A JUDICIAL PERSPECTIVE ON THE SACRED IN SOCIETY

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The primary virtue of establishment is the Church's duty under law to minister to anyone at all who may turn to it, including the ungodliest. Establishment does not imply a religious State, that is a State whose law requires subservience by the citizens to the State religion; if it did, it would be barbarous (but contrast the Black Rubric in the Book of Common Prayer*). Establishment does not entail State control of the Church. The legal characteristics of establishment are as follows. (1) The law of the Church of England is part of the law of the land. (2) Bishops and some other office-holders are appointed by the Queen on ministerial advice. (3) 26 diocesan bishops sit as legislators in the House of Lords. (4) The Queen as Supreme Governor acts as monarch for the Church as she acts as monarch for the State. The Church of England is not a "congregational" church: its forms of worship are prescribed by law, and are not at the liberty of the community worshipping in any particular church. The bishops' resolution which authorised the use of the 1928 revision of the* Book of Common Prayer *in face of the will of Parliament (which was the lawful authority in the matter) was a lamentable disobedience to the law which it was their duty to uphold. Such a legal transgression might possibly nowadays be subject to correction by the High Court on judicial review, though that would require departure from earlier high authority. However that may be, it has to be recognised that there is no room, in the practice of an established Church, for the notion that conscience might justify disobedience to the law. The conscience of the believer is worth no more than the conscience of an unbeliever. The established Church possesses two immeasurable virtues: first, that religion is no tyrant: belief is not compulsory; second, that the Church's ministration is available to everyone. Their unified effect is a great force for good.*

I agreed far too blithely to the suggestion that I should if invited address this conference, for I have no respectable qualifications for doing so. Still, my very ignorance of the nature of the establishment of the Church of England has led me to enquire, without any preconceptions of any kind, what this conception of the Church's establishment means; and it may be there is some very modest value in this kind of beginning with a *tabula rasa*. I have found the enquiry unexpectedly elusive. My starting-point was to try and discover what are the legal conditions of this establishment: what are the propositions of law in which it consists. I thought this was safe enough territory, for at least it was law and nothing else; though certainly I had no previous expertise in this branch of the law. But I soon discovered that the austerity of legal propositions was by no means, in the eyes of many thinkers at least, the whole or even the greater part of what

is meant by the establishment of the Church of England. It is said to consist in something much more fundamental. This has been put many ways. A coarse and figurative summary would be that it represents a marriage of the divine and the secular, so that the State is in some way underpinned by the Christian faith and is an expression of it.

There is a good deal about this idea in a book (which my wife, who is a theologian, suggested I read) by Paul Avis, General Secretary of the Council for Christian Unity of the Church of England, called *Church, State and Establishment.*[1] I have to say that I regard an author who uses adjectives like 'missiological' and 'salvific' as an enemy of the English language, a condition which does not exactly predispose me in favour of anything else he has to say. Early in the book[2] Avis equates establishment, perhaps uncontroversially, with 'the recognition on the part of the State of the contribution of Christian ministry to the health of civil society'. Later, Avis offers an excellent conspectus of those great figures from the sixteenth to the nineteenth century who have written of this relation between Church and State: Hooker, Burke, Coleridge, Gladstone, Thomas Arnold, and Mandell Creighton (who I think was educated at Durham School).

The more I looked into the whole matter of the Church of England's establishment, the more interested I became in this underlying notion of the relation between Church and State: rather at the expense of my sober researches into the dry legalities of establishment. The reason is that as a lawyer who regards our legal constitutional arrangements in this country, which are at root a function of the common law, as a powerful force for good, I have a profound sense of unease at the notion that these very arrangements are to be treated in some way as a function or derivative of religious truth. Avis suggests[3] that 'In the British constitution, we may say, sovereignty is vested in the Queen in Parliament under God'. I am afraid I have a very great deal of difficulty in seeing what God has to do with it, unless He is a beneficent but unseen moving finger; but in that case He is a cause of our constitutional arrangements, not a reason for adopting them or developing them or acting in accordance with them. The integrity and rationale of our constitution are not intelligible in terms of the causes of its existence. Rather its integrity and rationale are intertwined with, indeed consist in, the reasons why we accept and endorse it; and indeed, modify it over time. There is a chasm between cause and reason.

