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The Future of 'High' Establishment

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The present form of church establishment in England represents no more than the eroded residue of the original confessional state. The presence of non-Christian religions and the significant decline in Christian belief and observance call into question the validity of the remaining elements of establishment, though not necessarily a national mission. It is argued that, rather than wait passively on events that themselves may – carelessly – force uncomfortable outcomes, it would be better for the Church of England itself to consider its future policy and practice as a national church, should it wish to retain that role. Apparently declining to consider any unforced change, the Church shows a tendency to aimless drifting that makes it rudderless and vulnerable. Some examples of where it might constitutionally take initiatives are discussed. However, the position and behaviour of bishops in the House of Lords exemplifies a tendency to hold on, however untenably, to what it has without thinking through the implications of the politics of its situation. Now that the Church is, in practice, in charge of its own destiny, it should face up to the responsibility that its changed status implies.[1]

PROLOGUE

Perhaps I might start with Tony Blair – hardly, I realise, a fashionable figure nowadays. However, I happened to be present when he came to address the Lambeth Conference in 1998. Faced with an ocean of purple shirtfronts, he confessed to a degree of moral panic – in his case entirely temporary, of course. Faced as I was at the conference by a formidable array of lawyers, it might be imagined that – though in no way remotely as august as Blair – I felt rather the same, and more than momentarily. I was, however, buoyed up to some extent by the knowledge that policy must precede law, that law is ever the handmaid of policy and that it was of policy that I had been charged to speak.

THE POLICY AREA

First, some definitions: what is establishment? The best starting point remains the 1970 Chadwick Report: 'For us "establishment" means the laws which apply to the Church of England and not to other churches . . . It is important to take the

1 This is a revised version of a paper delivered at the Ecclesiastical Law Society's Conference on Establishment, Leeds, April 2011.

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question in this form in order to strip the fact from its surrounding myth.'[2] I shall interpret this definition in the case of 'high' establishment (Wesley Carr's useful distinction from 'earthed' establishment[3]) to extend to the three religious tests that are applied to the monarchy: namely, the requirements that no-one may succeed to the throne who is either a Roman Catholic or married to one and that they must be in communion with the Church of England. Further, although the collective term 'establishment' is customarily employed to signify the totality of the arrangements, I take the position that each provision falls to be examined on its own merits and that it is not the case that all are mutually interdependent. The departure of bishops from the House of Lords, for example, would not bring the house, as it were, down.

As I see it, the topic – the higher church establishment – is essentially about the politics of religion. How is the present relationship between the state and the Church of England to be understood, including in the context of the state's relationships with other religious bodies? Moving on from that, how is the society in which these relationships now exist to be viewed? Finally, what seem to be the implications of social change for those relations, what are the options for alteration and how might change be brought about?

WHAT HAVE WE GOT?

As I have sought to argue before,[4] we live in the remains – not yet the ruins – of the confessional state. That was a political design where the state determined the particular religious form that it preferred and – let us make no bones about it – enforced observance in the interests of securing uniformity. Toleration of protestant nonconformity and Roman Catholicism emerged with a price: total exclusion (with some mitigation) from civic society until 1829, and with trailing lesser disabilities until, arguably, Welsh disestablishment from 1920 or the 1936 Tithe Act.[5] In the long history of state concession, the Church of England itself volunteered nothing. Much of the character of the British democracy was formed by the interaction of opposing religious forces and the ultimate need for the political process to find an accommodation between them.

What is left from this process is the hollowed-out political structure of the confessional state. As Charlotte Smith has summarised the position:

2 *Church and State: report of the Archbishops' Commission* (London, 1970), p 2.
3 W Carr, 'Crown and people: reflections on the spiritual dimensions of establishment', Westminster Abbey Lecture, 16 September 2002.
4 B Morris, 'The future of church establishment', (2010) 12 Ecc LJ 214.
5 Although ostensibly declaratory, the Lord Chancellor (Tenure of Office and Discharge of Ecclesiastical Functions) Act 1974, which cleared the way for Roman Catholics to become Lord Chancellor, was arguably the most recent milestone in a protracted process that now leaves the prohibitions in the Act of Settlement 1701 and the Act of Union 1706 uniquely exposed.

