Religious freedom and the state church

by John Warwick Montgomery

In a recently published collection of jurisprudential essays, its author devotes an entire section to "Religion and the Law" (James Wilson, *Cases, Causes and Controversies,* London, Wildy, Simmonds & Hill, pp 91-110). Mr Wilson, a New Zealander, no longer practises law—he works now for LexisNexis—and his views are by no means original. But he is quite correct that "Religion and the law has become a much more common form of dispute in the United Kingdom in the twenty-first century than it was for most of the twentieth" (p 91). Mr Wilson believes that the solution to such disputes should lie in a more rigorous separation of church and state—and that religious factors should exercise far less impact in judicial decision-making than they frequently have done.

He is of course correct as to the unfortunate nature of a decision by Cherie Booth QC, sitting as a part-time judge, to suspend the sentence of two-years imprisonment of one Shamso Miah on the ground of his being "a religious man" who was aware that punching another person was "not acceptable behaviour" (p 93). But the issue of relating religious considerations to legal activity goes well beyond such illustrations. In the view of the present writer, separation of church and state requires a rethinking of the difference between what is possible and desirable in a nation having a state church as contrasted with what prevails legally in a constitutionally non-sectarian state.

We find serious difficulty in the common view, expressed by Wilson, that "just because a person is entitled to hold a belief does not mean that another person has to pay for it, or suffer unlawful discrimination because of it" (p 110). In the context of a state with an established religion, the trouble with this formula is twofold.

First, descriptively, it is simply not an accurate statement of the case. In England – to to take but an obvious example – Anglican Church edifices are repaired at public expense. This is not done for the Kingdom Halls of the Jehovah's Witnesses. But the Jehovah's Witness—and the atheist, for that matter—must nonetheless pay taxes, and a part of what is paid goes to the upkeep of Anglican sanctuaries.

Secondly, from a normative standpoint, such discrimination is constitutionally justifiable. The Anglican establishment is a testimony to the value-system of the nation, and thus deserves public support in a way that other value-systems do not. As a specialist on the subject has recently written:

> *The integration of Church of England and the nation, expressed in the idea of a national membership, highlights the underlying rationale or purpose of Establishment. It was an expression of the state's assumption of an obligation to make public provision for religious services. Further, it was an expression of the church's assumption of a duty to minister to the nation as a whole* (Charlotte Smith, in *Law and Religion in Theoretical and Historical Context*, ed P Cane, C Evans, and Z Robinson, Cambridge University Press, p 160, citing P Avis, *Church, State and Establishment*, London, SPCK).

The constitutional status accorded to that "Reformed part of the Holy Catholic Church established in this Kingdom" follow from the nation's commitment to that particular value-system and not another. As I have argued elsewhere:

> *Should a nation determine that it wishes to make its Ultimate Concern explicit by establishing a particular faith or church, then it surely has the right specially to protect and encourage its value system by way of that faith or church—as long as this does not prevent other faiths and secular philosophical options from freely proclaiming their ideological wares in an open marketplace of ideas* (Montgomery, *Christ Our Advocate,* Bonn, Germany, Verlag fuer Kultur und Wissenschaft, p 151).

VITAL DISTINCTION

It is therefore vital to distinguish on the one hand between the duty of a state to preserve religious freedom (the right as defined in Art 9 of the European Convention of Human Rights to believe and publicly practice one's religious beliefs, change one's religious position, etc) and, on the other hand, the right of a state with an established church to give a special position and special privileges to that religious commitment. (Indeed, the European Court has never found incompatibility per se between Art 9 of the Convention and the existence of European state churches).

What are the consequences of not understanding this vital distinction? Consider several recent legal decisions in this area involving religious argument. A psychological counsellor and fervent evangelical believer refused to provide sex counselling to a same-sex couple; he was discharged from his position in a public facility and his firing was upheld by the European Court of Human Rights (*Gary McFarlane* case). A registrar of births, deaths and marriages refused to officiate at same-sex partnerships ceremonies; she was fired and her firing was upheld in Strasbourg (*Lilian Ladele* case). A Christian couple would not allow two homosexuals to occupy the same room in their bed & breakfast; the UK Supreme Court ruled against the bed & breakfast owners and the case has gone forward to Strasbourg (*Peter and Hazel Mary Bull* case). A nurse in a public hospital was forbidden to wear a cross at work; her discharge was upheld by the ECHR (*Shirley Chaplin* case). A stewardess on British Air was likewise told not to wear a cross on pain of discharge; here, the ECHR agreed with the stewardess (*Nadia Eweida* case).