The basis of my concern does not in any sense depend on an anti-religious or anti-Christian position. Far from it: it depends rather on the need to safeguard what I regard as the primary virtue of the Church's establishment: its universality; that is, its legal duty to minister to anyone who may turn to it: to unbelievers, doubters, and backsliders not a splinter less than the most faithful among the faithful; to all the Queen's subjects including,

[1] SPCK, 2001.
[2] p 16.
[3] P Avis *Church, State and Establishment* (SPCK, 2001), Preface, p ix.

therefore, the ungodliest. In a nation State of many faiths and none, where roots are sometimes severed, ancient certainties often fractured, where many, especially the young, cast about which way to turn because there are too many competing signposts, this compulsory openness of the Church of England is more, not less, important than in other times which may have been more settled and more devout. The marriage of Church and State, 'the Queen in Parliament under God', may in those earlier times have been the engine of establishment. If so, now in this later and more fluid age we need a new crankshaft.

But now I will turn to the letter of the law. I hope I will be forgiven if what follows is a short and superficial account. I am not capable of better. I hope I may without impertinence be allowed to pay tribute to Professor David McClean's scholarly paper,[4] which introduced me to section 8 of the Act of Supremacy 1558. First, as I see it, there are two preliminary points to notice, which are of some significance. The first is as obvious as it is important. It is that establishment does not imply a religious State: that is, a State whose general law compels the citizens' subservience to the forms and tenets of the State religion. A constitution of that kind is peculiarly barbarous, for it pierces freedom of thought—not just freedom of expression, freedom of thought—to the very quick; and in doing so provides a spurious justification for tyranny if anything more hypnotic than the false and tawdry claims of communist rulers to represent the people. In its first 2,000 years Christianity has sometimes been guilty of this. But it is very obviously no part of the conception of the establishment of the Church of England, which, thank God, does not require under threat of legal sanction that England's people should believe or practise anything.

However, there is as it happens one provision remaining in the law of England, in its ecclesiastical law, which on the face of it forbids free thought. This is the Black Rubric, which as everyone here will know is one of the instructions appended to the Order for Holy Communion in the *Book of Common Prayer*. It is in these terms:

> Whereas it is ordained in this office for the Administration of the Lord's Supper, that the Communicants should receive the same kneeling . . . yet, lest the same kneeling should by any persons, either out of ignorance and infirmity, or out of malice and obstinacy, be misconstrued and depraved: It is here declared, that thereby no Adoration is intended, or ought to be done, either unto the Sacramental Bread or Wine there bodily received, or unto any Corporal Presence of Christ's natural Flesh and Blood . . . .

The Rubric was composed by Archbishop Cranmer for his second Prayer Book of 1552. It requires the communicant to kneel; but forbids him to worship the bread and wine as if it were Christ's flesh and blood. It is

[4] D McClean, 'The Changing Legal Framework of Establishment' is reproduced at page 292 of this volume.

intended to regulate what happens in his head while he is on his knees. Her late Majesty Queen Elizabeth I had the Rubric removed; as Sir Francis Bacon tells us, 'She would not make windows into men's souls'. But it was restored in the 1662 Prayer Book, and has been the law of the land, directory I hope rather than mandatory, ever since.

In this context of freedom of belief, consider the text of Article 9 of the European Convention on Human Rights, which of course is incorporated into our domestic law by force of the Human Rights Act 1998:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 is in the two-paragraph form adopted in each of Articles 8 to 11, dealing with what are sometimes called the political rights. The first paragraph declares the right; the second paragraph articulates limitations or qualifications to which the right is subject. What is interesting about the text of Article 9 is that whereas the first paragraph includes within the right declared freedom of thought, the limitations imposed by the second paragraph relate only to freedom to manifest one's religion or belief. Nothing can justify any limitation upon the right to think, or believe, anything at all.