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> It is undeniable that such modifications as have been made to the Establishment have reflected a growing differentiation between church, state and nation, and a widening gulf between them … This has not, however, led to a systematic and total abandonment of the national mission or traditional trappings of establishment.[6]

In law, the sovereign remains head of the Church of England, appoints the senior clergy and judiciary, summons the Church's legislature and approves its legislation. In addition, religious tests apply to heirs to the throne. Although entirely from England and all male, the 26 most senior bishops continue to sit as the Lords Spiritual in the United Kingdom legislature. They are still be able to play a full part in the legislature's affairs, including to the point of influencing legislation in the Church's interests – most recently against the government on 25 January 2010, an episode to which I shall return below.

For the most part, save for the cognoscenti and a few others, these arrangements are unnoticed. The Church in its political capacity functions largely in a sea not of hostility but of indifference. Very occasionally, voices are raised. A Scottish cardinal and even the Scottish Parliament criticises the discrimination against Roman Catholics.[7] *The Guardian* newspaper (when it remembers) returns to campaigning against the Act of Settlement (and, of all things, the Treason Felony Act) as a sort of running joke. Equally occasionally, a bishop in the Lords defends the discrimination's continuance on the grounds that the Roman Catholic Church does not recognise Anglican orders.[8] Free churchmen now and again raise ancient objections. But all is well: Lord Harries of Pentregarth reassures us that only *symbolic* privilege is at issue and, anyway, non-Christians prefer the sort of comfy, weak establishment that Anglicanism represents.[9]

There does indeed seem little harm in it all. The Church of England is nowadays largely autonomous – for worship and doctrine from 1974 and, as to appointments, since Gordon Brown's unilateral withdrawal from active prime ministerial involvement announced in 2007, a position reaffirmed by the present coalition government.[10] The Church courts continue, under the superintendence of members of this Society, to be part of the national judicial system and scrupulously to operate what may be described as a minor equity and planning jurisdiction with occasional forays into clerical discipline.

6 C Smith, 'A very English affair: establishment and human rights in an organic constitution' in P Cane, C Evans and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge, 2008), p 162.
7 L Maer, *The Act of Settlement and the Protestant Succession*, HC Library Standard Note SN/PC/683, 24 January 2011, 10–11.
8 Bishop of Manchester, HL Deb 10 January 2010 c 1170.
9 Talk at British Academy/British Council Conference 'Belief in Dialogue', London, 29 March 2011.
10 HL Deb 22 July 2010 c 1181WA.

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Legacy leftovers can sometimes surprise, as in the case of lay rectoral repair responsibilities in the Aston Cantlow case. However, such difficulties can be dealt with by practical men. It is said that one result has been to see a rise in insurance policy sales to landowners on the premise that their properties *may* harbour ancient obligations for which the right policy can deliver peace of mind.

On the other hand, it is not in fact merely *symbolic* privilege. While it is true that church establishment is not incompatible with religious freedom, it is not at all compatible with religious equality, however much some religions may support it in what they see as their own interests, including for fear of something worse.

It is not mere antiquarianism to recall the circumstances in which the current structure at the highest level was fixed between 1688 and 1701. At that time, the English – not yet the *British* – state was surrounded by hostile Roman Catholic powers that threatened its political and economic integrity, not to mention its considerable ambitions. All the present religious tests applying to the sovereign date from that period. The original bloodcurdling diatribe of the accession declaration against transubstantiation required by the Bill of Rights 1689 was converted into its present anodyne form only in 1910. The coronation oath continues, minimally altered (without legislative authority), to reflect changes in the territorial extent of the monarchy and also to make clear (as included in 1937) that the obligation to uphold establishment applies to the United Kingdom alone.[11] It will be recalled that the oath requires the sovereign to swear, among other things, to preserve inviolably all aspects of the settlement of the Church of England and to 'preserve unto the Bishops and Clergy of England … all such rights and privileges, as by law do or shall appertain to them or any of them'. I understand that these days even clerical toes involuntarily curl at this last passage.

