

Freedom of belief for minorities in states with a dominant religion: Anomaly and pragmatism

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Summary

This article provides a European perspective on church and state that may be instructive in understanding current developments in Africa. In particular, the article explores the fragile inter-dependency of minority and majority religions within national systems. It examines various ways of defining dominant and minority religions and various paradigms of church-state relations. The article provides a comparative case study of the English religious establishment model for understanding these concepts and argues for both the inclusion of religion in public discourse and the protection of religious minorities in the ongoing development of law and religion in Africa.

1 Introduction: Church and state in Europe and Africa

Scholarly interest in matters of freedom of religion has grown exponentially in recent years. The European Consortium for Church and State Research¹ has existed for a quarter of a century, and the International Consortium for Law and Religion Studies² held its inaugural conference in Milan in 2009, reconvening some two years later in Santiago, Chile, and thereafter in Virginia, United States of America in 2013. South America has the *Consortio Latinoamericano de Libertad Religiosa*, a forum within which experts in law and religion can meet to exchange research.³ The convening of a conference in

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1 See its website <http://www.churchstate.eu/> (accessed 31 January 2014).

2 See its website: <http://www.iclars.org/> (accessed 31 January 2014).

3 See its website: <http://www.libertadreligiosa.net/> (accessed 31 January 2014).

Ghana to address law and religion in Africa was an ambitious project, but the aspiration was realised with enthusiasm and efficiency.⁴ In addition to the logistical difficulties involved in bringing together so many experts from such a vast and varied continent, it posed conceptual challenges for participants from the northern hemisphere having to re-imagine embedded paradigms and loosen their adherence to accepted principles and practices, which had been reinforced by teaching and experience over generations.

Amongst a varied collection of contributions from leading scholars of law and religion in Africa, this article is somewhat unusual. Its author was the sole European participant⁵ in the Ghana conference: a privilege but also a demanding responsibility. I sought to bring to the gathering my expertise in law and religion within the United Kingdom as a scholar, litigator and judge, but with an open-mindedness to learn from the experience and practices of a vibrant continent, shaped by its history – including the legacy of colonialism – but energised by its own culture, values and self-understanding. My presentation comprised a series of questions designed to promote a critical exploration of the fragile inter-dependency of minority and majority religions within national systems. Taking as a case study the historic tradition in England where religious pluralism flourishes despite (or because of) an established state church, this article ventures some reflections as to how the seeming anomaly of a favoured or privileged national church, properly understood, can be an instrument for protecting the rights of minority churches and promoting their support and nurturing.

2 Defining ‘dominant’ and ‘minority’ religions

Defining terms is essential in any study such as this; interest groups are prone to deploy terminology in different ways to reinforce their own positions. Is dominance based in numerical prevalence or political influence? Is twenty-first century dominance based upon historic cultural factors which may have outlived their current relevance and objective justification? Is the dominance of one religion purely ‘self-serving’ or can it benefit all religions by, for example, emphasising the importance of the spiritual in public life and political discourse?

Equally, what constitutes a ‘minority religion’? Is this measured in terms of membership, status, longevity or *de facto* influence? Does the concept of registration serve to facilitate or frustrate freedom of

4 Congratulations are due to Prof Kofi Quashigah, Dean of the Faculty of Law, Ghana University, and to the entire organising committee and institutional sponsors for their efforts in bringing the conference to fruition and establishing a forum for continuing academic discussion throughout Africa.

5 I was subsequently appointed Extraordinary Professor in the Department of Church Polity within the Faculty of Theology at the University of Pretoria.

religion? How does the social dimension of collective religion relate to conscience and belief as an aspect of the dignity of the person?

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁶ It follows that all states will have within their territory multiple sets of self-defining minorities.

3 Varying models of church-state relations

The autonomy of churches and faith communities in any legal system is achieved *actively*, through the express grant and preservation of rights of self-determination, self-governance and self-regulation; and *passively*, through non-interference on the part of organs of state, such as national government, local or regional government or the secular courts. In the United Kingdom, for example, there is no systematic provision made for the autonomy of churches, but the twin principles of non-interference and neutrality are evident from both general and particular laws, and from the judgments of courts and tribunals.

However, models of church and state are infinitely variable and range from strict separation in the USA to theocratic government, as seen in Iran or Afghanistan.⁷ Within Europe, there is no uniform constitutional construct which dictates the relationship between the state and religious organisations. Three broad types can be identified.⁸

3.1 State church or predominant religion

In this model, there are strong links between the state and one particular dominant religious community. Examples include England, Denmark, Greece, Malta and Finland.

