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Establishment vs Disestablishment: Constitutional review and the legal framework of the Church of England

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Abstract

One of the most dynamic relationships historically has been that of the state with religion. Having been blamed for many wars and rebellions it comes as no surprise that those states continuing to model close relationships with an individual religion come under high scrutiny, especially now religious freedom plays such an important part in today's society. Furthermore, sociological theories have developed beyond metaphysical explanations of state authority and no longer depend on spiritual or religious explanations. The UK, with two established churches, is one such state with its relationship with the Church of England especially being subjected to criticism from a number of different groups.

Whether this constant criticism is justified is another story and one of the aims of this thesis is to try to unpick some of the debates that flow around the subject in order to put them into a practical context. Often, when such discussions are undertaken there are lots of arguments made as to why the Church of England should, or should not, be disestablished. Discussions on whether they retain an important place in society are made but ultimately very little said about how disestablishment may occur if this was chosen as the way forward.

This thesis will aim to tackle some of these questions and will delve into the constitutional complexities in order to discover how such a procedure can be initiated, and the effect this would have on both the state and the Church of England. Future relations will also be discussed and an important consideration will be the views and effect this might have on other religions who have come to benefit from the pleural approach of the established church. Ultimately, the result will be the uncovering of the complexities of disestablishment and who, if anyone, will benefit from the process.

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Table of Cases

Acronyms

CEDAW – Convention on the Elimination of Discrimination Against Woman
COMECE – Commission of the Bishop's Conference of the European Community
CRC – Convention on Rights of the Child
CSC – Church and Society Commission
EEC – European Economic Communities
ECSR – European Coal and Steel Community
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EU - European Union
HRA – Human Rights Act
ICCPR – International Convention on Civil and Political Rights
ICESCR – International Convention on Economic, Social and Cultural Rights
PCC – Parochial Church Council
SACRE – Standing Advisory Council for Religious Education
UK – United Kingdom
UN – United Nations
UNDHR – United Nation Declaration on Human Rights

Introduction

The Topic

In 1961, shortly before becoming Archbishop of Canterbury, Ramsey was quoted as stating 'you mustn't campaign for disestablishment. I wish rather that the Church of England would become worthy of it, would be so annoying to the State that it had disestablishment forced upon it.'[1]

This statement was part of a move from within the church that voiced concerns about the established church's relationship with the state and formed part of a wider debate mirroring calls from outside. This thesis aims to analyse the strength of such calls and to investigate the practicalities that would be involved in disestablishing the Church of England. Over the last century there has been much discourse concerning why this might happen and why it should happen but there are very few analytical studies on how this would happen in practical terms. This in turn limits the use of these debates should disestablishment occur. While these debates give a clear indication of how different religious and non-religious parties view the relationship between the State and the Church of England they often fail to examine the effect that removing the constitutional ties will have on the two parties. Many of these studies are, however, incredibly detailed on how the two bodies are linked, and with the introduction of international and regional human rights law, there has been a refocus on religious discrimination and freedom which has influenced a great deal of academic writing and has also affected social perceptions towards this relationship. With the added fact that religion is often blamed for causing conflicts both at national and international levels, very close state relationships with religion have come under increasing fire: real

[1] Cited in Grimley 'The Dog that didn't Bark: the failure of disestablishment since 1927' in Chapman, Mark, Maltby, Judith and Whyte, William *The Established Church: Past, Present and Future* (T&T Clark International, 2011) 39-55; also see Cumper 'Religious Liberty in the United Kingdom' in Van der Vyver and Witte Jr *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Press, 1996)

questions are drawn as to whether an established religion allows neutral or equal treatment of religion without bias. All of these matters are important in drawing together the reasons why disestablishment may occur in the UK and any practical measures taken to severe these ties will have to look at any future relationship in order to ensure that all religions continue to be treated neutrally. If this is not done, then the reasons behind disestablishment may become fruitless.

The main emphasis of the first chapter will be to evaluate what it means to be an established church. With the UK being one of the only countries without a written constitution,[2] this is an important term to understand and there has been little universal agreement over the conclusive features of the structure. In relation to the Church of England the matter becomes even more complex as the constitutional structure of the two have become entangled. This means that many of the constitutional principles that have developed to govern the State's institutions have also been extended to their relationship with the Church of England. Without detaching from the purpose of the thesis itself, some of these principles will be examined within the first chapter in order to establish the effect they might have on the disestablishment process itself. They will also help to identify how the Church of England benefits from its relationship with the state, and also how this relationship can be burdensome. More importantly, the chapter will establish what it means to be an established church in the UK and how this affects its relationship with the State. By the end of this analysis, an evaluation will be drawn as to how this relationship has changed since the inception of the established church during the sixteenth century, when social engineering was key to their recognition, in order to move into a wider analysis of why questions have arisen on the appropriateness of this relationship, producing an overall modern debate over establishment verses disestablishment.

Much of the material used within this first chapter comes from the area of constitutional law rather than law and religion itself. This is due to the vast majority of material covering the established church, which, although identifying and evaluating many of the

[2] The only other countries to have an unwritten constitution are Israel and New Zealand.

benefits accruing from their constitutional status, do not go very much further.[3] This makes them an invaluable source of information for this study, but there is a need to assess this information and use pure constitutional analysis in order to establish what this really means in constitutional law terms. Equally constitutional lawyers do not generally handle the issue of church and state within their analysis; this makes it very difficult to identify which constitutional principles will need to be amended relative to the Church of England's relationship with the State. There are of course some obvious principles: the fact that Measures have primary legislative status; the constitutional position of the bishops in the House of Lords; the fact that the Monarch sits as Head of State and also Supreme Governor of the Church of England. However, the identification of these privileges needs to be extended so as to ascertain how these relationships would have to change, and the effect that this would have not only on the parties themselves but, on society as a whole and on other religious and comparable non-religious organisations.

Saying this, there are some invaluable studies which will be used throughout this thesis which give important overviews and detailed analyses about where the relationship stands today and how this may change in the future. Morris's recent book *Church and State in 21st Century Britain: The Future of Church Establishment*[4] is one of these studies. It gives a full overview of the current position and some clear insights into what the future may hold. Equally, Rivers work *The Law of Organized Religions: Between Establishment and Secularism*[5] and his article "The Secularisation of the British Constitution"[6], as well as Ferrari and Rinaldo's collection *Law and Religion in the 21st*

[3] Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011); Oliva, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504; Ahdar and Leigh *Religious Freedom in the Liberal State* (Oxford: Oxford University Press 2005); Avis, Paul *Church, State and Establishment* (SPCK 2001); Cranmer, Luca and Morris *Church and State: A Mapping Exercise* (London: Department of Political Science 2006); Cranmer and Oliva "Church-State Relationships An Overview" (2009) 162 *Law & Justice – Christian Law Review* 4-17; Furlong, Monica *The C Of E: The State It's In, The Past And The Present* (2000, SPCK); Harlow, Cranmer and Doe 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490; McCrudden "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38; McLean "The Changing Legal Framework of Establishment" (2004) *Ecclesiastical Law Journal* 292-303; Morris *Church and State: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008)

[4] (2009, Palgrave MacMillan, Hampshire)

[5] (Oxford: Oxford University Press, 2010)

[6] (2012) *Ecclesiastical Law Journal* 371-399

Century: Relations between States and Religious Communities[7] and Chapman, Maltby and Whyte's *The Established Church: Past, Present and Future*[8], all contribute to a detailed analysis of the position of the established church within society and some of the problems that this causes in light of modern developments. On a broader level literature such as Temeperman's *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance*[9] and Doe's *Law and Religion in Europe: A comparative introduction*[10] also prove invaluable.

Although the term modern development is not confined to international and regional human rights there is a high concentration of influential material from these sources. This new-found focus on human rights, which has progressively developed since the age of enlightenment, has seen an immense amount of political movement both domestically and internationally. Consequently, there has been a significant effect on international relationships, and Europe has been a centre for such change. This is in part due to the Council of Europe, whose founding treaty the European Convention of Human Rights has been supported by the EU, with a pre-requisite requirement on all members to abide by the standards set in this Convention. Not only has this refocused discourse on the State's relationship with religion to that of an individual substantive rights stance; it has also raised a number of questions as to whether this relationship discriminates against other religious and comparable non-religious organisations who are not able to enjoy the same privileges.

The legal effects of these new human rights instruments have also meant that courts have had to deal with the more practical issues resulting from the State's relationship with religion. To a large extent these issues have concentrated on the manifestation of belief in the public sphere, but the effects have been felt on a wider scale, especially in relation to the outward expressions of religion in the form of religious symbols or dress. Often this has resulted in calls for the privatisation of religion, a concept that would

[7] (Ashgate Publishing Limited, 2010)
[8] (T&T Clark International, 2011)
[9] (Martinus Nijhoff Publishers 2010)
[10] (Oxford University Press 2011)

mean religion is no longer able to be present in the public sphere.[11] Meanwhile, those who choose to manifest their beliefs in public argue discrimination and an infringement of their religious freedom.[12] These cases have all caught the eye of the media and have been reported internationally with varying views and comments, academically, politically and legally. The effects of these comments have had wider repercussions on the state's relations with religion, whose duties involve the protection of the right to religious freedom. Legal challenges concerning religious freedom have also not been confined to a single area of law but have spread to private law matters, including employment law, property law, discrimination and equality law. Courts, both domestic and regional, have thus had to grapple with substantive issues without infringing individual personal belief systems or interfering with doctrinal matters.

The subject of international and regional human rights is a very saturated area, with an increasing amount of material being published in the area of religious freedom since the enactment of the Human Rights Act in 1998. Edge's article 'Current Problems in Article 9 of the European Convention on Human Rights'[13] and Malcolm Evans' book *Religious Liberty and International Law in Europe*[14] both came before the Human Rights Act and highlighted a number of problems religious freedom created and how these provision been interpreted;, with Evans' work *Freedom of Religion under the European Convention on Human Rights*[15] was published soon after the Human Rights Act came into effect. These tackled the provisions of international and/or regional law that governed religious freedom in general terms, with each of the two books also containing a section on historical developments. None directly tackle the issue from the view point of the State's relationship with religion, but inferences can be made by reading between the lines. Other authorities such as Ahdar and Leigh's *Religious Freedom in the Liberal State*[16] tackled the issue directly with a chapter specifically related to models of

[11] McCrudden gives an interesting analogy between religion and the public sphere in "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38 doi:10.1093/ojlr/rwr019; also see D'Costa, Evans, Modood & Rivers *Religion in a Liberal State* (Cambridge University Press 2013)
[12] *S.A.S v France* 43835/11; *Sahin v Turkey* 44774/98 [2004] ; *Ewida and Chaplin v United Kingdom* (48420/10) [2013] I.R.L.R.231
[13] (1996) *Juridical Review* 42
[14] (Cambridge University Press, 1997)
[15] (Oxford University Press, 2001)
[16] (Oxford: Oxford University Press 2005); Ahdar and Leigh also produced an article "Is Establishment Consistent with Religious Freedom" a year before this ((2004) 49(1) *McGill Law Journal* 635-681) where they argue that the presence of an established church is not contrary to religious freedom.

religion-state relations and whether establishment is consistent with religious freedom: this debate was revisited in new terms by Temperman in 2012 in his article "Are State Churches Contrary to International Law?"[17]

All of these sources are invaluable to an analysis of how international and regional laws have impacted on the state's relationship and thereby with the established church regardless of whether this is dealt with directly. Collections such as Hill's *Religious Liberty and Human Rights*[18] and Ferrari and Cristofori's *Law and Religion in the 21st Century: Relations between States and Religious Communities*[19] will also be used, as well as a number of articles tackling religious discrimination[20] and references to ECtHR case law, with a full analysis of the main legal provisions governing religious freedom.