WHERE ARE WE NOW?

Three hundred years after the Act of Settlement, it is obvious that our society has changed. We are twelve times more populous, distinctly less agrarian, more educated and articulate and considerably more democratic. Does it matter that the higher reaches of Church establishment continue to reflect the urges of the geopolitics – the stigmata even, as John Madeley claims[12] – of the late seventeenth century? It certainly does not follow that social change necessarily challenges what remains or, if it does, by itself justifies changing establishment. Whereas

11 N Bonney, 'Modernising the monarchy: the oaths of office', (2010) 81 *Political Quarterly* 564–570. N Bonney, 'The monarchy, the state and religion: modernising the relationships', (2010) 81 *Political Quarterly* 199–204.

12 J Madeley and Z Enyedi (eds), *Church and State in Contemporary Europe: the chimera of neutrality* (London, 2003), p 2.

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Sweden has terminated establishment, Norway and Denmark – the latter the most Erastian of all – have not. Forms of establishment persist in the *Kirchensteuer* church tax in Germany, the dual establishment in Finland and even in *laïque* France. The final outcome of the European Court of Human Rights *Lautsi* case in Italy has confirmed the just presence of a Christian legacy in the schoolrooms of an otherwise secular state.

In aiming to provide an analysis of the relevant state of affairs in contemporary Britain, the following sections concentrate on two of the most relevant themes – religious pluralisation and secularisation.

PLURALISATION

Even in Hooker's day, England was not the homogeneous society that he argued could rightly be brought together under the roof of a single Christian denomination. The mere existence of Catholic recusancy gave the lie to that, as did growing factionalism within the Church of England itself.

Today the situation is transformed. Plurality is not confined to conflicting Christian denominations within a still recognisable Christendom but extends to a global range of belief systems. The 2001 census showed that about 5 per cent of the population of Great Britain followed the major non-Christian religions. Of this total of nearly 3 million people, just over 1.5 million were Muslim, 0.5 million Hindu, 0.3 million Sikh, a little over 0.25 million Jews and 152,000 Buddhist. Survey evidence indicates that religion is generally more important to these groups and to their sense of identity than is the case for Christians.[13]

To pause a moment for a thought experiment, the question to ask might be how far and in what way the accession of the next sovereign should be marked by some public recognition of this situation in order to emphasise the extent to which non-Christian believers are to be regarded as full members of British society with the same rights as everyone else. Would an Anglican coronation alone be sufficient symbolism for this purpose? After all, although in 1953 Archbishop Fisher invited the Moderator of the Church of Scotland to participate briefly in the ceremony, he refused to contemplate the involvement of the Free Church Federal Council. When pressed on the point in the Privy Council committee by the then leader of the Liberal Party, Archbishop Fisher replied

> that this point had been most carefully considered and he would have been most pleased if a way could be found to do something of the kind. It would

13 M O'Beirne, *Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey*, Home Office Research Study 274 (London, 2004), vii.

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> be seen however in the latter part of the Oath … there was the question 'Will you to the uttermost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law?' It was one of the characteristics of the Free Churches that they were not established by law. Having regard to this it would obviously be extremely difficult to include the Free Churches of England and Wales with the Church of Scotland.[14]

That was an archbishop nearly 60 years ago. Assuming that there will be another coronation, would or should an archbishop take the same line with the Free Churches, and exclude the non-Christian faiths too? If he did, what would be the implications? What views might the sovereign and the government of the day have? Would it be thought necessary to precede the coronation with some entirely new non-religious event that stressed the equal membership in UK society of all religious and communal groups? Some thought, even in 1952/3, was apparently given to a possible supporting ceremony based on Westminster Hall but rejected on the grounds that it would demote the importance of the coronation itself.[15] Does that balance remain the same or has it in fact reversed?

