommendations, see Smith 2003.

[17] *The Role of Bishops in the Second Chamber* (GS Misc 558), Church of England, May 1999, p. 9.

As a Constitution Unit comparative study of second chambers had pointed out, widening religious representation on Wakeham lines is in fact problematic:

> It is widely acknowledged that the representation of only one religious group in a multi-cultural Britain is outdated. However, it is difficult to envisage an agreement being reached on religious representation in a new chamber which fully satisfied all religious groups. Arguments about the relative number of seats to be given to Catholic bishops or Muslim leaders are likely to prove equally difficult as questions about the relative balance of employers and trade unions, or teachers and doctors, in a 'functional' or vocational chamber. (Russell 2000: 330-1)

In its study of House of Lords reform published in 2002, the House of Commons Public Administration Select Committee recommended that 'Bishops of the Church of England should no longer sit *ex officio* from the time of the next general election but one'.[18] Observing that the debate had moved on since the Report of the Wakeham Royal Commission and that removal need not lead to disestablishment, the Select Committee said:

> We entirely accept the case that a healthy variety of opinions, which should include a range of religious, moral and ethical viewpoints, should be represented in the second chamber. However, the political support for a very large second chamber, of the sort that could accommodate the bench of bishops, has diminished, with the Conservative Party for instance now proposing a chamber of 300. The continuing process of reform, with a largely elected second chamber and the active statutory appointments commission we propose, would rapidly make the tradition of ex officio religious membership an anachronism. It is of course the case that distinguished senior figures in the Church of England (and other religious bodies) will be considered for membership of the second chamber through the appointment process (and they should be free to stand for election). This appears to us to represent the fairest approach. (House of Commons 2002: 35)

In practice these issues have not been addressed conclusively because, so far, Parliament has not been able to agree how, if at all, the composition (and powers) of the House of Lords should be further reformed.

Executive

The constitutional relationship between the Church of England and the executive stems from the latter's position as advisers, and consequently conduit, to the Crown. Accordingly, all Crown patronage is exercised on the advice of ministers. The Queen, advised by the Prime Minister, is at the apex of the system. It is partly in recognition of the Prime Minister's role that the current Prime Minister normally meets with the Archbishop of Canterbury about twice a year. This relationship does not, of course, exclude contact with other religious leaders. However, that contact is less frequent and of a necessarily different character.

Senior Church of England appointments

This section summarises the extent of government involvement, current ecclesiastical appointment procedures, and their prospective development. (The Annex to this chapter explains the modern background to current practices not otherwise covered in Appendix A.)

(a) Extent of Crown patronage

Bishops and Suffragan bishops

The Crown appoints 43 diocesan bishops and 68 suffragan bishops. The diocesans include the Bishop of Sodor and Man but not the Bishop in Europe. Neither of the latter two bishops is eligible to sit in the House of Lords.

Cathedral Deans

Under the Cathedrals Measure 1999, all cathedrals now have deans. The Crown appoints 28 of the 44 deans, that is all except the deans of former "parish church" cathedrals, and the dean of the cathedral in Gibraltar. There is no dean in the case of the Isle of Man where the bishop is dean of his own cathedral. The Crown also appoints the deans of the Royal Peculiars of Westminster Abbey and St George's, Windsor.

Residentiary canons

There are approximately 160 such canonries. About 30 appointments are in the hands of the Crown shared roughly equally between the Lord Chancellor acting by himself and the Prime Minister advising the sovereign. In practice, the preparatory work for such appointments is undertaken by the Prime Minister's Secretary for Appointments who from 1964 has acted additionally as the Lord Chancellor's Ecclesiastical Secretary supported by an Assistant Ecclesiastical Secretary also based at No 10 Downing Street.[19] The 30 appointments include those held by the relevant Regius chairs at Oxford, but do not include others at present in abeyance for various reasons. In addition, a small number of the appointments are appointed in turn, shared with the diocesan bishop.

Royal Peculiars

These are churches exempt from the visitation of the customary Ordinary (typically the diocesan bishop) but where the crown (as supreme Ordinary) has visitatorial jurisdiction. They include Westminster Abbey and St George's Chapel, Windsor, and the Chapels Royal at St James's Palace, the Tower of London and Hampton Court.[20] As explained above, the deans of Westminster and Windsor are Crown appointments made on the advice of the Prime Minister, as are the appointments of their residentiary canons. Recommendations in respect of the Chapel of the Savoy, a peculiar falling within the Duchy of Lancaster, are made by the Chancellor of the Duchy.

Ministerial advice can reach beyond questions of appointment. Following a difficult episode at Westminster Abbey, a review covering the peculiars at the Abbey, Windsor and the Chapels Royal was set up in 1999 to report to the Queen through the Lord Chancellor on the organisation, management and accountability of each. In 2004 the

[19] The approximate annual management staff costs of this small unit's involvement with all ecclesiastical patronage amounted to about £80,000 in 2005, with an additional £60, 000 attributable to support staff salary costs.

[20] Whilst their organisation, management and accountability was subject to a review whose outcome was announced by the Lord Chancellor in 2004 (DCA Press Release of 9 February 2004), the review did not extend to appointments.

Queen accepted the Lord Chancellor's recommendations based on the report of the review group.[21]

Crown reversion

It is the established convention that, where the appointment of a diocesan bishop creates a vacancy even in certain non-episcopal offices, it is the Crown that appoints to the vacancy so created. Thus, the Crown may become involved on those occasions only in appointments to cathedral deaneries, archdeaconries and residentiary canonries not otherwise in its patronage as well as those deaneries and canonries which are.

Benefices

The government is also significantly involved in the exercise of patronage for the appointment of clergy to individual benefices, that is as the incumbents of parishes. A total of 652 benefices is involved: 210 where the Crown appoints on the advice of the Prime Minister, and 442 where the Lord Chancellor is the appointing authority – in 157 as the sole patron, and in 285 cases either alternately or sequentially with other patrons. Whilst all these appointments are exempt from the Patronage (Benefices) Measure 1986, it is the practice of the appointing authorities to observe the spirit of the Measure's requirements

Since 1964 the preparatory work in all these cases has been undertaken by the Assistant Ecclesiastical Secretary at No 10. He maintains a database of names of clergy actively interested in appointment. The names may reach him from any source, including the Archbishops' Clergy Appointments Adviser who is co-located with the Archbishops' Secretary for Appointments. (The work of the Assistant Ecclesiastical Secretary in respect of the Lord Chancellor's patronage recently received attention from the Select Committee on Constitutional Affairs where the Secretary explained the procedures followed.[22] Essentially the same procedures are followed in the case of the Crown's patronage.)

The Duchy of Lancaster exercises a much smaller patronage with just over 40 benefices, and operates on the same lines as, if on a different scale from, the Appointments Secretary's office.

Other Crown appointments

These include the six Church Estate Commissioners, the Master of the Temple, six members (including the chairman) of the Churches Conservation Trust. and six members of the Advisory Board for Redundant Churches – the latter appointed by the Archbishops after consultation with the Prime Minister. (Whilst the Dean of the Arches and Auditor - the most senior ecclesiastical judge - is appointed by the Archbishops, the necessary Royal consent is forthcoming only on the advice of the Prime Minister.)

(b) Appointment procedures

These are as follows:

[21] See press notice *Royal Peculiars*, Department for Constitutional Affairs, 9 February 2004.
[22] *Select Committee on Constitutional Affairs,* oral evidence, 29 January 2004, QQ 48-95.

Archbishops and diocesan bishops

The appointment of archbishops and bishops is determined under the Appointments of Bishops Act, 1533 (25 Hen VIII c 20). In its original form, the Act laid down that the sovereign could in effect order cathedral chapters to elect the sovereign's nominee on pain of praemunire. Since the removal of that ancient sanction in 1967 and the substitution of Colleges of Canons for the previous arrangements, the crown's requirements are nowadays issued to the College.[23]

The statutes confer an absolute discretion on the Crown. In practice, however, since 1976 the actual process of appointment of archbishops and diocesan bishops has been modified and developed to make room for a greater degree of both clerical and lay involvement of the Church whilst continuing to reserve the ultimate decision to the Crown advised by ministers. In addition, the Church itself has continued to develop selection procedures designed to identify clergy who appear best qualified for consideration for appointment.

Following a statement by the Prime Minister in 1976[24], the Church's involvement is formalised through its own Crown Nominations Commission, a committee consisting of clerical and lay members, and originally set up as the "Crown Appointments Commission" in 1977. The operation of the Commission and of diocesan "Vacancy in See" Committees (which prepare the way for the work of the Commission) are prescribed in Standing Orders and Regulations respectively of the General Synod.[25]

In the case of a vacancy the Crown Nominations Commission operates in the following way.

> The Archbishop of Canterbury presides when the appointment is in his Province, and the Archbishop of York when the appointment is in his Province, though the presiding Archbishop in either case may invite the other Archbishop to preside instead for all or part of the meeting. In the absence of the appropriate Archbishop the other Archbishop shall preside or, in the absence of both Archbishops, one of the members elected by the Houses of Clergy and Laity shall be nominated to preside by the appropriate Archbishop or in the event of his incapacity by the other Archbishop.
>
> The other members of the Commission are: six members of the General Synod (there clerical and three lay), and six elected by the diocesan Vacancy in See Committee (of whom at least three must be lay). Both the Prime Minister's Appointments Secretary and the Archbishops' Appointments Secretary are *ex officio* non-voting members of the Commission.
>
> In the case of a *Canterbury* vacancy, the Prime Minister nominates the chair. In such an instance, there is added to normal membership of the Commission one of the members of the Primates Meeting of the Anglican Communion elected by

[23] What would now happen should a College refuse to elect has not been, and is unlikely to be, tested. Ultimately, however, direct appointment by Letters Patent could presumably be considered.
[24] Hansard, Commons, 8 June 1976, cols 612-4.
[25] The Vacancy in See Committees Regulation 1993 (as amended) and the Crown Nominations Commission Standing Order (S.O. 122). Very full Guidance Notes have been issued to assist Committees.

the Joint Standing Committee of the Primates Meeting of the Anglican Communion and the Anglican Consultative Council as a voting member. Also invited, but in a non-voting capacity, is the Secretary General of the Anglican Communion. In the case of a *York* vacancy, the Appointments Committee of the Church of England, after consultation with the Archbishop of Canterbury, nominates the chair. (In the instance of the most recent archiepiscopal vacancies, the Canterbury Commission was chaired by a senior Judge and the York Commission by a senior northern figure with wide experience of the Church, both at national and diocesan level.)

The Vacancy in See Committee's function is to prepare a brief description of the diocese with a statement setting out the diocese's needs, and to elect the diocesan representatives to the Crown Nominations Commission. Its *ex officio* members include all suffragans and stipendiary assistant bishops, the cathedral dean, no more than two archdeacons, any diocesan members of the General Synod, and the chairs of the Houses of Clergy and Laity of the diocesan synod. Elected members are not fewer than two each of clerical and lay members of the diocesan synod. There are also arrangements for the diocesan bishop's council to nominate up to four additional members in order to secure representation of a special interest or to improve the representative character of the Committee as a whole.

Having taken into account the statement of needs provided by the diocese, the national statement of needs provided by the Archbishops and also the memorandum written by the Appointments Secretaries, and after considering eligible candidates, the Crown Nominations Commission submits two names (in order of preference if they so choose) to the Prime Minister for recommendation to the Crown. The Prime Minister may determine which of the names to recommend or invite the Commission to reconsider and submit an alternative name or names.

Following approval by the Sovereign, cathedral colleges elect the final nominee expressing thereby consent to the outcome of a process in which the diocese's representatives will have played a full part. The election is then confirmed by the relevant Archbishop or by his Vicar General on his behalf. It is at that ceremony that the candidate becomes the diocesan bishop and is given spiritual jurisdiction over the diocese. If not already in episcopal orders, he will be ordained bishop before taking up office. He will also need to make an act of homage to the Sovereign at a ceremony attended by a Cabinet minister. An enthronement service subsequently takes place in the diocese.

The secretary to the Crown Nominations Commission is the Archbishops' Secretary for Appointments and she supports the work of the committee. Both she, and the Prime Minister's Appointments Secretary, attend at least one meeting of the Vacancy in See Committee. In practice the two officials work closely together at all stages, including when they jointly visit dioceses in order to sound out opinion on local needs and preferences. Both officials also attend in a non-voting capacity the deliberations of the Crown Nominations Commission.

Suffragan bishops

These bishops are appointed under the Suffragan Bishops Act, 1534 (26 Hen VIII c14). The Act requires the diocesan bishop to submit two names to the Crown for it to choose which of the two is to be appointed.

> The initiative for the appointment of suffragan bishops is in the hands of the diocesan bishop in whose diocese the suffragan appointment is to be made. Whilst the Crown Nominations Commission is not involved, there is a formal consideration procedure during which diocesan bishops sets up consultative arrangements about the nature of the role and the type of person required, as a minimum involving a small group to advise him and the bishop's council on the vacancy. In addition, the Archbishops' Secretary for Appointments advises as to the field of consideration of candidates, and acts as the vehicle for submitting the diocesan bishop's recommendations through the Archbishop of the relevant Province to the Prime Minister's Secretary for Appointments. Whilst by law two names must be submitted, by convention the first name is recommended by the Prime Minister to The Queen.

Cathedral Deans

> Where the patronage rests with the Crown, the initiative for appointment is taken by the Prime Minister's Secretary for Appointments. Although he does not rely on any formal consultative machinery, the practice is for him to take careful local soundings and, as necessary with the contribution of the Archbishop's Secretary for Appointments, have regard to the pool of potentially eligible persons. The resulting nomination is then put to the Prime Minister to recommend to the Queen.

(c) Prospective developments in senior ecclesiastical appointments processes

These have been the subject of attention *within* the Church on recent occasions. A review in 1992 led to the adoption in1995 of a Code of Practice for the appointment of suffragan bishops, deans, archdeacons and residentiary canons applicable to all those appointments not within the patronage of the Crown. Although the Code did not bind the Crown, it is understood that its practices seek to observe the Code's spirit

The Perry Report (Perry 2001) reviewed the operation of the Crown Appointments Commission that had been set up by the Church in 1977 in response to the Prime Minister's statement the previous year. The Perry Committee was precluded from considering any changes in the law. After further consideration of the Report's recommendations, a number of changes in the procedures for nominating diocesan bishops were made, including the renaming the Commission as the "Crown Nominations Commission". The purpose of the changes was to increase the transparency of the selection process, to ensure that candidates were considered from as wide a pool as possible, and to improve the candidate information available to the Nominations Commission.

Discussion in Synod in early 2005 resulted in a decision to set up a further review. Its object will be to consider how the current separate processes for making appointments to senior ecclesiastical office (other than diocesan bishops) may be best integrated and made consistent. The terms of reference of the working party extend to reviewing and making recommendations

as to the law and practice regarding appointments to the offices of suffragan bishop, dean, archdeacon, and residentiary canon. It is expected to report in 2006.

Judiciary

The jurisdiction of the ecclesiastical courts was much curtailed in the course of the 19th century (when, for example, they lost their jurisdiction in cases of defamation, testamentary matters and matrimonial causes). Their jurisdiction, currently regulated largely by the Ecclesiastical Jurisdiction Measure 1963, is now essentially confined to the control of the fabric and contents of churches, churchyards and other consecrated land ('the faculty jurisdiction') and clergy discipline. However, in the same way that ecclesiastical law forms part of the law of England, the courts and judges administering it are courts and judges of the Queen. This is reflected in the appointment of ecclesiastical judges (all of whose appointments involve ministers of the Crown whether Royal approval is required or not) and the composition and structure of the ecclesiastical courts.

At the diocesan level, the court is known as the *consistory court*, and is normally presided over by the chancellor of the diocese. The chancellor, who like all other ecclesiastical judges must be a communicant member of the Church of England and has to be legally qualified according to the requirements of s. 71 of the Courts and Legal Services Act 1990, is appointed by the bishop of the diocese in consultation with the Lord Chancellor and the Dean of Arches and Auditor. The latter (normally referred to as the Dean of Arches) is the Church's senior Judge and is appointed by the Archbishops jointly, but with the approval of Her Majesty on the advice of Ministers.

At the *provincial level* (the Arches Court of Canterbury and the Chancery Court of York) there are five judges presided over by the Dean of Arches. Each of these judges must either have a ten year qualification under the1990 Act or have held defined high judicial office. They are appointed by the Archbishops jointly with the approval of the Queen.

The *Court of Ecclesiastical Causes Reserved* (which deals with offences of doctrine, ritual and ceremonial, as well as hearing appeals in faculty cases involving such matters) has five members all of whom are appointed by the Queen, two of them being persons who hold or have held high judicial office[, and three who are, or have been, diocesan bishops.

Furthermore, in relation to faculty cases not involving matters of doctrine, ritual or ceremonial, the final right of appeal lies to a secular court, in the form of the *Judicial Committee of the Privy Council*. (That body also hears appeals against pastoral schemes made by the Church Commissioners.) Similarly, appeals from a commission of Convocation or the Court of Ecclesiastical Causes Reserved relating to offences of doctrine, ritual and ceremonial are heard by a Commission of Review, comprising five persons nominated by Her Majesty, of whom three must be Lords of Appeal.

Like other inferior courts, the ecclesiastical courts are subject to control by the superior courts through the process of judicial review (at least as regards excess of, or failure to exercise, jurisdiction; the position in relation to errors within a court's jurisdiction is less clear). And, through the doctrine of precedent, the ecclesiastical courts are bound by any applicable decisions of the Judicial Committee of the Privy Council (other than in relation to matters of doctrine, ritual or ceremonial).

Finally, the ecclesiastical courts established under the 1963 Measure have the same powers as the High Court in relation to the attendance and examination of witnesses and the production

and inspection of documents; and failure to comply with their orders can be enforced by the contempt process, through the High Court, in the same way as if there had been contempt of the High Court.

Legatine jurisdiction

Before the Reformation, Archbishops of Canterbury commonly exercised legatine powers delegated to them by the Pope. At the Reformation these powers were "nationalised" by the state and are exercised by the Archbishop under legislation originating in the Ecclesiastical Licences Act 1533. The system is administered on behalf of the Archbishop by the Faculty Office operating under the supervision of the Master of the Faculties (usually a High Court judge).

The commonly active elements[26] of this jurisdiction include three areas:

- *Special marriage licences* – These may be issued in England *and* Wales to authorize the solemnisation of marriage in circumstances not permitted under normal Church of England and Church in Wales requirements, for example where parties wish to marry outside their parishes of residence.
- *Notaries Public* – These are legal officers of ancient standing. Their functions include the preparation and execution of legal documents for use abroad, attesting the authenticity of deeds and writings, and "protesting" bills of exchange. Under the Courts and Legal services Act 1990, the Master of Faculties may make Rules for the regulation of the Notarial profession.
- *Lambeth Degrees* – The ability of the Archbishop to award degrees is also founded on the 1533 Act. The degrees are recognized in law as full degrees. In practice, they are awarded (sometimes after examination) to those – not necessarily Anglicans - who have distinguished themselves in the service of the Christian Church.

[26] For long in abeyance until the revival of religious communities in the nineteenth century was a power to secularise religious (i.e. members of religious orders) at the request of their orders.

ANNEX

Howick to van Straubenzee

Howick Commission

In the 1960s the modalities of appointments came to the fore, at least in part, as a result of the Government's refusal in 1961 to appoint the Provost of Guildford, Walter Boulton, to the newly-established Deanery of the Cathedral for whose completion he had worked so long and hard (Welsby 1984). In that year a Commission was established under the chairmanship of Lord Howick of Glendale to consider Crown appointments: it reported in December 1964, suggesting a modification of the system rather than a radical overhaul. A vacancy-in-see committee of about twenty people under the chairmanship of the senior suffragan bishop or, failing that, the dean or provost would make representations about the needs of the diocese to the Prime Minister and the Archbishops but without suggesting names; formal elections by cathedral chapters would be abolished (Howick 1964). The Commission also wished to see a wider degree of consultation before the appointment of deans and provosts (Howick 1964: 55). It is difficult to judge the impact of the Howick Commission. Though adopted later, vacancy-in-see committees were not established immediately, and, since the process remained strictly confidential, whether there was, in fact, any wider degree of consultation cannot be known

The 1976 settlement

In 1974, Synod resolved that it

> affirms the principle that the decisive voice in the appointment of diocesan bishops should be that of the Church; believes that, in arrangements to give effect to this, it would be desirable that a small body, representative of the vacant diocese and of the wider Church, should choose a suitable person for appointment to that diocese and for the name to be submitted to the Sovereign; and instructs the Standing Committee to arrange for further consideration of these matters...(van Straubenzee 1992: 107)

In 1976, after lengthy informal negotiations between the Church and Downing Street, it was agreed that a modified system of consultation should be introduced which would involve the Church more closely in Crown appointments. When a diocese fell vacant, a vacancy-in-see committee would be established along the lines envisaged by Howick. It would submit two names to the Prime Minister, who would be free to recommend *either* name to the Queen, or to ask for further names. The Prime Minister, James Callaghan, rejected any notion that it was time to end Prime Ministerial involvement in such appointments.

> There are... cogent reasons why the State cannot divest itself from a concern with these appointments of the Established Church. The Sovereign must be able to look for advice on a matter of this kind and that must mean, for a constitutional Sovereign, advice from Ministers. The Archbishops and some of the bishops sit by right in the House of Lords, and their nomination must therefore remain a matter for the Prime Minister's concern.[27]

The possibility that the Church *itself* might advise the sovereign was evidently not regarded as a serious option in a situation where the executive took the view that the sovereign could not act other than on ministerial advice.

[27] Hansard, Commons, 8 June 1976, col 613.

Van Straubenzee Working Party

The issue was revisited in the late 1980s by a Working Party chaired by the former MP and Second Church Estates Commissioner, Sir William van Straubenzee, and charged with reviewing the appointment of dignitaries other than diocesan bishops. It reported in 1992 with a series of proposals for the removal of the Prime Minister's part in the appointment of dignitaries. In particular, it recommended that the appointment of deans should be made after an appointing group chaired by the diocesan bishop had considered the matter; the bishop would transmit two names in order of preference to the Archbishop of the Province who, as a Privy Councillor, would submit the preferred name direct to the Sovereign. (van Straubenzee: 38-42)

However, the Working Party was by no means unanimous. Frank Field MP entered a Memorandum of Dissent in which he argued strongly for the Prime Minister's continued involvement in the process, on the grounds that any attempt to diminish the involvement of the Crown in Church appointments would lead to disestablishment by default:

> For what would be left of the Crown's influence if the Government were to accede to the reforms in the [van Straubenzee] report? And if the Crown were to lose its remaining influence in appointments how could the privileges of the Church, particularly its endowments, remain intact?

His preference would be for something like the present system, but

> ... exercised in public. I therefore endorse the... [van Straubenzee] approach for senior positions. I do, however, believe that the majority of places on any such committee should go to Crown nominees. (van Straubenzee: 115-7)

The recommendations of the Working Party were not implemented.

II FINANCE

A common fallacy is the belief that "establishment" means that the state funds the costs of the Church of England. This is not now, and never has been, true.

When approaching the topic of state funding, it is first right to bear in mind that, for running costs purposes the Church of England relies on its own resources. Annual expenditure exceeds £800 million. The Church Commissioners (the body that united the Ecclesiastical Commissioners and Queen Anne's Bounty in 1948) concentrate on support for dioceses/parishes, bishops, cathedrals and paying clergy pensions. For these purposes, the Church Commissioners manage capital assets currently amounting to over £4 billion.[28] The dioceses, mainly using funds from parishes, are responsible for paying and housing their clergy, the Church of England's relations with its schools, and support of the parishes. The upkeep of parish churches and cathedrals is in the first instance the responsibility of each individual body.

The last decade has seen important shifts in internal funding responsibilities. Because of the increased burden of clergy pensions, a resulting reduction in the amounts formerly given by the Commissioners to dioceses has had to be made up by increased giving from church members, including in respect of pension entitlements arising from service after 1997. Since 2000, tax changes (the Gift Aid scheme estimated in 2001 to have helped make covenant giving worth a total of £196 million (Daws 2001) have benefited the Church of England as all other charities.

What follows will summarise (a) the historic subventions of the state and, with the exception of Church of England schools (to be dealt with separately), (b) the current sources of state – concentrating on central government - funding made available to the Church of England.

(a) Historic subventions

In the medieval period - when the distinction between the personal rule of the sovereign and the impersonal concept of what is now understood by the "state" was unknown - the crown conferred many gifts on the church *in* England in the days before it became regarded as the Church *of* England. The Chapels Royal, other Royal Peculiars and many cathedral and collegiate buildings continue to testify to this munificence. The Reformation on the other hand both nationalised and alienated much church property. The crown diverted to itself the taxation revenues formerly received by the Pope, and a significant amount of tithe (the local taxation directed to the support of incumbents) fell into lay ownership.

In a measure designed to reduce clerical poverty, Queen Anne in 1704 surrendered the former Papal revenues - the first-fruits and tenths[29] - to the Church of England to establish the funding charity Queen Anne's Bounty. Although the state continued to collect the revenues on the Bounty's behalf, they constituted a peculiar kind of gift in the sense that in practice they merely returned to the Church of England its own resources, though in a way which devoted them to particular purposes.

[28] How the Church Commissioners manage these resources – and their very creditable recent investment record – is publicly available in their annual reports, the most recent of which is that for 2004.

[29] 'First-fruits and tenths were [by then] royal taxes on ecclesiastical dignities and benefices, the first-fruits being the sum of money paid on entry into possession of any one of them, and tenths being a recurring annual charge of much smaller amount.' (Best: 21) A briefer and more accessible history may be found in Hicks (2004). First-fruits and tenths were abolished in 1926.

Other subventions were of a different character. There were two church building initiatives. The first was the early eighteenth century Commission for Building Fifty New Churches which spent nearly £250,000 secured from that part of the coals duty formerly used for the rebuilding of St Pauls and the maintenance of Westminster Abbey. Restrictive conditions and problems which included negotiating the rights of existing incumbents meant that only 12 churches were built though five were subsidised and two others acquired (Port 1986). In the nineteenth century, the two principal Church Building Acts of 1818 and 1825 steered £1.5 million through a Church Building Commission into a process where a significant matching effort from within the Church of England saw a total of 612 churches built by the time the Building Commission was amalgamated with the Ecclesiastical Commissioners (Port 1961). These sums were augmented by "drawback" (exclusive to the Church of England[30]) on building materials, that is tax refunds similar to current Value Added Tax refunds.[31] In addition, from 1809, the government made grants of £100,000 a year to the Bounty up to a total of £1,100,000.

All of these were, of course, significant sums. Equally significant was that there were no further Parliamentary grants after 1828. Although Parliament continued to legislate for the Church of England, it took no further steps to fund it. The creation of the Ecclesiastical Commissioners in 1835-6 was an occasion for enabling *existing* funding to be managed more equally and efficiently rather than an opportunity for additional Parliamentary largesse. Peel, the prime mover in 1835, was clear in his ministry of 1841-5 that there could be no question of fresh public funding even when church extension was thought to be an important response to the social ills of the day (Gash 1972: 381-4).[32] On the other hand, the Church of England National Society and the largely Nonconformist British and Foreign Society schools continued to benefit from funding arrangements initiated in 1833.