Building on the above studies, the third chapter will look more deeply at some of the more modern debates on the question of disestablishment. The chapter will concentrate on sociological theories, the opinions of those from other religions, and the views of those from the Church of England themselves. These three groups have been chosen in order to concentrate the study on the three most focused groups, with the section on sociology embracing a number of non-religious viewpoints.

Within these studies, the historical development of the country will also be surveyed in order to illustrate how some of these theories voicing opinions on the established church have developed. For example, many sociological theories are highly influenced

[17] (2013) 2(1) *Oxford Journal of Law and Religion* 119-149; Temeperman's book *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010) also gives a detailed overview of a number of different state's relationship with religion and analysis different models internationally. Hill's more recent article "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180 is also a good reference.

[18] (2002, University Press of Wales, Cardiff)

[19] (Ashgate Publishing Limited, 2010)

[20] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623; Evans, Carolyn "Religious Education in Public Schools: An International Human Rights Perspective" (2008) 8(3) *Human Rights Law Review* 449-473; Ghanea, Nazila *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff, 2003); Gilbert, Howard "Redefining manifestation of belief in *Leyla Sahin v Turkey"* (2006) 11(3) *European Human Rights Law Review* 308-326; Griffiths, Peter "Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation" (2007) 2 *Religions and Human Rights* 149-162; Hill, Mark and Sandberg, Russell "Is nothing sacred? Clashing symbols in a secular world" (2007) *Public Law* 488-506; Hunter-Henin, Myriam "Why the French don't like the Burqa: Laicite, National Identity and Religious Freedom" (61(3) *International and Comparative Law Quarterly* 613-639

by the developments that occurred during the age of enlightenment, when new methods of explaining state authority emerged based on the conception of rational and logical thinking. These theories moved away from any divine grant of power and chose to reject any metaphysical grounding through religious foundations. The rejection of establishment was natural to these theorists who were completely opposed to any close connections between the state and religion.

Many of these theories have been extended, and there are those such as Buchannan[21] who are deeply opposed to the established church. There is also a reasonably new school of thought developing from the writing of Davie,[22] who argues that although attendance may be declining in established churches, the majority of citizens still feel closely aligned to these organisations, and the majority of citizens are in support of its presence, though they leave its maintenance to a minority of practicing participants. Terms such as 'believing without belonging' and 'vicarious religiosity' have emerged to explain this phenomenon, and a number of authorities have used these ideas to call for more interdisciplinary research.[23]

A number of studies have also been conducted on the views of other religions, with Modood's study *Church, State and Religious Minorities*[24] and Cranmer, Luca and Morris' research in *Church and State: A Mapping Exercise*[25] forming the main sources of authority. As with other studies in the area, the main basis of these works is taken from interviews with leaders of some of the other religious organisations which feature strongly in the UK today. These interviews are then analysed in conjunction with other sociological and legal factors to give an informed understanding of whether these

[21] *Cut the Connection: Disestablishment and the Church of England* (Darton, Longman and Todd Ltd 1994)
[22] Davie's works include *Religion in Britain since 1945* (Blackwell Publishing 1994); *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002); *The Sociology of Religion* (Sage Publishing 2007); "Law, Sociology and Religion: An Awkward Threesome" (2011) 1(1) *Oxford Journal of Law and Religion* 1-13
[23] Sandberg, Russell "Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach" (2008) *1 Journal of Religion in Europe* 329-352; Sandberg, Russell & Doe, Norman "Church-State Relations in Europe" (2007) 1(5) *Religious Compass* 561-578; Oliva, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504; Rivers, Julian "The Secularisation of the British Constitution" (2012) *Ecclesiastical Law Journal* 371-399
[24] (London: Policy Studies Institute 1997)
[25] (London: Department of Political Science 2006)

religions are in support of the established church or would give preference to a disestablished church.

Many of the same sources give an insight into how the Church of England themselves feel about their current framework, and although Ramsey's quote given above indicates that there has been a strong call for disestablishment within the Church of England, this does not appear to have been supported in continuity even though there are voices from within that express doubts about their continued relationship with the state.[26] More recent statements from the former Archbishop of Canterbury, Rowan Williams[27] and also from the Queen[28] appear to indicate that there is more support for establishment constitutionally than sometimes recognised, even though its position as an established church has meant they become more pluralist in nature.

Leading on from this is a study into some of the comparative models of state-religion relationships. As we are focusing on the UK model and European regional law has been seen to have a large impact on this landscape, there will be a concentration on the European continent. A number of theorists, some legal and some sociological, have developed methods of describing the various relationships within Europe, and a number describe a form of cooperative collaboration that is slowly beginning to build within the EU.[29]

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[26] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997); Chapman, Mark, Maltby, Judith and Whyte, William *The Established Church: Past, Present and Future* (T&T Clark International, 2011); Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623; Morris, R.M. *Church and State: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008)

[27] Williams, Dr Rowan *Civil and Religious Law in England: a religious perspective* (7/2/2008) found at <www.archbishopofcanterbury.org/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective> last accessed 9/6/2011

[28] The Queen's speech at Lambeth Palace, (15th February 2012) The Official Website of the British Monarchy, accessed 11/08/2013 <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx>

[29] See Casuscelli, Giuseppe 'State and Religion in Europe' in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 131-146; Also, Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209; Davie, Grace *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002); Davie, Grace "Law, Sociology and Religion: An Awkward Threesome" (2011) 1(1) *Oxford Journal of Law and Religion* 1-13; Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011); Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370

Before these models are analysed, a brief recap on how the European landscape has influenced the development of state's relationship with religions will be undertaken. This will cover some of the prior material from chapter two, but it will also look at the historical influence that religion has had on the introduction of these rights. One of the main sources of such influence is the references found to 'human dignity' within a number of both international and regional instruments.[30] In response to this, a number of theories have emerged in order to explain these references without referring to any metaphysical theory of where these rights originate. Theorists such as Perry,[31] Kohen[32] and Dworkin[33] attempt to explain these rights from a non-religious viewpoint, but often find themselves having to refer to such metaphysical theories in order to explain why such rights are inviolable to begin with, making their arguments somewhat circular.

The main substance of this section will be formed around the work of Robbers, whose book *State and Church in the European Union*[34] envisions three models of state relationship with religion. These models, the separation model, the state church model, and the hybrid model, continue to form the basis of the majority of studies on this relationship. In order to enable the placement of individual states within these models, Robbers undergoes a detailed analysis of each state's legal approach to religion in different areas of fundamental law. Each considers the legal position of religion within the constitution as well as matters such as the legal position of religious communities, how the church links with culture, and other areas of law, such as criminal law and family law, are touched upon.

Robbers' study constitutes an incredibly detailed analysis of these areas and has proved an invaluable starting point for many authorities, especially those that have used such critiques to develop an argument against the placement of state models within specific models; instead they argue that collaborative neutrality between state and religion is occurring on a more general basis. This is due to a number of overlaps between states

[30] For example the preamble of the UNDHR, ICCPR and the ICESCR as well as Article 1 of the UNDHR which reads 'all members of the human family are born free and equal in dignity and rights … and should act towards one another in a spirit of brotherhood.'
[31] Perry, Michael J "The Morality of Human Rights: A nonreligious ground" (2005) 54 *Emory Law Journal* 97-150
[32] Kohen, Ari *In Defence Of Human Rights: A Non-Religious Grounding In A Pluralistic World* (Routledge, 2007)
[33] Dworkin, Ronald *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011)
[34] (2nd edn, Nomos 2005)

that have been boxed within one of the three models. In order to illustrate these overlaps, a comparative study of two separate states placed within these models will be used to draw out the reasons why criticisms have resulted. Both domestic and regional case law is also used throughout this analysis.

Those arguing from the stance of collaborative neutrality have used many of the overlaps between the tripartite system to demonstrate how there is now more of a move towards cooperative systems, with Doe's work[35] illustrating a number of principles that can be lifted from different areas of law throughout Europe.[36] A method that may form instances of best practice throughout member states of the EU who are also heavily influenced by the jurisprudence of the ECtHR with new member states having to become signatories to the ECHR.

The final evaluation from this chapter will be useful in expanding the penultimate chapter: that concentrates on the practicalities of disestablishment in an attempt to identify a path forward in the UK's approach to religion once the Church of England is no longer established. One of the initial aims of this chapter will be to consider those in a position to initiate the disestablishment procedure, and the likelihood that they will be able to do so without being contested. Three such parties have been identified: the Monarch, the state and the Church of England itself. Although there is not much written evidence on the matter, various statements have been made from those in power within the three parties.[37] Such statements will be analysed in conjunction with other academic comments on the matter. The advantages and disadvantages that would result from such a change would also be considered, as well as whether such a process could be initiated without more extreme calls.

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[35] Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011); A more extensive list of references is given at note 24

[36] Schanda, Balazs "Church and State in the New Member Countries of the European Union" (2005) 8(37) *Ecclesiastical Law Journal* 186-198

[37] The Queen's speech at Lambeth Palace, (15th February 2012) The Official Website of the British Monarchy, accessed 11/08/2013 <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx>; Cameron, David 'Prime Minister unveils changes to succession', (28 October 2011) accessed at <www.number10.gov.uk/news/prime-minister-unveils-changes-to-royal-succession>; HM Government *The House of Lords: Reform* (The Stationary Office, 2007) Cm 7027; HMSO, *The Governance of Britain* (2007) CM7170

The chapter will also concentrate on the removal of all the constitutional links between the state and the church. Such a matter may prove more extensive than those who call for such a change initially realise, by requiring more than one statute. The reason for this is that, although only a few major constitutional links are identified in great length by academics, the constitutional principles which govern the relationship will also need to be unravelled, and there are a number of smaller details which are often identified with cultural developments, such as funeral rites and marriage rites, that will have to be considered as well. However, it is quite likely that some of these matters will not come to light until after an initial attempt at disestablishment has begun, which will mean the process is likely to be slow.

One of the clearest examples of how complex some seemingly simple constitutional matters are can be seen briefly in the changes that would be made to the title of the Monarch, Supreme Governor of the Church of England. This title, established in 1559 under Elizabeth I, would need to be removed and some researchers in the area have commented on how this may potentially risk the viability of the Monarch's position in society.[38] It would also mean changes to the Coronation Oath and the Coronation ceremony, and there is the question of whether it would attract more extensive consultation within the Commonwealth countries under the requirements of the preamble of the Statute of Westminster 1931. On the matter of the Commonwealth, the only comparable change that has occurred is that of the Succession to the Crown Act 2013 which amended the rules of succession.[39] Studies such as Twomey's article 'Changing the rules of succession to the throne'[40] and Morris's article 'Succession to the Crown Bill'[41] will be considered in order to see if any analogies may be made and to predict what may have to happen in relation to these countries should the initiation of disestablishment become a reality.

[38] Comments from a number of authorities are given in Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire); The Fabian Commission on the Future of the Monarchy, *The Future of the Monarchy* (Fabian Society 2003); Hunt, Tristan "Monarchy in the UK" (2011) 17(4) *Public Policy Research* 167-174

[39] This examined the question over whether such changes required the consultation and amendment of the Commonwealth countries and their own constitutions.