6 E/CN.4/Sub.2/384/Rev 1 para 568.

7 Shari'a is said to be the official basis for state laws in the following countries: Yemen, Afghanistan, Somalia, Sudan, Saudi Arabia, Mauritania, Oman and Iran, and operates in certain regions in Nigeria.

8 For the fullest, and most recent, study of the differing models of church and state in the European Union, see N Doe *Law and religion in Europe: A comparative introduction* (2011), whose empirical findings suggest that common to all systems is a degree of co-operation.

3.2 Strict separation

Here the system is founded upon a strict separation between state and religions, broadly in line with the United States model. Examples include France, the Netherlands and Ireland.

3.3 Co-operation

This type features the basic separation of church and state whilst recognising a multitude of common tasks in the fulfilment of which there is active collaboration. Examples include Belgium, Poland, Spain, Italy, Hungary, the Baltic States and Portugal. In some there are high level concordats or covenants between organs of government and the church hierarchy.

The largest religion in Europe is Christianity, with 76,2 per cent of Europeans considering themselves Christians, including Catholic, Eastern Orthodox and Protestant Churches. Following these is Islam, concentrated mainly in the south-east (Bosnia and Herzegovina, Albania, Kosovo, Kazakhstan, North Cyprus, Turkey and Azerbaijan). Other religions, including Judaism, Hinduism and Buddhism, are minority religions (though Tibetan Buddhism is the majority religion of Russia's Republic of Kalmykia). Europe has become a relatively secular continent, with an increasing number and proportion of irreligious, atheist and agnostic people, actually the largest in the Western world. There are a particularly high number of self-described non-religious people in the Czech Republic, Estonia, Sweden, Germany (East) and France.

The diversity of the civil ecclesiastical law systems in the European Union (EU) mirrors the range and variety of national cultures and identities. The relatively recent addition of former communist countries has enriched this diversity and brought into sharper focus state interference in and against religion, the role of religion in the transition process and questions of restitution of property. Civil ecclesiastical law remains rooted in Christianity, but with contributions from Islam and Judaism. There is an increasing number of small religious communities, often linked to larger communities in other parts of the world (the 'diaspora').

Religion is acknowledged as an important element of social life; and one to be fostered and encouraged by the state. Equally, there is a general tendency towards acknowledging the right of self-determination of religious communities. Initially, the guiding principle behind the EU was economic unification,⁹ a process now very far advanced. As this has become consolidated, the reach of the European institutions has progressively extended to embrace the cultural life of member states, through education, labour law, social and welfare concerns, and it now engages with churches and religious

⁹ Originally styled the European Economic Community, its title subsequently changed to the European Union, reflecting its broader purpose.

organisations.¹⁰ However, the principle of subsidiarity requires a general reticence on the part of the EU itself with regard to questions of the law on religion, where national governments enjoy legislative competence under a wide margin of appreciation.¹¹

4 England: A case study

In many ways, the United Kingdom demonstrates in microcosm the various models of church and state visible throughout the EU. Within the UK, there are various models of church and state: Some churches are established, others are disestablished, while yet others are non-established. Some are 'national', some regional, and some multi-national. There are many myths and misunderstandings about the nature of establishment. The United Kingdom has not one, but two established churches. The (Anglican) Church of England is the established church in England. The (Presbyterian) Church of Scotland (or 'the Kirk') is the established church in Scotland.¹² The Church of England was disestablished in Wales in 1919.¹³

The meaning, effect and future of the establishment of the Church of England is a complex matter of history, ecclesiology, sociology and politics.¹⁴ Historically, the Church of England has discharged an important and influential role in the life of the country and enjoyed special links with central government. But the Church of England as a whole has no legal status or personality: 'The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.'¹⁵

The Church of England and the state are frequently said to have a symbiotic relationship: the Church being the state in its spiritual aspect. The grandeur of establishment may be both mythical and illusory; the grass roots civic religion is real and vibrant. The census in

10 See A Pimor 'A collection of states or a state of mind? The religious and spiritual dimension of European citizenship' in N Doe & R Sandberg *Law and religion: New horizons* (2010) 191-217.

11 For a nuanced forensic critique, see R McCrea *Religion and the public order of the European Union* (2010). Note, by way of example, *Dahlab v Switzerland* App 42393/98, 15 February 2001: 'It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions.'

12 The Queen is the 'Supreme Governor' of the Church of England. However, the Anglican Church in Scotland (the Scottish Episcopal Church) is not established nor is the monarch its head. North of the border, Her Majesty is a member of the Presbyterian Church of Scotland.