At the same time, and to put contemporary funding practices in perspective, it has to be borne in mind that Parliamentary grants continued to be made to other churches. The *Regium Donum*, payments in support of ministerial salaries begun in 1690, conferred something akin to concurrent establishment on Presbyterian churches, especially in Northern Ireland. It was discontinued only following disestablishment of the Church in Ireland in 1869. Not only were there church building grants to the Church of Scotland in 1825, but money for the augmentation of stipends 1812 -1839 amounted to nearly £370,000. The Church of Ireland received almost as much as the Church of England by way of grants up to 1840. Grants were also made for the rebuilding or repair of Roman Catholic chapels destroyed in the 1798 rebellion. From 1795-1840, Maynooth, the Roman Catholic seminary, received nearly £400,000 – originally under an Act of the Irish Parliament (35 Geo III c 21 (Ireland)). The total paid to non-Church of Ireland churches in Ireland from 1690 to 1840 was nearly £1 million. (Established Church Return 1840)

In addition, Parliament arranged for the financing of the Church of England abroad. Two Acts in the reign of George IV prescribed both the salaries for Church of England clergy in the West Indies and that, although the payments should issue from the Consolidated Fund in London, the money should come from the colonial revenues.[33] In 1850-51, £31,000 was being paid to support the ecclesiastical establishment in the West Indies, and for clergy in America, New Zealand, Australia, the Gambia, Falkland Islands and Hong Kong (Religious etc Institutions 1852). Support for Church of England clergy and buildings in India was guaranteed on the

[30] The Excise Office took the view that the relevant statute (3 Geo IV c 72) benefited only the Church of England.
[31] Port put the total value of drawback at £175,000 (Port 1961: 125).
[32] "Parsimonious with the public purse, Peel was generous with his own." (pp. 383-4). Peel subscribed £1,000 to the National Society for the building of schools in manufacturing and mining districts.
[33] 6 Geo IV c 88 and 7 Geo IV c 4.

Indian revenues, a situation confirmed in the Government of India Act 1915 (5 & 6 Geo V c 61) but repealed in the Government of India Act 1936 (26 Geo V and Edw 8 c). In Canada and Australian territories, proportions of crown land values had been set aside early on for the purpose of supporting the clergy. In Canada, since 1791 one seventh of all crown land sales had been reserved for the support of Protestant clergy, latterly in ratios of two thirds for the Church of England and one third for Church of Scotland clergy. Preserving existing entitlements, the system was abolished from 1853.[34] In Australia the new responsible legislatures moved to do the same – in Queensland at the first opportunity in 1860. (Selborne: Appx IV 94-191)

Finally, although the state did not supply the funds, it stood behind two forms of taxation that benefited the Church of England and which were levied on the whole population irrespective of their religious beliefs: the tithe (originally a tax on the product of the land to support incumbents, finally phased out from 1936); and church tax (for the maintenance of church fabric and worship whose compulsory character was abolished in 1868).

(b) Current sources of state funding

The legal structure of the Church of England is relevant:

> The Church of England is not a corporation as such, though institutions within it may enjoy the status of corporations sole or aggregate.(Doe: 8)

As the present Archbishop of Canterbury has put it: 'I can't speak for the Church of England as a whole (no-one can)…'[35]

It follows that there is no single conduit for the inward flow of central or local government funds, and identifying their character and extent is not entirely straightforward. The effect of Gift Aid, for example, at different levels of church organisation would be very difficult to disentangle. On the other hand, with the exception only of assistance to the Church of England's Churches Conservation Trust (the body that cares for redundant church buildings remitted to its care), there is no question but that modern government policy where it does benefit the Church of England does so on criteria equally applicable to all religious organisations.

Church buildings

Apart from Gift Aid, most of the state funding available is directed towards buildings. Of the 16,200 Church of England buildings, over half (approximately 8,400) are listed buildings graded I or II*, constituting 45% and 20% respectively of all the listed buildings in those categories.

There are five current funding streams (the first three competitive) that benefit Church of England buildings. The principal schemes are operated by English Heritage (EH) and the Heritage Lottery Fund (HLF) under the auspices of the Department for Culture, Media and Sport (DCMS). The sources are:

(i) Places of Worship repair grants (operated jointly by EH and HLF since 1996)

[34] By means of the Canadian Clergy reserves Act (16 Vict c 21). See Hansard (Commons) 15 February, 1853, for the debate in which the Minister explained the need for the change and why the will of the local legislature had to prevail.

[35] Address at service in Westminster Abbey on 4 November, 2004, to mark the 300th anniversary of Queen Anne's Bounty.

- For urgent repairs to listed buildings in regular use as public places of worship
- Worth an average of over £20 million 2000/01 - 2003/04.[36] Money available for offers for 2004/5 and 2005/6 was just under £25 million in each year.

(ii) Cathedral grants (EH only)

- For repairs to Church of England and Roman Catholic cathedrals listed grade I or II* and/or are situated within a conservation area.
- Total grants (including Roman Catholic cathedrals, though chiefly directed to Church of England cathedrals) £2.1 million 2003/04.[37]
- For each of the three years 2005/6 until 2007/8 EH proposes to offer £1 million for cathedrals.

(iii) Heritage grants (HLF only)

- Grants (or loans) allocated between all applicants on a competitive basis and directed to maintaining or preserving buildings, assets and sites of outstanding heritage significance.
- Outcome examples: of the 50 projects which qualified in the category for grants of more than £5 million listed by EH 2004/05 at a total value of £550 million, two were Church of England projects in line for grants totalling £19 million, or just over 3% of the total. Between them the two projects will have to raise a further £44 million i.e. 70% of the total cost.[38]
- Total awarded by Heritage Lottery Fund for projects of all kinds since their establishment in 1994 was £3 billion. They estimate that in the UK as a whole between 1994 and July 2004 they have given a total of nearly £300 million to churches, chapels and cathedrals of all denominations over that time. This includes grants for new facilities, activity and community projects as well as repairs.[39]

(iv) Churches Conservation Trust

- DCMS grant currently pegged at £3m a year. (In 2004 the Trust nearly doubled that sum from other sources.)[40]

(v) Refund of Value Added Tax on listed church building repairs

- Available for reclaiming on cost of listed church repairs carried out since 1 April 2001.
- Estimated to be worth £6 million in 2002.[41]

[36] *Building Faith in Our Future: A statement on behalf of the Church of England by the Church Heritage Forum* (2004), London, Church House, p. 11.
[37] English Heritage, *Annual Report and Accounts 2003/04.*
[38] *Annual Report Heritage Lottery Fund 2004/05.*
[39] *Churches, chapels and cathedrals: 10 years of Heritage Lottery Funding,* Heritage Lottery Fund 2005.
[40] *Annual Report and Accounts for the year ended 31 March 2004*, Churches Conservation Trust.
[41] *Building Faith in Our Future,* p.11.

- As at 30 September 2005, £28 million had been paid out in total since the scheme began to churches in England, an estimated 90% for Anglican churches.

Summarising the 2002 experience on the funding of repair costs, the sources have been estimated as follows[42]:

Major sources of funds paid in 2002

Source	**£m**
EH/HLF	21.0
Garfield Weston	3.5
Vat reclaimed	6.0
Landfill	2.0
Historic Churches Preservation Trust	1.5
County trusts	1.4
Local church fund raising and other smaller trusts	57.0
Total	**93.0**

On this analysis, EH, HLF and VAT refunds defrayed less than 30% of repair costs. In other words, whilst the state's contribution is substantial, the larger part of the costs was defrayed from other sources.

Other funding

The armed forces, prisons, education and health service Church of England chaplaincies are dealt with elsewhere. It is arguable whether they should be regarded as an activity "funded" by the state when it is the state which requests the services the chaplaincies provide. Similar considerations may be thought to arise in the case of Church of England schools, though the history of their relationship with the state is very different.

Whilst it could be asked of the civil service costs arising from the work of the Prime Minister's Appointments Secretary whether they should be incurred at all, they are at present an unavoidable concomitant of the current form of church establishment.

Finally, it should probably be noted that, along with five other religious denominations in England and Wales, the Church of England benefits from the "ecclesiastical exemption". This is an arrangement which exempts church buildings from many listed building and conservation area controls. After consultation in 2004, DCMS have recently agreed that the "exemption" should continue in its present form for the time being.[43] Access to exemption is in practice conditional on denominations possessing internal control systems comparable with those that would otherwise have applied. Whilst it could be argued that the exemption constitutes an indirect financial benefit to denominations, an alternative view is that it constitutes merely a delegation

[42] Trevor Cooper, *How do we keep our parish churches,* The Ecclesiological Society, 2004.
[43] *The Ecclesiastical Exemption: The Way Forward,* DCMS, July 2005

which spares denominations no labour and subsidises no expense. Moreover, it could be maintained that the arrangement confers an indirect financial benefit on the state, because the cost implications of replicating the expertise involved in advising on works to churches and cathedrals, much carried out on a voluntary basis by members of advisory committees and central church bodies, would run into millions of pounds.

III CHAPLAINCIES

In addition to arranging the availability of its ministry through its parochial organisation, the Church of England extends that ministry to a range of public and private organisations by the appointment of chaplains. It is not, of course, the only religious denomination that provides such services. Indeed, although the Church of England remains the largest supplier, one of the consequences of the increased multiculturalism in the UK is the extent to which not only are other Christian denominations represented through chaplaincies but now also faiths other than Christian.

The following seeks to summarise the extent of the Church of England's chaplaincy effort, concentrating on public organisations. Where reasonably ascertainable, estimates will be made of current running cost expenditure where it is borne by sources other then the Church of England itself. Amongst the deficiencies of such estimates is that, since they concentrate on running costs, they fail to include the costs incurred by the Church of England in preparing individuals to assume chaplaincy roles. Overall, the Church of England estimates that chaplains of one kind or another amount to 4% of licensed ministries as a whole, and 10% of all stipendiary clergy.[44]

Armed services

Chaplains are provided as commissioned officers under Queen's Regulations subject to the approval in each case of the appropriate denominational authority. For the Church of England this entails the Archbishop of Canterbury's licence.

In May 2005, the total number of full time Church of England chaplains in the armed forces was 177, or 58% of the total of 294. (Of the rest, Roman Catholic chaplains constituted 16%, Church of Scotland 12%, Methodists 8%, and the remaining churches 6%.)

Because of the way in which costs are allocated within the Defence budget, it is not possible to give an exact figure for total expenditure on Church of England chaplaincy services. Based on capitation rates for the financial year 2004/2005 (which include employers' national insurance contributions, education allowances and support etc costs as well as pay), a reasonable estimate for the current cost of the chaplaincy services would be in the region of the following:

Estimated Church of England Chaplain capitation costs

Service	***Costs £000s May 2005***[45]
RN	4,000
RAF	5,000
Army	9,000
Total	**18,000**

Adding in a conservative estimate of the Church of England share of the additional costs of clerical and other support to the chaplaincies throughout the three services would increase the total to £18.5 million.

[44] *Church Statistics 2002*, Church House 2004.
[45] Source – Ministry of Defence.

Prison Service (England and Wales)

By law (s. 7 of the Prisons Act 1952) every one of the 129 prison establishments in England and Wales must have a chaplain who has to be a clergyman of the Church of England – a requirement which in respect of the 4 of the establishments in Wales is stipulated (s. 53(3) to include a clergyman of the Church in Wales.

The prisons chaplaincy is not confined to Church of England clergy or, indeed, Christian denominations. Under the general superintendence of the Chaplain General, a Church of England priest, the chaplaincy nowadays includes representatives of, for example, the Muslim and Buddhist faiths. This greater diversity reflects significant changes in the character of the prison population where the proportions of the population professing any religious faith were in 2002 as follows:

Religion	%age
Anglican	36
Roman Catholic	17
Muslim	8
Other Christian	3
Free Church	2
Buddhist	1

Between 1993 and 2002, Bhuddists showed the highest growth rate. In second place was the growth in the proportion of prisoners professing no religion.[46]

There is a total of 315 chaplains, 184 full-time and 131 part-time. Of the full-time 147 are Church of England. Because of the manner in which expenditure is delegated to individual establishments, cost data are not readily available. However, on the analogy of Defence costings, it will not be unreasonable to estimate that the annual level of public expenditure in respect of Church of England chaplains runs at about £11 million.[47]

Hospital chaplains

Authorised under the National Health Service Acts, there are 422 full-time chaplains of whom 350 are Church of England clergy. There are also estimated to be 3,000 part-time chaplains half of whom are from the Church of England.[48] That Church has operated a Hospital Chaplaincies Council, a Council of the General Synod, since 1951 and which functions at the interface of the Church of England, the department of Health and the NHS Executive. In addition, the Church of England participates in a Churches' Committee for Hospital Chaplaincies which co-ordinates the relations of all Christian denominations with the Department and the NHS.

Because budgets are delegated to Trust level, it has not been practicable to obtain overall figures constructed on a common basis. Assuming an equivalence with Prison Service chaplains

[46] Home Office (2002) *The Prison Population in 2002: A statistical review,* Findings 228, p. 3.
[47] MOD costings are calculated as capitation rates which are comprehensive in including, for example, employer NI contributions, education support though not accommodation costs, support costs and training costs. On that basis, MOD chaplain main grade capitation rates are at £90-95k depending on the Service concerned. Assuming conservatively that the capitation rates of 147 Church of England chaplains run at about 80% of the lowest MOD capitation rates, then the total cost would amount to £11,172, 000.
[48] *Church of England Yearbook 2004*.

would suggest an annual cost of over £26 million for full-time chaplains. However, granted that hospital chaplains cost less because there is no housing allowance and probably less in the way of support costs, a more conservative estimate confined to full-time chaplains suggests public expenditure costs in a range of £9-10.5 million {i.e. at annual rates of £25,000 and £30,000 for 350]

Chaplaincies in Higher Education

There are on one estimate174 Church of England chaplains in Universities, 35 in Colleges of Further Education and 29 in Colleges of Further Education.[49] There is a National Adviser for Higher Education/Chaplaincies at Church House generally supporting these chaplaincies.

Estimating costs on the basis of the number of Higher and Further Education chaplains (85) recorded in the Church of England's statistics for 2002 (Church House 2004) and on the same conservative estimating principles for hospital chaplains, the annual public expenditure costs would fall into the range £1-2 million.

Other chaplaincies

These include numbers working in the police service, at airports and in hospices most of whom are part-time operating, like the Speaker's Chaplain in the House of Commons who is also Rector of St Margaret's, from their parishes. Finally, there are thought to be over 220 Church of England chaplains in private schools.[50]

[49] Derived from *Crockfords Clerical Directory 2004*.
[50] *Church of England Yearbook 2004* and *Crockfords* 2004.

IV THE DEVELOPMENT OF ESTABLISHMENT 1800-2005

Annexed is a non-exhaustive list of the principal legislative and other changes or events over the last two hundred years relevant to the constitutional relationship between the Church of England and the United Kingdom state.

From the perspective of today, it can be seen that, whereas in 1800 state and church were conceived as joint partners in the governance of the nation, by the end of the period a process of - still incomplete - institutional separation had been occurring. That process was uneven, non-linear and largely unplanned – the product of individual initiatives in response (especially so far as the state was concerned) to particular political problems. There was never any programme of deliberate overall change as such. Furthermore, it would not be right to see the process as one determined entirely by the state: the response of the Church itself always played a part and increasingly so in the later period.

These cumulative changes may be seen simultaneously in different ways. On the one hand, some may be seen as the product of a progressive division of view between the Church and the state about, for example, the objects of family and marriage law, or the extent to which the state should continue to stand behind interests, for example financial interests, specific to the Church. On the other hand, they may be characterised as the product of a state increasingly impelled to extend its protections directly and uniformly to the whole population regardless of confessional considerations, though it would be anachronistic to label such a process for the most part as one of self-conscious secularisation.

In 1800, however, state and church were, formally, a single enterprise. A largely Anglican Parliament legislated for secular and ecclesiastical affairs in a structure which in theory treated the entire population outside Scotland as a uniform entity. The law subjected all Dissenters to civic penalties designed to deny them full membership of the political society. The civil and ecclesiastical courts constituted a joint jurisdiction with the latter's functions controlling significant areas of family law as well as matters, such as clerical discipline, entirely of internal Church of England concern. Whatever the issue, all the judgements of the ecclesiastical courts were enforceable by mechanisms supported by the state. The support of the clergy and the fabric of the churches themselves depended on a system of local hypothecated taxation – tithe and church rates - underpinned by the state. The state appointed the episcopacy which was itself in its entirety in full membership of the senior part of the legislature.

Reciprocally, the Church of England acted on responsibilities for a wide range social functions then not shouldered by the state. These included, for example, education (one quarter of all primary schools in England are still Church of England schools), the parochial based system of relief of the poor, the solemnisation of marriage, and the disposal of the dead. Originally responsibilities exclusive to the Church of England, they became increasingly undertaken by the state.

All significant changes in the functioning of the church had to be processed through the legislature. Unlike the position in Scotland, the church had no separate assembly of its own. Even when functioning – and they had not done so regularly since 1741 – the Convocations of the two Provinces of Canterbury and York were entirely clerical bodies possessing no significant powers. For example, they could not legislate finally for their own affairs and their power to tax the clergy had been surrendered in 1664.

Even in 1800, however, the formal and the real positions were already significantly different. Despite the appearance of a confessional state (that is, one where government, nation and church are coterminous)[51], the state had since 1727 long in practice admitted most Christian Dissenters to full, normal civic participation by means of annual Indemnity Acts. In addition, since the late seventeenth century, the state had made payments, known as the "Regium Donum", to Dissenting ministers in England and Ireland – a limited form of concurrent endowment. In other words, the state had conceded the principle of pluralism for many, if not all, purposes in practice.

During the nineteenth century the same benefits were extended to non-Trinitarian Christians in 1813, to all Protestant Christian Dissenters by the removal of all *formal* discrimination against them in 1828[52], to Roman Catholics in 1829, to Jews successively in 1846 and 1858, and to explicit non-believers in 1888. The introduction of civil marriage and the removal of the Church of England's remaining control of marriage in 1836 legally institutionalised pluralism further, as did the burial legislation of 1880.

The state withdrew from invariably standing behind the ecclesiastical courts' judgements, for example when the civil penalties of excommunication were abolished in 1813. More significantly, the state moved to restrict the ambit of the ecclesiastical courts: actions for defamation were removed from the ecclesiastical courts in 1855, and their family law jurisdiction abolished in 1857. The fact that from 1833 the senior appellate court became the Judicial Committee of the Privy Council emphasized the extent to which the apex of the ecclesiastical system was in the hands of a predominantly lay and not necessarily Anglican body.

Moreover, after a long period of passive support, the state began to take initiatives to reorder church affairs. As a response to political events in Ireland and in an atmosphere influenced by the behaviour of the Church in the run up to the 1832 Reform Act, the state in 1833 drastically reorganised the Irish church in a way which, although designed to render that church more defensible, triggered the Tractarian reaction in England, and signalled to many clergy a more final disjunction than the legislation of 1828 and 1829. The interventions were not invariably, however, malign or unwelcome. For example, up to the late 1820s the state gave substantial grants to the Church (see "Finance for the details), and took the initiative in establishing in both Ireland and England standing Commissions designed to manage the church's assets to its best advantage. The state also attempted to modernise and facilitate payment of the main hypothecated tax in Acts of 1836 and as late as 1891. On the other hand, with the exception of granting excise relief on building materials to the Church of England alone, the state made no other subventions to the Church of England's finances in the nineteenth century after the church building Acts. Moreover, in 1868 it abolished compulsory church rates, and in 1936 moved to bring tithes finally to an end.

Significantly, however, as a consequence of larger political changes associated with the rise of more democratic forms of government, the state disestablished and to some extent disendowed the church in Ireland from 1871 and in Wales from 1920. The complete severance of church and state in England much agitated for by Dissenters and others did not, on the other hand, come to pass. The two disestablishments were also seen as emanating from a legislature that was decreasingly (especially in the Commons) an Anglican or even, in any normal sense, a body

[51] "In 1800 the State was confessional: the United Church of England and Ireland…and the Presbyterian Establishment in Scotland, were accorded exclusive endorsement as the spiritual and theological ordering of society." (Norman 1994: 277)

[52] The Whig Lord Holland judged this change as very important because "it explodes the real Tory doctrine *that the Church and State are indivisible*". Quoted Podmore 2005: 17.

exercising legitimate religious authority - one of the issues seen as relevant in its rejection of the Church Assembly Measures in 1927 and 1928. It is from this perspective that the Public Worship Regulation Act 1874 (which attempted to legislate for ritual) is commonly viewed nowadays as the last direct legislative initiative by Parliament in relation to religious worship or doctrine.

The interventions of the state provoked gradual reciprocal changes initiated by the Church of England. The increasingly non-Anglican character of the legislature, and the absence of any corresponding institutions in the Church of England itself, found responses in institutional revival (the Convocations from 1855) and growth, for example the progressive inclusion of laymen in representative bodies and the creation in 1904 of a single Representative Church Council. But the most significant change of all was the "Enabling "Act of 1919 which established the Church Assembly and conferred upon it unique powers of legislative initiative. These included an ability, subject to veto, to determine the *content* of legislation given statutory force. One of the drawbacks of the preceding system had been that, when Parliamentary time could be found at all, the shape of the legislation as introduced into Parliament could be greatly altered by the time it emerged.

In what became a characteristic procedural feature, the proposal for the 1919 Act came not from a Royal Commission (the standard state inspired initiative of the preceding period as in, for example, the commission that preceded the Clerical Subscription Act 1865) but as the result of a Commission set up by the Archbishops themselves. There were four other comparable commissions in the course of the century, and the whole tenor of Church of England governance since 1919 has been, with the exception of the Tithe Act 1936, one where the Church of England has itself taken full charge of its own affairs. In that respect, organisational change on the Church of England's own initiative, like the amalgamation of Queen Anne's Bounty with the Ecclesiastical Commissioners in 1947 to form the Church Commissioners and the National Institutions Measure of 1998, have become the norm. Above all, a radical change like the admission of women to the priesthood, although highly controversial and carefully scrutinized in both Houses, was treated by Parliament as a matter entirely for the Church of England to initiate.

ANNEX

TIMELINE

1800. Act of Union (40 Geo III c 67) created United Kingdom of Great Britain and Ireland, and a United Church of England and Ireland to include representation of the Irish episcopate by four Irish bishops in the House of Lords. Ministers resign over refusal of George III to accept a concurrent measure designed to remove Roman Catholic disabilities, e.g. to continue their ability to vote as granted by the Irish Parliament in 1793 (33 Geo III c 21 (Ireland)).

1813 Doctrine of the Trinity Act (53 Geo III c 160) put Unitarians (Christian non-Trinitarians) on the same basis as other Protestant Dissenters when they had hitherto been excluded from the benefits of the toleration legislation.

1813 Excommunication Act (53 Geo III c 127) abolished the civil penalties of excommunication.

1818 Church Building Act (58 Geo III c 45) established a Commission with a Parliamentary Grant of £1m to encourage the building of churches. A further grant of £0.5m was made in 1824. The Commission was merged with the Ecclesiastical Commission in 1856.

1828 Repeal of Test and Corporation Acts (9 Geo IV c 17) removed the civic disabilities placed on Protestant Christian Dissenters in the reign of Charles II and ended the regime of annual Indemnity Acts 1727-1827 which allowed Dissenters in effect to circumvent the Acts' requirements. The Repeal Act required beneficiaries to swear an oath that they would never as holders of their office "injure or weaken the Protestant Church as it is by law established in England, or to disturb the said Church, or the bishops and clergy of the said Church, in the possession of any rights or privileges to which such Church, or the said bishops and clergy, are or may be by law entitled". [The oath was repealed by the Promissory Oaths Act 1871 – 34 & 35 Vict c 48.] The change meant that Parliament, although it remained a Protestant assembly, was no longer (disregarding the Scottish representation since 1707) a wholly Anglican body.

1829 Roman Catholic Relief Act (10 Geo IV c 7) removed Roman Catholic civic disabilities although continuing to exclude Roman Catholics from the offices of Lord Chancellor, Lord Lieutenant of Ireland and the High Commissioner to the General assembly of the Church of Scotland. Roman Catholic peers and MPs had to take an oath on assuming their seats which included similar clauses to those of the 1828 Act swearing that they would not seek to harm the Church of England (or the Church of Scotland). The effect of the 1828 and 1829 Acts was that Parliament ceased to be a wholly Protestant body though it retained legislative control over the Church of England.

1833 Irish Church (Temporalities) Act (3 & 4 Will 4 c 37) abolished church rates (the rate levied for the support of the church fabric and divine service) in Ireland, halved the number of archbishoprics to two, reduced the number of bishoprics from eighteen to ten, and established a Commission to administer the funds released by the changes. (Because it was seen by some as unilateral interference by the state, this Act was one of the triggers of the Tractarian movement.)

1833 Irish Tithe Owners Relief Act (3 & 4 Will IV) in response to tithe agitation voided collection of tithes for 1833 and allowed for recovery of arrears for 1831 and 1832, advancing relief to owners on repayment terms.

1833 Court of Delegates Act (2 &3 Wm IV c 92) removed final appeals from ecclesiastical courts from Court of Delegates (a specialised tribunal) to Judicial Committee of the Privy Council which therefore became the supreme authority for determining, amongst other things, questions of worship, doctrine and discipline in the Church of England in addition to its other wide-ranging judicial functions.

1833 Treasury grant of £30, 000 a year in aid of school building shared between the Anglican National Society and the predominantly Protestant Dissenter British and Foreign Schools Society commencing a system of concurrent endowment. Sum later increased, extended to include other denominations, and policy responsibility given to a permanent committee of the Privy Council.

1836 Marriage and Registration Acts (6 & 7 Wm IV cc 85 and 86) permitted civil marriage and registration, and also allowed Dissenters to marry in their own places of worship. [Quakers and Jews had already been permitted to marry outside the Church of England.]

1836 Tithe Commutation Act (6 & 7 Wm IV c 71) created a Tithes Commission in England and Wales to oversee the commutation of tithes from payments in kind to cash payments.

1836 Established Church Act (6 & 7 Wm IV c 77) set up a permanent Ecclesiastical Commission to manage important revenues of the Church of England. It was the first in a series of initiatives – managed and led in practice by clerical Commissioners - compulsorily to redistribute revenues in the interests of financing the ministry of the Church in poorer neighbourhoods.

1836 London University formed by government approved Charter as a secular institution.

1838 Irish Tithe Act (1 & 2 Vict c 109) converted tithe to a charge paid by the landowner.

1843 Government forced by opposition of Dissenters to drop education clauses from Factory Bill that would have given Church of England teaching monopoly in state funded schools.

1846 Religious Disabilities Act (9 & 10 Vict c 59) put Jews on same basis as Dissenters.

1847 Bishopric of Manchester Act (10 & 11 Vict c 108) restricted episcopal representation in England and Wales to the 26 bishops of sees existing before the Act, and subsequent legislation laid down that all but the five most senior sees were to take up the 21 remaining places in order of consecration.

1850 Gorham judgement. The Judicial Committee of the Privy Council, a predominantly lay body, determined a controversial doctrinal dispute concerning baptismal regeneration finding in favour of a clergyman whom his bishop had refused on doctrinal grounds to institute into a living to which the clergyman had been presented by the Lord

Chancellor exercising his ecclesiastical patronage. The case drew attention to the reality of ultimate state control over the Church of England.

1851 Religious census – whose methodology was much disputed amongst denominations - showed a considerable shortfall in the availability of places of worship for the population as a whole, and the fact that nearly half the population did not attend church at all, with the lowest rates of attendance amongst the poor. Denominationally, there was a slight general preponderance of dissenting numbers over those for Church of England but with a more marked preponderance in the urban Midlands and North as well as the West country, and a four to one majority in Wales. Irrespective of the arguments on detail, and the differences between England and Wales, the outcome weakened the Church of England case for privileged treatment in so far as it had rested on its continuing predominance in the population. This had implications for its exclusive control over burial grounds, for compulsory church rates, tithes, and for the remaining civil jurisdictions of the ecclesiastical courts over family law and probate.