So the established Church is not a function of a religious State. My second preliminary point is linked to the first, but is more pedestrian. It is that the established Church does not function like a nationalised industry: that is to say, the government is not its ultimate boss. The objection to a religious State consists in the vice that the Church, or rather the churchmen, would control the State. The objection to this further model, the metaphor of the Church as a nationalised industry, consists in the vice that the State, or rather the statesmen, would control the Church. Herbert Hensley Henson, appointed Bishop of Durham in 1920, feared something like this when he wrote in 1946:

> Far from ministering to "spiritual efficiency", the Establishment now immerses the Church in a bondage to secular forces which is destructive of her true influence, and quite plainly inconsistent with her essential character as a spiritual society, a true and living branch of the Catholic Church which is the body of Christ.[5]

But Avis is surely right[6], when by reference to 'synodical government, con-

[5] Bishoprick Papers (OUP 1946), p 90.
[6] *Church, State and Establishment*, p 34.

trol of [the Church's] doctrine, worship and discipline, and complete responsibility for nominating (if not actually appointing) its bishops', he dismisses these fears as nothing but a bogey nowadays.

I return, then, to the defining legal characteristics of the established Church. They include at least the following: (1) The law of the Church of England is part of the law of the land, and the ecclesiastical courts are among the Queen's courts. (2) Bishops and certain other office-holders are appointed by the Queen, acting constitutionally on the advice of the Prime Minister. (3) 26 diocesan bishops sit in the House of Lords, and thus are part of the legislature. (4) The Queen as Supreme Governor acts as monarch for the Church as she acts as monarch for the State. I acknowledge, indeed I think we should find much satisfaction in the fact, that under the dry letters of the law there are many powerful traditions touching the relation of Sovereign and Church. Closely allied to these legal characteristics though not, I think, strictly forming part of them, is what Avis describes as 'a close and sympathetic relationship to national culture and, more locally, to regional expressions of that culture. [The Church] has a chaplaincy role to national institutions, such as schools and colleges, municipal corporations, the armed services, hospitals and penal institutions'.[7]

I will say a little more about the law of the Church as the law of the land. The law prescribes the forms of worship. Every new priest upon his ordination undertakes and declares in just the same words as did the new Archbishop of Canterbury upon his enthronement:

> I will use only the forms of service which are authorised or allowed by Canon.

Furthermore, as Latham CJ said in the High Court of Australia in 1948:

> The Church of England is not a congregational church. The members of the congregation worshipping in a particular church building are not at liberty to adopt any doctrine or ritual which commends itself to them and still to describe themselves as members of the Church of England.[8]

Against this background we may recall the famous, some have thought it infamous, rejection by Parliament in 1928 of the first attempt, in the shape of the Deposited Book, to revise the *Book of Common Prayer*. As is well known, Hensley Henson became a formidable advocate of disestablishment in consequence of this decision by Parliament. It seems to me that his position had a good deal more integrity than that expressed by this following resolution which was adopted by the bishops:

> That during the present emergency and until further order the bishops

[7] *Church, State and Establishment*, p 15.
[8] *Wylde v Attorney-General for New South Wales, ex rel Ashelford* (1948) 78 CLR 224 at 256.

> ... cannot regard as inconsistent with loyalty to the principles of the Church of England the use of such additions or deviations as fall within the limits of these proposals ... That accordingly the bishops, in the exercise of their legal or administrative discretion, will be guided by the proposals set forth in the Book of 1928 ...