SECULARISATION

Secularisation has lately been having a hard time, largely because it has become caught up in the polemics of the politics of religion. In sociology proper it consists of rather more modest observations than are often attributed to it. The concept has also suffered from its notion of a social process being adopted as part of political programmes, those programmes being best described perhaps as *secularist*, and from being confused with a state constitutional stance that is *secular* – that is, one committed to treating all religions equally or, of a society, as one that itself experiences a decline in religious affiliation.

In the sociological sense, as I understand it, secularisation is an observation that, as an unintended consequence of those social changes banded together for convenience as constituting 'modernity', organised religion will lose influence as individuals turn away from it. So far as I know, no sociologist argues that religion will actually disappear. Much argument has ensued over the extent to which the phenomenon can be observed, how far it is confined to northern Europe, the extent to which there may be multiple modernities and whether – granted the

14 Coronation Committee of the Privy Council, 2nd Meeting Conclusions, 16 February 1953 (The National Archives LCO 6/3522). Fisher had, however, recommended that an invitation be sent to the Moderator of the Free Church Federal Council to attend the interment of George VI at Windsor: E Carpenter, *Archbishop Fisher: his life and times* (Norwich, 1991), p 247.

15 Carpenter, *Archbishop Fisher*, p 251.

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continuing strength of religion elsewhere – it is northern Europe that is the exception rather than, for example, the USA.

There is now a good deal of data available to test the secularisation paradigm beyond the mere observations that church attendances have substantially declined and that decreasing resort is made to churches for rites to mark the principal stages in the passage of life. Investigators have gone behind the 2001 census finding that 72 per cent of Britain's population identified themselves as Christian.[16] Claims that the decline in observance was not synonymous with a decline in belief – 'believing without belonging'[17] – cannot be sustained.[18] Yet, when all is said and done, none of these rationalisations is proof against the empirical evidence. In headline terms, for example, the British Social Attitudes survey has shown that, between 1983 and 2008, those prepared to say that they had no religion rose from 31 per cent to 41 per cent and that a bare 50 per cent of respondents claimed that they were Christian, as opposed to the 66 per cent who had so claimed in 1983.[19] Other surveys tell a similar story.[20] Precisely how, when and why this has occurred is the subject of continuing argument, though one fact stands out: succeeding generations, for whatever reasons, have failed to socialise their descendants into Christian observance. Actual church attendance has declined to less than 7 per cent. Whereas there is growth in some denominations, especially Pentecostal Churches – or even, it is claimed, in 'spirituality' – the rate of particular growth is eclipsed by general decline.

At least Britain is not as secular as the Czech Republic or Estonia. On the other hand, the USA is not as immune from secularisation as sometimes argued.[21] Indeed, it is maintained that, in addition to continuing disaffiliation, much of the religious observance that remains has been commodified and secularised in practice.[22] Similarly, one sociologist observes that in Europe there has been a process of internal secularisation among believers:

16 'Given the nature of the question as asked in England and Wales, the results are best understood as reflecting the broader cultural and religious background of those who responded, within which is nested an active core of membership and belief whose size varies with the particular religions.' J Beckford et al, *Review of the Evidence Base on Faith Communities* (Office of the Deputy Prime Minister, London, 2006), p 13. See also D Voas and S Bruce, 'The 2001 census and Christian identification in Britain', (2004) 19 *Journal of Contemporary Religion* 23–28.

17 G Davie, *Religion in Britain Since 1945: believing without belonging* (Oxford, 1994).

18 D Voas and A Crockett, 'Religion in Britain: neither believing nor belonging', (2005) 39 *Sociology* 11–28.

19 D Voas and R Ling, 'Religion in Britain and the United States', in A Park , *British Social Attitudes 2009–2010: the 26th report* (London, 2010), pp 65–86. Interviewed before publication, Professor Voas was reported as saying: 'The declining Christian share is largely attributable to a drift away from the Church of England': *Daily Telegraph*, 16 December 2009.

20 Eg J Ashworth, Research Matters and I Farthing, *Churchgoing in the UK* (Teddington, 2007).

21 B Kosmin and A Keysar, *American Religious Identification Survey*, Summary Report (Hartford, CT, 2009) and Pew Forum on Religion and Public Life, *US Religious Landscape Survey* (Washington, DC, 2008).