[40] Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401

[41] (2013) *Ecclesiastical Law Journal* 186-191

Many studies dealing with the question of disestablishment do not get this far. Often this is because they are coming from different viewpoints, such as sociology, constitutional law, religion or politics, and do not need to go this far. Here, the aim is to assess all these areas which have been discussed throughout the thesis, primarily to establish how the constitution and laws of the country would have to change in order to harness disestablishment and to build a successful relationship between the state and all religions, while remaining respectful of religious freedom.

Aims and Objectives

The aims and objectives of this thesis very much come to fruition in the final chapter. From the outset there is a definite constitutional law basis which aims to set out where the established church stands within the British constitutional framework. The intention is to build on this foundation in order to evaluate why this framework does not fit with modern society. If the historical purpose was to politically help socially engineer the population of the country, this reason is now redundant and the real question is whether the Church of England can now fit another purpose.
If the historical objective was to promote the social engineering of the population of the country, this reason is now redundant, and the real question is whether the Church of England can now fit another purpose.

The changes that have occurred within the area of human rights have also raised a number of pressing questions in regard to the relationships between states and religions. A sense of neutrality and equality has become a key focus, and the involvement of international organisations and enforcement bodies have meant that pressure has begun to mount on states still supporting an established church. However, often these views are loud in volume rather than united, and one loud shout is not as effective as a chorus; such a chorus, singing in unison, would be needed in most states before such a relationship is unwound. This is particularly true if their constitutional stance is as embedded as that of the UK. In any case, such voices cannot be underestimated, and the effect of human rights in international and regional human rights instruments has been felt by states and religions alike. If nothing else, it has

raised awareness both in society and within religious organisations of what protection they can expect from the state – if any – and how discrimination law can aid their cause. The objective here is not to make any assumptions about the effectiveness of these instruments, but to identify how they have influenced different social and religious perspectives of the established church, and how these relate to any calls for disestablishment. The effect of religious freedom and religious discrimination will also be an important consideration in remoulding the state's relationship with the Church of England, should disestablishment occur.

In discussing the importance of some of these calls for disestablishment there will also be an overarching aim to draw on historical developments as well as modern concerns, in order to establish whether there are any key historical patterns to these arguments. Often patterns of theories are repeated over the years in much the same way as fashion trends repeat over a period of time. Sociologists and legal theories are equally guilty of this, as the waves between positivist and natural legal theories show. However, modern calls have been considered to be much louder than in previous periods, and the illustration of how these have developed and how they relate to society, religions other than the established church, and the Church of England itself, will have to be analysed in order to answer the main research questions which address the disestablishment process itself.

The final aim, and by far the most intricate question raised by the thesis, is to identify the laws and constitutional principles that will need to be amended in order to enable disestablishment to occur. The identification of key actors in the initiation process will be vital in succeeding with this objective, as well as establishing whether those capable of doing so can act alone or would have to act as in unison. Keeping in mind that this is a legal thesis, the objective here is to analyse any legal challenges and complexities that may result in order to establish how likely the procedure is to go ahead. This means that no matter how small, insignificant or comical such challenges may appear, they must be given equal weight if they are to amount to a legal challenge. As is noted within the thesis, Parliamentary sovereignty means that all laws are equal, and therefore equal consideration must be given to all statutory challenges that could be faced during the process.

The culmination of this study will produce a number of comments on what the research has revealed and a list of further recommendations regarding how future research can develop in the subject. The saturation of ideas on how the UK can continue its relationship with the established church, either as an established church or as a disestablished church, will thus be enabled in light of both sociological and human rights considerations, and how this might fit within the public and political sphere.

Chapter 1:

The Church of England and the British Constitution

Understanding how the Church of England fits within the UK Constitution as the established church is an essential starting point for this thesis. In forming such an understanding, arguments will be highlighted concerning the difficulty in envisaging any clear way of cutting the ties between the state and the church due to the seemingly inextricable ties with the state through the constitution. It is only through undertaking such an analysis that the reader will be able to deepen an understanding of the basic constitutional framework, clarifying how unique, and how complex, the situation is in the UK; more importantly, it will stress how different this makes the UK in comparison to other countries which have ~~a~~ written constitutions. In such other countries, the state's authority and powers to amend the legal framework are more easily identifiable and are set out clearly in one single document; this makes it easier to identify the procedure to follow in order to disestablish a state church.

Importantly, the aim here is not to analyse all constitutional rules that govern the UK. This would take far too much time and distract from the purpose of this thesis itself. Although this piece is written from a constitutional law perspective, it primarily concerns the position of the established church within that framework and therefore the development of the Church of England's relationship with the state. As the thesis continues, this will become clear and an attempt will be made here to concentrate on the constitutional rules that most affect the state's relationship with the established church. This will be a theme that is mirrored in the final chapter, where the practical possibility of disestablishment will be discussed. Selectiveness will thus be an important factor in this section, and an explanation for the selection of each rule will be undertaken in order to ensure that we do not stray too far into pure constitutional law and detract from the main focus of this thesis: constitutional review and the framework of the Church of England.

When it comes to material on the constitutional position of the Church of England, it appears that whilst there is a large amount of material focused on constitutional matters, there is less data concerning the constitutional position of the Church of England itself. As the established church is a peculiarity when it comes to religious freedom, the matter is not generally covered within mainstream academic textbooks.[42] This means that such authority constitutes a very specialist area, and because constitutionally it is a peculiarity when compared to other religions, a lot of the legal material concentrates on a comparative analysis of the different treatment by the state of the Church of England compared to all other religions.[43] Much of this focus is to illustrate the continued benefits enjoyed by the Church of England in the 21st Century. As Cumper states, 200 years after Voltaire observed that the Anglican clergy 'also have the pious ambition of being the Masters,'[44] the established church 'continues to retain its unique status as the nation's established church' despite being one of the most religiously diverse regions.[45] Although these benefits will be discussed in the following passage in order to facilitate an overall picture of the position held by the Church of England, it will be important to place this material in context by constantly looking back to the constitutional analysis of the Church of England, and how constitutional reform would be made, should disestablishment be required.

It will also become clear that the state and the church's relationship has changed quite drastically in modern terms, and much more recent material, especially material written after the entrance into force of the Human Rights Act 1998, concentrates on

[42] Elliot, Mark and Thomas, Robert *Public Law* (2nd edn, Oxford University Press 2014); Bradley, A W and Ewing K D *Constitutional & Administrative Law* (15th edn, Pearson Education Limited 2011); Turpin, Colin and Tomkins, Adam *British Government and the Constitution* (7th edn, Cambridge University Press 2012) The only real reference to the established church is in passing – e.g. the position of the bishops in the House of Lords. There is no real discussion of any controversy this may cause.

[43] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press 2010); Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (Oxford: Oxford University Press 2005); Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623; D'Costa, Evans, Modood & Rivers *Religion in a Liberal State* (Cambridge University Press 2013); Doe, Sandberg & Hill *Religion and Law in the United Kingdom* (Kluwer Law International 2011); Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Ashgate Publishing Limited, 2010)

[44] Voltaire (Francois Marie Arouet) *Philisophical Letters: Letters Concerning the English Nation 22* (Ernest Dilworth trans. Dover Publications 1961) cited in Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623

[45] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623, 601

international and regional human rights law.[46] These external laws have not only changed the way we perceive the state's relationship with the church, but they have also influenced, and at times directly affected, the way in which the courts deal with cases of religious freedom in all spheres of law, whether private or public. The practical and social effects of this cannot be ignored, as these external pressures do have an effect on the way established religion is viewed. Even if this alone has little direct consequence on the established church, the combination could prove fatal when placed together with other political and sociological factors that also chip away at the validity of an established church model. Through this analysis it thus becomes clear that, whereby historically an established church may have served a genuine purpose to help socially engineer a population, it is now ineffective, with religious and cultural diversity replacing a unified system of church-state obedience. Theories of secularisation, pluralism and erastianism have emerged to compete against the state-church model. The relevance of these developments is important in illustrating why the relationship between the state and the established church has been forced to change. In order to illustrate the development of this relationship, it is important to understand not only the modern place of the Church of England constitutionally, but its historical development within the state and why their ties have become so entangled. If social engineering was the purpose of the former entanglement, then arguably the established church itself was merely a product of its time and now needs to be disengaged. Further, in this thesis discussions will be taken from other viewpoints, such as sociologists and theologians, to establish whether the Church of England does now meet some other pressing need. However, here our purpose is to gain an understanding of the framework itself, including an analysis of the origins of the state - church ties. The link between the historical development and the constitutional entanglement will thus become clearer, and will not only evaluate the constitutional position of the Church of England, but will also produce the basis of an understanding as to why the process of

[46] Evans, Malcolm *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997); Evans, Carolyn *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001); Evans, Caroline & Thomas, Chris 'Church-State Relations in the European Court of Human Rights' (2006) *Brigham Young University Law Review* 669-725;
Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011); Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Ashgate Publishing Limited, 2010); Hill, Mark *Religious Liberty and Human Rights* (2002, University Press of Wales, Cardiff); Lavinia, Stan & Turcescu, Lucian *Church, State, and Democracy in Expanding Europe* (OUP 2011)

disestablishment could become highly problematic from the perspective of constitutional law.

The way in which this section will unfold will therefore begin with a brief analysis of what constitutes an established church, and the distinction between 'high' establishment features and 'earthed' or 'low' establishment features. This will be followed by an examination of aspects of the British Constitution that effect the Church of England and how its structure fits within the constitution itself. From this, arguments will be drawn as to why the established church does not work in today's society and how the constitution must adapt to fit new demands. Finally, the chapter will end with an analysis of the Church of Scotland, the UK's second established church. This will highlight why the Church of England's constitutional positioning is so problematic and why such debate has not been as forthcoming in concern with this second established church. It will also highlight elements that could be used in redeveloping the state's relationship with the Church of England.

1.1 What is an established church?

There are many definitions of what it means to be an established church, with no universal explanation being accepted, or it seems, considered capable of embodying all examples of established churches. Although considered a 'European phenomenon'[47] each state's relationship with religion appears to have historically formed on its own basis. The result is the emergence of a number of different models that will be explained further throughout this thesis. For our purposes now, it means that various differing models of establishment have developed. There are those that embody the established church as a governmental department,[48] and there are those which grant complete autonomy and are established only in name.[49] The UK falls somewhere in between these.

[47] Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)
[48] For example Denmark. See Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)
[49] For example Greece. See Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)

A helpful exploration of establishment was given in *Attorney-General for the State of Victoria; Ex rel Black v The Commonwealth* in 1981:

> 'The widest of these meanings is simply to protect by law… Secondly, and this is the most usual modern sense, the word means to confer on a religion or a religious body the position of a state religion or a state church… Thirdly, when used in relation to the establishment principle… the word means to support a church in the observance of its ordinances and doctrines… the establishment principle can be held by churches that are unconnected with the state, and are supported by voluntary contributions alone… A fourth possible meaning of the word 'establish' is simply to found or set up a new church or religion…'[50]

The second definition, stated as 'the most usual modern sense,' reiterates how the Church of England themselves saw their own establishment, which was described in the Chadwick report as 'the laws which apply to the Church of England and not to other churches.'[51] Although simplistic, this purely legal sense of establishment can be beneficial to those working within the area. However, it is commonly recognised that the Church of England has no clear statute establishing the Church of England. Rather a number of benefits are conferred by separate statutory authority, whilst others are set through common law. As we shall see, some have also come to be viewed more as social devices, and others as political instruments that are left over from former times. It is also recognised that establishment in the UK is a product of simultaneous evolution rather than being state recognition of a primary religion. As stated in the Cecil report, 'Establishment has been a growth and not a creation, and dates from an age when Church and nation were indistinguishable one from another.'[52]

The way in which the state's relationship with the Church of England has grown demonstrates how, when two bodies evolve simultaneously, they can become constitutionally established without the need for express legislative statement. In this case, it is through the actions we see rather than the words expressed, and in the present day the Church of England remains in a privileged position with a number of

[50] *Attorney-General for the State of Victoria; Ex rel Black v The Commonwealth* (1981) 146 CLR 559, 595-7
[51] Chadwick *Church and State – Report of the Archbishops' Commission* (London, Church Information Office) 2
[52] Cecil of Chelwood (1935) *Church and State – Report of the Archbishops' Commission on the Relations between Church and State* (London, Church Assembly) 171

benefits that are not available to other religions. Over the years, attempts have been made to explain this relationship, many from a theological background, basing themselves on the fact that state and church's powers devolves from God's own power. Both Luther and Calvin considered this through the doctrine of two kingdoms.[53]

Such theories may, however, be considered products of their time, with many dating back to periods where there was only one single religion present in the state. In modern times the development of such a relationship is far more complex, with many opposing religions and equivalent philosophical organisations vying for state recognition - a bit like one state sword and lots of competing swords representing religions. Human rights have also developed in a way that protects individual religious freedom and religious association.