13 See generally M Hill 'Church autonomy in the United Kingdom' in G Robbers (ed) *Church autonomy: A comparative study* (2001) 267-283.

14 For an instructive overview, see RM Morris (ed) *Church and state in twenty-first century Britain: The future of church establishment* (2009).

15 *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 para 61 *per* Lord Hope of Craighead.

the United Kingdom conducted in 2011 contained, for the second time, an optional question on religious affiliation. It revealed that 59 per cent of the population declared themselves to be Christian.¹⁶

However, it is vitally important that liberal democracies in the twentieth century do not lose sight of the presence of the spiritual in society. That the government interacts with the Church of England at its highest level reflects the weight to be given to matters of faith and belief in society at large.¹⁷ It is noticeable that the voices in favour of Church of England bishops remaining in the House of Lords are to be found in the Catholic, Muslim and Jewish communities.

Religious bodies of all denominations can make a useful contribution to law making. The constitutional presence of Church of England bishops in the House of Lords and the customary inclusion of members of other faith communities give credibility to spiritual concerns. Empirical research suggests that many bishops regard themselves as representing religion.¹⁸ Moreover, members of minority religious groups tend to welcome the Bishop's presence in the House of Lords. Establishment means that political figures and officials become familiar with consulting faith groups and recognise the existence of religion in the public sphere.

The English courts, by convention, adopt a self-denying ordinance whereby they decline to enter into doctrinal disputes or matters concerning the organisation or operation of faith communities.¹⁹ Indeed, the courts have shown a marked reluctance to interfere with the internal management and administration of churches.²⁰ Lord Justice Hoffman, in giving judgment in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*, remarked:²¹

The attitude of the English legislator to [horse]racing is much more akin to his attitude to religion ... it is something to be encouraged but not the business of government.

16 In the previous census conducted in 2001, 3% were Muslim, with Hindu, Sikh, Jewish and Buddhist declarants amounting to fewer than 1% each. There were 16% who declared themselves to be of no religion and for 7% none was stated. Of those declaring themselves to be Christian, there were 1.3 million for the Church of England; 1 million Catholics; 300 000 Methodists; 200 000 Pentecostal; 200 000 Orthodox; 180 000 Mormons; 150 000 Baptist; and 125 000 Jehovah's Witnesses.

17 For a broader discussion and reflection in a European context, see M Hill 'Voices in the wilderness: The established Church of England and the European Union' in L Lustean & J Madeley *Religion, politics and law in the European Union* (2010).

18 A Harlow *et al* 'Bishops in the House of Lords: A critical analysis' (2008) *Public Law* 490.

19 See M Hill 'Judicial approaches to religious disputes' in R O'Dair & A Lewis (eds) *Law and religion* (2001), an approach adopted by Mr Justice Gray in *Blake v Associated Newspapers Limited*, 31 July 2003 (unreported) and subsequently by the Court of Appeal in *Khaira v Shergill* [2012] EWCA Civ 893.

20 For a general discussion, see D McClean 'State and church in the United Kingdom' in G Robbers (ed) *State and church in the European Union* (1996) 307.

21 [1993] 1 WLR 909.

Because the Church of England has an existence quite separate and distinguishable from that of the state, it is able to be outspoken in its criticism of government policy. Lord Williams of Oystermouth, formerly Archbishop of Canterbury, condemned the illegal act of aggression on the part of President Bush in launching a war on Iraq, and the complicity of Prime Minister Blair in supporting him. Likewise, his successor, Justin Welby, has been critical of the banking industry and its flawed regulation.

There is nothing inherently wrong or offensive in states entering into special relationships with majority religions, provided discriminatory consequences are avoided. This has been recognised by the European Court of Human Rights.²² Successive waves of European Directives have embedded strong anti-discrimination provisions into national legislation, which has the effect of strengthening the protection afforded to minorities by ensuring that it is equal to that given to the majority of favoured group.²³ Equal treatment does not mean identical treatment. Majority churches (whether established or not) carry a heavy social duty, which is responsibly discharged in various states of Northern Europe. This includes the promotion of all religions and belief systems, an essential instrument of ecumenism. It also embraces social and humanitarian action in the fields of education, medical treatment and care of the young, the elderly and the infirm. The responsibility is founded upon trust and becomes workable as a result of the confidence engendered by the prolonged security of safeguarding fundamental freedoms. It is a delicate but effective means of promoting tolerance and religious freedom. The state also carries an obligation. It cannot favour one religion or denomination over others, nor must it work too adroitly to separate church and state with an artificial rigidity. Instead, it must value all equally.