1854 Oxford University Act (17 & 18 Vict c 81) abolished religious tests for admission to Oxford for most purposes. [Cambridge followed suit in1856.]

1855 Defamation Act (18 & 19 Vict c 41) removed actions for defamation from ecclesiastical to civil courts. As the preamble to the Act put it: "Whereas the Jurisdiction of the Ecclesiastical Courts in Suits for Defamation has ceased to be the Means of enforcing the Spiritual Discipline of the Church..."

1855 Canterbury Convocation resumed for first time since 1717. [York resumed in 1861.]

1857 Divorce and Matrimonial Causes Act (20 & 21 Vict c 85) permitted civil divorce without recourse to private Act. Jurisdiction of the ecclesiastical courts over marriage and probate transferred to civil courts.

1858 Jewish Relief Act (21 & 22 Vict c 49) permitted Jews to sit in Parliament which was therefore no longer nominally an entirely Christian assembly though it retained power to legislate for the Church of England.

1865 Clerical Subscription Act (28 & 29 Vict c 122) altered and simplified the range of clerical oaths accumulated from the Reformation following a Royal Commission set up to examine them.

1868 Abolition of Compulsory Church Rates Act (31 & 32 Vict c 109) abolished the compulsory rate levied on all parishioners irrespective of religious affiliation after successive attempts in Parliament from 1834 to address the issue. The outcome was to oblige the Church of England to look to other funding sources since the voluntary system of church rates that remained proved unviable.

1869 Irish Church Act (32 & 33 Vict c 42) with effect from 1871 disestablished the Irish Church and dissolved its union with the Church of England, removing Irish bishops from the House of Lords. The 1833 Irish Ecclesiastical Commission was absorbed into a new Commission responsible for administering the 1869 Act with its compensation schemes for incumbents and owners of advowsons, and scheme for the extinction of rentcharge. A new self-governing church representative body was set up on synodical lines and the Irish ecclesiastical courts abolished. Although it was

contemplated by Parliament, the measure of disendowment involved was *not* deployed in the interests of concurrent endowment of all Christian denominations. Both the *Regium Donum* (state payments to Dissenting Protestant clergy) and the grants to the Roman Catholic seminary at Maynooth were discontinued. [The *Regium Donum* had been discontinued in England and Wales from 1851.]

1870 Education Act (33 & 34 Vict c 75) established a national system of primary education with statutory school boards where existing denominational schools insufficient. Religious instruction to be separate from instructional curriculum, and opt out permitted.

1871 Universities Tests Act (34 & 35 Vict 26) removed requirement of Church of England membership from all posts at Oxford and Cambridge and Durham except the Regius Divinity chairs.

1874 Public Worship Regulation Act (37 & 38 Vict c 85) was a government sponsored initiative following controversial litigation before the Judicial Committee of the Privy Council and designed to deal with disputes over ritual and clerical discipline.

1880 Burial Act (43 & 44 Vict c 41) conferred a general right of burial in Church of England graveyards with or without a religious service and regardless of rite, if any, used.

1885 House of Laymen attached to Convocation in Canterbury Province. York followed suit in 1892.

1888 Oaths Act (51 & 52 Vict c 45) permitted affirmation to be substituted for religious declaration in all cases including Parliament.

1891 Tithes Act (55 & 56 Vict c 8) placed responsibility for payment of tithe rentcharge on landowners following disturbances in Wales.

1894 Local Government Act (56 & 57 Vict c 73) abolished vestry parochial administration and substituted secular elected parish councils.

1902 Education Act (2 Edw VII c 42) made local councils education authorities for their areas, extended running costs rate support to denominational schools but, controversially, did not disturb the religious settlement. [The Liberal government's attempts from 1906 to revisit the settlement, thought to be more favourable to the Church of England than to Nonconformists, failed.]

1904 Representative Church Council set up which combined both Convocations and their Houses of Laity.

1907 Deceased Wife's Sister Marriage Act (7 Edw VII c 47) permitted marriages in opposition to Church of England doctrine with (i) a saving for Church of England clergymen who refused to marry people qualified only under the Act and (b) no conferment of an ability to contract such marriages themselves.

1910 Accession Declaration Act (10 & 11 Edw VII c 29) abolished the monarch's previously required declaration against transubstantiation and substituted a formula otherwise no longer intentionally hostile to Roman Catholics.

1914 Welsh Church Act (4 & 5 Geo V c 91) disestablished the Church of England in Wales on lines similar to the disestablishment of the Irish Church. Rejected by the House of Lords, the measure was due to come into force under Parliament Act procedures at commencement of World War I but was then suspended. The Act's original disendowment provisions were mitigated by an Act of 1919 - Welsh Church (Temporalities) Act (9 & 10 Geo V c 65). The legislation came into force in 1920, and the monies from the disendowment eventually transmitted to Welsh county councils.

1916 Report (Selborne Report) of the Archbishops' Committee on Church and State recommended a special procedure for Church of England legislation. The Committee had been set up as a result of a resolution of the Representative Church Council.

1919 Church of England Assembly (Powers) Act (9 & 10 Geo V c 76) [known as the Enabling Act] instituted the Church Assembly and a special legislative procedure which gave the Assembly the right of initiative in proposing Measures with statutory force subject to a Parliamentary veto that could reject a Measure but not amend its terms. This gave the Church of England its own legislative body and ended its complete legislative dependence on Parliament, thus largely completing a process which cumulatively emphasised the distinctiveness of the organs of church and state though without eventuating in any final separation.

1927/ Parliament twice rejected Measures for a Revised Prayer Book.
1928 Strong reaction in the Church of England which had regarded the Enabling Act as securing it effective autonomy in such matters above all. In 1929 the bishops of the Canterbury Convocation voted to allow clergy discretion to use the Prayer Book nonetheless.

1930 Archbishops' Commission on Relations between Church and State (Cecil Committee) set up as part of reaction to Parliamentary rejections of 1927/8. 1935 Report recommended a method of certification for "spiritual" Measures as a way of insulating such initiatives from Parliamentary control. Not acted upon.

1936 Tithe Act (26 Geo V and 1 Ed VIII c 43) abolished tithe rentcharge setting up Tithes Redemption Commission to oversee compensatory arrangements.

1944 Education Act (7 & 8 Geo VI c 31) introduced statutory requirement for religious instruction on non-denominational basis in state schools for the first time with compulsory worship at the beginning of each day but with the customary opt out preserved. It left untouched previous arrangements for Church of England schools.

1947 Church Commissioners Measure (10 & 11 Geo VI No 2) amalgamated Queen Anne's Bounty and the Ecclesiastical Commission.

1952 Report of Church and State Commission (Moberly Committee) set up by Church Assembly in 1949. Recommended seeking authority for experiment with doctrine and worship changes, establishing a Church of England consultative committee for episcopal appointments, and the removal of the Judicial Committee of the Privy Council as the supreme appellate body in the ecclesiastical courts system.

1963 Ecclesiastical Jurisdiction Measure (1963 No 1) implemented the Moberly recommendation on removal of Judicial Committee.

1964 Commission on Crown Appointments and the Church (Howick Commission) set up after Government's failure to appoint the incumbent Provost of Guildford to the Deanery of the new Cathedral. Modest suggestions not acted upon though its recommendation in favour of a consultative procedure including vacancy in see committees ultimately influential.

1965 Prayer Book Measure (1965 No) implemented Moberly recommendation on worship changes, though *permanent* form of worship remained as prescribed by the 1662 Prayer Book enforced by the Act of Uniformity 1662 and the Clerical Subscription Act 1865.

1969 Synodical Government Measure (1969 No 2) reconstructed the Church's representative system by instituting the General Synod with effect from 1970 and thus establishing full lay participation in all the work of the Church of England including doctrine and liturgy.

1970 Report of the Archbishop's Commission on Church and State (Chadwick Report) recommended full power to Synod to determine forms of worship, disagreed on method of episcopal appointment though agreed that Church of England should have the dominant voice, and accepted 1969 government White Paper proposals on episcopal membership of House of Lords,

1974 Church of England (Worship and Doctrine) Measure (1974 No 3) implementing the relevant Chadwick recommendation accepted by Parliament. (The Measure nonetheless reserved to Parliament the right to make any change in the use by the Church of the Book of Common Prayer.)

1976 Appointment of bishops – Prime Minister's statement accepted majority Chadwick recommendation and rejected minority recommendation. In a procedure with which the Prime Minister's Secretary for Appointments was associated, the Church of England to forward two names with the Prime Minister remaining free to recommend either one to the Sovereign or to request fresh names.

1993 Priests (Ordination of Women) Measure (1993 No 2) permitted the ordination of women to the priesthood.

1995 Turnbull Commission recommended changes in the internal governance of the Church of England. [It had been set up to address a situation where the Church of England possessed a legislature (the Synod) but lacked a single executive].

1998 National Institutions Measure (1998 No 1) implemented the spirit of Turnbull by bringing all the existing Church of England organisations (for example, the House of Bishops, Synod, and Church Commissioners) into a closer working relationship with a co-ordinating role for a newly created Archbishops' Council.

2000 Royal (Wakeham) Commission on the House of Lords (Cm 4534) recommended that the Church of England should continue to be represented in the Lords but on a basis which gave representation also to other Christian denominations and other faiths. Of the 26 places set aside for faith representation, 16 should go to the Church of England, that is, the same number as recommended in government proposals in 1969. [Parliament has so far yet to determine the extent of future religious representation, if any.]

APPENDIX A

CHURCH OF ENGLAND INQUIRIES IN THE 20TH CENTURY

> We…find ourselves in the position of explorers whose path is strewn with the bones of earlier adventurers, more experienced and better equipped than ourselves.
> (Moberly 1952: 69)

The following summarises the origins, principal recommendations, and outcomes of the four main inquiries.

Selborne Committee

The last quarter of the nineteenth century saw the development of Church of England representative bodies which, for the first time, included lay members. Previously, lay representation fell to be seen as restricted to Parliament which alone had the power to order Church of England affairs in a situation where the Church of England, unlike the General Assembly of the Church of Scotland, was not itself free to do so. Following the revival of the Canterbury and York Convocations (Canterbury in 1854 and York in 1861 - themselves wholly clerical in composition), both Provinces created representative bodies which included laity. These came together in a national Representative Church Council in 1904.

It was a resolution of this Council in 1913 that led to the setting up of the Selborne Committee:

> That there is in principle no inconsistency between a national recognition of religion and the spiritual independence of the Church, and the Council request the Archbishops of Canterbury and York to consider the advisability of appointing a Committee to inquire what changes are advisable in order to secure in the relations between Church and State a fuller expression of the spiritual independence of the Church as well as of the national recognition of religion.(Selborne 1916: 1)

The initiative reflected an increasing frustration with dependence on Parliament when that body appeared to find it ever more difficult to give time to Church of England priorities, a fact itself thought to be reflective of the changed composition of a body no longer wholly Anglican. At the same time, the then recent experience over Welsh disestablishment had shown how a dominant legislature could set aside the Church of England's interests to the point of expropriation.

A further most important, and less immediately obvious, influence arose from the tenor of the current negotiations in Scotland concerning a proposed union – finally achieved in 1929 - between the Church of Scotland and the United Free Church of Scotland. The most difficult points in the negotiations involved the extent to which the Church of Scotland, despite the self-regulatory character of the General Assembly, could be considered free from ultimate government control of its doctrine and worship. Draft "Articles Declaratory" had been drawn up in Scotland (eventually legislated in the Church of Scotland Act 1921) designed to express the right degree of independence that the Church of Scotland should have in these matters. That even the General Assembly could be thought deficient in that respect drew attention in ways acutely felt in England to the extent to which the Church of England was dependent on the legislature.

Amongst the score of members of the Selborne committee were five peers, two bishops, six MPs and a total of ten ecclesiastics including the two archbishops. A very full Report surveyed

developments from Henrician times (emphasising those changes to the law that represented a retreat from a confessional state), examined closely the Scottish position, charted the evolution of the wider Anglican Communion abroad, and devoted much time to what constitutions for Church of England representative bodies should at different levels include.

At the core of its church and state concerns, however, was the relationship with the legislature. Observing that the attitude of Parliament to Church of England legislation was 'not so much one of hostility as of indifference (Selborne 1916: 29)[53], it pointed out that of 217 Church of England Bills introduced into Parliament 1880-1913, 183 had been dropped, one negatived, 162 had never been discussed at all, and 13 of the 33 that had become law had been directly sponsored by a government minister in a situation where the other successful Bills had also needed some measure of government assistance to succeed.

The scheme recommended by the Committee essentially passed the initiative for legislative change to the Church of England's own representative institutions subject to veto by the legislature. In its original form (Selborne 1916: 58-60), the scheme envisaged an Ecclesiastical Committee of the Privy Council dealing with proposals from a Legislative Committee of the Church of England's Representative Council. If the King's consent alone was necessary, there would be no Parliamentary procedure. However, if legislation were required, then the legislation should be presented to Parliament by the Ecclesiastical Committee and, unless objected to – that is, under a negative procedure - within 40 days, should become law. Whilst stressing that Parliament should have confidence in the Church of England's own representative institutions if it were to concede the legislative initiative, the Report also stressed that there should be no question of Parliament determining what those institutions should be.

The continuation of the War precluded any immediate possibility of implementing the Report's legislative recommendations. It was, however, fairly swiftly afterwards that a Bill was introduced by the Archbishop of Canterbury (Randall Davidson) into the House of Lords on 3 June 1919 and received Royal Assent on 23 December. The Church Assembly (Powers) Act (known as the 'Enabling Act') made only two significant changes to the Selborne Report scheme: the proposed Ecclesiastical Committee of the Privy Council became a joint statutory committee of both Houses consisting of fifteen members from each, freshly appointed at the beginning of a new Parliament, and, in a significant concession made by the Archbishop, the negative procedure in the Bill as introduced was reversed into an affirmative procedure. An attempt to prescribe the Representative Council's constitution in the Bill was successfully resisted, and the Church of England itself set up the Church Assembly on lines recommended in the Selborne Report. As the Archbishop's biographer put it: 'Thus a very notable change in the institution of the Church of England was accomplished, and with a speed that is startling to those who look back.' (Bell 1952: 979-980)[54]

Cecil Committee

After a very long period of controversial review of the 1662 Prayer Book starting in 1906, the Church Assembly in 1927 approved a Measure which gave authority for the optional use of an alternative version. The exercise attracted a great deal of public attention. The Ecclesiastical Committee recommended acceptance in terms disposed against interfering

[53] It was noted that Nonconformists had not fared much better: of their 79 Bills in the same period, 49 had been dropped.

[54] The reception of the Selborne Report, particularly within the Church of England itself, and the proceedings on the Bill are summarised at Chapter LIX, pp. 956-990.

> with decisions of the Church Assembly on matters so clearly lying within the province of that Assembly as the doctrines and ceremonial of the Church, unless persuaded that any proposed change of doctrine were of so vital a description as materially to alter the general character of the National Church as recognised in the Act of Settlement and by the oath sworn by His Majesty at his Coronation, whereby His Majesty has promised to maintain the Protestant reformed Religion established by law.(Bell 1952: 1342)

The House of Lords, where the Archbishop was able to present the Measure, approved the Measure after a three day debate. The debate in the Commons was, however, a quite different affair: the Measure's attackers (which included the Home Secretary and the Solicitor General acting in their personal capacities) were much more effective than its supporters, even where the Prime Minister spoke in its favour. Atavistic fears of Rome and anti-episcopal sentiment swayed the House into rejection on 15 December 1927 by a substantial though not overwhelming majority. A slightly revised Measure was presented the following year, but was again rejected by the Commons by a slightly larger majority on 14 June 1928. As the Archbishop of York later observed this outcome 'was a dramatic illustration of the legal right of Parliament to control the worship of the Church'. (Garbett 1950: 204)

This bruising experience seemed to controvert the expectations of autonomy, above all in such matters as these, conveyed by the Enabling Act. Again, the contrast with Scotland was evident, especially since Parliament had as recently as 1921 approved that Church's independence in matters of faith and worship and in a 1925 Act set the seal on a settlement of property which paved the way finally to the union with the United Free Church.

Following a Church Assembly resolution, the Archbishops established a Committee under Viscount Cecil of Chelwood in November 1930. Other members included the Archbishop of York, academics, lawyers and the same Earl of Selborne who had chaired the Committee that had reported in 1916.The relevant parts of the resolution which formed the Committee's terms of reference were as follows:

> It is desirable that a Commission should be appointed to enquire into the present relations between Church and State, and particularly how far the principle…'that the Church …must in the last resort, when its mind has been fully ascertained, retain its inalienable right …to formulate its faith…and to arrange the expression of that Holy Faith in its form of worship'…is able to receive effective application in present circumstances in the Church of England, and what legal and constitutional changes, if any, are needed in order to maintain or to secure its effective application…(Cecil 1935: 1)

Concerned much more than its predecessor with the very principle of establishment, the Committee took evidence from a wide range of sources, including representatives of the Churches in Ireland and Wales who discussed their experiences of disestablishment. It also received written and oral evidence from the Treasury Solicitor, Maurice Gwyer, the civil servant who headed the government legal service. Taking the view that the Church of England had never been established as such but was, rather, the product of an age when Church and nation were indistinguishable from each other, he argued

> The expression 'Established Church' is not…a term of art in the sense of connoting a legal status with a well-defined and universally recognised content. The essence of establishment appears to be a recognition of some kind by the state, but the legal consequences and implications of that recognition may vary infinitely. By recognition is here meant something more than toleration, since otherwise all Churches to which the law has accorded liberty of conscience and worship would become Established

> Churches; it means that the State has for some purpose of its own distinguished a particular Church from other Churches, and has conceded to it in a greater or less degree a privileged position.(Cecil 1935 Vol 2: 170)[55]

The final Report in 1935 rejected going down the Scottish road on the grounds that the history of the two countries was not the same, adding that it would also be very difficult to obtain in England the agreement on doctrine and ritual which, whatever their other original differences, had not been in contention between the Church of Scotland and the United Free Church. However the Committee rejected the Scottish model with one proviso:

> …the Church of Scotland Act …[shows] that a complete spiritual freedom of the Church is not incompatible with Establishment. The Crown in Parliament has solemnly ratified the principles on which the Scottish settlement is explicitly based, and has accepted the relations between the spiritual and the civil power laid down in the Declaratory Articles. It is, therefore, neither illogical nor impractical to infer that the Crown in Parliament would be willing to consider and to grant to the Church of England what has been, with the full consent of England, freely granted or confirmed to the Church of Scotland.(Cecil 1935 Vol 1: 55-6)

At the same time, the Committee asserted the view that the Church of England continued to represent the Christian faith of the nation as a whole:

> Its [the Church of England's] primacy has been maintained by the essentially conservative English mind as a primacy of age and honour and comprehensiveness as the acknowledged position of a body which at crucial moments in the spiritual history of the nation has the right to speak for all, however sundered its religious tenets might be. In this sense the Christian State of England may be termed a Church of England State.(Cecil 1935 Vol 1: 17)

The legislative solution recommended by the Committee, and set in a draft Bill in their Report, was that Parliament should allow the Church of England new powers to legislate with regard to the doctrinal formulae and the services and ceremonies of the Church of England. In such cases, where a measure was certified by the two Archbishops, the Lord Chancellor and the Speaker as related 'substantially to the spiritual concerns of the Church of England', Parliament should not interfere. (Cecil 1935 Vol1: 62-3 and 99)

The Archbishop of Canterbury (Cosmo Lang) was clear[56] that there could be no precipitate action, including because much effort - in the end fruitless – would be needed to follow up Committee recommendations that there should be a Synodical declaration to deal with the question of "lawful authority" in the relevant clerical oath as well as a round table conference to settle doctrinal questions. The central issue in the case of the proposed declaration was how far it could itself claim "lawful authority" except with the approval of Parliament. In his oral evidence to the Committee, Gwyer had poured doubt, if not actual scorn, on the notion of a certification

[55] See also National Archives TS 27/420 for the Treasury Solicitors' side of the papers.

[56] Correspondence of Archbishop Lang, Lambeth Palace Library, Vol. 7, f. 186, typed but undated memorandum of 1936 by the Archbishop.

procedure as a way of circumventing Parliamentary interference in Measures tackling worship and doctrine questions.[57] Further, he thought it unlikely that Parliament would agree to any larger measure of freedom for the Church of England so long as bishops remained in the House of Lords, and the limited contemporary representative basis of the Church Assembly stayed unchanged.

The Cecil Report was considered in government by an ad hoc committee of officials which included Gwyer and was chaired by Claud Schuster, Permanent Under Secretary at the Lord Chancellor's Department. In their report to the Prime Minister in the autumn of 1936, they took the view that

> What is in fact proposed here is the formal abdication by Parliament of any authority in spiritual matters…This amounts to an attempt by the Church to recapture (and indeed improve upon) the legislative position which it claimed before the suspension of Convocations (from 1717 to 1854) swung the balance over to Parliament. But it does not take sufficient account of the fact that in the meantime personal monarchy has given place to constitutional government. That fact seems fatal to it.[58]

The report of officials included a lengthy appendix about the Scottish option. It listed a number of difficulties in the way of resorting to that option in England, emphasising the immaturity of the Church Assembly, and unresolved questions about the place of the laity in the Church of England. If that Church wanted the Scottish solution, then it would have to travel down the Scottish path. In that case, there would have to be unanimity on doctrine, and a single democratic assembly accustomed to exercising financial, legislative and judicial authority.

The Archbishop had further exchanges with ministers in 1938 to explore the possibility of alternative ways of gaining autonomy in respect of the disputed issues. Bishop Bell, who had been a member of the Cecil Committee, had been discouraged to think there was any route other than via the government and Parliament. 'Lawful authority', the Home Secretary had told him, could only mean the Crown as advised by ministers.[59] Entertaining him later to lunch at Lambeth, the Archbishop pressed the Home Secretary further, but he gave no ground, observing in addition that no escape via Canon was available because ministerial approval would still be required. The exchanges petered out in late September. Though a round table conference was convened in 1938 under the chairmanship of the Archbishop of York, it had achieved nothing when war supervened in 1939 and it was effectively stood down.

Moberly Commission

This was set in motion by a Church Assembly resolution in 1949

> to draw up resolutions on changes desirable in the present relation between Church and State and to present them to the Assembly for consideration at an early date.

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[57] Church of England Records Centre, AC/CS2/IV3, oral evidence 16 December 1931, p. 477. Nonetheless, Gwyer attempted in private correspondence with the Archbishop to be helpful over 'lawful authority' even if he thought that the *vires* of a Synodical declaration dubious. See Lang Correspondence, Vol.7, letter of 27 August1936.

[58] National Archives, LCO 2/1348. Report submitted to Prime Minister Baldwin, under letter of 16 October 1936 which said "There is at present no indication that the Church will seriously attempt to give effect to the [Cecil] report's recommendations…" In an undated reply, the Prime Minister simply acknowledged receipt of the officials' report.

[59] Lang Correspondence, op. cit., ff. 376-7 contain Bell's note of his meeting with Hoare on 30 May 1938.

The chairman, Sir Walter Moberly, was a former head of the University Grants Committee. Amongst the members were three bishops, one lay member each of the Lords and Commons, and a High Court Judge. The unanimous Report was published in 1952 (Moberly 1952).

Sitting during the uncertainties attendant on the aftermath of the Second World War, to a large extent the Report revisited the issues examined by its predecessor, though with a greater distance from the events of 1927/8 and concentrating particularly on control of worship, the appointment of bishops and the appellate machinery of the Church of England courts.

The Committee started out rather cautiously: 'Churchmen should recognise that any demand for greater liberty of action put forward on behalf of the Church tends to excite in many quarters a rather inarticulate but obstinate suspicion. Nonetheless, the Committee roundly affirmed its support for establishment:

> We agree with the 1935 Commission that…the separation of Church and State could not be carried through without grave injury to each. At home the effect would be to increase greatly the unsettling influences already at work, just when we need, for ourselves and for others, to maintain our stability. We believe, too, that it would have disastrous repercussions, injurious to the Christian cause on the Continent and in the whole world…Further,…it is by no means certain that 'disestablishment' would enhance the Church's spiritual freedom. (Moberly 1952: 25-6)

It considered but rejected the Scottish model, even though it showed that establishment was compatible with spiritual freedom. Its reasons were in practice identical to those of the Cecil Commission viz. the more co-extensive character of the Church and nation in Scotland, the lack of division over doctrine and worship, the less clear line of division between clergy and laity, and the fact that the Church Assembly could not make the same claims to longevity and prestige as the General Assembly.

Whilst not attempting to revive the 1935 recommendation for 'certificated' Measures, the Committee canvassed seeking authority to allow experimental deviations during an interim period. On the appointment of bishops, it noted the extent to which informal consultation had led to a more acceptable process in which the Archbishops were more influential. It proposed that there should be a consultative body for appointments which included episcopal, clerical and lay membership answerable to the Archbishops rather than the Assembly. Such a body should invite representatives of the vacant diocese, including cathedral chapters, to confer with it as part of the appointment process. As to the ecclesiastical courts, the final appellate jurisdiction should be removed from the Judicial Committee of the Privy Council into a wholly Church of England body which included laymen who held, or had held, high judicial office.

No immediate steps were taken to act on these recommendations. Over time, however, all found a place – the removal of the Judicial Committee of the Privy Council's role, for example, was achieved in the Ecclesiastical Jurisdiction Measure 1963, experiment with forms of service permitted under the Alternative and Other Services Measure 1965, and the appointment recommendations were – admittedly after two subsequent reviews - addressed in the new arrangements announced by the Prime Minister in 1976.

Chadwick Committee

Commissioned by the Archbishops in 1967, and chaired by the Reverend Professor Owen Chadwick, the committee is perhaps best seen as a response to post World War II social and political developments. Whereas the Moberly committee faced the straitened circumstances of a still rationed and uncertain post war world that had been plunged into the Korean conflict, the Chadwick committee was launched during a period of rapid economic growth and, many felt, social hedonism. Moreover, in a post colonial state, and aware of a more self-conscious Anglican communion beyond the British Isles, the Church of England leadership found itself clashing with the governments of the day over immigration control, and Rhodesia.

Reflecting preparatory work on a scheme of unity with the Methodists, the terms of reference were:

> to make recommendations as to the modifications in the constitutional relationship between the Church and State which are desirable and practicable and in so doing to take account of current and future steps to promote greater unity between the churches.

The committee had a strong lay membership. Seven clerics (including two bishops) were balanced by two MPs, a senior church official, and a raft of three assessors, one of whom (Harold Kent) had been Treasury Solicitor. In addition, for the first time, the committee included female representation - in the form of two women (one of whom was a professor of social studies in one of the 'new' universities).

Like its predecessors, the committee considered how bishops were appointed. Although it appears that Prime Ministers readily accepted and generally acted upon the Archbishops' views on episcopal appointments in this period, there remained dissatisfaction in the Church of England – voiced from time to time in the Church Assembly as well as elsewhere - about the appointments system in principle. Whilst the system continued to evolve, for example with vacancy-in-see committees, in a direction which gave the Church of England a definite voice, it was not balanced to general satisfaction. Further, the relative withdrawal of Prime Ministers was matched, it was thought, by the vacuum of initiative being filled by their Appointments Secretaries (Chadwick 1990: 128-144) Moreover, as the committee was sitting, the government attempted a reform of the House of Lords which embraced what should be the place of the bishops in the House.

The Committee reported in 1970. Even when sitting, events had occurred underlining the potential for friction in the Church/State relationship The Nigerian civil war had led the Archbishop to criticise government policy on the supply of arms to the predominantly muslim Federal government, eventually victorious over the predominantly Christian seceding would-be state of Biafra. The bishops had very publicly disagreed with the government's 1968 Bill designed to control the immigration of Asians from East Africa. Archbishop Ramsey, in his capacity as chair of the National Council for Commonwealth Immigrants, had led a delegation to the Prime Minister to protest.