22 See generally B Turner, *Religion and Modern Society: citizenship, secularisation and the state* (Cambridge, 2011).

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> Few Protestants now believe that the Bible is the revealed word of God, that Christ was really the son of God, that God created the world in six days, that the Bible miracles really happened, that there is an actual heaven and hell, and so on . . . The purpose of religion is no longer to praise God: it is to help find peace of mind and personal satisfaction.[23]

At the same time, broader investigation of secularisation has brought out the limited character of some of the observations upon which early discussion was based. As Bryan Turner points out, 'contemporary anthropological and comparative sociological research clearly illustrate both the complexity of secularisation as a process and the vitality of religion in the rest of the world'.[24] Whether this suggests that we live in a post-secularist world is a different matter. We may have gained an improved understanding of the processes at work in different societies but it does not change the facts applying to our own society and its neighbours. Turner concludes, therefore, that 'despite the growth of fundamentalism, national religions and public religion, the concept of secularisation, provided we remain imaginatively responsive to the diversity of modern religions, can still be safely applied to the modern world'.[25]

SOME CONSEQUENCES OF DECLINE

One of the consequences has been some anxiety in the Church of England itself and other religious groups. There is a feeling that the cumulative effect of social change that has increased secularisation has also pushed organised religion into more private spaces, into a privatisation of religion that imperils its ability to function in the public sphere. While some thinkers such as Denise Myerson argue that religion should be confined to the private sphere,[26] others have maintained that there is a general mood less indifferent than hostile to religion, unless it functions only in a privatised way.[27] It is sometimes difficult, in what can be a perfervid environment, to espouse a balanced account, for example of the kind attempted by Roger Trigg,[28] or Christopher McCrudden's cool analysis in a recent issue of this journal of how international jurisprudence seems to be developing.[29] The more that these anxieties take on a shriller tone (for example, from the Christian Legal Centre) and express claims of

23 S Bruce, *Secularization: in defence of an unfashionable theory* (Oxford, 2011), pp 5–6.
24 Turner, *Religion and Modern Society*, p 147.
25 Ibid, p 150.
26 D Myerson, 'Why religion belongs in the private sphere, not the public square' in P Cane (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge, 2008), pp 44–71.
27 Cardinal O'Brien, for example, has echoed papal words about 'aggressive secularism': *The Guardian*, 24 April 2011.
28 R Trigg, *Religion in Public Life: must religion be privatised?* (Oxford, 2007).
29 C McCrudden, 'Religion, human rights, equality and the public sphere', (2011) 13 Ecc LJ 26.

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victimisation, then the more they attract hostile rebuttal, as in Professor Grayling's recent *Observer* interview: 'The reason why it [religion]'s become a big issue is that religions have turned the volume up, because they're on the back foot'.[30]

All that seems very debatable. There have always been different views about the proper place of religion in public life, including among religious groups themselves. Different times have seen different responses, and the arguments, which are not new, continue. In other words, it is not the case that we can expect what is left of establishment to be replaced by some wholly coherent, new and lasting settlement of the kind for which ecclesiastical lawyers above all might devoutly wish. That view tends to result in regarding change as a process of negotiation where nothing is agreed until everything is agreed. It is the stance identified by Cornford a century ago as 'the principle of unripe time'.[31] This does not seem the right model: in a dynamic situation, stasis can lead to paralysis and the ceding of initiative to others. A more helpful model would be one that conceives change as a continuing journey, in which whether it remains sensible to continue to keep hold of all the inherited baggage whatever its age or origins remains a more open question.