For example, British legislation provides that an exemption from local tax liabilities is provided for certain places of worship.²⁴ A temple belonging to the Church of Jesus Christ of Latter-Day Saints is open only to Mormons of good standing. This has been held by the UK domestic courts not to be a place of *public* worship, and therefore not entitled to the exemption. An appeal is pending to the European Court of Human Rights alleging religious discrimination, and the judgment is awaited.²⁵

22 *Darby v Sweden* (1991) 13 EHRR 774.

23 For a detailed comparative evaluation, see M Hill (ed) *Religion and discrimination law in the European Union* (2012).

24 Sec 117 Local Government Finance Act 1992; sec 51 sch 5 para 11 Local Government Finance Act 1988.

25 *Gallagher v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56, which is currently the subject of an appeal to the European Court of Human Rights in Strasbourg: *Church of Jesus Christ of Latter-day Saints v United Kingdom*, App 7552/09.

5 Religion and public discourse

There are a number of reasons why it is important for religious communities to be given a seat at the table of national life and legislature. First, it is a bastion against secularism, consistent with a global re-awakening of religiosity. In a typically English manner, the subtle placing of religion within public life, combined with the growth in pluralism, have helped in preventing secularism gaining a more dominant hold. A positive recognition of the spiritual element embraces agnosticism and humanism and is a constant reminder of the benefits which result from the recognition of a healthy mix of belief systems.

The existence of one or more established churches does not preclude the co-existence and thriving of other religions and denominations. On the contrary, a state which engages with one religion at the highest level of its governance may be more likely to be sympathetic to all religions, and to none. It is difficult to improve upon the statement made by Her Majesty Queen Elizabeth II, Supreme Governor of the Church of England, at a reception for faith communities during the course of the celebrations of the sixtieth anniversary of her accession:²⁶

We should remind ourselves of the significant position of the Church of England in our nation's life. The concept of our established Church is occasionally misunderstood and, I believe, commonly under-appreciated. Its role is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country. It certainly provides an identity and spiritual dimension for its own many adherents. But also, gently and assuredly, the Church of England has created an environment for other faith communities and indeed people of no faith to live freely. Woven into the fabric of this country, the Church has helped to build a better society – more and more in active co-operation for the common good with those of other faiths.

6 Protection of religious minorities

Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁷ provides that states 'shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities' and adopt appropriate legislative and other measures to achieve those ends. However, the Declaration is not prescriptive as to the means to be adopted, recognising – quite properly – the infinite variety of church-state relations as discussed above.

²⁶ From the speech of Her Majesty Queen Elizabeth II to a multi-faith reception convened at Lambeth Palace on 15 February 2012. The full text is at <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspechatLambethpalace15February2012.aspx> (accessed 15 June 2013).

²⁷ Adopted by General Assembly Resolution 47/135 of 18 December 1992.

What protection or support should a state give to minority religions? Some suggest that states with a majority religion afford special protection to religious minorities. The requirement for registration, however, can be seen as a two-edged sword: a means of providing support and benefits to those who choose to register or an instrument of control and supervision. There is a broad historic trajectory, discernible in the United Kingdom as well as in other European jurisdictions, which demonstrates a progression from religious persecution, through a mild level of toleration, through systematic accommodation, culminating in equality of treatment. One might wonder whether the next step in this progression will be the positive fostering of minority religions. This will raise further questions as to how the state achieves practical engagement with minority religions. Who has authority to speak for or represent a particular faith group or minority religions collectively? Ought minority religions collaborate together to achieve effective engagement with government? How far should the state foster and promote the interests of minority religions – is the time now ripe for positive discrimination (affirmative action)?

7 Conclusion: Toward African conceptions of law and religion

There is no single model of church-state relations. Freedom of religion is both an individual and a collective right; and the securing of that right is subject to an infinite number of variations. There is nothing objectionable in a state having a dominant religion which enjoys a special relationship. There may well be historic reasons for this, the unravelling of which could have major constitutional implications. There can be advantages for all religious organisations by having a concept of the spiritual overtly recognised within manifestations of the state at a relatively high level. The guiding principles are neutrality and non-interference. Favouring a dominant religion violates neither the freedom of religion provision (article 9) nor the anti-discrimination provision (article 14) of the European Convention on Human Rights.

The challenge for comparative scholars of law and religion in Africa is to consider the extent to which European and North American notions of church-state relations have attained traction in African jurisprudence. But, more particularly, it is to recognise uniquely African conceptions of law and religion, not least the place for traditional religion, and provide a vocabulary and fresh paradigms from which global scholarship will benefit in generations to come, serving to encourage religious liberty and to promote minorities through active engagement with the majority. There is no 'one size fits all' solution. Together we live and learn.