It was against this background that the committee addressed establishment in its report in 1970. Like its predecessors, the report gave its version of historical developments, this time predicated on the observation that, as the state became more impartial in religion, the Church of England naturally developed its structure of self-government and became more autonomous.

The report first presented establishment as a legal construct: 'For us, "establishment" means the laws which apply to the Church of England and not to other churches.' (Chadwick 1970: 2) But the report did not stop at that:

> We want to make it clear …that we are not blind to the plural nature of English society. The Church of England is one Church of several. So far as it is called a 'national' Church, it professes a mission to all the nation. It does not claim to cast its shadow over men and women who repudiate it…No amendment of the laws could alter the vocation to a national mission…(Chadwick 1970: 10-11)

The committee reviewed the forms of legislation available to the Church of England. It was clear that proceeding by Measure, especially in organisation and property matters, was to be preferred to the private bill procedure. On the other hand, the committee discounted the arguments in favour of retaining the Parliamentary veto under the Enabling Act, and recommended that there should be a Measure to give full power - with safeguards - to the Church Assembly (which became the General Synod in 1970) to determine forms of worship. The safeguards could, for example, require a two thirds majority in the Assembly. Questions of doctrine should be dealt with by Canon.(Chadwick 1970: 23 and Chapter 5)

On the machinery for appointing bishops, as already mentioned part of the background was a government attempt to reform the House of Lords. In 1968 the government had introduced legislation on the lines of a White Paper which urged a reduction in the number of bishops in the Lords from 26 to 16. Whilst this Bill failed, the initiative raised the whole principle of episcopal membership of the House of Lords.

The committee disagreed on the way forward. A minority preferred some form of election from within the Church of England without any political involvement. The majority favoured further development of the existing system on the lines recommended in the Howick Report of 1964. As to episcopal membership of the House of Lords, the committee accepted the White Paper scheme of a membership limited to 16 with only five having voting rights, and in a system where the representation in the Lords of other religious groups was simultaneously increased.[60]

The committee was also divided on the principle of establishment. Whilst no-one favoured the Scottish model, two memoranda of dissent argued for severing church/state links, one to the extent of addressing also the Act of Settlement and the legislation relating to the personal religion of the Sovereign.[61] This was not, however, the majority view:

> We have not recommended a total severing of the historic links; first, because we think such a programme to be impracticable in the present state of opinion; and, second, because even if such a programme were practicable, most of us would not like it, though we should not shrink from it if the State decided it to be either wise or politically necessary. The people of this country value various features of our polity, and will not favour too much tampering. The people of England still want to feel that religion has a place in the land to which they can turn on the too rare occasions when they think they need it; and they are not likely to be pleased by legislation which might suggest that the English people as a whole were going unchristian. (Chadwick 1970: 65)

[60] This position was not endorsed 30 years later in the Church of England's evidence to the Wakeham Royal Commission.
[61] Chadwick 1970: Note of Dissent by Miss Valerie Pitt.

If not immediately, these largely ameliorative recommendations - later described as ‘moderately reformist (Norman 1976: 456) - were mostly acted upon in the next few years. In a situation where the Archbishop (Ramsey) ‘valued autonomy in worship far more than autonomy in appointing bishops’ (Chadwick 1984: 191), it must have been particularly gratifying to him shortly before his retirement to see the Worship and Doctrine Measure 1974 carried and all the uncertainties that had followed the rejection of the 1927 and 1928 Measures brought to an end. After further review in the General Synod, an accommodation was reached with the government over episcopal appointments in the form of the Prime Minister’s statement in Parliament in 1976. No changes ensued, however, in the forms or use of legislation – an issue settled in practice by Parliament’s acceptance of the 1974 Measure.

APPENDIX B

THE CHURCH OF SCOTLAND

The Church of Scotland has from its inception presented an alternative model of Church/State relations to that of the Church of England. There, close at home, appeared to be another national church recognised in one of the few parts – the Act of Union - of the UK's constitution that is written down. The result has been that the position of the Church of Scotland has invariably attracted the closest attention of those contemplating the revision of the Church of England's relationship with the state.[62] What follows will attempt to describe the Church of Scotland's status, how it came about and its relevance to establishment in England.

Background

The pre-Reformation church in Scotland had no metropolitan until the designation of the bishop of St Andrews in 1472. In the absence until then of a metropolitan capable of summoning the provincial councils recommended by the Lateran Council of 1215, from 1225 the church had been enjoined by the Pope to hold its own councils. These appear to have occurred irregularly, the membership constituted simply by episcopal summons, and not to have developed any representative form as in the English Convocations. The appointment of the bishop of Glasgow as a second metropolitan later in the fifteenth century led to metropolitical rivalry, and no council was summoned from then until 1549. (Dowden 1910: 223-241)[63]

The Reformation occurred in Scotland a little later in the sixteenth century than in England and on different lines. Whilst the English Reformation can be described as initially an act of state which sought politically to substitute monarchical for papal governance over an existing church, the changes in Scotland had more popular support and followed Presbyterian lines of church government to which the state was not finally reconciled until 1690. Indeed, the Stuart kings attempted to enforce episcopacy and it was not until after their departure in 1688 that the Scottish legislation of 1560 and 1592 establishing Presbyterianism was reaffirmed.

Then as now the Church of Scotland possessed the General Assembly as its supreme decision making body. Meeting annually, the Assembly is composed of ministers, deacons and elders of the Church, presided over by a Moderator elected each year. The Assembly has mixed functions: it is a legislature, a court (at least vestigially[64]) and an executive. The ordinances of the Church are known as Acts of Assembly. Under the Assembly's Barrier Act of 1697, 'overtures' (that is, proposals for Acts) 'which are to be binding Rules and Constitutions to the Church' are referred for a process of approval and ratification to presbyteries. They may be subsequently adopted as Acts of Assembly only when they have received majority approval.

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[62] All four of the twentieth century Church of England Church and State inquiries considered the Scottish model – see Appendix A. For a more recent example, see McLean 2004 which argues that the Church of England's position should be put on the same footing as the Church of Scotland.

[63] Authorities differ on whether there was ever a lay presence at the councils. Dowden thought not but the Selborne Committee in 1916 thought there was a lay association and that this was a precedent for the later General Assembly of the reformed church.

[64] Historically, one of the functions of the General Assembly was to act as the final court of appeal in discipline cases, but since 1988 such appeals have been heard by a Judicial Commission.

Position of the Crown

Under Article XXV.IV of the Act of Union 1707, and within a formula designed to entrench cited Scottish Acts in respect of Presbyterian church government, all new sovereigns are bound on accession to swear to uphold the Church of Scotland:

> .. . after the Decease of the Present Majesty ... the Sovereign succeeding to her in the Royal Government of the Kingdom of Great Britain shall in all time coming at His or Her Accession to the Crown swear and subscribe that they shall inviolably maintain and preserve the foresaid Settlement of the True Protestant Religion with the Government Worship Discipline Rights and Privileges of this Church as above established by the Laws of this Kingdom in Prosecution of the Claim of Right.

This oath is sworn at the Accession Privy Council, that is the first official engagement of the new sovereign immediately after succeeding. It is the only oath required of the sovereign by the Act of Union.

By convention, the sovereign does not normally attend the General Assembly although the right to do so is preserved in a Scottish Act and the present Queen has attended in 1960, 1977 and 2002. Normally, a representative of the sovereign – the Lord High Commissioner (an honorific role given each year normally to a prominent Scottish figure) - attends the annual meeting of the General Assembly but, sitting - like the sovereign - in the balcony as an observer only, in no way participates in its business proceedings. In 2000, the role was undertaken by Prince Charles. In Scotland, it has been argued, the Church and the State are *separate* and *distinct*: in England, even though Parliament has delegated the initiative in legislative functions since 1919 to what is now the General Synod, the Church of England is, save presently for matters of worship and doctrine, *subordinate* to the State.

Secessions and reunions

Whilst other doctrinal and worship matters have occasionally given rise to acute controversy within the Church of Scotland, questions of governance have been the most dramatic and direct cause of secessions of various kinds since the early eighteenth century.[65] The foremost issue has been the extent to which the Church is free to govern its own affairs. In Scotland the theology of the "two kingdoms" has always possessed particular importance. That is, the State and the Church were conceived as inhabiting simultaneous but separate spheres. Accordingly, intrusion by the state into affairs perceived as especially belonging to the province of the Church itself to determine have been highly sensitive matters.

The restoration of lay patronage in 1712 (10 Anne c 12, a measure designed to wean landowners from Jacobitism[66]) led to secessions up to and including the "Disruption" of 1843. This was precipitated by judicial decisions which challenged the autonomy of the General Assembly in ways hostile to the then dominant evangelical party. The first decision in 1838 (*Auchterarder*) struck down an Act of Assembly of 1834 (the Veto Act) aimed at mitigating patronage by the addition of elements of popular choice, and the second (*Stewarton*) in early 1843, by invalidating the Assembly's Chapel Act, effectively eliminated the evangelicals' majority

[65] The bewildering character of these secessions and partial unions is often rendered comprehensible by means of resort to 'wiring' diagrams. See for example Sjolinder (1962) Appendix I 'Divisions and Reunions of the Scottish Church 1690-1929'.

[66] This measure was arguably in breach of the Act of Union which included measures to guarantee the then condition of the Church of Scotland.

and led to almost a third of the General Assembly leaving to establish their own Free Church. But they did not do so because they wished to break the link between church and state but because they sought a renewed national church in which 'The Crown Rights of the Redeemer' would be fully respected – and which would remain established in accordance with the Treaty of Union. As Thomas Chalmers, the leader of the Disruption, proclaimed in his Moderational address to the first General Assembly of the new church:

> We hold that every part and every function of a commonwealth should be leavened with Christianity, and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that in them lies to countenance and uphold it. That is to say, though we quit a vitiated establishment, we go out on the Establishment principle; we quit a vitiated establishment, but would rejoice in returning to a pure one. To express it otherwise: we are the advocates for a national recognition and national support of religion – *and we are not Voluntaries.* (Proceedings 1843: 12, emphasis added)

This emphatic act was a defining moment in nineteenth century Scottish history. Following an enormous effort to raise funds and build new churches, the heirs to the Disruption created a substantial presence outside the Church of Scotland but still sharing adherence to the Westminster Confession.

The Church of Scotland Act 1921

Towards the end of the nineteenth century projects of reunion of various kinds began to be discussed. Characteristic of such events in the past was that there were usually minorities in the uniting forces which stood out obdurately against the proposed settlements. In the case of the union in 1900 between the Free Church of 1843 and the United Presbyterian Church (itself a union of voluntarist secessions of 1733 and 1761), the minority in the Free Church litigated claiming that it should be regarded as the continuing, legitimate entity entitled to the whole of the Free Church's property. The House of Lords found (*Overtoun*) for the minority in 1904 on two grounds: that the Free Church was unable to alter the terms of the trust on which it was founded; and that the United Presbyterians (with whom the majority had united) rejected the 'Establishment Principle' on which Chalmers and his colleagues had laid such emphasis. This left the minority in possession of a number of churches, manses and associated property (not all of which had been in issue in, or therefore decided by, the litigation) beyond its capacity to cope and the majority contemplating a situation in which it had no physical assets whatsoever.

These issues were remitted, effectively for arbitration, to a Royal Commission. Reporting nine months after the Lords judgement, the Commission opined:

> We are forced to the conclusion that the Free Church, from the paucity of its numbers and the poverty of its resources, is incapable of carrying out the religious work of the Church which it represents, and therefore of putting to their proper purpose the enormous endowments with which it claims to be entrusted. But, on the other hand, it would be unjust that these endowments, or the greater part of them, should be handed over absolutely and without condition to the United Free Church.(Royal Commission 1905: 20)

The immediate result was the Churches (Scotland) Act of the same year (5 Edw VII c 12) which implemented the Commission's recommendations for a fair and workable distribution of the assets. Although not involved directly in the events, the Church of Scotland was affected by them in the sense that the Lords decision turned on the view that the Free Church's form of trust did not contain any means of varying it. Opportunity was therefore taken of the legislation to

have a clause (s. 5) inserted which put beyond doubt that the Church of Scotland was able to vary its own standing in a way that freed it from the kind of threat, for example in future possible unions, that the litigants had had to confront. Should it wish to vary the basis upon which subscription to the Confession of Faith was required, then the Act laid down that the Church of Scotland could do so by means of an Act of General Assembly following the Barrier Act procedure.

The dramatic character of these events, and the way in which they demonstrated intervention by the state, naturally coloured the character of discussions with a view to union between the Church of Scotland and the United Free Church:

> The Free Church case of 1904 demonstrated, with the utmost clarity, that a Church claiming independence from the State was as exposed to risks in the exercise of its spiritual liberty, as the Church of Scotland had been found to be in the pre-disruption judgements. (Sjölinder 1962: 107)

From the point of view of the United Free Church, union with the Church of Scotland was impossible if it was offered only on a basis which imperilled the principle – avoidance of state control – that had lain at the root of previous secession. In popular language, union could not take place with an 'established' church.

Discussions between the two churches from 1909 tried to find a satisfactory solution.[67] The outcome was the formula of the "Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual" contained as a schedule to the Church of Scotland Act 1921 (11 & 12 Geo V c 29) – 'in effect a treaty between Church and State' (Bogdanor 1995: 237). The Act asserted that the Articles were

> …lawful articles, and the constitution of the Church of Scotland in matters spiritual is as therein set forth, and no limitation of the liberty, rights and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby declared that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.

The nine Articles themselves (appended) state amongst other things that the Church of Scotland had 'the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers.' As may be seen, in this and other ways the independence of the Church in all matters spiritual is asserted in ringing language.

The Bill was a government Bill introduced on Second Reading by the Scottish Secretary. He made it clear that the Bill was a paving Bill to enable – after a later Bill to deal with property and endowments – union to take place. Strong emotions were expressed: 'The nation is weary to death of the wastefulness of the present system, and is deeply conscious of the shame and the

[67] One of the most up to date accounts of the whole process may be found in Murray (2000).

peril of ecclesiastical strife.'[68] There were objectors but they did not divide the House on this occasion, though there was a division on the Second Reading of the later Church of Scotland (Property and Endowments) Bill 1925 (15 & 16 Geo V c 33).[69] The reunion between the Church of Scotland and the United Free Church eventually took place in 1929.

Implications for Church and State in England

The special character of the position of the Church of Scotland was a matter of remark for the Church of England even before the 1921 Act. The Selborne Committee on Church and State, which reported in 1916, devoted a whole appendix (Appendix V) to the Church of Scotland and quoted the then draft 'Articles Declaratory' at some length opining 'The settlement of the sixteenth century was made not by a government, but by a people: and the constitution after the Revolution was only ratified and confirmed by the State.' (Selborne 1916: 35) The Committee defended its recommendations for retaining a state veto in what became the Enabling Act of 1919 partly because it distinguished the position of the Church of England from that of the Church of Scotland: 'The Church of England does not represent the mind of the English people as fully as the established Church of Scotland represents the mind of Scotland.' (Selborne 1916: 39)

Set up in the wake of Parliament's refusal to accept the Prayer Book Measures in the late 1920s, the Cecil Commission also looked closely at what it called 'The Scottish Solution' after the reunion of 1929. The Commission did not, however, recommend following the Scottish model:

> We do not think that The Scottish settlement could be an exact model for what should be done in England. The history and conditions of the two countries are not the same. In Scotland there was little or no difference on doctrine or ritual. (Cecil 1935: 5)

The Moberly Commission came to similar conclusions in 1952. Though claiming that the Scottish example showed that establishment was compatible with spiritual freedom, it rejected the model for the Church of England. Its arguments were similar to those used in 1935 viz. the greater co-extensive character of the Church of Scotland and nation, the lack of division over doctrine and worship, the less clear line between clergy and laity, and the longstanding character and prestige of the General Assembly to which the then Church Assembly could not lay claim. Moberly 1952: 27-8) After somewhat briefer consideration than its predecessors, the Chadwick Commission eighteen years later came to the same conclusion on the basis that the two churches had very different histories.

The Church of Scotland and 'establishment'

In England there has been a tendency to enlist the Scottish model in aid of whatever argument over establishment is being promoted. Thus, it has for some been a subject of envy and for others - because comparison demonstrates English exceptionalism - not a viable alternative despite apparently attractive features. The Church of Scotland Act, because it has been received in England as largely reinforcing pre-existing Scottish tendencies, has not by itself much influenced English perceptions – although those coming across it for the first time may be surprised by its content.

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[68] Hansard, Commons, 22 June 1921, Secretary Munro, col. 1406.

[69] Hansard, Commons, 10 February 1925, cols. 55-164. There was a further measure, the Church of Scotland (Property and Endowments) Amendment Act 1933 (23 & 24 Geo V c 44) to tidy up some matters arising from the actual reunion in 1929.

In Scotland, there are also different views about the extent to which the 1921 Act disestablished the Church of Scotland. Even during the Second Reading debate on the 1921 Bill it was pointed out that there was some ambiguity in how the Articles Declaratory were seen:

> My friends of the Established Church are told this Bill is to establish the Church of Scotland more strongly than ever…The people who hold the old United Presbyterian view, or the Free Church view…are told that this Bill is really equivalent to disestablishing the Church of Scotland….It is unfortunate that a Bill which is intended to promote union should depend for its support upon exhibitions of casuistry which would have been a credit to the Middle Ages.[70]

As a Scottish lawyer argued over thirty years later

> By this remarkable statute the UK Parliament has admitted the legislative sovereignty which the General Assembly has always claimed in the ecclesiastical sphere, and, by implication, it seems to have conceded that there is in at least one respect in which the UK Parliament is not sovereign. This power of ecclesiastical legislation is a very real mark of freedom, but not at all a mark of disestablishment. For what established church could ask for a greater measure of state association than to share with the civil authority the legislative power of the state? (Murray 1958: 160-1)

At the root of these considerations is just what meaning should be attributed to 'establishment'. In practice an elastic term, its meaning is often stretched to accommodate the rhetorical purpose and policy preferences of particular writers. One commentator has argued that the language of establishment should not be applied to the Scottish situation because it is impossible to do so without giving rise to misunderstanding. Accordingly, the Church of Scotland is neither established nor disestablished but 'a Church both national and free'. (Sjölinder 1962: 374)

More recently, it has been suggested that though the Church of Scotland rejects establishment in the narrower sense of a Church 'by law established',

> …broader understandings of establishment are more relevant. The Church of Scotland sees itself as more than a sect or a collection of gathered congregations. It has a responsibility to address the whole life of the nation, and to minister to the structures of society…It tries to maintain its historic responsibility to be prophetic, to speak truth to power, to be concerned with what used to be called 'the Christian good of Scotland'. And the state, for its part, gives a special degree of recognition to the Church of Scotland, although the 1921 Act makes clear that this does not in any way 'prejudice the recognition of any other Church in Scotland as a Christian Church protected by law in the exercise of its spiritual functions'. (Forrester 1999: 86)

Whilst a more extended discussion of the issues is offered above in relation to the Church of England, it will be sufficient perhaps to note here that the 1921 settlement in Scotland was designed for a particular contemporary purpose, and cannot be expected, however it was interpreted in 1921, to be absolutely proof against events and developments, for example EU law and rights approaches, since.[71] The relationship between any church and the civil authorities

[70] Hansard, Commons, 22 June 1921, A. Shaw, col 1451.

[71] This is well understood in some modern Church of Scotland thinking: see MacLean 2004. A recent Assembly act relating to discipline was apparently run past the Strasbourg European Human Rights Convention authorities to ensure that there was no conflict.

is a dynamic process depending on the circumstances of the times and not to be pickled for ever in a single statute. One Scottish observer has expressed the position as follows :

> The age of establishment is drawing to a close. Neither the UK nor Scotland can be described, except residually, as Protestant countries. Since the Reformation, the Kirk has been presented as the authentic expression of national identity. This is no longer tenable and it is time to move forward to a church life that must inevitably be more voluntarist, congregational, countercultural in part, and engaged in new patterns of mission. (Fergusson 2004: 186)

It seems that this change is being reflected in modern judicial thinking. The classical view of the courts of the Church of Scotland has been that they are courts of the realm, exercising a jurisdiction separate from and parallel to those of the Court of Session and the High Court of Judiciary. In *Wight v Presbytery of Dunkeld*[72], for example, the Court of Session agreed that, though the proceedings in the Presbytery complained of were irregular, contrary to the laws and practice of the Church, and altogether null, they should not be set aside:

> If…this were a case in which we were called upon to review the proceedings of an inferior court, I should have thought that a strong case had been made out for our interference. But whatever inconsiderate *dicta* to that effect may have been thrown out, that is not the law of Scotland. The jurisdiction of the Church courts, as recognised judicatories of the realm, rests on a similar statutory foundation to that under which we administer justice within these walls…Within their spiritual province the Church courts are as supreme as we are within the civil; and as this is a matter relating to the discipline of the Church, and solely within the cognisance of the Church courts, I think we have no power whatever to intervene.[73]

However, in a recent case, Lord President Rodger appeared to take a rather different view of the nature of the courts of the Church of Scotland. The appellant, an associate minister, had her employment terminated in circumstances where, contrary to the Sex Discrimination Act 1975, she claimed a male minister would not have been treated in the same way. In dismissing the appeal on other grounds, the Lord President described the position of the Church courts as follows:

> …the General Assembly enacts laws which have many of the stylistic and other hallmarks of the kind of legislation which is enacted by Parliament. The procedures of the Church courts are replete with terminology which is familiar to practitioners of Scots law. The language does nothing indeed to conceal the hand which those trained in Scots law have had in guiding such proceedings down the centuries. None the less, despite their outward appearance, the laws of the Church operate only within the Church and her courts adjudicate only on matters spiritual. *In other words, the formality and indeed solemnity of all these transactions and proceedings does not disclose an intention to create relationships under the civil law;* rather, it reflects the serious way in which the Church regulates the matters falling within the spiritual sphere. (Percy 2001, emphasis added)

By a majority, the House of Lords decided for Ms Percy when she appealed the Scottish judgement (Percy 2005), and remitted the case to the employment tribunal to determine the discrimination claim. The majority decided that Ms Percy was an employed person rather than

[72] (1870) 8 M 921.
[73] Lord Justice Clerk Moncrieff at p. 925.

an office holder, and that the provisions of the 1921 Act privileged the jurisdiction of the Church of Scotland only in so far as spiritual matters were concerned. The minority judgement took the contrary view on Ms Percy's employment status and did not, therefore, have to address the position under the 1921 Act.

At the time of writing, the wider implications of the *Percy* case are still being digested. At the heart of the case was how the 1921 Act was to fare in the light of developments since its passage and what the implications were, if any, for the Church of Scotland's legal status more generally.

Articles Declaratory of the Constitution of the Church of Scotland

I. The Church of Scotland is part of the Holy Catholic or Universal Church; worshipping one God, Almighty, all-wise, and all-loving, in the Trinity of the Father, the Son, and the Holy Ghost, the same in substance, equal in power and glory; adoring the Father, infinite in Majesty, of whom are all things; confessing our Lord Jesus Christ, the Eternal Son, made very man for our salvation; glorying in His Cross and Resurrection, and owning obedience to Him as the Head over all things to His Church; trusting in the promised renewal and guidance of the Holy Spirit; proclaiming the forgiveness of sins and acceptance with God through faith in Christ, and the gift of Eternal Life; and labouring for the advancement of the Kingdom of God throughout the world. The Church of Scotland adheres to the Scottish Reformation; receives the Word of God which is contained in the Scriptures of the Old and New Testaments as its supreme rule of faith and life; and avows the fundamental doctrines of the Catholic faith founded thereupon.

II. The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church. Its government is Presbyterian, and is exercised through Kirk Sessions; Presbyteries, [Provincial Synods deleted by Act V, 1992], and General Assemblies. Its system and principles of worship, orders, and discipline are in accordance with "The Directory for the Public Worship of God," "The Form of Presbyterial Church Government " and "The Form of Process," as these have been or may hereafter be interpreted or modified by Acts of the General Assembly or by consuetude.

III. This Church is in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707. The continuity and identity of the Church of Scotland are not prejudiced by the adoption of these Articles. As a national Church representative of the Christian Faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry.

IV. This Church as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and From Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

V. This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always

in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith.

VI. This Church acknowledges the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation acting in its corporate capacity to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church, and to promote in all appropriate ways the Kingdom of God. The Church and the State owe mutual duties to each other, and acting within their respective spheres may signally promote each other's welfare. The Church and the State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom.

VII. The Church of Scotland, believing it to be the will of Christ that His disciples should be all one in the Father and in Him, that the world may believe that the Father has sent Him, recognises the obligation to seek and promote union with other Churches in which it finds the Word to be purely preached, the sacraments administered according to Christ's ordinance, and discipline rightly exercised; and it has the right to unite with any such Church without loss of its identity on terms which this Church finds to be consistent with these Articles.

VIII. The Church has the right to interpret these Articles, and, subject to the safeguards for deliberate action and legislation provided by the Church itself, to modify or add to them; but always consistently with the provisions of the first Article hereof, adherence to which, as interpreted by the Church, is essential to its continuity and corporate life. Any proposal for a modification of or addition to these Articles which may be approved of by the General Assembly shall, before it can be enacted by the Assembly, be transmitted by way of overture to Presbyteries in at least two immediately successive years. If the overture shall receive the approval, with or without suggested amendment, of two-thirds of the whole of the Presbyteries of the Church, the Assembly may revise the overture in the light of any suggestions by the Presbyteries, and may transmit the overture when so revised to Presbyteries for their consent. If the overture as transmitted in its final form shall receive the consent of not less than two-thirds of the whole of the Presbyteries of the Church, the General Assembly may, if it deems it expedient, modify or add to these Articles in terms of the said overture. But if the overture as transmitted in its final form shall not receive the requisite consent, the same or a similar proposal shall not be again transmitted for the consent of Presbyteries until an interval of five years after the failure to obtain the requisite consent has been reported to the General Assembly.

IX. Subject to the provisions of the foregoing Articles and the powers of amendment therein contained, the Constitution of the Church of Scotland in matters spiritual is hereby anew ratified and confirmed by the Church.

APPENDIX C

DISESTABLISHMENT IN THE BRITISH ISLES: THE CASES OF IRELAND AND WALES

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Introduction

There are two established churches in the British Isles - the Anglican Church of England and the Presbyterian Church of Scotland. Until the middle of the nineteenth century the Anglican Church was also established in Ireland and Wales. These churches were disestablished, however, in 1871 and 1920 respectively as the result of long campaigns culminating in Acts of Parliament.

What establishment meant in Ireland and Wales

The Church of Ireland and the Church in Wales were reformed by the English crown with the Church of England during the mid-sixteenth century. Until its disestablishment, the Welsh Church consisted of the four sees of the province of Canterbury that roughly corresponded to the geographic area of Wales, but had no separate status within what was a unitary church organization for England and Wales together. Though Anglican in form, the Church of Ireland was an independent church until the Act of Union of Great Britain with Ireland in 1800 which explicitly united the Church of Ireland and that of England and Wales.[74]

Establishment provided identical financial benefits. The established churches controlled the traditional lands and revenues of the pre-reformation churches, including rights to tithe and church tax (known in Ireland as church cess) regardless of parishioners' confessions.

Establishment also conferred membership of the relevant legislature and therefore a degree of political power. The bishops of the Irish church sat in the Irish House of Lords in Dublin until the Act of Union, after which a rota was created giving four Irish bishops the right to sit alongside their English and Welsh counterparts at Westminster. In all cases, other clergy were forbidden to sit in the House of Commons. Political influence was also given to the Church of Ireland through places for two archbishops on the Irish Privy Council.