There are also those that have distinguished elements of the established relationship between the church and state as 'symbolic' or 'real' and 'actual' features.[54] Those that are 'symbolic' are those that place the Church of England on a dignified pedestal; however, those that are 'real' and 'actual' are those that still have an effect on the 'social, cultural, religious, legal and political fabric of English society and the UK state than is usually allowed for.'[55]

This division between the two can be complex, and other terms such as 'high' and 'low' establishment have also been used and will be explored further below. Before moving on to this it is worth noting that the privileges enjoyed by the established church are weighed down with obligations. Additionally, the UK structure does not particularly fit well within generic models of state churches,[56] leading one to consider that its position is somewhat unique.[57] Notably, although this is the case in the UK, the Church of England is not delegated any governmental powers and is not able to enact on matters

[53] Vandrunen "The Two Kingdoms Doctrine and the Relationship of Church and State in the Early Reformed Tradition" (2007) *Journal of Church and State* 743-763, 747

[54] Further discussion can be found in Weller, Paul *Time for a change: Reconfiguring Religion, State and Society* (2005, T & T Clark International) chp 2 and 5.

[55] Weller, Paul *Time for a change: Reconfiguring Religion, State and Society* (2005, T & T Clark International) 158

[56] Robbers, Gerhard *State and Church in the European Union* (2nd edn, Germany: Nomos Verlagsgescellschaft). This book gives a detailed account of all the church-state relations in the European Union at that time.

[57] *Aston Cantlow v Wallbank* (n.5)

outside its jurisdiction.[58] As Lord Craighead pointed out in the historical case of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*:

> '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.'[59]

Therefore, although the Church of England is established, it does not act as a branch of the government, and although the state continues to take an interest in the Church's constitution, it is afforded a certain degree of autonomy. For this reason, it seems more fitting to explain its position using Cumper's analogy. He states that:

> 'One useful way of looking at establishment is as a special relationship, consisting of both benefits and burdens, between the Church of England and the English – later British and then United Kingdom – state.'[60]

Although as Hill points out, 'There are precious few benefits which accrue to the Church of England by dint of establishment,'[61] and those benefits that are granted seem to come with a lot of conditions; one of the main ways in which we see these burdens rather than benefits lies in the fact that the church itself does not receive any financial support from the state. In matters of finance it is placed in a similar position to other religions within the United Kingdom whereby, apart from the occasional grant being issued from the Lottery Heritage Fund,[62] the only fiscal benefits awarded to the church come under the guise of its registration as a charity for the advancement of religion, the same as all other religious organisations.[63]

Regardless of this it is clear that Cumper's analogy in all other respects seems to mirror the disparity felt between the Church of England and other religions. More recently this separation has become more highlighted and debated due to international and regional

[58] These are confined to matters of church governance or spirituality.
[59] *Aston Cantlow v Wallbank* (n.5) para 61
[60] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623, 603
[61] Hill, Mark 'Church and State in the United Kingdom' in Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing 2010) 199, 207
[62] This is given towards the maintenance of historical buildings.
[63] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007); Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)

enactments concerning the right to freedom of religion,[64] with many considering that 'A state's endorsement of a single church will have a dampening effect upon religion as measured by citizens' participation in organized religions.'[65] Regardless, as cases such as *Darby v Sweden*[66] have shown, establishment itself is not considered to constitute a breach of the state's duties under the letter of these new laws, although suggestion has been made that it does appear 'out of sync with some of the premises underpinning the new law.'[67]

1.2 The 'high' and 'earthed' (low) divide

It was noted above that some distinctions have been drawn between some of the characteristics of the state and the Church of England in the UK. The term 'symbolic' has been used to distinguish from 'real' and 'actual,' and the terms 'high' and 'earthed' have also been used to separate different features of the relationship. Below we will explore this divide using the terminology 'high' church and 'low' church, a distinction drawn from Carr in his article "A Developing Establishment" back in 2002.

In his article Carr states that 'high' establishment 'describes that historically based nexus of intertwined privilege and responsibility that associates the Church of England with a solid idea and ideal of establishment and, it is argued, justifies the status quo.'[68] Such aspects include 'the nexus of crown and church'[69] seen at the coronation, the bishops position in the House of Lords and the General Synod's position especially in terms of Church legislation. In contrast, 'earthed' establishment refers to the day-to-day running of the church at a grass-roots level. As Carr indicates, it concerns the

[64] See the Universal Declaration on Human Rights Article 18 and the European Convention on Human Rights Article 9. A fuller discussion on this can be found in Ahdar, Rex and Leigh, Ian 'Is Establishment Consistent with Religious Freedom?' (2004) 49 *McGill Law Journal* 365-681
[65] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (2nd edn, Oxford: Oxford University Press 2013) 121
[66] App No 11581/85 (1990)
[67] Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011) 70
[68] Carr, Wesley 'A Developing Establishment' (1999) *Theology* 2-10, 4
[69] *ibid*

relationship between the church and parishioners in their ordinary, every day lives. [70] Some years later, Ahdar and Leigh reiterate this distinction, stating that

> 'Some distinguish between 'earthed' or 'low' establishment, by which they mean the daily on-the-ground presence of the Church of England in community life, and 'high' establishment – referring to the constitutional apparatus. Defenders contend that 'earthed' establishment justifies the elements of 'high' establishment.'[71]

Burdens such as the ability of any person to secure burial within church grounds can be used to support this.[72] This right is securable regardless of a person's denomination and has been extended to the interment of cremated remains.[73] The same is true of a parishioner's right to baptism,[74] a right not subject to any fee,[75] and also their right to be married in their parish church, or a church to which they have a qualified connection.[76] This supports Ahdar and Leigh's assertion of 'earthed' establishment being the 'daily on-the-ground presence of the Church of England in community life' and can be contrasted with 'high' establishment, those aspects which are often little known or understood by those at parish level.

It has been recognised that discussions on establishment in the UK have generally focused on features of 'high' establishment.[77] More recently discussions have been more amenable to evaluating the characteristics of 'earthed' establishment. This can be seen as a positive step as it could be argued that this is where any real start to disestablishment might begin. The features themselves include all those individual rights that parishioners can hold over the church. Many of these are religious rites such as baptism, marriage and funeral rites. However, in modern times many such religious

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[70] *ibid*

[71] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (2nd edn, Oxford: Oxford University Press 2013) 103

[72] Canon B38 para 2

[73] Church of England (Miscellaneous Provisions Measure 1992 s 3(1). This right does not however extend to burial grounds that have been closed by Order in Council. In such cases a faculty must be sought.

[74] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)

[75] Baptismal Fees Abolition Act 1872. Although a fee is chargeable to the incumbent for a certificate of baptism and searches of the baptismal register under the Parochial Fees Order.

[76] As extended by the Church of England Marriage Measure 2008 section 1 to proving a qualified link (of which there are six) with the Church in question. Also note that this right has not gone without question, as is evident in the writing of both Hill (n.6) and Doe, Norman *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996)

[77] McClean, David 'The Changing Legal Framework of Establishment' (2004) 4 *Ecclesiastical Law Journal* 292-303

rites have come to be known as 'turning-points in human life'[78] rather than an entrance or participation of religion. As Furlong attempts to explain, with the lower levels of church attendance the presence of an established church has

> 'left a mood of goodwill behind it, and a willingness to use the Church for occasions like baptisms and weddings, but it does not represent any real commitment.'[79]

Buchanan describes these final stages of association with the church as 'folk religion' whereby the majority of citizens still consider themselves loosely attached to the established church.[80] More avidly, many communities have chosen to unite around their parish church when threats are made concerning closures. An example of this was seen when a whole sit-in protest was conducted in a small parish church in the Rhondda in response to threats of closure which meant a planned wedding could not take place.[81] According to Davie, similar responses have been made when charges are placed upon entrance to a religious building.[82]

These are all signs of parishioners continuing acceptance of the established church's presence at an 'earthed' or 'low' level regardless of their acknowledgment or understanding of high establishment. Equally, features of these are seen in the state's reliance on the Church of England during times of great tragedy or crisis. At such times it has been said that the country come together 'to mourn under the spiritual guidance of the Church of England',[83] with the Archbishop of Canterbury often making appearances on national television or radio.[84] Places of worship, such as St Paul's Cathedral, are also often opened and events are arranged to offer up prayers for all those affected by disaster or tragedy. Importantly, such statements are increasingly given as multi-religious statements, with leaders of other religions appearing alongside

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[78] Davie *The Sociology of Religion* (Sage Publishing 2007) 81
[79] Furlong *The C of E: The State It's In* (SPCK 2000) 240
[80] Buchanan *Cut the Connection: Disestablishment and the Church of England* (Darton, Longman and Todd Ltd 1994)
[81] Archbishop offers Rhondda church protestors talks (11th July 2011) BBC news <www.bbc.co.uk/news/uk-wales-south-east-wales-14116158> last accessed on 16/08/2011
[82] Davie *The Sociology of Religion* (Sage Publishing 2007)
[83] BBC, Church of England (last updated 25/6/2009) <http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml> last accessed 9/6/2011
[84] Mission and Public Affairs Council, *Facing the Challenge of Terrorism* (October 2005) found at <http://www.churchofengland.org/media/45479/gs1595.pdf> last accessed 9/6/2011 para 64. This gives a brief overview of the Church of England's response to the terrorist attacks of 7/7.

the Archbishop of Canterbury or other high standing clergy.[85] This reflects again the reliance that has often been made by the state and other secular organisations on religious figures to broach matters of inter-religious communication, such as meeting minority religion needs at universities and other secular institutions.[86]

In contrast, 'high' establishment features vestiges of establishment that, often, individual parishioners are not aware of. Such elements affect their day-to-day living very little. The three most recognisable characteristics are seen through the position of the Monarch as Supreme Governor of the Church of England, as reflected in the Coronation Oath; the positioning of the bishops in the House of Lords; and the General Synod's position in regards to Parliament and their legislative procedure.