Where we have got to constitutionally seems to be something like the following. The UK remains, despite devolution, a union state. Although it presents as a monarchy, it has become a republic with an hereditary head of state. (France, on the other hand, is of course a monarchy – albeit elective – that looks like a republic.) Although religious observance and belief have declined, what remains is greatly more diverse. Rights-based approaches – themselves influenced by Christian traditions, in much the same way as agnosticism is perhaps but abridged Christianity – have led across the European Union to species of equality legislation that challenge some forms of discrimination (for example, against homosexuals) supported by religious groups. As a result, government has increasingly taken more apparently secular positions, has tended without saying so to withdraw from unique relationships with the Church of England and has sought ways to engage with other religious traditions. As Julian Rivers has described the process without commending it:

> As a plausible alternative to establishment, secularism must be understood as an attempt to transcend the diversity of religious and non-religious systems of belief and practice, including atheism and agnosticism, by creating a public sphere which is not committed to any of them.[32]

30 *The Observer*, 3 April 2011.
31 F Cornford, *Microcosmographia Academica* (Cambridge, 1908), p 16.
32 J Rivers, *The Law of Organized Religions: between establishment and secularism* (Oxford, 2010), p 329.

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There has clearly been some movement here. Whereas in the past secularism was welcome to religions because it meant that the state did not discriminate *between* religions or denominations, some are claiming that rights-based approaches in particular discriminate *against* religions and that the secular state, though it may *claim* to be neutral, is incapable of being neutral.

These arguments are not without merit. As one political philosopher, Cecile Laborde, has summarised the position:

> The secular state is supposed to provide neutral common ground, yet it is also the favoured substantive position of those who do not embrace any religion. As a result … the secular state cannot avoid being biased towards non-religious people, and the ideal of secularism violates the liberal injunction that the state should not favour the conception of the good in particular.[33]

After this acknowledgement, she contends that the argument is overstated: 'A secular public order cannot claim to be equally suited to religious and non-religious peoples, but it is nonetheless the closest we can get to an order that most, if not all, citizens can endorse'.[34] If multicultural approaches encourage forms of religious corporatism – equally a criticism of features of French *laïcité* – then there is a danger of promoting restrictions on the members of the group's own rights and liberties. This is because they become defined – and limited – by a particular group identity.

The confessional state in England was forged at a time when sovereigns were still actually head of the executive. When they took public oaths such as the coronation oath they had the power to ensure that the state, which was inseparable from their persons, abided by and enforced them. As the executive functions became assumed by ministers responsible to Parliament, the oaths became emptied of real meaning. George III's refusal to contemplate Catholic emancipation because of his coronation oath was at the time thought to be somewhat eccentric, and the oath's existence did not lead to George IV withholding consent in 1829, nor did it trouble either Victoria or George V over Irish and Welsh disestablishment.

It is maintained that the oath symbolises the answerability of the sovereign, and therefore civil government, to a higher power than any temporal controls. However, the decline of belief in supernatural agency – for example, that God chooses the sovereign or otherwise intervenes in political affairs – probably means that very few people who give it any thought nowadays believe that such symbolism has real value, and therefore wonder why we should pretend

33 C Laborde, *Critical Republicanism: the hijab controversy and political philosophy* (Oxford, 2008), p 85.
34 Ibid, p 85.

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that it does. Certainly, it is not evident that, even when sovereigns were also chief executives, they felt restrained from doing whatever they thought it was politically necessary to do. In so far as these points can be accepted, some fundamental recasting of the purpose, tone and content of the coronation would seem indicated, and not – as Norman Bonney has shown[35] – in the hectic, scrambled, hole-in-the-corner way in which the oath was revised at the time of the last two coronations.

In the case of the Act of Settlement, the ground already appears to be moving under our feet. When prime minister, Gordon Brown announced that there would be a review of the common law rules of succession that excluded female primogeniture. Some further details were given recently by Lord McNally in a way that suggested that, although there were no existing plans to change the situation, discussions with governments in the realms (that is, those Commonwealth countries where the Queen is also head of state) were continuing and stretched to considering also the present statutory succession rules hostile to Roman Catholics.[36] Such a review has to include all 15 of the Queen's other realms to agree upon common positions, among other things in the spirit (if not because of the actual legal requirements) of the 1931 Statute of Westminster.[37] It would, indeed, seem difficult to defend a review that stopped at gender discrimination without also reviewing the continuing discrimination against Roman Catholics and compulsory membership of the Church of England for sovereigns. As another thought experiment, one might consider whether even the most minimal tidying-up attempt to codify the current disaggregated constitution as it stands could possibly pass over those provisions in silence, and how patient any reviewing body might be with arguments that Roman Catholics should remain excluded because the pope did not recognise Anglican orders.