Establishment also meant that ecclesiastical law was enforceable under the authority of the crown, and, following the Court of Delegates Act 1833 (2&3 Wm IV c 92) all matters that involved questions of doctrine, ceremony and ritual were decided by the Judicial Committee of the Privy Council.

[74] 39 & 40 Geo III c 67 p.534 Article V stated: 'That it be the fifth article of union, That the churches of England and Ireland, as now by law established, be united into one Protestant Episcopal church, to be called The United Church of England and Ireland; and that the doctrine, worship, discipline, and government of the said united church shall be, and shall remain in full force for ever, as the same are now by law established for the church of England; and that the continuance and preservation of the said united church, as the established church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union'.

Until the 1828 repeal of the Test and Corporation Acts and the grant of Catholic Emancipation in 1829, establishment entrenched a privileged position for the laity of the Established Church, while suppressing non-members. Additional penal laws had been directed in Ireland against the majority Roman Catholic population, although most were repealed by the Irish Parliament at the end of the eighteenth century. In Wales, the growth of Protestant dissent embarrassed a Church increasingly associated with an Anglican and anglicized ruling class. Establishment was consequently a symbol of repression and inequality to the non-Anglican populations of both Ireland and Wales, especially during periods when franchise limitations denied participation in the legislatures to large numbers of people.

Ireland

Prior to 1870, the Irish Church was viewed by many as 'a badge of conquest'.(Marx 1869: 421) The members of the Church of Ireland were vested with political and economic power, and owned the majority of the land. They were the descendants of predominantly English settlers from the sixteenth to early eighteenth centuries. This 'Protestant Ascendancy' over Catholics in Ireland was supported in Ulster by Presbyterian Scots, who had settled in Ireland during the early seventeenth century. In return for their loyalty to William III during James II's attempts to win back the British crowns, the Presbyterians were awarded a grant called the Regium Donum to support their clergy.

Despite English pressure, the majority of the Irish population, who were descended from the native Gael population, and the 'Old English' families from the thirteenth century, remained Roman Catholic. The census of 1861 in Ireland contained a question on religion. The results illustrated the absurd position of the Established Church, which made up only 11.9% of the population, while Roman Catholics constituted 77.6%, and Presbyterians 9% (Bell1969: 41).

Political background

Before the Act of Union, the Irish Parliament had achieved a degree of independent action from 1782, and had relaxed some of the Penal Laws which had heavily discriminated against Catholics in civic and economic life. Catholics were allowed to vote in elections from 1793 (although the high franchise excluded the majority of Catholics), and a Catholic seminary at Maynooth was founded in 1795 with state support. The Union was meant to be accompanied by emancipation legislation, although George III refused to sanction this as he considered it to be in violation of his coronation oaths.

Emancipation in 1829 was followed by the Irish Church (Temporalities) Act in 1833 (3 & 4 Will 4 c 37) which abolished church cess, reduced the number of archbishops from four to two, and the number of bishops from eighteen to ten, and established a commission to administer the funds released by the changes. Although the act, an unprecedented and swingeing intervention by the executive, sought to strengthen the church through reform, it also signalled that ecclesiastical change was possible throughout Britain – a point not lost on churchmen and non-churchmen alike in England and Wales as well as in Ireland. To reduce resistance to tithe (which had become acute in the 1830s) an act of 1838 converted it into a rentcharge. De facto limited concurrent endowment in the Maynooth grant and Regium Donum was continued. Indeed, Robert Peel's Tory government increased Maynooth's endowment in 1845. It was over that issue that William Gladstone left the government, though he later became the champion of disestablishment under the Liberal Party banner.

Irish political action

Establishment and the Protestant Ascendancy were meant to increase British security. However, it became clear in the nineteenth century that Catholicism was no longer a threat to British security though political instability *within* Ireland was. This threat was exemplified by the birth of unified Catholic political action in Daniel O'Connell's Catholic Association. It was the election of O'Connell as the MP for Clare in 1828 that forced the hand of Wellington's Tory government over emancipation. Irish political grievances were later internationalised by the formation in the United States in 1858 of the Irish terrorist group called the Fenian Brotherhood, and the threats it posed to Canada.

A national issue

Political articulation was also given to the Irish question in England itself with the formation of the Liberation Society in 1853 by Edward Miall. Although seeking to disestablish and disendow churches throughout the United Kingdom so that all Christian churches would have equal status, the Society quickly picked out Ireland as the weakest point in the armour of established religion. As Ireland's political problems became more pronounced, Westminster politicians were forced to pay them more attention. By the late 1860s both Tory and Liberal politicians had begun to accept the necessity of resolving the Irish problem. Prime Minister Benjamin Disraeli stated that the Church of Ireland was 'an alien church' and a central part of the 'extreme distress' of Ireland.[75]

The Tories, however, favoured the concept of concurrent endowment rather than disestablishment and disendowment. The Earl of Mayo, Disraeli's Chief Secretary for Ireland, maintained 'that Justice and Policy may demand a greater equalisation of ecclesiastical arrangements than now exists… If it is desired to make our churches more equal in position than they now are, this should be secured by elevation and restoration, and not by confiscation and degradation'. (Moneypenny 1929: 589-90)

Despite Tory views on the matter, the mantle was stolen by William Gladstone, who, in the course of the mid 1860s, sought to unite all non-conformist and Catholic opinion with Whigs and Radicals under a Liberal Party banner throughout the British Isles capitalising on the expanded franchise of the Reform Act of 1867 – which also delivered a phalanx of Irish nationalist MPs into the Commons. Despite being a high-churchman, Gladstone decided that, as part of his programme for reform in Ireland, the interests of the British state would be better served by the disestablishment and disendowment of the Anglican Church in Ireland. Accordingly, the Liberals went on the parliamentary offensive and In March 1868 Gladstone carried a motion against the government in favour of Irish disestablishment.

Later that year, the country went to the polls in a campaign largely fought on the issue of Irish disestablishment and disendowment. Liberals supported the issue using the arguments of justice in terms of population and the disproportionate wealth of the church compared to its membership, alongside the need to resolve the Irish political situation. The election proved a success for Gladstone and his coalition of Radicals, Whigs, Catholics and dissenters under the wing of the Liberal Party, winning 387 seats to the Conservatives 271. As a result, Gladstone had a mandate to move ahead with a bill to disestablish and disendow the Irish Church.

Finally introduced on 1 March 1869, Disraeli's Tories vigorously attacked the bill in committee stage, but all amendments were voted down. When it reached the Lords in June, the bill was heavily amended to reduce its financial effects and there was some toying with possibilities of concurrent endowment. The Commons rejected the Lords amendments and it was only after high level mediation involving the Queen and some mitigation of compensation terms that a major constitutional crisis was avoided and the bill finally passed, receiving royal assent on 28 July 1869.

An Act to put an end to the Establishment of the Church of Ireland, and to make provision of the Temporalities thereof (32 & 33 Vict c 42)

The date of Irish disestablishment was set for 1 January 1871, at which time the union of the churches of England and Ireland, crown patronage, appointments and lay patronage ceased. The Irish bishops also lost their places in the House of Lords, and the archbishops their ex-officio places on the Irish Privy Council.[76] The other main provisions were as follows:

- Ecclesiastical law ceased to have effect other than by the operation of the normal civil law of contract.

- Ecclesiastical corporations were dissolved and their property handed over to the new commissioners appointed to receive the property of the church, including that formerly administered by the Irish ecclesiastical commissioners.

- The Crown was empowered to grant a charter to a new representative body of the Church to enable it to receive property, which included church buildings and movable goods for the use of worship. The Church was also given the opportunity to buy its glebe-houses at favourable rates.

- The church kept endowments that it had obtained after 1660 when the church assumed its post Restoration form. Endowments before that time were put towards the good of the greater Irish community, but only after vested interests had been compensated.

- Clergy who held the freehold to their benefice or were permanent curates received a net income for life on the condition that they continued to perform their duties, and with a right to voluntary commutation. Non-permanent curates received compensation of between £200 and £600. Lay patrons were also compensated, as were others who worked within the church.

- Tenants were given first refusal where the new commission sold land. Likewise, the tithe was put up for sale on the same terms, but few if any took up the offer, and the tithe effectively died.

- The Maynooth Grant and the Regium Donum ceased, but were compensated both by preserving existing life interests and the payment of final capital sums

- The new Church of Ireland was allowed to hold a synod, which was to form the backbone of future church governance alongside the representative body.

[76] The archbishops kept their positions for the duration of their terms of office.

Church of Ireland organisation

Between 1869 and 1871 the church designed its new General Synod, which was to meet annually. It consisted of the House of Bishops and House of Representatives, made up of clerical and lay orders. Legislation could only pass if approved by a majority of each order. Thus, each house could operate a veto, although the bishops' veto was limited.

The Representative Church Body was formed to hold the property that remained with the Church. It consisted of the episcopate, one clergyman and two laymen from each diocese, and twelve laymen. Meeting regularly, it was the civil service of the Church, and responsible to the General Synod.

Bishops and the Archbishop of Dublin were elected by the Synods of their dioceses, while the Archbishop of Armagh, elected in the same way, was approved by the House of Bishops. Clergy were appointed by vestry councils operating with diocesan appointment boards.

Post disestablishment

The Church of Ireland declined into the twentieth century, especially in southern Ireland, although it remained unified after 1922 and the creation of the Irish Republic. The new constitutional arrangements functioned successfully and the Church managed to agree on a new prayer-book.

Gladstone's Church of Ireland Act was, of course, only the first in a series of measures that were designed to resolve the Irish issue. Gladstone's Liberal Party held together its coalition of Whigs, Protestant dissenters, Catholics and radicals until the issue of home rule split the party in 1886. Whereas the Act succeeded in removing the religious issue, it could not by itself redress all Irish grievances whose residue remain an intractable puzzle for both the Irish and British governments.

Wales

A situation where the Welsh Church was the Church of England in Wales was not seriously challenged until the growth of nonconformity increasingly apparent in Wales from the mid-eighteenth century, itself a symptom of the neglect that had characterised ecclesiastical affairs in the country where the Church became increasingly distant from the people.

No Welsh-speaking bishop was consecrated after Anne's reign (1702-1707) until Gladstone appointed Joshua Hughes to St Asaph in 1870. The Church was inflexible and monolithic and unable to respond to the needs of the growing Welsh population, especially in quickly industrialising South Wales. New parishes could not even be created without legislation. It was much more thinly endowed than in England, with a higher proportion of its anyway less valuable tithes in the hands of lay impropriators. Nonconformity, on the other hand, was flexible and responsive to local needs. Moreover, it catered much more assiduously for a monoglot Welsh speaking as well as bilingual Welsh population. However, although there were certainly special cultural and linguistic features unique to Wales, their exact contribution to the decline of Anglicanism in Wales might be in danger of being exaggerated when it is remembered that Anglicanism also lost support in England at the same time.

Political Background

In 1851 Henry Mann conducted the first census of religion. It revealed the strength of Nonconformity in the four Welsh dioceses. Of the 52% of the Welsh population who attended services on 30th March 1851, 78% were dissenters, while only 21% went to services within the Church (Morgan 1980: 10). The results provided a clear insight to the conditions of religious activity in Wales and demonstrated that the Church constituted only a small part of active Christianity.

Although the Church did go through a mid-century revival and became more responsive to the needs of the population that it served, the strength of the combined Nonconformist groups continued in the period before disestablishment. By 1906, when the Royal Commission was appointed to investigate the state of the Church in Wales, 27% of active Christians were from the Church, while 73.% practised in dissenting chapels (Bell 1969: 274), although the 'national' Church laid claim to the 50% of the population which did not practice any faith at all.

Although the grievance of church tax was removed in 1868, the Church's unpopularity was aggravated by the existence of tithes as a major part of the Church's endowment throughout rural areas, regardless of confession. Anger boiled over in the 1880s with forced sales during the collapse of the agricultural market, and legislation was passed in November 1890 to hand the responsibility of paying tithe to the landlords rather than tenants.

Disestablishment and Liberal Radicalism

The progress of disestablishment in Wales was not simply a struggle of religious affiliation; it was intrinsically tied to the growing awareness of Wales as a political body, especially as political enfranchisement increased at both the local and national levels.

The Liberation Society quickly took root in Wales and encouraged those favouring radical political change to support disestablishment as the vanguard and symbol of that change. In the election campaign of 1861, the society placed pressure on Liberal candidates in Wales to come out in support of disestablishment and disendowment.(Bell 1969: 18) Disestablishment quickly became the centre of Welsh political consciousness. The campaign for religious equality came to represent the rejection of the political subjugation of Wales as a whole.

The process was advanced by two events in the latter half of the 1860s. The first was the election of 1868, which was fought with a widened franchise after the Reform Act of 1867. This act gave the vote to thousands of Welsh nonconformists for whom disestablishment was a key issue. Liberal candidates campaigned on the slogan 'the nonconformists of Wales are the people of Wales'[77]. The second event was the Irish disestablishment which provided a blueprint for nonconformists and radicals to consider the possibilities for their own nation.

Wales as a separate political identity

The political identity of Wales became further pronounced during the 1870s. Politicians began to understand and exploit the potential of the Welsh 'block' in the Commons. Gladstone's attendance at the 1873 Mold Eisteddfod, at which he defended Welsh nationalism and language, was a key example of this recognition.

[77] (Morgan 1980: 28) - Henry Richard, candidate for Merthyr Tydfil.

Stuart Rendel, an English Anglican, saw the possibilities of Welsh action when, standing on a disestablishment ticket and claiming that the Church was anti-Welsh, he ousted sitting Tory MP Sir Watkin William Wynn.(Morgan 1980: 40). Observing that the Liberal voting block in the Commons consistently won 27-30 out of 34 possible seats, Rendel sought to organise the Welsh block to further Welsh interests, placing disestablishment at its fore.

This goal was also taken up by the radical Liberals of the main party. In 1882, Joseph Chamberlain visited Wales, spoke about disestablishment and added the issue to the radical Liberal 'Unauthorized Programme'.

One of the clearest signs of the Welsh political voice's growing power was the first ever separate legislation for Wales in 1881. The Nonconformists' opposition to intoxicating liquor gave rise to an influential temperance movement which bore fruit in the form of the Welsh Sunday Closing Act 1881. This was a major political landmark for Wales as, together with the Welsh Intermediate Education Act 1889, it set the precedent that Wales could be legislated for separately from England.

Dependence on national events

Despite these developments, the issue of Welsh disestablishment remained on the agenda with little effect for fifty years, although various motions and bills about it were presented to Parliament. The issue did, however, rise on the *Liberal* agenda. After the Liberal Party split over the issue of home rule for Ireland in 1886, Gladstone had to rely on the Welsh Liberal voting block. Gladstone himself said 'the Welsh vote is a strong vote, and they are right to try what they can do with it' (Bell 1969: 230-1).

The Liberal Party was out of office between 1886 and 1892, which effectively destroyed the chances of disestablishment. Further resolutions on the Commons in 1889, 1891 and 1892 failed, although the Welsh block remained solid. The importance of the block to the Liberal Party was highlighted in 1891 when the issue was placed second only to Irish home rule on the Newcastle Programme of Liberal Party objectives.

In a nod to Welsh members after Gladstone won the 1892 election, Asquith, the Home Secretary, introduced the Welsh Church Suspensory Bill in February 1893 in preparation for disestablishment. However, it made no progress because of the preference given to the Irish Home Rule Bill.

In 1894, Rosebury, Gladstone's successor, failed to introduce a bill despite his stated commitment to Welsh disestablishment (Morgan 1980: 143). Three Welsh Liberal members, including Lloyd George, declared themselves independent of the whip in protest. The worried government then introduced the first Welsh Disestablishment Bill, but the Liberals lost the 1896 election and the bill failed. The issue remained a low priority until the next Liberal government, which appointed a Royal Commission in 1906 to examine church affairs in Wales. This was a sign that the government intended to press ahead with disestablishment legislation.

Despite disestablishment being a major issue for the party, Irish home rule dominated the last decades of the nineteenth century. Home rule caused Liberal governments to fall, or meant that not enough Parliamentary time could be found to take the Welsh bills past their second readings. Likewise, the 1909 bill failed because the Government was consumed by the budget crisis.

Lack of progress was compounded by the fact that bills had to pass both the Commons and the Lords. Bills were introduced by Liberal governments as a sop to the Welsh lobby in the knowledge that they would not be approved by the upper house. (Wittingly introducing Bills that could in fact make no progress was a standard Liberal government technique for managing radical agitation.) It followed that there was no incentive to give such Bills parliamentary time. It was only after the Parliament Act of 1911 removed the Lords' veto that a Bill for Welsh disestablishment became a practical proposition.

Disestablishment and beyond

By the time Home Secretary Reginald McKenna introduced the final bill, much of what disestablishment represented to the people of Wales, especially the equation of religious with political equality, had already been achieved. Two in three men had the vote, Wales was recognised as an area with a separate custom; Welsh culture and language had been recognised by the foundation of a university and national library (Morgan 1980: 274); the Local Government Act had removed Anglican oligarchic county rule; and a Welshman was Chancellor of the Exchequer. The fire that had raged over the cause of disestablishment in Wales was dying out; the Bishop of St Davids commented to the Bishop of London that the Disestablishment movement was dying at its roots from old age.

The Lords failed to pass the 1912 bill twice, but the terms of the Parliament Act were invoked on its third introduction in April 1914. While in the Lords committee stage war broke out. Although the government toyed with the idea of suspending the Act altogether, the Welsh Church Act and supporting suspensory legislation received royal assent on 18 September 1914 and merely postponed the principal Act's coming into force until after the conclusion of hostilities..

An Act to terminate the establishment of the Church of England in Wales and Monmouthshire, and to make provision in respect of the Temporalities thereof (4 & 5 Geo V c 91).

The act dissolved ecclesiastical corporations, abolished patronage, removed the Welsh bishops from the House of Lords and allowed Welsh clergy to sit in the Commons. The ecclesiastical courts ceased to have jurisdiction, and ecclesiastical law no longer had force except as contract under the normal civil law. The Welsh bishops and clergy were removed from the Convocation of Canterbury.

The Act also made provision for the temporalities of the church by supplying a measure of disendowment. A body of commissioners was established to receive the church's property, which was divided into income and non-income generating property. As non-income generating property, the cathedrals, churches, ecclesiastical residences, churchyards and closed burial grounds were transferred to the representative body of the new province.

Approximately five-eighths of income-generating property was transferred to the county and parish councils of Wales, the colleges of the University of Wales, and the National Library. The sequestration of this property, which included tithes as well as diocesan and glebe lands, was justified by the argument that the donation of such ancient property to the Church in Wales had been made in the spirit of donation to the pre-1662 undivided religious community, and was therefore the rightful property of the nation as a whole.

Roughly one quarter of income-producing property was derived from English sources, namely the Ecclesiastical Commissioners' common fund and Queen Anne's Bounty. The Act made

provision for these sources to be transferred to the Representative Body. The final eighth fell under the description of 'modern endowments', or those which had been given to the church after 1662.

The disendowment was conditional to life interests upon 'freehold' livings. Likewise, lay patrons of the church, whose rights over livings were ended by the Act, received compensation of not more that one year's revenue from the benefice in question. Curates, however, were not compensated.

Following the outbreak of World War I, the Act's entering into force was suspended and the church, as a result, given more time to prepare for what not all regarded as necessarily the inevitable. For example, some churchmen felt that a post-war Conservative government might look more favourably upon the church, or repeal the Act. But as war progressed, the Church, led by Alfred George Edwards, bishop of St Asaph, sought to organise its affairs in order to prepare for disestablishment.

After the armistice, the progress of the Act was both resumed and the extent of disendowment mitigated with the Church in Wales (Temporalities) Act (9&10 Geo V c 65) of August 1919. It set the date of disestablishment at 31 March 1920, and provided £1,000,000 from the taxpayer towards commutation. Thus, on slightly more favourable terms than the original 1914 Act, the Church in Wales became an independent province within the Anglican Communion. The Archbishop of Canterbury released the four Welsh bishops from their oaths of obedience, and they duly elected bishop Edwards as their metropolitan.

Effects of disestablishment

No-one appears subsequently to have been sure about the financial effects of disendowment. In addition to the taxpayers' subvention, Queen Anne's Bounty and the Ecclesiastical Commissioners behaved generously to the Welsh Church which itself had by 1935 raised over £700, 000 in new endowment by voluntary subscription. Tithe was not abolished but the ownership of the rentcharge passed to county councils before abolition as in England from 1936. Noting with relief in 1935 that the Church in Wales no longer had the responsibility of tithe, Archbishop Green though that one net effect had been actually to see an improvement in net clerical incomes. (Green 1935: 9)The length of time it took to implement disendowment necessarily made it more difficult to judge final outcomes. Ultimate transfers to the county councils from the commissioners during 1942-47 amounted to £3,455,813 10s 8d. (Bell 1969: 312)

Organisationally, two new dioceses were later founded to better serve Wales: the See of Swansea and Brecon was carved out of St David's in 1921, and the See of Newport was created out of Llandaff in 1923. The sole substantial untidiness left from the legislation related to the upkeep of usable pre 1662 churchyards. The legislation made these available to county councils should they want them. By 1935 out of 819 the Church still had 670 on its hands, and legislation was later necessary to deal with the situation.

The two disestablishments in perspective

Both disestablishments may now be seen as part of a process of adjustment to the concession of effective political personality to Irish and Welsh people. Ultimately, an English establishment in the two countries could not be sustained if it was not wanted. In a way that principle had been conceded in the Clergy Reserves (Canada) Act 1853 (16 Vict c 21) which ceded to the local

legislature the disposition of the reserves introduced in 1791. What could be tolerated in a far off country was one thing: nearer home questions of property rights, tradition and – in Ireland at any rate – security were at stake. Alien establishment/concurrent endowment could survive only where there was oligarchic control: significantly, it was the Governemnt of India Act 1935 that abolished, save for minor chaplaincies, its manifestation in India.

Both disestablishments assumed that they would be accompanied with measures of disendowment. On the whole, it could be maintained that the disendowment in Ireland was less punitive than that in Wales, though there it is also true that each successive Welsh Bill was less severe than the last. Finally, neither disestablishment could necessarily function as a model for disestablishment in England. Apart from the fact that attitudes and circumstances have moved on greatly from the ancient controversies, dealing with peripheries is quite distinct from tackling the core. In that case, forms of disestablishment which severed links with the Crown would require revisiting not only state formularies but also the whole constitutional settlement of the late seventeenth and early eighteenth centuries.

APPENDIX D

CHURCH-STATE RELATIONS IN SCANDINAVIA

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Introduction

At the Reformation, the Scandinavian churches were restructured in accordance with Lutheran principles, although the resulting institutions were by no means identical; Sweden, for example, made a point of preserving the historic 'apostolic succession' of bishops while Denmark decisively rejected it. What they have in common, however, is that they all began as State churches established by law; in addition, all identify themselves strongly with the people of the country that they serve: the 'folk-church' concept.

A Lutheran ecclesiology

For Martin Luther, the conduct of secular affairs was to be reserved to the civil power while the government of the Church was to be conducted by the superintendents and clergy. (Höpfl 1991:28).[78] However, he had no strong desire to supplant the traditional ecclesiastical hierarchy with the kind of conciliar system of governance espoused by the followers of Calvin and, though no great admirer of the nobility, Luther was prepared to concede a place for the Christian prince, always provided that the prince did not act capriciously. Superintendents were to rule the Church unfettered but they, in their turn, were to be subjects of the secular authority. (Höpfl 1991:32). Bernt Ofestad has suggested that, given the troubled times he lived in, Luther regarded this as no more than a temporary expedient. (Ofestad 1996: 23)[79]

But once one has conceded that the Church, though independent in spiritual matters, is subordinate to the secular authorities in temporal ones, it is a fairly short step to conceding the interest of those secular authorities in such matters as senior Church appointments, or even acknowledging that, as protector of the Church's independence, they should have some say in the polity of the Church whose independence they are to guarantee.

And not even in Calvinist polities could the newly-reformed Church always survive without secular assistance. As Ian Henderson points out, Reformation Scotland, for example, was still largely feudal and weak at the centre, with strong territorial magnates. It was this lack of a strong central authority that enabled the people to resist attempts by the Crown to restore episcopacy – but the leadership and support of the 'Lords of the Congregation' were critical to that resistance:

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[78] '[A]s regards whatever is on Earth and belongs to the temporal, earthly kingdom, man can have power from God. But whatever belongs to heaven and to the eternal kingdom, is subject to the Lord of heaven alone.': *Von Weltlicher Oberkeit* [*On Secular Authority*]. See also Melancthon's *Augsburg Confession – Article XXVIII: Of Ecclesiastical Power*.

[79] But see also Fergusson 2004: 37–39.

> When the first General Assembly met the feudal magnates quietly drew in their chairs and joined in. Again their presence could be left to be justified by the strained laws of exegesis. Its real justification lay in the more basic law that if you rely on someone to shoot you out of a situation he will expect to have some say in determining the kind of situation you are going to get yourself into. If the prototypes of English bishops are government stooges, the prototypes of Scots elders are guys with guns. (Henderson 1967: 65).

Reformation and Establishment

Though Lutheran ecclesiology provided a degree of theological justification for the particular form of the Scandinavian Reformation, it also rested to a considerable degree on *Realpolitik*, beginning in Denmark-Norway-Iceland with a decree by Christian III on his accession to the Danish throne in 1538. In Iceland, the process of Reformation was not completed until the execution of the last Roman Catholic bishop, Jón Arason of Hólar, and his sons in 1550. (Fell 1999: 90, 97).

Similarly, though the Swedish Reformation had been begun by Gustavus Vasa, a Roman Catholic restoration was only narrowly averted on the death in 1592 of Johan III, who had allowed his son Sigismund to be brought up as a Roman Catholic.[80] Sigismund's uncle, Duke Karl Gustafsson Vasa, summoned a synod at Uppsala in 1593 which condemned the new liturgy, elected as Archbishop a militant Lutheran, and adopted the *Augsburg Confession*. Karl became Regent in 1599 and succeeded Sigismund as Karl IX in 1604. Under the Act of Succession 1604 the Crown was secured to the heirs of Karl IX and the Reformation settlement firmly established. (Derry 1979: 99–101).[81]

The folk-church

Dag Myrhe-Nielsen describes the 'folk-church' concept as 'the Scandinavian speciality in the field of church characteristics'. (Myrhe-Nielsen 1990:85). Though it is shared to some extent by the Church of England, the Church of Scotland and the Church in Wales, it is much more developed in Scandinavia than in Britain, given that the vast majority of Scandinavians still regard themselves as members of their national churches even if they hardly ever attend a service. In Denmark, for example, the Church is formally known as *Den Danske Folkekirke*: two possible translations might be 'The Church of the Danish People' or 'The Danish National Church'.

The idea of the folk-church is basic to the self-image of the Scandinavian churches.[82] When, for example, in the early part of the last century the inclusive approach of the leaders of the Church of Sweden was attacked by its Evangelical wing (who wanted gathered congregations united by personal conversion instead of territorial, inclusive parishes (Hope 1995:584)), territoriality was stoutly defended by the bishops. Perhaps the most telling response was by Bishop Einar Billing of Västerås, who argued that territorial ministry demonstrated in a practical way that the services of the Church were available to everyone and bore witness to the fact that every person lives

[80] And who in 1577 had offended many clergy by introducing a new liturgy – *Liturgia Svecanae Ecclesiae Catholicae et Orthodoxae Conformis*, aka the *Red Book* – which many thought Romanizing.