The position of the Monarch, which is enshrined in the Act of Settlement 1701, is also reflected in the wording of the Coronation Oath. This oath places a duty on the Monarch to 'maintain and preserve' the position of the Church of England and the bishops and clergy in the Church of England as well as the churches in their charge.[87] The Monarch's position as head of state and head of church are thereby interlinked and can be considered two sides of the same coin. In much the same way as Gealasius's theory on duality, the secular and spiritual are placed together. The public also stand behind the Monarch and often their celebrations are bathed within a religious cloak, as has been demonstrated recently with Prince William's marriage to Catherine Middleton[88] and the baptism of their two children,[89] demonstrating how features of high establishment can have an indirect effect on individual citizens through their presence. Arguably such features begin to waver over being more traditional in nature than religious, in the same way that some have come to view certain rites of passage such as baptism or marriage.

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[85] Mission and Public Affairs Council, *Facing the Challenge of Terrorism* (October 2005) found at <http://www.churchofengland.org/media/45479/gs1595.pdf> last accessed 9/6/2011

[86] Carr, Wesley 'A Developing Establishment' (1999) *Theology* 2-10

[87] Halsbury's Laws Vol 8(2) paras 28 and 29. Cited in The House of Commons Library – The Coronation Oath SN/PC/00435

[88] "Royal Wedding: In numbers" BBC (1st May 2011) <http://www.bbc.co.uk/news/uk-13248642> accessed 12th July 2015; Ami Sedghi "Royal Wedding: In numbers" *The Guardian* (29th April 2011) <http://www.theguardian.com/news/datablog/2011/apr/29/royal-wedding-numbers-figures> accessed 12th July 2015.

[89] "Prince George Christened at Royal Chapel" BBC (23rd October 2013) <http://www.bbc.co.uk/news/uk-24642388> accessed 12th July 2015; Gordon Rayner "Princess Charlotte christening: Royal baby christened in intimate ceremony – as it happened" (5th July 2015) <http://www.telegraph.co.uk/news/uknews/princess-charlotte/11718918/Princess-Charlotte-christening-live-updates.html> accessed 12th July 2015.

In terms of 'high' establishment the relationship between the Monarch and the bishops is also reflective of a dependency between the state and church. Not only is the Monarch responsible for their appointment,[90] but all 26 bishops automatically hold a seat in the upper chamber of Parliament. Although criticised, their position has found support from the government,[91] and any modern proposals have supported a continuation of their presence.[92] Such support is often condoned by reference to their position as 'spiritual peers' rather than as representatives of the Church of England.[93] As spiritual peers they are subjected to high levels of lobbying from other religious groups, although research indicates a degree of uncertainty amongst them as to how to act on such lobbying about how they carry out their duties. As Rivers indicates, there is 'a certain mismatch between the bishops' own perception of their contributions and their actual performance.'[94] Equally, areas of professed expertise do not correspond to where they give their highest contributions.[95] It is also evident that the bishops do not always act in reflection of what their followers believe, with some believing that they are at risk of becoming 'dangerously out of step with wider society.'[96] Their actions at times also appear to indicate that they feel anxious about openly opposing legislation passed by the House of Lords, and are therefore not always freely open to support other religious unions opposing them.[97] This may indicate some form of miscommunication between the laity and the upper end of the church's hierarchy, which may equally be

[90] The process of appointing bishops is governed by the Crown Nominations Commission who are responsible for drawing up a list of potential candidates. These are passed to the Prime Minister who will then pass this to the Queen. The Queen is ultimately responsible for their appointment. Since 2007 the Prime Minister by convention will submit the first name given by the Crown Nomination Commission. See HMSO *The Governance of Britain* (2007) CM7170. Specifically para 60.

[91] Royal Commission on the Reform of the House of Lords, *A House for the Future* (The Stationary Office, 2000) Cm 4534; House of Lords Reform Bill (May 2011) Cm 8077

[92] HM Government *The House of Lords: Reform* (The Stationary Office, 2007) Cm 7027

[93] Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490

[94] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) 291

[95] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010); Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490

[96] Piggott, "What does women bishops decision mean for the Church" (13th July 2010) BBC News UK found at <www.bbc.co.uk/news/10616553> last accessed 13/08/2011.

[97] Hill, Mark "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180. Mark Hill discusses the exception fought for by an alliance of religions against the Gender Recognition Act 2004 which came to fruition through the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) Order 2005

reflective of a disparity between 'high' church and 'earthed' church. Or, this may in fact mirror what Davie describes is occurring in Scandinavian countries at the moment, whereby it is no longer a case of 'believing without belonging' but of 'belonging without believing.'[98] Again this may indicate some form of embedded tradition through the established church making it difficult to disestablish without changing perspectives at an 'earthed' level first.

The position of the General Synod as a body working parallel to Parliament is also a feature of 'high' establishment. Parliament is the legislative body for the state, and since 1919, the General Synod[99] is the legislative body for the Church of England. Prior to this, Parliament was responsible for both. Laws and Measures are given Royal Assent and granted primary legislative power, making the established church the only religion able to legislate on behalf of all citizens, regardless of their religion – something that seems unequivocally biased on its surface. However, with this benefit has come the burdensome task of having to prepare church Measures[100] to be scrutinised by the Ecclesiastical Committee within Parliament. This Committee is comprised of various ministers from both the House of Commons and the House of Lords and is far from exclusively members or sympathisers to the Church of England. Often this means that members of other religions, or no religion, are responsible for scrutinising church laws and, although they cannot directly make amendments, they are responsible for producing a report which influences how Parliament might vote on the matter.

As well as enacting Measures since 1970, the General Synod have also been responsible for enacting Canons. Prior to this, the Convocations of York and Canterbury were responsible for them in the same way as they were responsible for Measures.[101] Canons form a type of subordinate or secondary legislation and these govern the day-to-day running of the Church of England in the same way as the hierarchical structure of primary and secondary legislation in state law. Unlike Measures, they do not have to

[98] Davie, Grace *The Sociology of Religion* (London: Sage Publishing 2007)
[99] Formerly known as the Church Assembly. It became the General Synod under the Synodical Government Measure 1969.
[100] The name given for the laws of the Church of England.
[101] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)

pass before Parliament before becoming law, but they do have to gain Royal Assent.[102] In general they are only binding on clergy,[103] are overruled by any contradicting Act or Measure,[104] and 'may not be made if repugnant to the royal prerogative, custom or laws of the realm.'[105] - a condition only imposed in law on the Church of England, though when there are clashes within other religious laws, state law will overrule religious law. As with Measures, they too must be read as compatible with the ECHR this time as secondary legislation under the Human Rights Act 1998.[106] Alongside these Canons there are also a large number of other secondary legislations enacted by the General Synod in the form of rules, regulations, schemes and orders, again mirroring the way that the state enacts Statutory Instruments.[107]

These features of 'high' establishment show how intrinsic the relationship between the Church of England and the state have become. Their status as a primary legislative body has also been recognised within European Human Rights law, with their laws subjected to compliance with the rights set out in the ECHR.[108] The effect of both 'earthed' and 'high' establishment is such that it has a legal, cultural and traditional impact on citizen's everyday lives.

1.3 Aspects of the British Constitution effecting the Church of England

As indicated above, the Church of England is entwined within the British Constitution, which is governed instead by rules set in statute, common law and through constitutional convention. Although this makes it flexible, its structure can be harder to understand and this is reflective of its relationship with the established church. In 2013, in his article 'History to understand, and history to reform, English public law', Allison states that

[102] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)
[103] Doe, Norman *The Legal Framework of the Church of England* (Oxford: Clarendon Press 1996)
[104] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)
[105] Submission of the Clergy Act 1533
[106] Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)
[107] Doe, Norman *The Legal Framework of the Church of England* (Oxford: Clarendon Press 1996)
[108] See Section 21 of the Human Rights Act 1998.

> 'Enduring anachronisms of a constitution that evolved over centuries render English constitutional law and practice peculiarly difficult to understand, indeed certain of its aspects barely intelligible, to someone whose knowledge of basic history cannot be taken for granted.'[109]

From this statement two important points can be drawn. First, that English public law is peculiar and complex, and secondly, that understanding the constitution cannot be separated from understanding its historical development. In the same way, these assertions could be applied to the Church of England, and more importantly to the Church of England's constitutional relationship with the state. At this point it is worth noting that the British Constitution incorporates a second established church, the Church of Scotland, and that Scotland itself has its own unique system of separation. This means that mutual agreement must often be sought when amendments that may affect Scotland are initiated by the Parliament in Westminster.[110]

As the UK does not have a codified constitution, its rules and relationships become more fluid in theory. This means that theoretically, although the established church is enshrined within the constitution, it can be removed with reasonable ease through the doctrine of automatic repeal. However, as seen above and as will be revealed throughout this thesis, the way in which the two have evolved has made this more difficult; those constitutional rules that should only effect the state have come to govern its relationship with the Church of England as well. As Elliot and Thomas state:

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[109] Allison J.W.F 'History to understand, and history to reform, English public law' (2013) 72(3) *Cambridge Law Journal* 526-557, 528

[110] The relationship between England and the Scottish Parliament is slightly more complex, having begun with the Act of Union in 1707. Since then Scotland has always retained its own legal system and has developed autonomously in many legal areas. This has been especially clear in land law which is governed in a very different manner than the rest of the UK (for a brief guide in the differences see Parton, David and Pacey, Anne 'On the borderline' 2013 43(Jun) *Property in Practice* 12-13). There are also occasions when the rest of the UK has borrowed from the Scottish legal system, the famous case being that of *Donoghue v Stevenson* [1932] AC 562. More recently, this has been a very hot topic as Scotland fights for its complete independence through referendum. See Aroney, Nicholas 'Reserved matters, legislative purpose and the referendum on Scottish independence' (2014) *Public Law* 422-445; *Cambridge Journal of International and Comparative Law* also ran a series of articles on different aspects of the matter at the beginning of 2014, most notably Aikens LJ 'The legal consequences of Scottish independence' (2014) 3(1) *Cambridge Journal of International and Comparative Law* 162-172, Crawford James 'Perspectives on the Scottish independence referendum' (2014) *Cambridge Journal of International Comparative* Law 136-138 and Hennessy Lord 'A political perspective on the Scottish independence referendum' (2014) 3(1) *Cambridge Journal of International Comparative Law* 159-161

> 'No organisation can work effectively without ground rules setting out who is responsible for doing particular things, how they should do them, and what should happen if things go wrong. This is true of companies, schools and universities, and even sporting clubs and debating societies.'[111]

The relationship between the Church of England and the state is no exception.

In terms of state and church law the doctrine of Parliamentary Sovereignty remains the keystone of the British constitution. Having been described as 'a clear expression and vehicle of an evolutionary constitutional logic'[112] this is the doctrine which gives both statutes and Measures their primary legislative power. Consisting of three basic rules: Parliament has the right to make any laws whatsoever; no person or body may override or set aside these laws; and no person or body is above the law.[113] Although the cases of *Jackson v Attorney-General*[114] and interpretation of *R v Secretary of State for Transport ex parte Factortame*[115] have brought with them a degree of uncertainty, this remains the doctrine that explains the primacy of statutory law within the constitution.