As I understand it, it was not until the Church of England (Worship and Doctrine) Measure of 1974 was passed that the General Synod was empowered to make provision by Canon as to the forms of service to be authorised for use in the Church. I am unaware of any legal justification for the bishops' resolution which purportedly authorised the use of the 1928 Book in face of the will of Parliament, which was then the lawful arbiter of such matters. The bishops spoke of their 'legal or administrative discretion'. Were they not sure which? In truth, they enjoyed neither. Such discretions as the bishops possessed did not as I understand it extend to a defiance of a clear position taken by the legislature. No *ius liturgicum* entitled them to go so far. As Rupert Bursell has written:

> ... the scope of any *ius liturgicum* was still restricted by those Acts of Uniformity and a bishop could not legally dispense with the requirements of the Acts or permit any variations in relation to the services prescribed by them.[9]

And *Read v Bishop of Lincoln* (1899) 14 PD 148, in the Court of Arches, is cited. There is also Briden and Hanson, *Moore's Introduction to English Canon Law*, where it is stated:

> ... there can be no legal validity in the purported exercise of an alleged episcopal discretion to allow the wholesale use of the deposited Prayer Book of 1928 ...[10]

If this approach is right, the position taken by the bishops in relation to the 1928 Book would appear to have been a lamentable disobedience to the law which, one might be forgiven for supposing, they should as leaders of the Church particularly uphold. Further than this: such a disregard of the law surely tends to undermine the establishment of the Church, which depends upon conformity with the law.

There is an interesting question, interesting in theory at least, whether and in what forum this resolution of the bishops might have been subjected to a legal challenge. An issue relating to episcopal authority was the subject of a challenge before the Court of Arches in *Re Lapford (Devon) Parish Church* [1955] P 205, which concerned a proposed tabernacle for the reservation of the sacrament. At first instance Chancellor Wigglesworth stated:

[9] 'Consecration, Ius Liturgicum and the Canons', chapter 7 of N Doe, M Hill and R Ombres (eds), *English Canon Law: Essays in Honour of Bishop Eric Kemp* (University of Wales Press, 1998), p 76.

[10] T Briden and B Hanson, *Moore's Introduction to English Canon Law* (3rd edn) (Mowbray, 1992), p 58. See also *Re St Peter and St Paul, Leckhampton* [1968] P 495 at 498A-B, Gloucester Cons Ct.

> I know of no authority which compels me to hold that reservation is unlawful when it takes place with the sanction of the bishop. I do not consider that it is forbidden by Article 28 [of the Articles of Religion] or by the rubric at the end of the Communion service ...[11]

The rubric states:

> ... if any remain of that which was consecrated, it shall not be carried out of the Church, but the Priest and such other of the Communicants as he shall call unto him, shall, immediately after the Blessing, reverently eat and drink the same.

On appeal in *Re Lapford Parish Church* the Dean of the Arches stated:

> Whatever may have been the reason for the insertion of these words, I think that I am bound to take them as they stand, and they are inconsistent with any form of reservation . . . So far the question of reservation by permission of the bishop had not come into prominence. But although the bishop has no doubt a large discretion in matters which are doubtful, or not fully provided by the rubrics, it does not enable him to legalise anything which is plainly illegal.[12]

Interestingly the Dean of the Arches proceeded to consider the bishops' resolution relating to the Book of 1928 which I have set out. He said:

> Of course these resolutions could not alter the law in any respect. But they did constitute a claim by the Church to do a number of illegal things within certain limits ...[13]

It may be—I would at once defer to scholars of canon law—that a pronouncement of the bishops such as that made in relation to the 1928 Book could not be challenged save indirectly, through a case brought in the ecclesiastical courts to complain of some specific practice, seemingly authorised by bishop or bishops, but which is said to be repugnant to settled canon law. In turn there is an interesting question how far decisions of the ecclesiastical courts are subject to the judicial review jurisdiction of the High Court. In a scholarly essay on the subject[14] Mark Hill points to the distinction between an order of *certiorari* (nowadays a quashing order) to quash a decision of an inferior tribunal, and orders of prohibition (a prohibitory order) and *mandamus* (a mandatory order) which are issued respectively to prevent an inferior tribunal from embarking on a jurisdiction which it does not possess, and to require it to embark upon a jurisdiction which it does possess and ought to exercise. The traditional view has been that the ecclesiastical courts are amenable to prohibition