THE EXTENT OF DESIRABLE CHANGE

Elsewhere I have offered some suggestions about where and how change might take place on the basis that it would be expedient for the Church itself to take the initiative as much as possible.[38] Even if the Church does nothing, it will, by default, have made decisions about how it views its role. I can understand that it might prefer to postpone or avoid considering such matters positively.

35 Bonney, 'Modernising the monarchy'.
36 HL Deb 10 January 2011 cc 1169–1172.
37 See A Twomey, 'Changing the rules of succession to the throne', (2011) *Public Law* 377–400, for an account of what is involved for the non-UK realms. For an earlier, more UK-focused account, see R Brazier, 'Legislating about the monarchy', (2007) 66 *Cambridge Law Journal* 86–105.
38 R Morris (ed), *Church and State in 21st Century Britain: the future of church establishment* (Basingstoke, 2009).

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It might, for example, be wary of (in William Whitelaw's phrase) going about the country stirring up apathy. On the other hand, whether the Church should retain a national mission is already being discussed within the Church, and too often perhaps – because undirected – without the fullest awareness of the implications.

With one exception, I do not propose to go into great detail here about features of establishment not already mentioned. Broadly, I believe it would be possible to make the sovereign's relationship more elective than compulsory. Now that bishops are in fact appointed by the Church, it would seem best to recognise that fact explicitly and remove the formal connection with the Crown without cutting the painter entirely. The case for the Church courts moving out of the state judicial process seems rather stronger than making the legislative function a wholly internal matter as in Wales,[39] but that would depend in the end on the extent to which the Church decided that it wished to preserve national roles of service.

The exception in terms of detail with which I would like to finish concerns the presence of bishops in the legislature. They were there in a wholly *English* parliament because they represented powerful economic interests as well as being a source of support for governance. They are – with the rump of hereditary peers – the sole residue of English feudal society in what is now a *United Kingdom* legislature. For some time they have struggled to reinterpret/modernise their rationale, a difficulty made the more acute as the departure of most of the hereditaries has left their position more exposed. On the model of an 'hospitable' establishment, they have claimed to speak as willing proxies for faith groups otherwise unrepresented. For understandable reasons, the 26 at any time designated as Lords Spiritual find it difficult to attend unless sessions are entered long beforehand into their forward engagements as 'duty' bishop for taking the prayers that open each sitting. They remain, however, full members of the House. According to the latest leak of the deputy prime minister's proposals for Lords reform, bishops would continue to sit, if in reduced numbers, and would still be able to debate and vote on matters outside England.

On 25 January 2010, eight bishops – an unusually large number – attended the debate on the Equality Bill. By a majority of five, a government amendment was defeated – effectively by the bishops.[40] A retired bishop (Lord Harries of Pentregarth, present therefore on individual merit) voted with the government. The amendment had been designed to clarify the effect of the relevant European Directive on equality in employment as to exemption from the normal

39 Though, as has been recently pointed out, it is an open question whether the Church of England should retain an ability to legislate by Measure for marriage law. See N Roberts, 'The historical background to the Marriage (Wales) Act 2010', (2011) 13 Ecc LJ 39.

40 HL Deb 25 January 2010 cc 1211–1248.

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requirements in the case of employment by organised religions. It did so by confining the exemption to ministers of religion or those involved in promoting or explaining the doctrine of the religion. Because, for tactical reasons, it was inexpedient for the government to seek to reverse the outcome at so late a stage in the session, they decided to let the matter stand.[41] The result was to leave legislation, as the *Church Times* leader put it, 'at variance with European law, which generally has little room for special pleading'.[42]

Under present arrangements, the bishops were entirely at liberty to behave as they did, even in regard to a Bill that applied to all parts of the UK. While they were probably not swayed by a contemporary supportive papal intervention, they used political muscle with the aim of avoiding a requirement to treat the great majority of Church employees equally, and in other respects sought to avoid administering the resulting position proportionately. Whether this was well done will be for others to judge[43] – probably literally and ultimately in the European Court of Justice. Whether the bishops should have been in a position to do it at all is a political question for the UK that goes to the heart of whether the bishops should be in the legislature in the first place.