In terms of the Church of England this explains the fact that Measures cannot be challenged. Their status has been recognised in case law[116] and they have been recognised under section 21 of the Human Rights Act 1999. In terms of religious organisations, this is unique to the Church of England in the UK and means all their internal laws (Measures) must comply with, or be interpreted in light of, the rights set out under the ECHR. Alongside the complex procedure of enacting Measures,[117] this

[111] Elliot, Mark and Thomas, Robert *Public Law* (2nd edn, Oxford University Press 2014) 3
[112] Walker, Neil 'Our constitutional unsettlement' (2014) *Public Law* 529-548, 530
[113] Dicey, A V *Introduction to the Study of the Law of the Constitution* (8th ed reprinted IN: Liberty Fund 1982) 3-4
[114] [2005] UKHL 56
[115] (No.2) [1991] HL
[116] See *R v Archbishops of Canterbury and York, ex parte Williamson* The Times 9 March 1994, where it was stated that once a Measure 'has been duly enacted by the Houses of Parliament, and has received the Royal Assent, it enjoys the invulnerability of an Act of Parliament and it is not open to the courts to question vires or the procedure by which it was passed, or to do anything other than interpret it.'
[117] For a full explanation reference is recommended to Hill *Ecclesiastical Law*. The hindrance referenced at this point is the passage of Measures through Parliament. Part of the process requires these Measures to be passed through an Ecclesiastical Committee, which comprises of ministers from the House of Lords and House of Commons. These Ministers are not confined to those affiliated with the Church of England and potentially have a diverse religious and non-religious background. Although this Committee cannot directly change the wording of Measures, they are responsible for drafting a concise report on the nature and effect of the Measure which is thus communicated to the Legislative Committee of Synod. This means they are able to influence and sometimes dictate the potential success of Measures through Parliament.

legislative status may be viewed as an incredible hindrance to the Church of England and reflects how the established church has had to develop a more pluralistic approach to their own church laws. Understandably, this may make disestablishment an attractive option to the church.

However, this burden may be considered to weigh up against the immense privilege of being able to legislate in such a manner. No other religion can profess such authority, and with great power comes great responsibility. An interesting question has also been raised in relation to distinguishing between "constitutional" and "ordinary" statutes by Laws LJ in the case of *Thoburn v Sunderland City Council.*[118] During the case Laws LJ stated that '[w]e should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes.'[119] He then lists examples of some statutes which he considers should be treated as "constitutional" statutes; these include 'the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998',[120] as well as the European Communities Act. Unlike ordinary Acts, these Acts are said to be immune from the doctrine of implied repeal and can only be repealed by express words.

Although not officially recognised at a constitutional level, this distinction has been mentioned by several authorities, including subsequent case law and the Select Committee on the Constitution. While that committee, defines "constitutional" statutes as 'the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual,'[121] there remains no uniform definition or acceptance.[122]

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[118] [2003] Q.B. 151, para 62

[119] *Thoburn v Sunderland City Council* [2003] Q.B. 151, para 62

[120] *ibid*

[121] House of Lords Constitution Committee, First Report of 2001-02, Reviewing the Constitution: Terms of Reference and Method of Working HL Paper No.11 (Session July 19 2001), para 20. The Committee concedes that this is not a conclusive definition but will for now meet its purpose. Cited in Feldman, David "The nature and significance of "constitutional" legislation" (2013) 129(Jul) *Law Quarterly Review* 343-358, 350

[122] There are even those who believe that "constitutional" statutes is too wide, as many such statutes contain provisions which would be classified as "ordinary" and should not be immune from implied repeal in the same way as other provisions within the same statute. Should this be the case the situation would be even more complicated, leaving the judiciary to decide which sections are of constitutional significance and thereby in

Thus far the question over statutes establishing the Church of England constitutionally have not featured within these debates. However, it is highly probable that some, if not all, of the statutory provisions relating to the Church of England would be classified as "constitutional" statutes (or provisions), especially those that deal with the title of the Monarch. In light of the statutes of Measures as primary legislation, these too would have to be considered, though most would not be deemed constitutional in nature. Features of "high" establishment, however, would need to be scrutinised at a deeper level and may need to be expressly repealed rather than relying on the doctrine of implied repeal.

In addition to this, the Monarch plays a key part in the constitution of the UK, and her title as Queen and 'defender of the faith' reflects the two roles she plays as head of the state and Supreme Governor of the Church of England, as noted above. Furthermore, these roles are enshrined into the Coronation Oath and, although the Monarch's power has decreased considerably over the years, with the majority of powers now being exercised through the executive, 'it remains the case that there has been little serious debate about the desirability of retaining a hereditary monarch as head of state in a modern democracy.'[123] This is despite her links with the established church; furthermore, there are ongoing debates over whether, if one of her positions were to be removed, the other would slowly cease to be recognised.[124] In many ways, her support for the Church of England is as important for the continuance of religion in the public sphere as having the established church itself. Although politically her power has waned, her ceremonial importance has remained, and the public remain on the whole supportive, with calls for a more responsive monarchy rather than a replacement.[125] The Queen's support for the Church of England has also helped influence the continued support of the executive. In 2012 she stated:

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need of express repeal by Parliament. Feldman, David "The nature and significance of "constitutional" legislation" (2013) 129(Jul) *Law Quarterly Review* 343-358, 353

[123] Bradley, A W and Ewing, K D *Constitutional and Administrative Law* (15th edn, Pearson Education Limited 2011) 237

[124] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)

[125] Bradley, A W and Ewing, K D *Constitutional and Administrative Law* (15th edn, Pearson Education Limited 2011)

> '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.'[126]

This gives a clear indication of the force with which she regards her role as Supreme Governor of the Church of England and head of the state.

Although the majority of the Queen's powers are delegated to the government or are governed by constitutional conventions, it is clear that she does hold a constitutionally vital role within the legal fabric of the country, as reflected in the granting of Royal Assent. However, conventions have grown to govern much of her authority, and as conventions are viewed as the robes that clothe the constitutional framework, this means that they govern all constitutionally established or recognised entities. This includes not only the executive, legislative and judiciary, but also the Monarch and the Church of England. For example, the executive will not propose legislation that directly affects the Church of England without first consulting with the General Synod. As Morris states,

> 'What is in effect a convention has been established that the government will normally expect the Church alone to act in such matters and will not itself exceptionally seek to legislate in such areas without the Church of England's consent.'[127]

Conventions thereby constitute an integral part of the constitutional fabric of the UK and directly affect the constitutional position of the established church as it is part of the integral legal framework. Should disestablishment ever become a reality, these conventions will play a key role in establishing the potential to initiate and complete the process, and this will be reiterated below when discussing the practical measures that would have to take place.

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[126] The Queen's speech at Lambeth Palace, (15th February 2012) The Official Website of the British Monarchy, accessed 11/08/2013 <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx>

[127] Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire) 41

1.4 The established church and the constitution

The main difficulty when viewing the established church in constitutional terms is that it is not established by one single piece of legislation. Many of its features and duties are specific to individual statutory provisions or originate from common law. Others are associated with constitutional principles such as Parliamentary supremacy or have been built up over an extensive period of time. The complete relationship is one of practical entwinement at a constitutional level. Problems also exist in identifying which features link to the constitution and which are social features that relate less to the state than to the citizens themselves. The potential difficulty that thus arises is that, because there are so many individual sources, it is difficult to see how one single piece of legislation would be sufficient to fully disestablish the church. It might have the effect of pure legal disestablishment – the separation of status itself – but with none of the practical realities, as the relationship would still be entwined at a constitutional level especially at a grassroots level (e.g. the case of baptism, marriage and burial), regardless of the wording of the statute itself. Many of the constitutional features also grant the Church of England privileges that are not awarded to other religions, and this conflicts directly with the state's duties under human rights law, specifically in terms of religious freedom. Within debates on these privileges what has been often neglected until recently is that these benefits come with a number of obligations that in many ways become more onerous than receiving the benefits to begin with. [128] As mentioned above, an example of this is through the primary legislative status of Measures, which comes at a cost of direct scrutiny by a mixed demographic of MPs who may have no direct links to the Church of England.[129]

Historically, this would not have been such a burden as the state used the established church as a tool of social engineering. All citizens were subjected to following one religion and would have been subject to that body's laws. Membership and citizenship were held together, and in order to hold any public office within the state an individual

[128] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623; Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007); Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011). Note, these authorities do not necessarily argue that establishment is good but do discuss its position well in terms of benefits and burdens.

[129] As established under section 2 of the Church Assembly (Powers) Act 1919

was expected to swear allegiance to the Monarch as supreme head to the Church of England and adherence to the XXXIX Articles (the church's thirty-nine theological statements).[130] At this time the state's power was viewed as a divine right granted by God who granted authority in both spiritual matters and temporal matters. However, as religious toleration increased both sociologically[131] and legally,[132] the use of religion as a tool for social engineering became less appropriate and, more importantly, less effective. The state had to look to change its approach, and began to do so even prior to the UNDHR or the ECHR.[133] However, the constitutional effects of these methods still remain with individual parishioners continuing to be able to claim certain rights over their local church. Those most commonly cited are the right to burial, baptism and marriage. Interestingly, in constitutional terms, some of these provisions are embedded not only in statutory law but also in the common law. For example, the extension of the right to burial to all inhabitants of a parish is something that is recognised under common law despite all other aspects of burial being governed by Measures.[134] When considering the practicalities of disestablishment, this is a complex matter, and these common law factors will need to be identified and amended directly by statute, or a new legal precedent must be created. Their identification could take some time. Of more concern to the Church of England themselves is the way in which many of these rights are coming to be viewed as rites of passage rather than being recognised as rites of religion. Baptism especially has been recognised thus despite, it remaining one of the

[130] Weller, Paul *Time for a change: Reconfiguring Religion, State and Society* (2005, T & T Clark International) 30

[131] Ishay, Micheline R *The History of Human Rights: From Ancient times to the globalization era* (2004, University of California Press); Shestack, Jerome J "The Philosophic Foundations of Human Rights" (1998) 20 *Human Rights Quarterly* 201-234; Freeman M.D.A *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008); Tierney, Brian *The Idea of Natural Rights* (1997, Published by Scholars Press for Emory University)

[132] Toleration Act 1989; Unitarians Relief Act 1813; Roman Catholic Relief Act 1791. For a good discussion on the historical developments, see Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)

[133] This can be seen in the decision to create a separate legislative body, the Church Assembly, to discuss, draft and propose laws specific to the Church of England after the damning conclusions of the Selbourne Committee. There they found that out of 217 Bills introduced between 1880-1913 on behalf of the Church of England, 180 had been dropped and 162 had not been discussed. Out of the 33 that were passed, only 13 of them had been directly sponsored by a government minister, even though all needed full ministerial support in order to be successful. The Selbourne Committee concluded that Parliament's attitude towards these Church of England Bills was 'not so much one of hostility as of indifference.' Selborne, Earl of *Report of the Archbishops Committee on Church and State* (London: SPCK 1916) in Cranmer, Frank, Luca, John and Morris, Bob *Church and State: A Mapping Exercise* (London: Department of Political Science 2006) 29

[134] This is noted in the Pastoral Measures Code of Practice Annex 6 (December 2009)

only two sacraments recognised by the Church of England now.[135] It is also taken as a basis for estimating the rate of membership[136] and features as a requisite requirement for any person to be registered on the electoral roll, which has also been used as an indication of membership.[137] If there is truth in the statement that these rites are becoming more cultural than religious – and, as Davie states it is 'relatively rare for an English person to die without some form of religious ceremony'[138] – then this affects not only the position of the Church of England as a whole but individual ministers whose pastoral care becomes divided between those parishioners who regularly attend and are an integral part of the church, and those who are not. These factors identify the closeness in constitutional terms of the Church of England with the state in practical terms despite some of the more recent legal changes put in place to try and distance the state from the church. Burial, especially in practical terms, would become highly problematic to the state should full disestablishment occur, as there are many who continue to turn to the Church of England as the accepted provider of care for the end of life. This is reflective of Davie's analogy of vicarious religiosity which will be discussed at greater length below.