[81] For a discussion of liturgical change from 1531 to 1614, see Brilioth 1930:237–62.

[82] For a recent discussion of the place of the folk-church concept in Scandinavian ecclesiology, see Aurelius 1998.

within the borders of the grace of God. (Billing 1930, quoted in Wingren 1967:85).[83] It was because of this desire to include everyone that the Church of Sweden's test of membership, for almost fifty years, was *citizenship and inheritance* rather than baptism; if either of its parents was a member of the Church then a child automatically became a member in its turn. (Ahrén 1960:32).

The folk-church concept remains very strong in all the Scandinavian countries, irrespective of the legal status of the church in question. In 2001 a black Muslim teenager, Benjamin Hermansen, was stabbed to death in an Oslo suburb in what was thought to be the first racially-motivated murder in Norway. Because the local mosque was not big enough to accommodate everyone expected to attend his funeral it was decided to hold it in the parish church – and it was then decided that the service should be conducted by the Bishop of Oslo rather than by the local imam. Jan-Olav Henriksen, of the Oslo Free Theological Faculty, explained that the decision was in accordance with the self-understanding of the Church of Norway as

> … a church that is there for all people living in Norway. Given that this is the organising point of view, the cultural function of the church cannot be restricted to that of an organisation only for those who happen to believe in God the Christian way. The bishop is the bishop for all, and the church is the place for everyone. (Henriksen 2001).[84]

Similarly, when in 1994 the Baltic ferry *Estonia* sank with the loss of some 900 lives, the Swedish people went to their churches to light candles and to mourn privately in the anticipation that the Church of Sweden would articulate – vicariously – the meaning of the tragedy on their behalf. The only obvious English parallel to this is the events that unfolded after the death of Princess Diana. (Davie 2002).

Henriksen suggests that, nationally, the Church of Norway is anxious to minimise conflicts within society and be seen as 'the common voice' and, in consequence, upholds 'a rather privatized mode of... religiosity'. (Henriksen 2001:8) He concludes that the Scandinavian churches have been able to survive in a post-modern, largely secularised society because they continue to provide

> … resources of morality, history and cultural identity etc. that is recognised by most members of society as relevant for their own shaping of identity, irrespective of their personal faith. (Henriksen 2001:18)

John Toy, a long-standing Anglican observer of Scandinavia, concludes that the Church of England has never held the dominant position in England that the Scandinavian churches retain even in today's heavily-secularised society, so that

> … the connection between people and church has never had here the ideological basis which makes it so strong over there. (Toy 1998:21–22).

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[83] *S*ee also Gustafsson 1990:7 and Toy 1998:19.

[84] quoted in Cranmer 2002:174.

It may be that one of the reasons for this is historical: though the Scandinavian state churches and the Church of England operated within fairly similar legal and constitutional frameworks, toleration both of Dissent and of Roman Catholicism came much earlier to England than to Scandinavia.

The individual churches

Because the national churches of Scandinavia grew out of the Lutheran Reformation they still have a strong family resemblance. But in spite of the unifying factors of the Lutheran tradition and the folk-church concept, the Church-State relationship in Scandinavia has developed differently in each country, with the result that no two of the Churches are exactly alike, while the outliers – Denmark and Sweden – are no longer very similar at all.[85]

Denmark

It was possibly Denmark that experienced the most radical Reformation: the bishops were deposed and the link with the historic episcopate intentionally and decisively broken. In 1537 King Christian III secured the services of Luther's colleague Johann Bugenhagen to help in the continued reform of the Church. Bugenhagen crowned the King and Queen[86] and later ordained seven clergy as superintendents to replace the deposed bishops.

The English version of the Danish Constitution[87] published by the Danish Parliament [*Folketinget*] defines the position of the Church as follows:

> [t]he Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State. [Part I s 4].

In addition, Part VII s 66 declares that '[t]he constitution of the Established Church shall be laid down by Statute'. Part VII also provides for public regulation of other religious organizations:

> Rules for religious bodies dissenting from the Established Church shall be laid down by Statute. [Part VII s 69].[88]

[85] That is, in terms of Church-State relations. The two have always been rather different in their theological emphasis: Sweden on the Catholic, sacramental wing of Lutheranism and Denmark (the only Scandinavian church that decided not to sign up to the Porvoo Agreement) more inclined to the Evangelical.

[86] A function traditionally been performed by the Archbishop of Lund, Skåne then being part of Denmark rather than a province of Sweden.

[87] Constitutional Act 1953.

Paradoxically, some argue that, with the abolition of absolutism in 1848, the Church of Denmark *ceased* to be 'established'.

> In a legal sense, the state has no religion; hence it is not stipulated that either the minister for the church, the members of parliament or any other citizen *must* be members of the people's church. State and church have been separated; civil and political rights apply regardless of whether one belongs to the people's church, some other community of faith, or prefers to live with no association with any faith whatsoever. (Lausten 2002: 229–230)

Moreover, the official English text of the Constitution Act is itself slightly misleading, since it renders *Den Danske Folkekirke* as 'the Established Church of Denmark'.

It is undoubtedly true that the modern Church of Denmark has no privileged position in terms of particular religious freedoms and civil rights; but in terms of its own governance it is possibly the last quasi-Erastian church in Western Europe. In spite of the declaration in s 66 of the Constitution, the Church still has no national system of synodical government, the Minister of Ecclesiastical Affairs is its supreme administrative authority and its canons are promulged by the *Folketing* and its regulations are part of public law (Dübeck 2005: 60) – though there is a very strong convention that church legislation will only be enacted if there is broad cross-party agreement about its content. (Lausten 2002:282). The Church's most important source of income is the church tax, payable only by members of the National Church. In addition the Government makes grants directly to the Church, which accounted in 2002 for some 12 per cent of the Church's total operating costs (Danish Ministry of Ecclesiastical Affairs 2002). The responsible department is now the Directorate of Culture, Education, Research and the Church

Possibly because there was no ecclesiastical counterweight to balance the views of secular politicians, legislation to permit the ordination of women was enacted as early as 1947 and the first ordinations took place in the following year – though the legislation did provide a 'conscience clause' for those bishops who were opposed to the ordination of women.[89] Similarly, the new Danish service-book, *Den danske Salmebog 1995*, was *autoriset ved kgl. resolution af 12 juni 1992*: 'authorised by Royal decree...'; in Sweden, on the other hand, the Church was given autonomy over matters of doctrine and worship in 1983 and the new liturgy, *1986 Psalmboken*, bore the colophon *antagen av 1986 års kyrkomöte*: 'approved by a Church Assembly in 1986';

Even though there is no national synod, since 1903 each parish has had an elected council[90] which has considerable influence in the choice of a new incumbent. The final appointment is made by the Crown on the recommendation of the Minister, but where the nomination of the

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[88] In one sense, of course, this last provision is true for the United Kingdom as well; within the limits of EU law and the European Convention on Human Rights, Parliament can pass whatever laws it likes: hence the Methodist Church Act 1976 and the United Reformed Church Act 2000. But those were private Acts passed at the request of the two Churches as petitioners.

[89] Ibid. As a comparison, the first women were ordained in Sweden in 1960 and in Finland in 1988.

[90] Parish Council Act 1903: see Kjeldgaard-Pedersen 2002. Parish clergy are members *ex officiis.*

parish council is unanimous, the candidate *must* be appointed. If, however, the nomination is not unanimous, the Minister is free to present any of the candidates for appointment. (Madsen 1964:92).[91]

Bishops and deans are appointed by the Crown in accordance with the recommendation of the Minister; but a new bishop is appointed only after an election in which all clergy and parish council members of the diocese can nominate candidates and vote – and a candidate receiving more than 50 per cent of the votes will be appointed automatically. The Ministry of Ecclesiastical Affairs also approves the construction of churches and functions as a court of appeal from decisions of diocesan or other authorities. (Danish Ministry of Ecclesiastical Affairs 2002).

As well as their purely ecclesiastical functions, the parish clergy also act as civil registrars. To gain official recognition to maintain legal registers and issue legally-valid certificates of marriage and baptism a religious group must either be 'recognised' by Royal Decree or 'approved' under the Marriage Act 1969. Before that date, only a limited number of faith-communities in addition to the Church of Denmark had official recognition. Even after the passing of the Act, however, the Minister would refer any application for approval to the Bishop of Copenhagen for an opinion as to whether or not the group applying for recognition was 'genuine' – a practice that continued until 1998. (Lodberg 2000:49). In 2004, twelve religious organizations had been recognized by Royal Decree (Stenbæk 2002).[92] and a further 92 had been approved.[93]

The Faroes and Greenland

The Church of Denmark has twelve dioceses: ten in Denmark itself and one each for the Faroes (established in 1990) and for Greenland (established in 1993). Although the extra-territorial dioceses are fully a part of the Church, they are not subject to domestic regulation.

From the reestablishment of the Faroese Parliament [*Løgtinget*] in 1848 until its reorganisation in 1923 the Dean (who was then the highest ecclesiastical authority in the islands, there being no separate diocese) was a member *ex officio*. The *Løgting* still begins its annual session on 29 July, St Olaf's Day, with a service in Tórshavn Cathedral followed by a procession to the Parliament House for the St Olaf's Address given by the Prime Minister – the Faroese equivalent of the Queen's Speech. Legislative authority for the Diocese of the Faroes is devolved to the *Løgting*, while administrative responsibility for church affairs rests with the Minister of Education and Culture.[94]

[91] Nothing has changed in the succeeding forty years.

[92] The situation in England under the Marriage Act 1949 was not dissimilar: that Act recognised for registration purposes only the Church of England, the Church in Wales, the Quakers and the Jews.

[93] By 'approving' religions under the Marriage Act, the Government allows individually-named clerics to conduct officially-recognised marriage ceremonies and thereby legally 'approves' the religion: Bureau of Democracy, Human Rights, and Labor 2004.

[94] See www.logir.fo/MENU/00017232.htm (which lists recent church legislation) and www.tinganes.fo (the Prime Minister's Office website).

Greenland was granted home rule on May 1st 1979. The legislative authority for the Diocese of Greenland is the Greenlandic Parliament [*Landstinget*] which in October 1993 introduced considerable changes in the Church's organisational structure of the church.[95] The ecclesiastical functions remain with the Bishop (who is responsible for the ecclesiastical and doctrinal supervision of the three regional deans, the parish clergy and catechists) while the administration of ecclesiastical affairs has been integrated into the Government's Directorate of Culture, Education and the Church, which also provides financial support for the Diocese.

The governance of the Church

Perhaps surprisingly, the current status of the Church of Denmark does not appear to be a matter of great concern to many of its members. According to the Ministry for Ecclesiastical Affairs:

> It was the intention of the Constitutional fathers that a constitution for the Church should be created which would give it autonomy and free it from the State. But it has never… been possible to reach agreement about a constitution for the Church or any type of synod to govern an autonomous Church. Minority groups within the Church have throughout the years wished for a free constitution for the Church. And… the Social Democrats for many years had a separation between Church and State as a major goal. But there has not for some decades been any serious wish in the Church nor in political parties for a change in that direction. (Danish Ministry of Ecclesiastical Affairs 2002).

This seems to be borne out by independent observers. Writing in 1986, Geoffrey Brown and Anders Bäckström could detect no great desire for reform. While some of their respondents acknowledged that the absence of any relatively autonomous national decision-making body presented certain problems for the Church, they sensed an overall acceptance of the *status quo* – possibly because no-one had any firm idea as to what should be put in its place. (Brown and Bäckström 1986:*passim*). The result, suggests Martin Schwarz Lausten, is something of a vacuum; quite apart from the question of church legislation, even on ethical issues there is no single individual, organization or movement that is able to speak on behalf of the whole Church. (Lausten 2002:283).

Peter Lodberg notes that Danish society is becoming more pluralistic and bemoans the fact that this has not been reflected in any loosening of the ties between Church and State:

> The Established Church is still dependent on the State and the Minister for Ecclesiastical Affairs. All important decisions on the structures and finances of the Established Church are taken by the Minister for Ecclesiastical Affairs and the relevant departmental civil servants in Copenhagen.(Lodberg 2000:59–60).

The constitutional status of the Church continues to be a matter of debate. The current Minister of Church Affairs, Bertel Haarder, has recently defended the present order, arguing in effect that it guarantees theological pluralism:

[95] *Landsting* Order No. 15 of 28th October 1993: see Statistics Greenland 2002: ch 21:223.

> the church is a free battlefield on which you cannot use anything else than spiritual weapons against your opponents. It is just because the politicians have retained the power that the parties to the dispute have not driven each other out of the Church. (*Church News from Denmark* February 2006:1/6).

And the *status quo* still has powerful support from Queen Margrethe herself who, according to a recent report, told her latest biographer that she was afraid that disestablishment would only serve to marginalise religious belief:

> I am not fond of the free congregations that are so fine and feel they are the genuine Christians… What about all of us? Where do we belong? There is one entrance, baptism, and that is enough. I am afraid that if you separate church and state then we will for real get a de-Christianisation of the country. (*Church News from Denmark* June 2005:3/6).

Finland

Section 76 (The Church Act) of the Constitution that came into force on 1 March 2000 reads as follows:

> (1) Provisions on the organisation and administration of the Evangelical Lutheran Church are laid down in the Church Act.
>
> (2) The legislative procedure for enactment of the Church Act and the right to submit legislative proposals relating to the Church Act are governed by the specific provisions in that Code.

Finland has *two* Established Churches. As well as the Evangelical-Lutheran Church, there is also an autonomous Orthodox Church of about 60,000 members under the ultimate jurisdiction of the Oecumenical Patriarch. When Finland became independent after the Russian Revolution, administrative ties with the Patriarchate of Moscow were severed. The Orthodox Church of Finland had to be reorganised and, though small, it was formally recognised by the Decree on the Orthodox Church of Finland in 1918 and is currently regulated by the Act on the Orthodox Church of Finland 1969. It is governed by a General Assembly of bishops, priests and laity; but the Assembly's decisions (like those of the Synod of the Church of Finland) have legal effect only if approved by the State – possibly because the Orthodox Church is a beneficiary of the church tax. (Archbishop Leo of Karelia 2003). Until 2000, the Orthodox bishops (like the bishops of the Church of Finland) were appointed by the President.[96]

The supreme legislative authority for the Church of Finland itself is the Finnish Parliament [*Eduskunta*] but it exercises this authority in a rather unusual form. Unlike the Westminster Parliament, the *Eduskunta* has no right to initiate church legislation: under the Church Act 1869, that power rests exclusively with the Synod. Although Parliament must ultimately ratify church

[96] The right appoint bishops surrendered under Ordinance 880 of 2000, amending s 153 of the Ordinance on the Orthodox Church (Heikkilä, Knuutil & Scheinin 2005: 530).

laws, it has no right to amend the proposals it receives from the Synod; they must either be accepted in their original form or rejected altogether. However, since changes to church law must be presented to Parliament by the Government, it is always possible for ministers to prevent a proposal of Synod from coming before Parliament in the first place. This has happened, though extremely rarely; but Parliament has never rejected a change in church law proposed by the Synod. (Seppo 2001).[97] An example of the kind of legislation approved by the *Eduskunta* is the Act on Amending the Church Act 2001, chapter 6.1 of which provides that offices within the Church may only be held by Evangelical-Lutherans. (Seppo 2002:155).[98]

In 1972 a parliamentary committee was established to re-examine the Church-State relationship. Its report in 1977 recommended an increase in the Church's internal autonomy and a broadening of the areas of separate responsibility. The tempo of reform slowed during the 1980s, during which both the Ministry of Education and the Church considered the parliamentary committee's findings. This eventually led in 1994 to the division of the material covered by the Church Act 1869 into three sections: the new Church Law, the Church Order and the Church Election Order. (Heino, Salonen and Rusama 1997). The result was that the majority of matters covered by the old Church Law became entirely the Church's internal business, so that regulations concerning the Church's operations and internal affairs would henceforth be determined directly by the Synod. (Seppo 2002:155). Crucially, the provision of the Church Act 1869 that 'final authority over the Church throughout the country is to rest with the national Government' was repealed. (Seppo 2001).

There are nine dioceses; eight are territorial, while the ninth – Porvoo (Borgå in Swedish) – is the extra-territorial diocese for the Swedish-speaking parishes, most of which are situated around the coastline and in the Åland Islands. Prior to 1994, bishops were appointed by the President of the Republic from among the top three candidates in a diocesan election.[99] The Church then moved to a system where the result of the election was conclusive and could, if necessary, go to a second round. (Mäkeläinen 2004). In 1999, the Synod decided on further reforms to the procedure. Candidates are now nominated by electors' associations which can be set up by a minimum of ten electors. The President of the Republic no longer appoints the bishop: under the new procedure a letter of appointment is presented by the diocesan chapter to the candidate who has obtained more than half the votes in the election. (Salonen, Kääriäinen and Niemelä 2001:25).

For historical reasons, the diocesan chapters (each of which consist of the bishop, the cathedral dean, two clergy assessors and a legally-trained assessor) were State-funded offices for 450 years. The maintenance of the chapters was transferred entirely to the Church at the beginning of 1997. (Salonen, Kääriäinen and Niemelä 2001:25).

[97] This has echoes of the English system of legislation by Measure: Measures must be initiated by Synod and are unamendable; but the Ecclesiastical Committee may declare tham 'inexpedient' and, in any case, Parliament retains the right to enact primary legislation for the Church.

[98] Chapter 6.2 provides for dispensation in the case of clergy of churches with which the Church Assembly has approved reciprocal arrangements for recognition of clergy.

[99] As they were in Sweden prior to disestablishment: see below.

The church tax remains under the 1994 settlement. All citizens belonging to either of the two State Churches pay it as part of their income tax and the churches reimburse the State for the cost of collection. Those who do not want to pay the tax must resign from the relevant church. In addition, the Church of Finland receives part of the corporate tax that is levied on private companies and public communities; as from 2000, the parishes' share of corporate tax is 1.63 per cent.[100] Because church finances continue to be the subject of parliamentary legislation rather than of church regulation, in the case of the Evangelical-Lutheran Church it is the *Eduskunta*, rather than the Synod, that has the decisive voice. (Salonen, Kääriäinen and Niemelä 2001:25).

One area over which there has been a degree of controversy has been the Burial Act 2004, which obliges the parishes of the Church of Finland to maintain public cemeteries and to establish non-denominational burial grounds if needed. Burial charges are to be equal for everyone, whether a member of the Church or not. Supporters of the new legislation contend that this is reasonable, since the Act also requires the Government to contribute to the costs of cemetery maintenance; opponents, however, argue that members of the Church pay twice over: once through general taxation and again through the church tax. (Seppo 2001).

The Freedom of Religion Act 2003 provides the legal framework for faith-communities other than the Church of Finland and the Orthodox Church. Any group of 20 persons or more may acquire legal personality by registering as a religious community with the National Board of Patents and Registration. (Heikkilä, Knuutil & Scheinin 2005: 525, 527). Markku Heikkilä and Jyri Knuutil feel that the Act is likely to have considerable influence on future developments in church-state relations:

> It seems inevitable that the bond between state and church will become progressively looser. This development will not necessarily by obvious. Old traditions will probably remain. Thus, the President of Finland and other representatives of government will continue to take part in the hour of devotion on Finnish Independence Day… However, the guidelines… will not any more [be set] by the State but [by] the Finnish Ecumenical Council. (Heikkilä, Knuutil & Scheinin 2005: 535–36)

Iceland

Chapter VI of the Icelandic Constitution begins as follows:

> The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State. [Article. 62]
>
> All persons have the right to form religious associations and to practice their religion in conformity with their individual convictions. Nothing may however be preached or practised which is prejudicial to good morals or public order. [Article. 63]

[100] In reality, there is not much difference between the Finnish church *tax* and the Swedish church *fee*.

Article 64 guarantees the freedom to exercise a religion or not, but includes an interesting provision about financial support for religious organisations. Individuals are free to direct their church tax payments to any of the religious groups officially registered and recognized by the State, but

> [a] person who is not a member of any religious association shall pay to the University of Iceland the dues that he would have had to pay to such an association if he had been a member.

So the church tax is payable in one form or another by all taxpayers: not even atheists escape.[101] In addition, the State pays the salaries of Church of Iceland's clergy from central government funds and the clergy are regarded as public servants under the aegis of the Ministry of Judicial and Ecclesiastical Affairs. Though the Church holds an election when there is an episcopal vacancy, it is the President of Iceland that signs the successful candidate into office.[102]

Synodical government, of a kind, began in Iceland in 1639 with the establishment of a diocesan synod for the Diocese of Skálholt, to be held annually at Þingvellir in conjunction with the open-air meeting of the mediaeval Parliament [*Alþingi*]. (Fell 1999:323)[103] When the Diocese of Skálholt was merged with the Diocese of Hólar to form the present single See of Iceland the synod became an annual gathering of all the Church's clergy.[104]

The first modern synod was the Church Council established by the *Althing* in 1931; it consisted of the Bishop, two theologians and two representatives chosen by district meetings. It continued in existence until 1957, when it was superseded by the Church Assembly [*kirkjuþing*], which meets annually and currently consists of twenty elected delegates: nine clergy and twelve laypeople, with a lay president. Its remit was to make recommendations to the Bishop of Iceland on the internal affairs of the Church which became binding if approved by the Bishop. (Fell 1999:323). Under new legislation that came into force on 1 January 1998, however, the Church's relationship with the Government was modified so that most of the legislation that would previously have been enacted by the *Althing* is now the province of the annual Church Assembly. The highest executive authority is the Church Council [*kirkjuráð*] of two clergy and two laymen elected by the *kirkjuþing* together with the Bishop of Iceland as chairman. (Sigurbjörnsson 2000). The Council is responsible for day-to-day decision-making over a wide range of matters referred to it by the Church Assembly, the Bishop himself, the *Althing*, and the Government. Together with the Bishop it prepares the meetings of the Church Assembly and follows up its resolutions. It may also take the initiative in proposing legislation for the Church, and is consulted by the Government on its own proposals for legislation. Finally, it prepares the Church's budget proposals. (Hugason 1990: 54–55)

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[101] The combined church and cemetery tax for 2003 was just over 10,000 kronor: about £80.

[102] I am grateful to my colleague Arna Bang, of the *Althing* Secretariat, for this information.

[103] Þingvellir – the *Althing*'s original open-air meeting-place – is now a World Heritage site.

[104] The mediaeval titles of Hólar and Skálholt were fairly recently revived when it was decided to consecrate two 'ordaining bishops' – in effect, suffragans – who would be able to act during a vacancy in the See of Iceland. (Őesterlin 1995: 279)

In its *International Religious Freedom Report 2005* the US State Department concluded that, in the case of Iceland,

> … although surveys show that the majority of citizens favor the concept of separation of church and state, most probably would not support the change if it meant closing Lutheran churches because of lack of funding. Although few citizens regularly attend services, they see the Lutheran religion as part of their culture and view the closing of a church as losing a part of their heritage.

The Report went on to note, however, that in October 2004 the Alliance Party leaders had called for a review of the role of the Church, and that in October 2003 the Liberal Party had presented a bill in the *Althing* to separate Church and State.[105]

Norway

The Constitution of 1814, which marked the country's brief independence in the changeover from Danish to Swedish rule, stated that the Evangelical-Lutheran faith should be the religion of the Kingdom of Norway (Church of Norway nd) and establishment remains embedded in the Norwegian Constitution. In two rather incompatible provisions, Article 2 states that:

> The Evangelical-Lutheran Confession remains the official religion of the state. Inhabitants belonging to the Evangelical-Lutheran faith should raise their children in the same. [Art. 2.1]
>
> All inhabitants should enjoy the right to free exercise of religion. [Art. 2.2][106]

Article 4 further states that the King is head of the Church of Norway, and Article 12 requires that at least half of the Government shall be members of the Church. Under Article 27, those members of the Government are responsible for Church matters, and the King (in practice, those ministers who are members of the Church) is required by Article 16 to provide statutes governing liturgy and to ensure that the teaching of the Church is in accordance with Lutheran confessional standards. (Plesner 2001: 318)

During the early part of its history the clergy of the Church of Norway were civil servants; however, the nineteenth and twentieth centuries saw a degree democratisation of the Church; parish councils were established in 1920, diocesan councils in 1933, the National Council in 1969, diocesan synods in 1984 and, finally, the General Synod in 1984. (Church of Norway nd).

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[105] At the time that the State Department's report was written, the bill was in committee.

[106] Article 2.1 was promulgated in 1814 at the separation from Denmark; Article 2.2 was added in 1964 on the 150th anniversary of the Constitution. (Plesner 2001:317–8). In 1994 and again in 1999 the UN Human Rights Committee concluded that Article 2.1 was in contravention of Article 18 of the UN Convention on Civil and Political Rights (Plesner 2001:322).

In spite of the provisions of the Constitution, the Church of Norway was, in effect, disestablished from 1942 until the end of German occupation. Refusing to give legitimacy to the Quisling regime, all the bishops declared their dioceses disestablished and issued the celebrated pastoral letter *Kirkens Grunn* ('The Foundation of the Church') in which they stated that the ministry and worship of the Church could never be a matter for the State and that the only legitimate relationship between Church and State was a concordat. As a result of their opposition to the regime, the bishops spent the rest of the war in prison; and although the Church was re-established after the war, the ecclesiology of *Kirkens Grunn* continued to have considerable resonance.[107]

In 1981 the Norwegian Parliament [*Stortinget*] voted to retain the State Church with the King as its constitutional head but agreed to grant it more autonomy and established the General Synod, which met for the first time in 1984; a Church of Norway Doctrinal Commission was established in 1987. (Church of Norway nd).Legislation concerning the Church still has to go through the *Storting* and responsibility within government rests with the Minister for Culture and Church Affairs; but under the Church Act 1996 the authority to determine the content of the liturgy and the right to regulate the use of church buildings have been delegated to the General Synod. (Plesner 2001:318). Article 2 of that Act also gave legal personality to the parishes – but the financing of the activities of the local church, the maintenance of church buildings and cemeteries and the payment of those church staff not paid by the State remains the responsibility of the secular municipal authorities. (Plesner 2001:318–319). Since 1989 parish pastors, who had been appointed by the King since 1660, have once again been appointed by diocesan councils; as in England, however, bishops and deans are still appointed by the Crown. (Church of Norway nd; Plesner 2002: 265)

The General Synod, which meets once a year, has 85 members: the 80 members of the eleven diocesan councils (including all the bishops) and five members representing clergy, the lay employees and laity. The three theological faculties each nominate a non-voting representative. Its main executive is the 15-member National Council, which meets four times a year, but it also has separate executive on ecumenical and international matters: the 18-member Council on Ecumenical and International Relations, which meets at least twice a year and which replaced the previous Council on Foreign Relations that had been established by the bishops in 1971. (Church of Norway nd).

Where Norway differs from the prevailing custom in Scandinavia is over finance. Instead of receiving the proceeds of a separate church tax, the Church is directly funded, partly by the State and partly by the municipalities. This right to State support was extended to non-established churches and other faith-communities by the Act on Faith Communities 1969 (Plesner 2001:320–21); they receive equivalent *per capita* funding to that of the Church of Norway. (Aarflot 2004:168).

In March 2002 a commission of the National Council of the Church brought forward a series of recommendations on Church-State relations. Its report, *Same Church – New Relations* (*Samme kirke – ny ordning*) recommended changing the constitutional provisions relating to the Church[108] by elevating Article 2.2 to prime position and replacing the rest with a provision stating the

[107] It has been suggested that the underlying ecclesiology of *Kirkens Grunn* is rather un-Lutheran because it characterises the Church as a sacramental fellowship distinct from the State.

[108] Articles 2, 4, 12, 16, 21, 22 and 27.

responsibility of the State to support faith and 'life-stance' communities. (Plesner 2002:263, 266).[109] The commission also wanted the Government to relinquish the right to appoint bishops and deans.