[11] *Re Lapford (Devon) Parish Church* [1954] P 416 at 424, Exeter Cons Ct.
[12] *Re Lapford (Devon) Parish Church* [1955] P 205 at 210–211, Ct of Arches.
[13] at p 213.
[14] 'Judicial Review of Ecclesiastical Courts': chapter 10 of *English Canon Law*, cited in note 9 above. Scholarly indeed, although Hill inexplicably categorises the Crown Court as an inferior court: p 110.

and *mandamus*, but not to *certiorari*. *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* [1948] 1 KB 195 (which I know of because it appears in the King's Bench report immediately before the *Wednesbury* case) is Court of Appeal authority for the proposition that *certiorari* will not lie to the ecclesiastical courts. This curtailed view of the High Court's jurisdiction over ecclesiastical courts historically bore quite a close parallel to the position regarding University Visitors, though in that case there has been judicial activity much more recently than the decision in *ex parte White*: see *R v Hull University Visitor, ex parte Page* [1993] AC 682, HL. As Hill demonstrates, the position relating to ecclesiastical courts and judicial review has been criticised. In *R v Chancellor of the Chichester Consistory Court, ex parte News Group* [1992] COD 48, Mann LJ sitting with Hidden J in the Divisional Court acknowledged, as no doubt he was bound to do, the force of the Court of Appeal's decision in *ex parte White*, but commented:

> The Court of Appeal might well now, if the occasion arises, decide that *certiorari* can go. If they do so decide, they may express the view that the courts should be cautious in exercising the review jurisdiction in regard to questions of ecclesiastical law because they are best left to the ecclesiastical courts with their own hierarchy of appeal.[15]

Hill concludes:

> The sooner the Court of Appeal looks again at *ex parte White* the better. There would now appear to be sufficient accreted justifications for judicial review to lie in respect of an ecclesiastical court acting in breach of natural justice ...[16]

If there were a modern parallel to the bishops' resolution relating to the Book of 1928, is it conceivable that the High Court might declare the resolution to be unlawful? Perhaps not.

The interest of all this, including the technicalities, brings me back to the relation between Church and State. It lies in the vital truth that the established Church, its acts and its forms of worship, are subject to the law of the land as it is administered in the Queen's courts, which of course include the ecclesiastical courts. This is the Church's virtue: it means that the Christian faith is mediated or offered to the people on a universal and compulsory basis which transcends the doctrinal, liturgical or other predilections of individual priests or prelates. Their voices are put in their proper place, which is under the law. In that place they will far better serve the spiritual needs of the unruly ranks of Christian, non-Christian, those who do not know one way or the other, and those who are not sure or who do not care. The parish priest is, as I understand it, and subject to important exceptions, obliged by law to baptise, to marry and to bury accord-

[15] Transcript, 7B.
[16] 'Judicial Review of Ecclesiastical Courts': chapter 10 of *English Canon Law*, cited in note 9 above, p 114.

ing to the rites of the Christian Church those of his parishioners, or in the case of burial their relatives, who seek such religious service or sacrament. He is not to enquire into their faith. He may, perhaps particularly where the parishioner is to be married, give counsel. But he cannot refuse. If he does so, he betrays the virtue as well as the law of the established Church.

In this there is no room for the notion that conscience might justify disobedience to the law. It is simply the priest's duty to administer the services of baptism, marriage and burial to the people. There are, as I have foreshadowed, exceptions: exceptions as regards the marriage of divorced persons, and as regards the burial of persons not baptised. The priest has no other legitimate space for conscientious objection. If he is driven by such an objection, then his place is in a sect, or a congregational church where no general law prescribes the duties of the ministers.