Now that the Church of England appoints its own episcopacy in reality, one way of looking at the position is that a private, publicly unaccountable and irresponsible committee of representatives of a religious interest group in England has the right to determine which males should succeed to 26 reserved seats in the UK legislature with the power to vote on matters applying to the whole of the UK. They cannot, they do not, claim any unique ethical authority, and in practice they behave in the end – on the evidence of what happened in January 2010 – as an interest group like any other.

The UK remains the sole sovereign democratic legislature that retains automatic religious representation as of right. It is irrelevant for the principle that the deputy prime minister apparently contemplates keeping some bishops in the Lords, or that bishops now constitute less than 4 per cent of the Lords' total membership. Since there remains no hope of securing agreement on changes to the composition of the upper chamber, it would be a foolish government minister who unnecessarily invited tiresome but needless opposition to proposals that cannot in any case prosper. Further, the fundamental constitutional issue is not about the number or proportion of bishops themselves but whether the membership of the legislature should have *any* corporatist component. At present, the UK Parliament has one, and only one, by accident.

41 HC Deb 4 February 2010 c 468.
42 *Church Times*, 29 January 2010.
43 As one friendly observer has put it regarding the conduct of ecclesiastical affairs: 'The trouble with the church is that it is a constant source of embarrassment'. A Billings, *Secular Lives, Sacred Hearts: the role of the church in a time of no religion* (London, 2004), p 108. See also Mary Warnock's reflections on the events in *Dishonest to God: on keeping religion out of politics* (London, 2010).

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It looks as though the Church of England will sit tight on the basis that it must await the outcome of the current interminable discussions – now over 13 years old – about how the Lords should be further reformed. There is in fact nothing to prevent the bishops withdrawing in whole or in part, on the basis that they recognise the questionable legitimacy of their continued (in many cases perhaps already unenthusiastic[44]) membership. This was the position, for example, of some of the former Law Lords. Their departure would have no impact on the Church's position generally, least of all constitute 'disestablishment'. However, it is appreciated that this is unlikely to happen for so long as the Church prefers to keep hold of what it has, no matter how untenably. It is possible, too, that status – particularly the reinforcement of local status – considerations may be thought by some to have a lingering value that in practice outweighs (for the Church of England, at least) the anomaly of their continuation.

CONCLUSIONS

Constitutionally, the Church of England is in an unenviable position. It is the custodian of a religious body that was once an equal partner with the state providing religious and other services to the whole of the English nation. That nation has changed unutterably and the original basis and functions of the confessional state have for most purposes – save perhaps for symbolic and celebratory occasions – very largely evaporated. We struggle to find a satisfactory constitutional architecture in which the secular and the religious may live together.

The burden of the argument offered here is that there is much to be said for the Church itself taking the initiative, both in contributing more explicitly to determining that architecture and deciding where it wishes to position itself within it, and in relation to other religious groups. Governments themselves are most unlikely to act in a way that will show either great knowledge of or respect for the Church's own traditions – and, above all, feelings. In the past, the Church has found it difficult to develop large-scale policy initiatives, partly because it has lacked a focused policy-making as opposed to legislative body, and authority has been very decentralised. Could this be something for the Archbishops' Council – 'To lead and to serve', as the Hurd Committee put it of the role of the Archbishop of Canterbury?[45] Time, some might think, for a new, more ambitious Chadwick Report?

44 And apparently also confused as to function: see A Harlow, F Cranmer and N Doe, 'Bishops in the House of Lords: a critical analysis', (2008) *Public Law* 490–509.

45 *To Lead and to Serve: the report of the review of the See of Canterbury* (London, 2001).

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