Another constitutional feature that has become politically problematic is the position of the bishops in the House of Lords. This feature is discussed in some depth above. It also acts to highlight an issue that will be discussed further below, the assessment of the non-religious of the bishops in the House of Lords. Pollock and Copson point out that:

> 'Religious people may feel that their viewpoint is neglected by an increasingly non-religious society, but the non-religious feel similarly when confronted with the vestiges of establishment within social institutions, the pervasive assumption of a default Christianity, and modes of discourse that exclude them by use of a 'multi-faith' approach (often lazily assumed, not least by government departments, to be inclusive of all).'[139]

[135] Article XXV of the 39 Articles. The other being the receipt of Holy Communion (also known as receiving the Lord's Supper), Article XXXIX. Found at <https://www.churchofengland.org/prayer-worship/worship/book-of-common-prayer/articles-of-religion.aspx>
[136] Davie, Grace *Religion in Britain since 1945* (Oxford: Blackwell Publishing 1994)
[137] Hill, Mark *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)
[138] Davie, Grace *The Sociology of Religion* (London: Sage Publishing 2007) 56
[139] Copson, Andrew and Pollock, David "Religion and the State in an Open Society" in Morris, R.M. *Church and State: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008) 52

This of course opens the gates to a whole new question of whether non-religious groups should also be included separately within any religious inclusion, or whether in fact religion should merely be excluded from the public domain entirely, as secularists often argue.[140] However, although this might prevent the non-religious feeling excluded by the government's multi-faith approach, it would not prevent those who are religious feeling neglected by an increasingly non-religious society. Surely, instead, it would drive religious groups into a position of seclusion and isolation.

Although this debate on the position of the bishops within the House of Lords has now raged for some thirteen years without looking as if it might come to a conclusion,[141] it demonstrates the way in which such attitudes are more readily coming to the forefront of these debates. The last century has already seen a dramatic change to the way that the Church of England legislates, and there are moving arguments being made to recommend changes in the coronation service,[142] a service which still mirrors the traditional, and legal, importance of the established church, the Monarch's position as Supreme Governor, and their responsibilities over the Church of England itself. More recently, Gordon Brown, when appointed Prime Minister, withdrew his ability, and that of all future Prime Ministers, to directly intervene with the appointment of bishops.[143] Responsibility for the procedure is now delegated to the Crown Nominations Committee,[144] who must deliberate upon the best candidates and produce two preferred names for candidacy. Since 2007, by agreed convention, the Prime Minister will put forward the first name given by the Crown Nominations Committee to the Monarch for appointment. [145] The second name only becomes relevant if there is a change of circumstances which prevents the primary candidacy's appointment. The fact that Gordon Brown has laid down the foundations for a convention to govern this area is again important on a constitutional level, as conventions are unique forms for clothing the bones of the legal framework under the unwritten constitution of the UK.

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[140] *ibid*
[141] Morris, Bob 'The Future of 'High' Establishment' (2011) 13 *Ecclesiastical Law Journal* 260-273
[142] *ibid*
[143] HMSO, *The Governance of Britain* (2007) CM7170
[144] The Crown Nominations Committee consists of the two Archbishops, six members of the General Synod (three clergy and three lay) and two Appointments Secretaries who are non-voting members. The Committee convenes twice a year to discuss nominations. Before they meet extensive consultation is undergone to determine the needs of the diocese in order to ensure the best candidate is put forward.
[145] HMSO *The Governance of Britain* (2007) CM7170. Of specific relevance para 60.

The fact that politically this is allowed and accepted between the state and the Church of England demonstrates how the established church is interwoven within the country's constitutional fabric. Conventions as a rule are reserved to the state's governmental institutes because they are then capable of being politically binding. If enforced on non-political organisations it is logical to assume they will not be as powerful.

The closeness of the Church of England with state constitutionally is almost mirrored in the way that the constitution of the Church of England is formed. Again, this is not found in one codified document but within a number of different sources. These include Acts of Parliament, Measures from the General Synod, Canons, rules and what have more recently been termed as a category of quasi-legislation.[146] Some of these sources are directly binding, others are only binding upon the members of the church, and there are those, such as quasi-legislation, that are merely persuasive. This final source is generally only used to clarify inconsistencies found in legislation in the same way as guidance or accompanying notes are issued by Parliament following a complex piece of legislation. Understanding the framework of the Church of England is thereby very difficult, although it mirrors an understanding of the constitutional framework of the country itself. At the same time, its structure, powers and duties are all tied into the British constitution and constitutional principles which, as discussed above, are far from straightforward.

A helpful place to start looking for this is the Church Assembly (Powers) Act 1919, which is the main source of the Church of England's legislative authority. This sets out a new legislative body responsible for debating and initiating laws on behalf of the Church of England. However, this essentially is all that it does. There is no reference to their constitutional status or to any of the other constitutional links mentioned above. These are all to be found elsewhere and the identification of these is vital before any attempt to disestablish the church is made. Although this Act was amended some years later by the Synodical Government Measure, this did not do much more than rename the Church Assembly to the General Synod, redefine the legislative powers of the three Synods,[147] and clarify a few other structural matters. This means that, although it may constitute a

[146] Doe, Norman, *The Legal Framework of the Church of England* (Clarendon Press, Oxford, 1996)
[147] These three Synods are the General Synod, the diocesan synods and the deanery synods.

statutory point, it goes no further in consolidating some of the matters that arise on a constitutional level on a primary legislative basis. In fact the most concise rules given to Ministers are found within the Canons, which are a form of secondary legislation that relate directly to Ministers' powers and their relationship within the hierarchy of the church. In a sense, this again mirrors the way the state's structure is shaped, with the executive often being responsible for implementing legislation at a grassroots level in order for the state structure to function properly.

What the above really demonstrates is that on a constitutional level the state and church are not only closely entangled, but also appear to have evolved structurally to some degree in unison. The way that their structures have formed and their legislative methodology is to some degree quite similar, and the complexity of their constitutional entanglement – largely due to the unwritten nature of the state's constitution – makes it hard to envisage an easy way of disestablishing the Church of England in one move. If disestablishment were to be pursued, it is more realistic to consider that it would have to be a gradual process which might never cut all ties between the state and church. The practicalities themselves will be further investigated in the penultimate chapter of this thesis.

1.5 Why this relationship does not work today

The biggest problem for the state and established church today is purely that the relationship no longer meets the need that it was once established for. When the Church of England was first established, it served a practical purpose. On a personal level, it helped Henry VIII solve his marital problems, and on a more political and practical level, it facilitated the severance of the country's ties with the Roman Catholic Church, and further solved some of the country's financial problems by pillaging the Monasteries and ensuring that tithes were paid to the state rather than Rome. It was then used to unify temporal and spiritual matters under Elizabeth I in order to secure her divine right to rule and to stabilise the country after the bloody years of her sister's reign. In order to secure this dominance, an age of intolerance which disadvantaged

anyone not adhering to the doctrines of the Church of England ensued.[148] In modern times, this situation is no longer important or appropriate. For over sixty years, international and regional laws have recognised the right to religious freedom, including the potential to change religions. This means that even in those states with an established church, there must be provisions present to ensure members can leave. Legally this means that any state church, no matter how benign, must allow the possibility of leaving the state religion. However, there are some, such as Temperman, who believe that in the presence of a state religion this is not so simple. He argues that when an established religion is present, it will always act as a default religion within the country.[149] In a sense this echoes the way in which many in the UK have come to recognise baptism and marriage as more of a cultural rite of passage rather than a religious commitment.

The way in which society has changed has also impacted on the Church of England in practical terms. Membership has decreased despite parishioner's ability to claim certain rights over their local church. Already discussed is the cultural changes that have occurred which have seen a number of religious rites being viewed more as social rites of passage than associated with religious belief. Baptism is also a requirement for those wishing to register on the electoral roll which is essential to those wishing to play a part in the governance of the Church of England.[150] Because of its importance in governance this electoral roll is another feature which has been used over the years as a tool for estimating membership numbers. However, neither baptism nor the electoral roll give a clear indication of membership as they offer no certainty regarding attendance. As Hill asserts, 'the inference is that 'membership' requires something more than the exercise of such rights (baptism, marriage and burial), although what that may be is difficult to express.'[151] Further complications arise when members join from other Christian dominations who have already been baptised with water in the name of

[148] These included the Treason Act 1571, Ordination of Ministers Act 1571, Religion Act 1580, Jesuits Act 1584, Religion Act 1586. Many were aimed directly at the Roman Catholic Church and the Pope's authority, especially after the excommunication of Elizabeth I by the Pope in 1570. A number of these Acts were thereby aimed at 'Papists' and have been described by Rivers as 'draconian.' Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) 12

[149] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149

[150] Hill, Mark *Ecclesiastical Law* (Oxford 2006)

[151] *ibid* 66

the Trinity as they are not required to be baptised again.[152] Other religions in comparison do not have such pronounced problems. As their membership works through consensual compact, their members alone are bound by their rules, but this binding is by voluntary agreement.[153] In the past, the census results have also been used to calculate Christian sentiment. The statistics that were produced acted as confirmation of high religious sentiment present in communities despite the low levels of attendance.[154] However, the integral problem with such statistics is that there is no breakdown within these figures of the group 'Christianity' which makes any true analysis on the Church of England alone very difficult. The more recent Census in 2011 appears to indicate that this Christian sentiment, though it remains the highest group in the UK, continues to decrease. Although 7.9% chose not to answer this question, there was a decrease in people who identified themselves as Christians, from 71.7% to 59.3%.[155] This may indicate that this feeling of religious sentiment is beginning to decrease and that, although the historical connections may still exist, communities no longer view their local church as a community hub.

This decline in religion has continued to question the need for or appropriateness of an established church and the part that this plays today. Indications of some justifications have already been given when discussing cultural rites of passage. There is a sense that individuals turn to the church in times of need, and Davie believes that it has become increasingly clear 'that European populations continue to see such churches as public utilities maintained for the common good.'[156] The basic precept of this argument is that a minority of citizens maintain the church through attendance and support for the benefit of the majority, who are then able to turn to the church in times of need. Often this is termed as vicarious religiosity. This practice has been known to bring

[152] Stancliffe, D "Baptism and Fonts" (1993) 3 *Ecclesiastical Law Journal* 141
[153] This has been confirmed by case law, *Scandrett v Dowling* [1992] 27 NSWLR 483 where it was stated that a consensual compact was 'a willingness to be bound to it because of shared faith' rather than 'the availability of the secular sanctions of State courts of law.' The interference of courts only becomes relevant should matters of finance or property come into question. See also Sandberg *Law and Religion* (Cambridge University Press 2011)
[154] Dobbs, Joy, Green, Hazel and Zealey, Linda *National Statistics: Focus on Ethnicity and Religion* (Palgrave Macmillan 2006)
[155] Religion in England and Wales 2011 (Released 11th December 2012) *Office for National Statistics* <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html>
[156] *ibid* 143

communities that do not habitually attend their local church to stand in unison in order to defend their religious buildings and surroundings when they are threatened. [157] This again reflects a sense of community surrounding the Church of England as a community hub, part of an area's history that binds the locality together, and when something threatens this normality everyone is ready to stand up and fight the threat.