Where the committee could *not* agree was over whether or not the Church of Norway should be given specific mention in an amended Constitution; the majority wanted a reference to the Church but the minority did not, while a sole dissentient wanted the *status quo*. (Plesner 2002:266). The report of the committee led to the Government's establishing a multi-party commission under the chairmanship of Kåre Gjønnes, a former minister and a Christian Democrat, to look at the issue of Church-State relations; it was asked to report in 2005. (Plesner 2002:263). Andreas Aarflot, until his retirement Bishop of Oslo and *Praeses*, has noted that

> there has recently been a marked trend, both in church and political circles, to advocate disestablishment and seek new ways of cooperation between the State and all religious societies in an increasingly pluralistic world. It becomes increasingly clear that the commitment to international conventions on human rights and equality are at odds with the idea that any church appears as 'the official religion of the State'. (Aarflot 2004: 162)

The Commission reported on 31 January 2006. Eighteen of its twenty members wanted to abolish the system, while only two wanted to keep it. Fourteen members of the majority wanted to see church-state ties loosened rather than completely severed and recommended that the legal status of the Church of Norway should no longer be founded in the Constitution. The Commission therefore recommended that the General Synod should assume the powers currently vested in the King and the Cabinet, including the appointment of bishops and clergy. However, a majority wanted to retain the present arrangement for clergy stipends, wages and the maintenance of church buildings. (Østang 2006)

The most likely outcome is that Norway will follow Sweden and that in due course the Constitution will be amended and a Church of Norway Act placed on the statute-book. But this will be a long process, since Article 112 of the Constitution requires a two-thirds majority for constitutional amendments; moreover, Article 112 also provides that any proposal for amendment must be brought forward before a general election and can only be enacted after the election by the new *Storting* – the intention being that the proposal can be taken into consideration in voting for those who are to implement it. (Plesner 2002:270).The last general election (which was won by the Labour Party) was held in September 2005 and the next is due in September 2009 – which means that the process of implementing the Gjønnes Commission's proposals is likely to take five years at the very least. (Østang 2006).

Sweden

Until the middle of the nineteenth century the *Riksdag* consisted of three Houses: Nobility, Clergy and People. The General Synod [*kyrkomötet*] was established in 1863 to fill the vacuum

[109] 'Life-stance' communities are recognised under an Act of 1981 which gives them the same right to support and funding as religious communities; the only one to have registered is the Norwegian Humanist and Ethical Association. (Plesner 2001: 321)

in respect of matters affecting the Church that was created by the abolition of the House of Clergy of the unreformed *Riksdag*.

In the early 1990s I spent a week at the *Riksdag* and on my host's desk I found a copy of the Swedish *Civil Service List*. Listed in it were all the bishops and cathedral deans and, to my surprise, the rectors of every parish in Sweden. Prior to disestablishment, the Crown (presumably on the advice of the Minister for Church Affairs) appointed to every third vacancy in every parish, and a parish rector in Skåne once told me, tongue-in-cheek, that he was 'the King's man' because he had been appointed when it was the Crown's turn to nominate.

In addition, until the early 1990s the parish rector was also registrar of the *civil* parish and was responsible for maintaining lists of residents. Since Swedes pay local tax on the basis of primary residence (presumably because vast numbers of them have little country cottages or chalets) in the event of any dispute the civil registrar decides the place of residence for local tax purposes. In the case of a company with more than one branch, however, this means that the civil parish registrar, in effect, may decide which *kommun* is going to collect rather a lot of tax. The impression was that the Swedish clergy were very happy to be relieved of this responsibility.

Prior to 1 January 2000, dignitaries were appointed, as in England, by the Crown on the advice of the Government. When a bishopric was vacant an electoral college, consisting of the diocesan council and parish representatives, voted on the candidates and sent a list of three names to the Government. The Government was not obliged to choose the first name on the list though, unlike the deliberations of an English vacancy-in-see committee, the votes of the electoral college were made public.[110]

The legal status of the Church of Sweden changed radically at midnight on 31 December 1999, though it remains a major player within Swedish society. (Gustafsson 2003; Cranmer 2000:417). Prior to this there was a long series of consultations, culminating in two major pieces of legislation which are regarded as part of the 'fundamental law' of the State: the Religious Communities Act 1998 and Church of Sweden Act 1998. (Persenius 1999:182–183).

The Church of Sweden Act 1998 and the resulting Church Ordinance that came into force on 1 January 2000 put clergy of the Church of Sweden on the same footing as clergy of other denominations. Since the passing of the Religious Communities Act, any religious organisation which fulfils a few very basic criteria has been able to register as a religious community and acquire legal personality. The purpose of the change was to enable dissenting churches who wished to do so to formalise their position *as churches*; prior to the Act, the Roman Catholic and Orthodox Churches had described themselves as 'foundations'. Registration is not compulsory; and those faith-communities who do not wish to register are free to continue as foundations. However, registration is a necessary prerequisite for any church that wants its membership dues collected through the tax system or wishes to solemnise marriages that are recognised in civil law. (Friedner 2005: 545). All religious organisations, including the Church of Sweden, are now taxed as not-for-profit organisations. (Persenius 1996: 135)

Section 3 of the Church of Sweden Act has given the Church full legal personality in its own right for the first time: 'The Church of Sweden may acquire rights and assume liabilities as well as plead a cause in court'. The Act sets out a skeleton structure for the new government of the Church, principally by defining it as a religious community with a legal personality, by providing

[110] There was a more complicated system for a vacancy in the primatial see of Uppsala.

for a parochial and diocesan structure, by establishing an ecumenical church *fee*,[111] collected by the Government, to replace the former church tax, and by making general provision about property and assets.

The new Church Ordinance that came into force on 1 January 2000 (replacing the Church Code 1992 and its associated legislation) put the flesh on the bones. It has five constituent parts: the Confession of Faith, Order of Services and the General Synod [*kyrkomötet*]; working structures at the various levels; elections, parish boundaries, church registers and archives; finance and property; and staff, structures of authority and complaint procedures.

Does all this constitute disestablishment? Paul Avis thinks not:

> a church which is embedded in the written constitution, which has the Monarch as its 'first member' and which retains statutory responsibility for all burial places on behalf of the state can hardly be described as 'disestablished' in any meaningful sense.[112]

Lars Friedner would seem to agree, pointing out that 'there are several links between the Swedish State and the Church of Sweden', not least as the custodian of a significant part of Sweden's historic buildings. (Friedner 2005: 542–43). Though in terms of constitutional law the intention and technical result of the legislation was to put the Church of Sweden on the same footing as other churches, perhaps its practical outcome has been a situation in which, as in Wales (Watkin 1990:*passim*), Sweden has retained some vestiges of Establishment.

Conclusions

The same but different?

The differences and similarities between the Scandinavian churches may be represented schematically like this:

	Denmark	**Finland**	**Iceland**	**Norway**	**Sweden**
Membership	85%	85%	87%	86%	83%
Established?	Yes	Yes	Yes	Yes	No
Final legislative authority	*Folketinget*	*Eduskunta* (confirmation only)	*Kirkjuþingi* (except constitutional issues)	*Stortinget* (except liturgy & use of buildings)	*Kyrkomőtet*
National synod	No	Yes	Yes	Yes	Yes
Parish	Yes	Yes	Yes	Yes	Yes

[111] Church of Sweden Act 1998 ss 7–8: the church fee continues to be compulsory for members of the Church of Sweden, while other churches are now able to have the fee collected from their members.

[112] Letter from William Fittall to Bob Morris, 1 December 2005.

Councils					
Senior appointments	State confirmation	Church	State confirmation	State	Church

Perhaps the most striking common feature is the extremely high proportion of citizens in membership, even if that membership may be largely nominal. This seems to be a peculiarly Nordic phenomenon, which Andreas Aarflot sums up like this:

> For many in the Church of Norway their feeling of belonging to a religious community offering its services and sympathy is more important than the contents or character of the goods that this fellowship delivers. Grace Davie has offered the observation that in Great Britain religious life is often characterised by 'believing without belonging'. In Norway one may well see the opposite position: 'belonging without believing'... But this sense of belonging is often not related to the real evangelical and biblical basis of the activities of the Church. (Aarflot 2004:170).

Aarflot's conclusion echoes the analysis of Jan-Olav Henriksen quoted earlier. And if their conclusions are true for Norway, then they are probably true for the rest of Scandinavia as well.

Scandinavian clergy as civil servants?

To assert, as does the Methodist Faith and Order Committee, that

> [c]lergy in some European countries, particularly in Scandinavia, are civil servants with standard employment contracts paid at least partly from taxation (Methodist Church 2004).

is something of an over-simplification. As noted above, prior to disestablishment the clergy of the *Church of Sweden* were included in the Swedish *Civil Service List*. Clergy of the *Church of Iceland* are paid by the State and appear to have been regarded as civil servants for all practical purposes, while clergy of the *Church of Norway* were certainly civil servants in the eighteenth century. The situation of the clergy in the *Church of Denmark* is less clear since, though not employed by the Government, they act as civil registrars. But it is undoubtedly true that the idea of the clergy as part of the State apparatus seems to be deeply embedded in the Scandinavian Lutheran model of governance.

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APPENDIX E

CHURCH AND STATE IN WESTERN EUROPE (EXCEPTING SCANDINAVIA)

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Introduction

The following notes attempt to illustrate the considerable degree of variation in relations between governments and religious organisations across the countries of Western Europe. However, they are offered with a series of health warnings. First, any comparative institutional study always runs the risk of failing to compare like with like – and the briefer and more impressionistic the study, the greater the risk of over-simplification. What *is* apparent from this kind of very general review, however, is that even in avowedly secular states accommodation is often made with religious organisations over such matters as the provision of educational facilities. Secondly, church membership statistics (where they exist at all) are notoriously unreliable: some are based very precisely on current membership, others on baptised members, yet others on annual attendance, and a few, one suspects, on wishful thinking. Thirdly, these notes are precisely what it says on the tin: *notes*. For a fuller description of church-state relationships in the various countries under consideration, the reader is referred to the most recent study by the European Consortium for State and Church Research (Robbers 2005) and the US Department of State's annual *International Religious Freedom Reports*, particularly those for 2004 and 2005, at http://www.state.gov/g/drl/rls/irf.

Austria

Article 7 of the Constitution declares that Austria is a secular state.[113] The status of religious organisations is governed by the 1874 Law on Recognition of Churches and by the 1998 Law on the Status of Religious Confessional Communities. Relations between the State of Austria and the Roman Catholic Church are governed by treaties with the Holy See that are recognised in public international law and may be transposed into domestic law under Article 50 of the Constitution. The treaties provide, *inter alia*, that the Roman Catholic Church may make laws within its own sphere of competence and that those institutions that have legal personality in canon law have legal personality in public law (Potz 2005: 397).

There are three distinct kinds of religious organisation: officially-recognized religious societies, religious confessional communities, and associations.

[113] Article 7(1) (Equality, Political Rights): 'All federal nationals are equal before the law. Privileges based upon birth, sex, estate, class, or religion are excluded.'

Religious societies recognised under the 1874 Law on Recognition of Churches benefit from the church tax and may provide religious instruction in state schools[114] and have 'public corporation' status, permitting them to engage in a number of public or quasi-public activities that are denied to confessional communities and associations.[115]

The 1998 Law established 'confessional communities' alongside 'religious societies'. Religious societies established under the 1874 Law retained their previous status; but a new religious group seeking to achieve the status as a religious society must fulfil stringent criteria for recognition: a 20-year period of existence and membership of at least 0.2 per cent of the population (approximately 16,000 people).

Recognition as a *confessional community* does not carry the fiscal and educational privileges available to a religious society, though a recognised confessional community acquires legal personality and may therefore hold land and enter into contracts. To qualify, a group must have at least 300 members and get Government approval for its constitution, its membership regulations and a summary of its religious doctrines. The Ministry of Education examines applicant organisations' doctrines to ensure compliance with public policy. [116]

Religious groups not recognised either as religious societies or confessional communities may apply to become associations under the Law of Associations, thereby enabling them to hold property.

Belgium

The Belgian Constitution of 1831 provided that

- 'freedom of worship to be exercised in public is guaranteed' (Article 14).
- 'the State has no right to intervene neither in the installation of the ministers of any denomination...' (Article 16).
- 'he State awards remuneration and pensions to religious leaders; those amounts required are included annually in the budget' (Article 181).

Initially, the Roman Catholic Church, the Protestant Churches and the Jews benefited from Article 117. The Anglican Church was later added by King Leopold I.[117]

Article 20 of the present Constitution guarantees freedom *from* religion as much as freedom *of* religion: 'No one can be obliged to contribute in any way whatsoever to the acts and ceremonies of a religion, nor to observe the days of rest.' However, the state recognises and finances certain

[114] The Government provides financial support for religious teachers at both public and private schools to religious societies recognised under the 1874 Law (but not to other religious organisations) and gives financial support to private schools run by the officially-recognized religious societies.

[115]The following are recognised under the 1874 law: the Roman Catholic Church, the Lutheran Church, the Reformed Church, the Islamic community, the Old Catholic Church, the Jewish community, the Orthodox (Russian, Greek, Serbian, Romanian and Bulgarian), the Oriental Orthodox (Armenian, Coptic and Syrian), the Methodist Church, the New Apostolic Church, the Buddhists, and the Mormons. (US Department of State 2005).

[116]Currently there are ten confessional communities: the Baha'i, the Baptists, the Evangelical Alliance, the Free Christian Community (Pentecostalists), the Hindus, the Jehovah's Witnesses, the Mennonites, the Movement for Religious Renewal, the Pentecostal Community of God and the Seventh-day Adventists. (US Department of State 2005).

[117] Possibly because Leopold I was a lifelong Anglican and regarded the resident Church of England clergyman in Brussels as the 'Royal Chaplain'!

religious groups and 'life stances': Roman Catholics (law of 8 April 1802), Protestants (law of 8 April 1802), Anglicans (law of 4 March 1870), Jews (law of 4 March 1870), Muslims (law of 19 July 1974), and Orthodox (law of 17 April 1985). Since 5 May 1993 non-confessional organisations have been recognized on an equal footing with the others. Rik Torfs suggests that though there are six recognised religions, the Roman Catholic Church is *primus inter pares* (Torfs 2005: 15), citing as evidence its role in the funeral of King Baudouin in 1993.

Article 181 provides for state funding for the salaries and pensions of representatives of those organisations that are recognized by law, including those that offer moral services based on a non-confessional ideology. In 2005 the cost of this amounted to over £50 million (US Department of State 2005: Belgium). All ten of the licensed Anglican clergy in Belgium currently receive a *traitement* of about £15,000.[118] In addition, religions may appoint army and prison chaplains who are paid by the state. (Torfs 2005: 15).

Since July 2001, the regional governments rather than the Government of Belgium have been responsible for the 'material organisation' of recognised religions. (Torfs 2005: 11).

Cyprus

Perhaps not surprisingly given the history of Cyprus, Article 2 of the General Provisions of the Constitution provides for a racial and religious definition of the two largest communities:

> For the purposes of this Constitution:
>
> (1) the Greek Community comprises all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share the Greek cultural traditions or who are members of the Greek-Orthodox Church;
>
> (2) the Turkish Community comprises all citizens of the Republic who are of Turkish origin and whose mother tongue is Turkish or who share the Turkish cultural traditions or who are Moslems;

Article 18 provides for freedom of religion. However, Article 110 gives special recognition to the autocephalous Orthodox Church and to the Turkish Cypriot religious trust, the *Vakf*, both of which have the right to regulate and administer their internal affairs and property in accordance with their own internal regulations. They are immune from legislative and executive acts and benefit from tax exemption on their religious activities, though not on their commercial ones. Instruction in the Orthodox faith is mandatory for all Orthodox children and is provided in all public primary and secondary schools. Three other religious groups have legal recognition and benefit from tax-exemption: the Armenians, the Maronites and the Latin Catholics. All five groups are eligible for government subsidies, which in 2003 amounted to some £2.7 million (Emilianides 2005: 247).

The Cypriot legal system also gives a degree of legal recognition to the internal juridical norms of the five religious groups. Article 111 provides that the law of the relevant religious group shall apply to

[118] Personal communication from the Diocesan Secretary of the Diocese of Europe.

> any matter relating to betrothal, marriage, divorce, nullity of marriage, judicial separation or restitution of conjugal rights or to family relations other than legitimation by order of the court or adoption…

Article 109 of the Constitution of 1960 provided for elected representatives from the minority religious groups 'in the Communal Chamber of the Community to which such group has opted to belong'. The Greek Communal Chamber was abolished in 1965 and replaced by the present House of Representatives. There are about 6000 Maronites, about 2500 Armenians and about 700 Latin Catholic citizens, together with about a further 7000 Latin Catholic permanent residents. Each of the three groups elects a representative who attends meetings of the House of Representatives (though without a right of participation in debates) and is consulted about matters affecting his or her community. However,

> these representatives do not represent their respective communities politically, but simply act as a link between the government of the day and their community, promoting its claims and providing for its needs, as well as working with the government in the preservation of the communities' customs, traditions and religion. (Government of Cyprus 2003).

A faith-community other than the five recognized religions is not required to register with the Government; however, if it wishes, for example, to maintain a bank account it will have to register as a not-for-profit company.

The Czech Republic

Article 2(1) of the Charter of Fundamental Rights and Freedoms declares that the state 'must not be bound either by and exclusive ideology or by a particular religion', Article 15 guarantees freedom of religion and Article 16 guarantees the right to profess and manifest that religion through worship religious services. Religious affairs are the responsibility of the Department of Churches at the Ministry of Culture. All religious groups officially registered with the Ministry of Culture are eligible to receive subsidies from the State. There are more than twenty state-recognized religious organisations (US Department of State 2005: Czech Republic).

The 2002 law on Religious Freedom and the Position of Churches and Religious Associations created a two-tiered system of registration for religious organisations. A first-tier group, which must have at least 300 adult members, receives limited tax benefits and must fulfil annual reporting requirements. A second-tier group must have a membership of at least 0.1 percent of the population (approximately 10,000 persons) and have been registered at the first tier for at least 10 years. Second-tier registration entitles the organisation to a share of state funding proportionate to the number of its clergy. The total in 2003 was about 3 billion crowns (about £67 million), of which about a third went to pay clergy stipends. Only ministers of registered second-tier organisations may perform officially-recognized marriage ceremonies and serve as chaplains in the military and prisons, although prisoners of other faiths may receive visits from their respective clergy. (US Department of State 2005: Czech Republic)

Religious groups registered prior to 1991, such as the Jewish community, are not required to meet the conditions for registration. Unregistered groups such as the small Muslim community may not own community property in their own right but may form civic-interest associations in order to hold property until they can meet the qualifications for registration; apart from this restriction they may worship in the manner of their choice.

Estonia

Article 40 of the Constitution provides for freedom of religion and decrees that there shall be no state church; in consequence, there is no church tax, but religious organisations are exempt from property tax. (Kiviorg 2005: 109)

The Churches and Religious Organisations Act 1993 required that all religious organisations should have at least twelve members and register with the Religious Affairs Department under the Ministry of Interior Affairs. Religious organisations were required to submit their constitutions for scrutiny and their leaders had to be citizens with at least 5 years' residence. However, the Churches and Congregations Act 2002, as amended,[119] has repealed the 1993 Act. The 2002 Act provides in section 2 for the existence of 'churches, congregations, associations of congregations, and monasteries' as 'religious societies', while section 4 makes provision for 'religious societies' –voluntary associations of natural or legal persons whose main activities include

> … confessional or ecumenical activities relating to morals, ethics, education, culture and confessional or ecumenical, diaconal and social rehabilitation activities outside the traditional forms of religious rites of a church or congregation and which need not be connected with a specific church, association of congregations or congregation.

Section 8 of the Act guarantees individual rights freely to exercise one's religion.

Sections 11 to 13 of the 2002 Act continue to require that a religious organisation should have a memorandum and statutes and should register. Since 2001 clergy of registered religious organisations have been able to apply to have marriage ceremonies conducted by them recognised in civil law.

Traditionally, because the Estonian Evangelical Lutheran Church has attracted the largest following from ethnic Estonians it has tended to function in some respects as the 'National Church'. But Estonia also has a large ethnic Russian population and, as a result, the Lutheran Church, with about 150,000 members (about 11 per cent of a population of 1,350,000) it is only slightly larger than the Orthodox Church. (Kiviorg 2005: 95–6) Therefore, however tempting the prospect might have seemed at the fall of Communism, a legal establishment of the Lutheran Church was probably never a realistic option.

France

Church and State have been separated since the 1905 *Loi de la Séparation*;[120] however, under what remains of the former 1801 Napoleonic Concordat with the Vatican the President of the Republic is consulted about the appointment of Roman Catholic bishops (Lamont 1989:160; van Straubenzee 1992: 83).

Religious organisations are not required to register, but may do so if they wish to apply for tax-exempt status or to gain official recognition. The Government defines two categories under which religious groups may register: *associations cultuelles* (religious associations, which are exempt from taxes) and *associations culturelles* (cultural associations, which are not).

[119] English text available at http://www.legaltext.ee/en/andmebaas/ava.asp?m=022.
[120] Therefore, for example, a religious marriage (unless contracted abroad) is not recognised as valid in French law and must be validated by a civil wedding.

Associations in these two categories are subject to certain management and financial disclosure requirements. A worship association may organise only religious activities, defined as liturgical services and practices. A cultural association may engage in profit-making activity. Although a cultural association is not exempt from taxes, it may receive government subsidies for its cultural and educational operations, such as schools. Religious groups normally register under both of these categories; the Mormons, for example, run strictly religious activities through their worship association and operate a school under their cultural association.

Under the 1905 statute, a religious group must apply to the local prefecture to be recognized as an *association cultuelle* and receive tax exemption. To qualify, the group's purpose must be solely the practice of some form of religious ritual: such activities as running a publishing company or running a school may disqualify an applicant group. On the other hand, private confessional education is recognised under the 1959 *Loi Debré*, and schools run by religious organisations can enter into contracts with the state, provided that they agree not to impose any religious test on admissions. (Basdevant-Gaudemet 2005: 171)

Under the amending Law of 1908, the state assumed ownership of Roman Catholic places of worship built before the 1905 *Loi de la Séparation* and undertook to bear the cost of maintaining them, with the result that a considerable part of the building maintenance costs of the Roman Catholic Church are met from public funds. (Basdevant-Gaudemet 2005: 163 n6, 178)

Alsace-Lorraine

Because they were German territories from 1870 to 1918, during which time the *Loi de la Séparation* was enacted, the Napoleonic Concordat remains largely in force in the three *départements* of Haut-Rhin, Bas-Rhin and Moselle. Four *cultes reconnus* have official status: the Lutheran and Reformed Churches, the Roman Catholic Church and the Jewish community. Clergy whose offices are recognised by the Concordat are paid by the State and the law allows the local governments to provide support for the building of places of worship. Authorised representatives of the four *cultes* provide religious instruction in schools, and, uniquely, the University of Strasbourg has Catholic and Protestant Faculties of Theology with the right to award the *Diplôme d'État*. Adherents of the four *cultes* may choose to have a portion of their income tax allocated to their religious organisation in a system administered by the central government that is not unlike the German church tax (US Department of State 2005: Germany). Finally, no doubt because their holders' stipends are paid by the State, the President has a role in appointments to the more important ecclesiastical offices. Lutheran superintendents are appointed subject to his approval, and the President and the Pope jointly appoint the Archbishop of Strasbourg and Bishop of Metz. (Greenacre 1996:14; Solé 1996: 3) [121]

Religious symbols

In recent years the separation of church and state has become a matter of considerable controversy. In September 2004 a law came into effect that bans public school students from wearing 'conspicuous' religious attire and symbols in school. In practice, this ban applies to Muslim headscarves, Sikh turbans, Jewish skullcaps and large Christian crosses. It remains to be seen whether or not the ban is compatible with the right under Article 9 of the European Convention of Human Rights to manifest one's religion or belief; but it is by no means certain

[121] Nor does the *Loi de la Séparation* apply in the *départements d'outre mer* of Réunion, Martinique and Guadeloupe (Basdevant-Gaudemet 2005: 169) – but their legal position is not entirely relevant to a discussion of church-state relations in Western Europe .

that the ban is contrary to the Convention, in view of the decision of the Grand Chamber in *Leyla Şahin v Turkey* (2005) (Nº 44774/98) ECHR that the prohibition on wearing of Muslim head-coverings in Turkish universities and the suspension of Ms Şahin from Istanbul University Medical School because of her refusal to comply with the prohibition did not breach Convention rights.

Germany

Article 3(3) of the Basic Law (Constitution) outlaws discrimination on grounds, *inter alia*, of religion and Article 4 guarantees freedom of religion. Church and State are separate; but various Concordats have been concluded, both by the Federal Government and by the *Länder*, with individual churches, while the *Reichskonkordat* of 1933 is still regarded as a valid treaty under international law. Gerhard Robbers describes the legal basis of the German system as resting on three basic principles: neutrality, tolerance and parity. (Robbers 2005: 79–80)

Religious communities may be granted the status of a 'corporation under public law', (*Körperschaften des öffentlichen Rechts*) which, *inter alia*, this entitles them to levy a church tax (*Kirchensteuer*) on their members; the State collects this as a proportion of the income tax at rates of 8–9% and for doing so it charges a fee, currently 3–4% of the sum collected. (Monsma and Soper 1997: German Embassy: Washington DC 2006) The yield of the *Kirchensteuer*, put at DM16000 million in 2000, has been declining since reunification but still accounts for some 80 per cent of the churches' income. (Robbers 2005: 89) There are various reasons for this. More citizens are opting out (*Kirchenaustritt,* a formal legal process of renunciation of membership) on the one hand, while an ageing population and high levels of unemployment on the other have reduced the number of income-tax payers (and only income-tax payers are liable for the *Kirchensteuer)*. The result is that only about 35 per cent of the population pays the tax. (Barker 2000) As well as what is raised through the *Kirchensteuer*, the State provides financial support for repairing and restoring some of the religious buildings that existed at the time of the expropriation of church lands in 1803.

The governments of the *Länder* also subsidize certain religious schools and hospitals and, in addition to the church *tax*, the majority of *Länder* operate a local system of "church money" *(Kirchgeld)*: a low, flat-rate contribution unrelated to income that is devoted entirely to the benefit of the payer's local church community. Because of the decline of the *Kirchensteuer,* the *Kirchgeld* has assumed a growing significance. (Barker 2000)

After World War II, the experience of the churches in the former Federal Republic (FRG) and the Democratic Republic (GDR) diverged. Although both states continued with the *Kirchensteuer,* its collection in the GDR was inhibited by various means and the yield fell considerably and to an extent that has not recovered following reunification. Although FRG churches continue to give some assistance, the condition of church fabric in the former GDR fell somewhat behind the condition of those in the FRG – and remain so. In addition, the considerable loss of church membership experienced in the GDR has continued in the GDR areas where now the majority have no religious affiliation. At the same time, the popularity of the secular *Jugendweihe* introduced in the GDR as an alternative to confirmation has held up. In this and other ways, reunification has not brought uniformity.

The Roman Catholic and Protestant Churches of Germany are of roughly equal size, each with just under 28 million members. (German Embassy: Washington DC 2006) They provide religious education in schools and, through the Roman Catholic *Caritas* and the Protestant *Diakonisches Werk* provide important medical and social services supported by state funds. Between them,

they are the second largest employers – after the public sector – in the whole of Germany. (Fischer 2005: 414).