Here I have to state and to stand by what may seem to be a hard truth, that the conscience of the believer is worth no more, and of course no less, than the conscience of the unbeliever. If the priest or bishop seeks to justify disobedience to the law of the established Church by reference to his own religious convictions, he is in no different case from the man who seeks to justify disobedience to the general law by reference to his own moral convictions. A claim to legal disobedience carries no kitemark of respectability because its grounds are religious. The opposite view, if it were generalised, would justify the dictatorship of the religious State. It is a deep virtue of the established Church that it puts the breathless claims of religious fervour below the law. In doing so it satisfies two unmeasurable values. I have already mentioned both of them. First, the established Church stakes out religion as no tyrant—no State tyrant or any other kind of tyrant. Belief is not compulsory. The Church respects the general law of the land under which, not least given the Human Rights Act 1998 but I would say equally by force of the common law, any attempt to compel religion would be utterly condemned. Secondly however, and by contrast, the Church's ministration is by law available to everyone, believer or no. These two values are interconnected.

Their unified effect is a great force for good. But as it seems to me this requires a hard discipline, hardest perhaps for the most faithful. It is a twofold discipline. It requires conformity with usages which the priest may personally disapprove, and it requires the extension of sacrament and succour to people who are frankly outside the Church. It seems to me that this is reflected in the striking words of the present Dean of Westminster: 'Incumbents are still appointed to the cure of souls, not just to the supervision of a congregation, even if few seem able or willing to tell the difference.'

In the end, I do not think that those who are sympathetic to the Church of England as it is established, or who are committed members of

it, should feel their adherence buffeted by all the pluralities of today. Others have described the support for the Church of England's establishment that is offered by leading members of other faiths and other denominations. There is a danger that the Church's virtues of tolerance and moderation become degraded, degraded into the vice of being apologetic for seeming to believe in anything very difficult or demanding, or even frightened of doing so. That is a terrible vice, akin to the vice of political correctness, which is a kindergarten kind of fascism. Of course the Church will preach the Gospel: I hope without inhibition and with all the vigour it possesses. It does so against the backcloth of the two immeasurable values I have described.

It is a great virtue of advocacy and argument not to put your case too high. F E Smith, one of my profession's great heroes, created Lord Birkenhead when he became Lord Chancellor in 1919, whose son's hagiographic biography of him led me—for the little that it is worth—into the law, for all his greatness committed this terrible mistake. He put his case too high in the House of Commons when he described the Welsh Disestablishment Bill as 'a Bill which has shocked the conscience of every Christian community in Europe'. Though it has nothing to do with the argument, I cannot resist reminding you of some of the stanzas in G K Chesterton's wonderful poetic response, Antichrist, or the Reunion of Christendom: an Ode:

Russian peasants round their pope
Huddled, Smith,
Hear about it all, I hope,
Don't they, Smith?
In the mountain hamlets clothing
Peaks beyond Caucasian pales,
Where Establishment means nothing
And they never heard of Wales,
Do they read it all in Hansard—
With a crib to read it with—
'Welsh Tithes: Dr Clifford Answered.'
Really, Smith?

In the lands where Christians were,
F E Smith,
In the little lands laid bare,
Smith, O Smith!
Where the Turkish bands are busy,
And the Tory name is blessed
Since they hailed the Cross of Dizzy
On the banners from the West!
Men don't think it half so hard if
Islam burns their kin and kith,
Since a curate lives in Cardiff
Saved by Smith.

It would greatly, I must own,
Soothe me, Smith!
If you left this theme alone,
Holy Smith!
For your legal cause or civil
You fight well and get your fee;
For your God or dream or devil
You will answer, not to me.
Talk about the pews and steeples
And the Cash that goes therewith!
But the souls of Christian peoples...
Chuck it, Smith!

It is a virtue of the English to be moderate and determined at the same time. The established Church has in the past exemplified this virtue. There is every reason why it should do so in the future.