There are, to be sure, subtle and individual factual issues in each of these cases that the courts have had to consider—such as whether, in *McFarlane* and in *Ladele*, the required activity had been specifically disclosed and mandated in the hiring contract. But, apart from such considerations, there is an overarching general principle that is often lost in the focus on detail. Homosexual practices have been historically and uniformly condemned by the Anglican Church as contrary to Holy Scripture and detrimental to the preservation and promotion of family life. The psychological counsellor, the marriage registrar, and the bed & breakfast owners were therefore expressing a position entirely consistent with the value system of the nation as expressed through the medium of its constitutionally established religion – cf this author's previous article on the subject in this journal at (2010) 82 *Amicus Curiae* 12-13. (Admittedly, not all English sovereigns – heads of the church as they officially are – have been models of classic Christian morality—but no-one seriously endeavoured to defend as a proper reflection of English values Edward VII's dalliances in Paris.) Cross-wearing must likewise be seen as a manifestation of the very value system to which the nation has committed itself by establishing a particular religion, and not another, as its statement of ultimate values.

Two objections may be offered to the position just articulated. First, as a result of the doctrine of Parliamentary sovereignty in English law, Parliament can in theory (and has in practice, as in the case of the legal recognition of same-sex partnerships) paid little attention to the traditions and beliefs of the established church, and (unlike the legal situation in the United States) the Supreme Court in the UK is in no position to declare such legislation unconstitutional. However, surely, English judges should try their utmost to reach decisions that do not create a constitutional crisis between Parliamentary legislation and the nation's established belief system as represented by its national church. Legislation in defiance of the historic position of the established church would appear to be the product of a cavalier disregard of English values and everything possible legally should be done to reverse it – if only in the interests of constitutional integrity.

Secondly, an argument could be offered that legal positions in favour of historic Christian values must necessarily discriminate against those not sharing the Christian belief system. To this, the appropriate reply is surely that allowing such practices does not in any way force others to conduct themselves as the believer conducts himself or herself. True, the believers' actions may very well cause offence, but, in a mature society, one must on occasion put up with what one does not like. Otherwise, the society becomes paternalistic and "politically correct" through the elimination of whatever bothers minorities (and there are no logical limits to such restrictions). If one chooses to live in a country with an established church, one needs to accept the legal and sociological consequences. Suppose one were to claim on the ground of discrimination that the country's flag should not be displayed – or should only be displayed in parity with the flags of all other countries – lest offence be created. If one simply cannot or will not tolerate the symbols – or the value system represented by them – the sole rational solution, it would seem, is to emigrate.

And now, a word about the situation in countries without established religions. As examples, take Italy and the United States. In Italy, at the end of Mussolini's régime, a new constitution for the country was created, and this constitution has explicitly separated church and state. Nonetheless, the European Court of Human Rights ultimately decided for the government in allowing the retention of crucifixes in public school classrooms (*Lautsi v Italy*; cf this author's article in Angus Menuge, ed, *Legitimizing Human Rights*, Farnham, Surrey, Ashgate). In the United States, in spite of the First Amendment "wall of separation" between church and state, a recent Supreme Court decision has sustained the use of prayers at the opening of meetings of governmental bodies (*Town of Greece, New York v Galloway*).

In both of these countries, however, the legal vindications of the religious practice have been justified solely on secular and cultural grounds—in Italy, the place of the crucifix in Italian society across the centuries; in the US, the historical role of prayer in public life (significantly, the court refused to allow any prayer that could be considered "sectarian").

Thus, even where a church is not established, religious activities are not totally excluded from public life – though they must be able to be justified in non-religious terms. But where there *is* establishment, the faith represented by the religious symbol or action can certainly be articulated and promoted by way of it, since it is (as we have been at pains to point out)

a consistent reflection of the very value system of that nation.

Finally, a practical note. Even in England, where establishment is reality, encountered daily as one passes by the great cathedrals and churches of the land, irrational fear of "discrimination" drives many to downplay the presence of established religious belief. In one of this author's Inns of Court, there is a tendency to drop the concluding line of Grace before or after Meat: "In the name of Jesus Christ our Lord" – out of apparent deference to pluralism. And the ranks of Anglican clergy include some who seem ashamed of the particular gospel at the heart of that church's message.

Pusillanimity, however, is never a virtue – and particularly in the context of religious expression and action in a secular age. One can very definitely sustain the freedom of Article 9 of the ECHR for all religious and philosophical positions that are not socially obnoxious – *without* jettisoning the position, the privileges, and the values of religious establishment.

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