Germany has a significant number of religious schools and kindergartens (Robbers 2005: 85); however, the provision of religious education continues to be the subject of litigation. In the former FRG, religious education was provided and dominated by the two main Christian churches whereas there was no such post- World War II tradition in the GDR. Differences remain between individual German *Länder* on the nature of provision and the extent to which they accommodate non-Christian religions, especially Muslims. (Barker 2004). Many of the state universities have confessional theological faculties whose staff, though largely chosen by the church whose theology they teach, are employed by the state. (Robbers 2005: 86)

Religious symbols

Perhaps following France's lead, Bavaria, Baden-Württemberg and Lower Saxony have all passed laws banning the wearing *by teachers* of religious symbols in schools, in reaction to a ruling by the Constitutional Court in 2003 that teachers could wear head coverings if they so wished because there was no statute forbidding them to do so. (Notes on Church and State 2005:1)

Greece

The overwhelming majority of Greeks are Orthodox Christians, and it is probably for that reason as much as any residual caesaro-papalism that the Constitution gives special recognition to the Orthodox Church. Article 3 is worth stating in full:

> (1) The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850 and the Synodal Act of September 4, 1928.
>
> (2) The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.
>
> (3) The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ in Constantinople, is prohibited.

Therefore:

> (1) the Orthodox Christian faith is the official religion of the Greek state;
> (2) the Church, which embodies this faith, has its own legal status: it is a legal person under public law in its juridical relations…; and
> (3) it is treated by the state with special concern and in a favourable manner, which is not extended to other faiths and religions. (Papastathis 2005: 117)

Though Article 13(2) of the Constitution provides for freedom of religion, it also stipulates that worship must not disturb public order or offend moral principles and prohibits proselytising–a prohibition that has been the subject of litigation before the European Court of Human Rights in *Kokkinakis v Greece* (1994) 17 EHRR 397. (Edge 1995) The Government pays for the salaries, pensions and religious training of clergy, finances the maintenance of Orthodox church buildings and gives special recognition to Orthodox canon law.

The Orthodox Church, Judaism, and Islam are the only groups that have legal personality in public law: other religions have legal personality only in private law and cannot own property as religious entities; instead, they must create specific legal entities to hold the properties. On the other hand, the laws that provide property-tax exemptions for religious organisations apply equally to Orthodox and non-Orthodox churches and monasteries. (Papastathis 2005: 118)

The position of the Turkish-speaking Muslim minority in Thrace is protected under the Treaty of Lausanne of 1923. Muslims in Thrace have the right to maintain social and charitable organisations and limited recognition is given to Islamic family law. The Government also pays the salaries of the three official Muslim religious leaders. Muslims resident outside Thrace are not covered by the Treaty.

Hungary

The majority of Hungarians are Roman Catholics; however, about fifteen per cent of the population belongs to the Reformed Church and about three per cent is Lutheran; they, together with the Jewish community, are regarded as the four 'historic religions'.[122] Article 60 of the Constitution provides for freedom of religion and for the separation of church and state. Article 60(4) also provides that a law on freedom of religion can be passed only with a two-thirds majority of Parliament.

The 1990 Law on the Freedom of Conscience regulates the activities of religious communities. There are over a hundred religious groups; to become registered by the courts, a religious group must have at least 100 followers and produce a basic charter or organisational memorandum. While any group is free to practice its faith whether it is registered or not, formal registration gives a religious group privileges and grants access to several forms of state funding. Churches 'enjoy legal personality as *sui generis* entities. Their internal organisational units… are also legal entities if the "charter" of the church so provides.' (Schanda 2005: 331)[123]

The curriculum of state schools does not include religious instruction; however, optional religious instruction is usually held in state schools at the end of the normal school day and is taught by representatives of religious groups. As to tertiary education, the churches operate their own theological colleges and private universities but there are no theological faculties in the state universities: 'courses *on* religion may be delivered at state institutions, but courses *of* religion may not. (Schanda 2005: 335).

[122] There are about as many Eastern-Rite Catholics in Hungary as Lutherans but they are not regarded as an 'historic religion'. Compare this situation with the United Kingdom: the Quakers are one of the historic 'privileged bodies' (a curious and rather random collection of institutions including, for example, the Dean and Chapter of Westminster and St Andrews University) with a largely theoretical right of direct access to the Sovereign, while the Orthodox are not – though the Orthodox are one of the senior branches of Christendom and outnumber Quakers in the UK by something like a factor of ten.

[123] The result of this is that the legal status of individual Latin and Eastern Catholic entities is determined by their status under their respective Codes of Canons. (Schanda 2005: 331)

A 1994 government decree provided for military chaplains and prison chaplains from the four 'historic' religious groups.

In 2003, the Government allocated almost £100 million (36.18 billion forints) in public funds for various religious activities and related programs. State schools and private religious educational establishments receive the same *per capita* funding, and the Government subsidises clergy in settlements with fewer than 5,000 people.[124]

Ireland

The Constitution as adopted in 1937 gave special recognition to the Roman Catholic Church as 'the guardian of the faith professed by the majority of the citizens'.[125] This statement was removed after a referendum in 1972;[126] but the Preamble to the Constitution still begins, 'In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland...'.

Though Article 44 of the present Constitution starts by acknowledging 'that the homage of public worship is due to Almighty God' it also provides for freedom of conscience and the free profession and practice of religion and declares that the State guarantees not to endow any religion. Article 44 also prohibits religious discrimination both on a personal level and within the education system and entitles religious denominations to hold property and to manage their own affairs. For the purposes of secular law, religious organisations are voluntary organisations[127] and their internal regulations are regarded by the courts as foreign law whose rules must be proved in evidence if they are to be cited in argument.[128]

Though the churches are regarded as voluntary organisations, primary education is almost entirely denominational and is supported by the state either through direct financial assistance for individual schools or the provision of free transport to take children to the nearest school run by their faith-community. (Casey 2005: 197) The majority of secondary schools have a religious ethos and, again, the state meets a very high proportion of their building and staff costs. (Casey 2005:199). Given the separatist nature of the Irish Constitution this policy might seem rather surprising – but its ultimate legal basis is Article 44 of the Constitution itself. The Department of Education therefore provides equal funding to schools of different religious denominations; for example, it funds an Islamic school in Dublin.

Italy

Article 3 of the present Constitution guarantees all citizens equality before the law 'without regard to their sex, race, language, religion, political opinions, and personal or social conditions'. Article 8 provides that–

> (1) Religious denominations are equally free before the law.

[124] About £4 million (HUF 1.424 billion) in 2003.
[125] Article 44.l s 2. S 3 of that Article also made specific reference to the Church of Ireland, the Presbyterian Church, the Methodist Church, the Quakers and the Jewish Congregations,
[126] Fifth Amendment of the Constitution Act 1972.
[127] *State (Colquhoun) v D'Arcy* [1936] IR 641.
[128] *O'Callaghan v O'Sullivan* [1925] 1 IR 90.

(2) Denominations other than Catholicism have the right to organise themselves according to their own by-laws, provided they do not conflict with the Italian legal system.

(3) Their relationship with the state is regulated by law, based on agreements (*intese*) with their representatives.

Article 19 guarantees the right 'freely to profess religious beliefs in any form, individually or with others, to promote them, and to celebrate rites in public or in private, provided they are not offensive to public morality', while Article 20 guarantees religious associations 'freedom from special limitations or fiscal burdens regarding their establishment, legal capacity, or activities'.

Prior to the adoption of the 1947 Constitution, Italy's relations with the Roman Catholic Church were governed by the 1929 Lateran Concordat establishing Roman Catholicism as the state religion. A 1984 revision of the Concordat, the Accord of Villa Madama, formalised the principle of a secular state but maintained the practice of state support for religion, including payment for teachers of religion appointed by the Church to give religious instruction in state schools. [129]

However, the 1984 revision also provided for state support for non-Catholic denominations that requested it. Under the revised arrangements, the Government has the power to conclude an accord with an individual denomination, whose ministers then gain access to state hospitals, prisons, and military barracks. The signing of an accord, which requires parliamentary approval, also results, *inter alia*, in civil registration of religious marriages by the denomination concerned. A religious community that has concluded an *intesa* may also request that voluntary donations from its members be channelled to it through income tax. The first such accord was made in 1984 with the Waldensian Church, followed by accords with the Seventh-Day Adventists and the Assemblies of God in 1986, the Jewish communities in 1987 and the Baptists and the Lutherans in 1993. (Ferrari 2005: 212)[130]

Silvio Ferrari suggests that Italian public law divides religious organisations into three categories. The Roman Catholic Church has a preferential position, partly because of its traditional significance in civil society and partly because of 1984 Accord. The groups that have concluded *intese* occupy an intermediate position. At the lowest level are the unrecognised groups, which are regulated by the Law of 1929 governing religious denominations and the general law on associations and which do not, therefore, benefit from any particular financial privileges. (Ferrari 2005: 213)

Latvia

Latvia has three churches of roughly similar size: a survey in 2003 suggested that 25 per cent of the population was Lutheran, 25 per cent Orthodox and 21 per cent Roman Catholic. (Balodis 2005: 253). Article 99 of the Constitution provides for freedom of religion and the separation of church and state. There is therefore no state religion; however, the Government distinguishes between 'traditional' religions (Lutherans, Roman Catholics, Orthodox, Old Believers, Baptists, Methodists, Seventh Day Adventists and Jews) and 'new' religions and concluded agreements with the seven 'traditional' churches in 2004. (Balodis 2005: 261). Religious groups are not required to register, but the 1995 Law on Religious Organisations accords certain rights and privileges to those that do, such as legal personality and tax benefits. Registration is regulated

[129] Though there are no theological faculties in state universities.
[130] Agreements had also been concluded with the Jehovah's Witnesses and the Buddhists, but had not been ratified by the end of 2004. (Ferrari 2005: 212)

by a Board of Religious Affairs under the supervision of the Ministry of Justice; only registered churches may establish theological schools and monasteries. There is an ecumenical theology faculty at the University of Latvia. (Balodis 2005: 268)

Lithuania

Almost 80 per cent of Lithuanians are Roman Catholic. (Kuznecoviene 2005: 283). Article 43(1) of the Constitution declares that the state

> … shall recognize traditional Lithuanian churches and religious organisations, as well as other churches and religious organisations provided that they have a basis in society and their teaching and rituals do not contradict morality or the law.

However, Article 43(7) provides for separation of church and state.

Article 26 provides for freedom of thought, conscience and religion; the right to profess and propagate a religion or faith 'may be subject only to those limitations prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, a person's health or morals, or the fundamental rights and freedoms of others.'. The religious teachings of churches and other religious organisations, their religious activities, and their houses of prayer may not be used for purposes that contradict the Constitution and the law. The Government may also temporarily restrict freedom of expression of religious conviction during a period of martial law or a state of emergency.

Though there is no state religion, Article 43 of the Constitution divides religious communities into state-recognized traditional Lithuanian churches and 'other churches and religious organisations'. In practice, a four-tiered system exists: traditional, state-recognized, registered, and unregistered communities.

Under the 1995 Law on Religious Communities and Associations, some religious groups enjoy government benefits not available to others. Article 5 recognises nine 'traditional' religious communities and associations: Roman Catholic, Greek Catholic, Evangelical Lutheran, Evangelical Reformed, Orthodox, the Old Believers, the Jews, the Sunni Muslims and the Karaites. Traditional religious communities and associations are not required to register their bylaws with the Ministry of Justice in order to receive legal recognition and personality. Non-traditional religious communities, however, must present an application, a founding statement signed by no fewer than 15 members who are adult citizens of the country, and a description of their religious teachings and their aims. Legally, the status of a 'state recognised' religious community is higher than that of a 'registered' community but lower than that of a 'traditional' community.

As well as being able to register marriages and teach in state schools, the nine 'traditional' communities qualify for government assistance through, for example, limited relief from VAT. Registered religious communities do not receive regular subsidies or tax exemptions but have legal personality and may rent land for religious buildings. Unregistered communities have no juridical status or state privileges.

It does not appear to be possible to progress from non-traditional to traditional status. In June 2000 the Constitutional Court ruled that

> naming churches and traditional organisations as traditional is not an act establishing them as traditional organisations but an act stating both their traditional character and the status of their relations with society. [131]

According to Jolanta Kuznecoviene, the effect of the ruling has been to close the list. (Kuznecoviene 2005: 290)

Luxembourg

In 1801 Luxembourg was a *département* of France, with the result that the Concordat of that year between France and the Holy See is still in some sense in force – though it is not clear exactly *how* it is in force. What is important, however, is not the precise status of the Concordat, but the fact that it has provided a flexible foundation for later developments.

There is no state religion and Article 19 of the Constitution provides for the free exercise of religion; however, Article 106 provides for the salaries and pensions of clergy to be borne by the state. The Government does not register religions or religious groups but, as a result of, some religious groups receive financial support from the State: Roman Catholics, Greek and Russian Orthodox, the Jews, and some Protestant denominations. In 2003 this support was extended to the Anglican and to the Romanian and Serbian Orthodox Churches. [132]

Roman Catholicism is the faith of the vast majority of Luxembourgers. There is a single Diocese, founded in 1870; under a Law of 1873 the Bishop must be a citizen of Luxembourg and the Government must approve the Pope's nominee before he can be appointed. (Pauly 2005: 312).[133]

There is a long tradition of religious education in public schools and the state subsidizes private religious schools. All private, religious, and non-sectarian schools are eligible for and receive government subsidies.

Malta

Though the vast majority of Maltese are Roman Catholics, the position of the Roman Catholic Church leading up to and after Independence in 1967 was a matter of some dispute; the Prime Minister of the day, Dom Mintoff, wanted a fairly clear separation between church and state. (Bonnici 2005: 352)

Section 40 of the Constitution of Malta provides for freedom of religion,[134] Section 2, which was inserted into the Independence Constitution by an amending Act in 1974 as a result of a

[131] Ruling of 13 June 2000 No. 49-1424..
[132] The sole licensed Anglican priest in Luxembourg receives a *traitement* from the state: personal communication from the Diocesan Secretary of the Diocese of Europe.
[133] The Pope raised Luxembourg to the status of an Archdiocese in 1988.
[134] Section 40 (1): All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship.

compromise between the Labour Government and the Nationalist Opposition,[135] establishes Roman Catholicism as the state religion:

> (1) The religion of Malta is the Roman Catholic Apostolic Religion.
>
> (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.
>
> (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

So, for example, there is no provision for divorce in Maltese family law;[136] and the Marriage Law Amendment Act 1995 restored the previously-recognised exclusive jurisdiction of ecclesiastical tribunals over Roman Catholic marriages that had been set aside by the Marriage Act 1975. (Mifsud Bonnici 2005: 360–361)

The Government provides partial finance for Roman Catholic schools. Roman Catholic religious instruction is compulsory in all state schools, but Section 40(2) of the Constitution ensures a right of conscientious objection for those who are not Roman Catholics.

Since 1991 all religious organisations have been able to own property. Perhaps surprisingly, however, neither the Roman Catholic Church nor the other faith-communities enjoy any particular tax exemptions beyond those given to charities generally. (Mifsud Bonnici 2005: 359).

The Netherlands

In the past, the religious makeup of the Netherlands has been characterised as roughly one-third Protestant, one-third Roman Catholic and one-third secular: a situation traditionally described as 'pillarisation'. However, Dutch society has become increasingly secular and the Protestant denominations, in particular, have suffered a considerable decline in membership.

Article 1 of the Constitution outlaws religious discrimination and Article 6(1) provides that everyone 'shall have the right to manifest freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law.'. The Dutch model of church-state relations is rather at the separatist end of the spectrum so that, for example, religious marriages contracted in the Netherlands must be validated by a civil ceremony. Religious groups are not required to register with the government; however, the law grants religious denominations certain rights and privileges, including tax exemptions. The Government also provides state subsidies to religious organisations that maintain educational facilities but does not aid religious organisations as such.

[135] Act LVIII of 1974. Sections 2(1) and (3) are not, however, entrenched under Section 66 (which requires a two-thirds majority in the House of Representatives to amend certain specified parts of the Constitution. Section 2(2), however, *is* so entrenched. (Mifsud Bonnici 2005: 352).

[136] Though foreign divorces are recognised: Article 33 of the Marriage Act stipulates that a decision of a foreign court regarding the status of a married person or affecting such status is recognised for all purposes of law in Malta provided that the decision is given by a competent court of the country in which either of the parties to the proceedings is a citizen or is domiciled.

Poland

Article 53 of the Constitution provides for freedom of religion, with the result that religious communities may register with the Government if they wish but they are not required to do so. Article 25 provides for a fairly level playing-field between faith-communities:

> (1) Churches and other religious organizations shall have equal rights.
>
> (2) Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
>
> (3) The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
>
> (4) The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
>
> (5) The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

However, those rather bald statements of the law can only give a massively over-simplified impression of the complicated relationship between the majority Roman Catholic Church and the Polish state.

During the post-War Communist regime, the Roman Catholic Church, under the leadership first of Cardinal Wyszyński then of Cardinal Woytyła (later Pope John Paul II), was perhaps the only institution strong enough to attempt to act as a serious counterweight to the Communist Party. During and after the period of martial law that was declared by General Jaruzelski in December 1981 and lasted until July 1983, the Church was heavily involved with the activities of Lech Wałęnsa and the Solidarity movement.[137] The result of the close relationship between Solidarity and the Roman Catholic Church was that when the Communist Government fell in 1989 and the devoutly-Catholic Wałęnsa came to power, the social policies of the new Government had a decidedly pro-Church stance: in particular, the reintroduction of religious instruction in public schools (which happened in 1990 without any prior parliamentary discussion), a prohibition on abortion, and restrictions on contraception.

The current law on abortion is that it is permitted only when the pregnancy has resulted from rape, when giving birth would put the mother's life at risk or when there is a serious possibility of birth defects. At the time of writing Ms Alicja Tysiac was contesting the abortion law as a violation of her rights under Articles 8 and 14 of the European Convention of Human Rights and Fundamental Freedoms relating to respect for privacy and family life and prohibition of discrimination, arguing that her third pregnancy (which in her view should have been terminated) severely damaged her eyesight, rendering her disabled. (Harding: 2006)

[137] The position both of Solidarity and the Church was probably strengthened by the murder by security police of Father Jerzy Popiełuszko in 1984.

One legacy of Communism positively benefited the Church: the Church Fund established in 1950 by the Communist Government in compensation for land they confiscated from the Church. In 2003 the Church received about £12 million in state aid for priests' pensions and church building maintenance. This became a political issue at the election in September 2005 (won by the conservative Law and Justice Party) when the Alliance of the Democratic Left (SLD) proposed the Church Fund's abolition. (Easton: 2004)

Faith-communities are divided into two groups for the purposes of recognition and legal status: those that operate on the basis of a special law regulating their relationship with the state, and those subject to the Law on Freedom of Conscience and Confession 1989 and the general laws relating to voluntary associations. The first group includes all the larger Christian communities, the Jews, the Muslims and the Karaites. (Rynkowski 2005: 427)

Portugal

Article 41 of the Constitution provides for freedom of religion and prohibits religious discrimination. Other than the Constitution, the two most important documents relating to religious freedom are the Religious Freedom Act 2001 and the Concordat with the Holy See.

Much the largest religious group in Portugal, with about 85 per cent of the population, is the Roman Catholic Church. The Government signed a new Concordat with the Vatican in May 2004 which abrogated the previous Concordat of 1940 and recognised the juridical personality of the Portuguese Episcopal Conference.

The Religious Freedom Act which came into force at the end of 2003 creates a legislative framework for other religious groups established in the country for at least 30 years and for those recognized internationally for at least 60 years. The Act grants to other denominations many of the rights that were previously enjoyed only by the Roman Catholic Church. In addition, each religious group may conclude its own 'Concordat' with the Government. [138]

Decree-Law 134/2003 establishes a register of 'collective religious bodies'. Registration, though not obligatory, entitles qualifying religions to full tax-exempt status and to give moral and religious instruction in state schools, it gives legal recognition to marriage ceremonies and other rites, and provides access to chaplaincy facilities in prisons and hospitals. (Canas 2005: 446–8)

The Slovak Republic

Article 1 of the Constitution declares that the Republic 'is not linked to any religious belief'. Article 24 guarantees freedom of religion and states that churches and religious communities administer their own affairs independently of state institutions.

A register is maintained by the Ministry of Culture. Religious groups are not *required* to register, but only registered faith-communities have the explicit right to hold public worship,[139] to conduct marriages that can be subsequently registered with the civil authorities and to receive tax concessions. Government funding also is provided to religious schools and to teachers of religion in state schools. Laws passed in 1991 and 1992 regulate registration, and the threshold

[138] They are listed in Canas 2005: 446–8.
[139] Though, in practice, there is no interference by the authorities with unregistered worship.

for registration is quite high: 20,000 adherents, who must be permanent residents.[140] Although the Nazarene and the Muslim communities existed in the country prior to 1991, they were never properly registered and, therefore, were not given registered status under the 1991 law. Unregistered religious groups may not build public places of worship, nor are their wedding ceremonies recognised as valid in civil law.

Registered groups receive government subsidies for clergy stipends and office expenses. State funding is based on the number of clergy rather than the number of adherents; the Roman Catholic Church (which has by far the largest number of adherents) receives much the greatest Government subsidy because it also has the most clergy. State funding is, however, a matter of controversy; and, according to the General Secretary of the Ecumenical Council of Churches in Slovakia, 'it remains only a question of time until a total withdrawal of state support to churches will gain necessary political support in the public'. (Prostredník 2003)

Slovenia

Article 7 of the Constitution provides for freedom of religion and separation of church and state, while Article 41 guarantees the free profession of belief. Faith-communities are, in essence, private voluntary associations, and Lovro Šturm describes church-state relations in Slovenia as 'an ultra-strict model of separation'. (Šturm 2005: 475)

Though there are no formal legal requirements for recognition as a religion and faith-communities are not subject to state supervision, religious groups must register with the Office for Religious Communities if they wish to be regarded as legal entities and benefit from quarterly VAT rebates. Perhaps surprisingly, there is provision for financial assistance by central and local government to registered religious communities, but the sums involved are tiny: about £11,500 in 2002. (Šturm 2005: 485)

Spain

Chapter 2, Article 16(1) of the Constitution provides for freedom of religion and freedom of worship; moreover '[t]here shall be no state religion',[141] but

> [t]he public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and other religious communities. [142]

Though four Spaniards in five regard themselves as Roman Catholics, Iván Ibán suggests that this 'should be seen in the context of an increasingly secular society which considers that standards of conduct should not be determined by any official religion'. (Ibán 2005: 140). Nevertheless, as a result of four accords with the Holy See signed in 1979, the Roman Catholic Church has a special status with respect to finance, religious education, involvement with the armed forces, and judicial matters.

As regards finance, the Roman Catholic Church is supported both through direct payments and through voluntary tax contributions of up to 0.5 per cent of income tax. In 2003 voluntary

[140] The fourteen religious groups already established before the law passed in 1991 were exempted from the membership requirement.
[141] *Ninguna confesión tendrá carácter estatal*.
[142] Article 16(3).

taxpayer contributions amounted to some £90 million (135 million euros) while the Government also provided an additional £18 million (28 million euros) in direct payments. (US Department of State 2005: Spain).[143] Representatives of Protestant, Jewish, and Islamic faiths have also signed bilateral agreements with the Government and are seeking parity of treatment on the matter of voluntary income tax contributions; and in 2004 legislation was approved to provide state funding for the teaching of Islamic, evangelical/Christian, and Judaic studies in public schools that could muster a class of 10 or more students.[144]

The Religious Freedom Act 1980 reiterates the secular nature of the state[145] and implements the constitutional provision for freedom of religion by establishing a legal regime and certain privileges for religious organisations. The position of the Roman Catholic Church is regulated by the concordat with the Holy See; otherwise; in order to acquire legal personality a faith community must register with the Ministry of Justice,[146] submitting evidence its foundation or establishment in Spain, a declaration of religious purpose, and its rules.[147] If such a group is judged *not* to be a religion, it may nevertheless be included on a Register of Associations maintained by the Ministry of Interior, which gives it legal status under the law regulating the right of association. (US Department of State 2005: Spain). The first section of the Register of Religious Entities lists religious entities of the Roman Catholic Church and those non-Catholic churches, denominations, and communities that have a cooperation agreement with the State.[148]

Switzerland

Article 15 of the Federal Constitution provides for freedom of creed and conscience, and the Federal Penal Code prohibits any form of debasement or discrimination of any religion or any religious adherents. The Swiss Confederation does not make laws on church-state relations. Instead, according to Article 72 of the Constitution 'the regulation of the relationship between church and state is a cantonal matter'; and the position across the cantons is by no means uniform, as the following examples indicate.

Under the Constitution of the Canton of Berne, the Reformed Church, the Roman Catholic Church and *l'Eglise catholique chrétienne* of the Union of Utrecht (which are generally regarded as the three 'traditional denominations') are recognised by Article 121 as the national churches of the Canton with legal personality as public corporations. Within the boundaries laid down by cantonal law they administer their own property and direct their own internal affairs, defined in the Law on the National Churches of Berne, Article 3 as 'everything that is concerned with preaching, doctrine, the cure of souls, worship, the religious task of the national Churches, of parishes and clergy, the diaconate and mission.[149] Article 122 of the Constitution also gives the three churches the right to be consulted and to comment on cantonal and inter-cantonal matters that affect their interests. In addition to the three national churches, Article 126(1) recognises the Jewish community as a body in public law. (Canton de Berne 2005)

[143] The figures do not include support for the teaching of religion in public schools or for military and hospital chaplains.
[144] *Ibid*.
[145] Religious Freedom Act 1980 Article 1(3).
[146] Religious Freedom Act 1980 Article 5(1).
[147] Religious Freedom Act 1980 Article 5(2).
[148] *Ibid*.
[149] *Tout ce qui concerne la prédication, la doctrine, la cure d'âmes, le culte, la tâche religieuse des Eglises nationales, des paroisses et des ecclésiastiques, la diaconie ainsi que la mission*.

Article 141 of the Constitution of the Canton of Fribourg recognises the Roman Catholic Church and the Reformed Church as institutions under public law. Other religious communities are regarded as private institutions; but Article 142(2) provides that if they respect fundamental rights and their social importance justifies such action 'they can obtain the prerogatives of public law or may be given a public statute'.

Perhaps surprisingly in view of its religious history, the Canton of Geneva has no national church; Article 164(1) of the Cantonal Constitution guarantees freedom of religion but Article 164(2) states that 'The State and the communes shall not support any religion financially'; [150] and the activities of religious communities are regulated by private rather than public law.

Articles 91–92 of the Cantonal Constitution of Thurgau recognise the Reformed and Roman Catholic Churches as *Landeskirchen* with the right to regulate their internal affairs. Article 93 accords legal personality to parishes [*Kirchgemeinden*] and authorises them to impose a church tax.

In 2005, the Canton of Zurich adopted a new Constitution that grants the Roman Catholic, *Catholique-chrétienne* and Reformed communities greater autonomy in regulating their internal affairs and gives official recognition (though without the benefits of the church tax) to two local Jewish communities. An amendment to the previous Cantonal Constitution 2003 that would have provided for the recognition of non-traditional religious communities had been rejected. (US Department of State 2005: Switzerland).

Most cantons (with the exception of Geneva and Neuchâtel, where church and state are separated) support financially through the church tax at least one of the three traditional denominations and, in certain cantons, the Jewish community. In order to receive preferential tax treatment, religious organisations must be registered. In some cantons the church tax is entirely voluntary; in others, it is compulsory for church members and an individual who chooses not to pay it may have to leave his or her church. In some cantons, private companies must also pay the church tax. Again with the exception of Geneva and Neuchâtel, religious instruction is given in cantonal schools.

[150] *L'Etat et les communes ne salarient ni ne subventionnent aucun culte.*

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