It is also interesting that, although arguments have arisen in terms of an established church acting as a default religion, North and Gwin's research appears to indicate that establishment has a detrimental effect on attendance. They state that

> 'Using survey responses on the frequency of attendance at religious services, we find that government establishment of state religion reduces religious attendance, whereas enduring constitutional protection of religion increases religious attendance.'[158]

The results thereby indicate that the position of the Church of England as an established church is actually detrimental to their own wellbeing. Their conclusion also supports the notion that disestablishment would be beneficial to the Church of England, as their status would be realigned to that of all other religions where they could compete at a market level more efficiently. As stated, other religions are bound by the voluntary agreement of their members, and those outside of this voluntary consensus are unable to claim any rights over the religion in the same way as parishioners of the Church of England. This includes disestablished religions such as the Church in Wales who were granted free control of their constitutional framework in 1914.[159] Although some of these religions, such as the Roman Catholic Church, have a longer presence historically, there has been a markable increase in religious diversity in more recent times. This has called for a new approach from the state which has been mirrored by religious freedom in regional and international law. The state has had not only to become tolerant to other religions but to facilitate religious freedom through the neutral treatment of religions. This in itself has become an area fraught with difficulty, with questions being brought up as to whether neutrality and equality of religion mean the same thing or

[157] Archbishop offers Rhondda church protestors talks (11th July 2011) BBC news <www.bbc.co.uk/news/uk-wales-south-east-wales-14116158> last accessed on 16/08/2011

[158] North, Charles M and Gwin, Carl R 'Religious Freedom and the Unintended Consequences of State Religion' (2004) 71(1) *Southern Economic Journal* 103-117, 104

[159] Church in Wales Act 1914

whether there is an integral difference between the two. Regardless of the debate itself, the common de facto outcome is that the Church of England, despite attempts to sever certain benefits, still stands in an unequal position to other religions, especially in political terms,[160] making it difficult to see how, without disestablishment, all religions can be treated by the state as equals or on neutral terms. However, the state themselves have issued strong statements in recent times echoing their commitment to both the established church and also to multi-faith dialogue. They recognise the importance of co-operation between faith communities and state agencies in order to ensure that productive relationships are able to flourish between all.[161] Equally, it is clear that other religions in the last few decades have supported the established church as the public protector of all faiths,[162] which is reinforced by Hill's recent statement:

> '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 speaks volumes for the weight to be given to matters of faith and belief in the governance of the population at large. 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.'[163]

The other demographic that has forced the state to reconsider its connections with the Church of England is that of the non-religious. Their belief systems are equally protected under International law and the ECHR, which means that they are equally protected against state interference and coercion when it comes to their belief systems and the manifestation of these beliefs. More recently, this has also been reflected domestically through discrimination law, including the Equality Act 2006, which protects both religion and belief where 'a reference to religion includes a lack of religion'[164] and 'a reference to belief includes a reference to lack of belief.'[165] The

[160] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623

[161] Ventura, Marco "States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 181-185

[162] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)

[163] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209, 208

[164] Equality Act 2006 44(c)

Church of England themselves have recognised the challenges that the non-religious bring. They discuss directly the issue of "new atheists", a group that has risen in the last ten years and who believe that religion should be countered and exposed by rational arguments rather than being tolerated as an acceptable part of our society.[166] Such groups pose a direct challenge to all religions but more specifically to the Church of England, as their structure is so interlinked with the state's legal, political and social structure. Their approach to religion is hostile and appears completely inhospitable towards amicable relations. In essence it appears to fit within Modood's statement on the way secularism has been viewed in historical terms:

> 'In today's context, secularism is more commonly perceived as the opposite of religion, and then – in a really extraordinary sleight of hand – becomes demonised as corrosive of moral concerns.'[167]

This is somewhat of a concern in a multi-faith society, with both the Church of England and the state having to be aware of the potential effect that such radical beliefs can have both from religious groups and the non-religious. Furthermore, their negative viewpoint potentially reflects on other non-religious groups who aim to have a positive input in a multi-faith society and encourage pluralist dialogue.

This negativity is not shared by all non-religious and there are many other secularist groups who are willing to work with religions in the public and political sphere. In fact a number of pluralist theorists have been forthcoming in recognising that religious groups merely comprise other competing interest groups when it comes to politics. For them, the only danger comes if one competing interest group becomes too dominant, and this is where they view the Church of England as a problem. They consider the established church to have too much dominance within the state's legislature and are able to influence the government too much.[168] As with the case of religious diversity, this is something that the Church of England has to keep in mind when acting in their capacity within the political sphere. They must act to protect non-religious belief

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[165] Equality Act 44(d)

[166] This movement stemmed from the publication of Harris, Sam *The End of Faith: Religion, Terror, and the Future of Reason* (Free Press 2004) and includes figures such as Professor Richard Dawkins, Professor Daniel C Dennett and Christopher Hitchens.

[167] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997) 27

[168] Lindblom *Politics and Markets* (Macmillan 1974). Although Manley is quick to state that this work is badly flawed; Manley "Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II" (1983) 77(2*) The American Political Science Review* 368-383

groups as well as other religions. However, the more general effects of secularist theories affect all religions, not just the Church of England. Only extreme groups such as the "new atheists", who aim to more directly challenge the doctrines, views and initiatives of the Church of England, are potentially more of a challenge than the increasing religious diversity within the UK. Their vision is one of complete privatisation of religion whereby none no religious group plays a part in political debate.

All of the above will be discussed in more detail in the next chapter. The above merely gives a brief summary of some of the issues that challenge the place of the established church in today's society in order to clarify why their structure may not fit within society. That chapter will indicate how these issues have then raised the establishment verses disestablishment paradigm. However, before looking at this issue in depth, it is important to acknowledge that the UK has two established churches, not just one, and this chapter would not be complete without looking at the constitutional structure of this second model.

1.6 The Church of Scotland

The Church of Scotland is the second of the United Kingdom's established churches and it enjoys a very different structural relationship with the state than that of the Church of England. In legal terms its inception in Scotland began in very much the same way as the Church of England, with a series of enactments which established the Church of Scotland by law.[169] These Acts broke the jurisdiction of the Pope, formulated church governance, and created a state-established church during the sixteenth Century. Its status was then re-affirmed as the Scottish Church 'by Law established'[170] by the Acts of Union passed in the Scottish Parliament in 1706 and Westminster Parliament in 1707. This certified its status as a church established by law, although no reference to establishment was made in the more recent 1921 Church of Scotland Act. Instead this Act gave legal recognition to the church's Declaratory Articles which 'state that the

[169] Murray, R. King "The Constitutional Position of the Church of Scotland" (1958) *Public Law* 155-162
[170] Act of Union 1707

Church is in historical continuity with the Church of Scotland which was reformed in 1560'.[171] The Act's purpose was further affirmed in *Ballantyne v Presbytery of Wigtown*[172] to be that of creating self-governance for the Church of Scotland in its own affairs.[173] As Munro states, this makes it 'fair to say that the Act may be regarded as a *recognition* by Parliament of the Church's constitution, rather than as a *conferment* of a constitution'.[174] This certifies that the church is wholly separate from the state and in control of its own affairs, having decided on its own constitution and its own future; this was an important element in the lead up to the re-union of the formerly separated strains of the Presbyterian Church in 1929.[175] However, it is important to recognise that it is an Act of Parliament setting out the relationship between it and the state, something which is not done for any other religion.[176] Murray also points out that a number of the original Acts which established the Church of Scotland by law dating back to the sixteenth century have never been repealed; therefore the church must still retain its original position as the established church, despite the 1921 Act introducing an unspecific repeal of any legislation inconsistent with the new arrangement.[177] This also means that on a constitutional level, the Church of Scotland is more clearly established than the Church of England as its recognition is given through one clear statute, making it established at law.

The Church of Scotland also retains some outward signs of establishment such as the Queen's automatic membership whilst in Scotland and her ability to appoint her chaplains, Dean of the Chapel Royal and of the Order of the Thistle.[178] A number of elements of 'low' establishment are also found within the Church of Scotland model,

[171] Act of Union 1707 Schedule 1 Section III; Munro "Does Scotland have an Established Church" (1997) 4(20) *Ecclesiastical Law Journal* 639-645

[172] (1936) SC 625 per Lord Justice-Clerk Aitchison, 654

[173] Munro "Does Scotland have an Established Church?" (1997) 4(20) *Ecclesiastical Law Journal* 639-645

[174] *ibid*, 644

[175] This was further aided by the Appended Articles Declaratory which detailed a brief written constitution which abandoned the language of establishment and replaced it with the concept that the church was national and free. For further information see MaClean, Majory "The Church of Scotland as a National Church" (2002) 149 *Law and Justice: Christian Law Review* 125-133

[176] Munro "Does Scotland have an Established Church?" (1997) 4(20) *Ecclesiastical Law Journal* 639-645, 644

[177] Murray, R. King "The Constitutional Position of the Church of Scotland" (1958) *Public Law* 155-162; MaClean, Majory "The Church of Scotland as a National Church" (2002) 149 *Law and Justice: Christian Law Review* 125-133

[178] Forrester, Duncan B. "*Ecclesia Scoticana* – Established, Free or National?" (1999) *Theology* 80-89

including provisions concerning hospital and prison chaplains,[179] and their courts are given special recognition:

> 'The courts of the Church of Scotland are legally established courts of the realm whereas courts of other Churches have jurisdiction only so far as conferred by their own constitutions and the adherence of their members.'[180]

This means too that their decisions cannot be reviewed by state courts so long as they have acted within their jurisdiction.[181] There are, however, a number of privileges associated with 'high' establishment from which the Church of England benefits that are not enjoyed by the Church of Scotland. Its bishops do not sit within the United Kingdom's legislature. The Monarch, although a member of the Presbyterian Church of Scotland when present in Scotland, is not the Supreme Head. Their laws[182] do not have the equivalent force of law as statutes and they do not have to be approved by the country's legislature. In fact in a constitutional analogy their framework mirrors more that of non-established religions.

The constitutional elements are thus very different from those of the Church of England which is interwoven into the fabric of the country's constitution. It is able to enjoy full autonomy, separate from the state, to such a degree that many have been surprised at the fact that the church retains its established status.[183] This also means that many of the legal and social changes that the Church of England has been pressurised into making, as seen above, have not had such a dramatic impact on the Church of Scotland's structure. Although there has been attention given to 'the relation of the churches and other religious bodies to the Scottish Parliament',[184] there are indications that religious freedom has definitely had some form of impact on the relationship between the state and the church. Some of the other issues mentioned above, such as the decline in religious attendance, has also been apparent in the Church of Scotland but has not led to the same questions concerning the future of the established church. Many have put this

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[179] Oliver, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504

[180] Walker, D.M *The Scottish Legal System* (6th edn; W. Green 1992) 645

[181] Cranmer, Frank "Judicial review and Church Courts in the Law of Scotland" (1998) *The Denning Law Journal* 49-66

[182] Excluding the Declaratory Articles which have been given the force of law by the Church of Scotland Act 1921

[183] Munro "Does Scotland have an Established Church?" (1997) 4(20) *Ecclesiastical Law Journal* 639-645

[184] Forrester, Duncan B. "*Ecclesia Scoticana* – Established, Free or National?" (1999) *Theology* 80-89

down to the fact that the Church of Scotland exercises so much more freedom in its governance and does not have as many visible privileges that potentially could affect non-members.[185] Questions of disestablishment have never actively been raised in regard to the Church of Scotland, and its relationship with the state was once described as 'quaint and irrelevant'.[186]

It is likely that reasons such as these have led many leading authorities to view the Church of Scotland as a model that the Church of England may be able to learn from. Munro states that it may be 'viewed as an interesting model for a 'lighter' form of establishment, perhaps even an example to be emulated',[187] and Oliver comments that 'Scotland might provide a useful source of inspiration.'[188] However, some time ago a similar proposal was put forward by Father Stephen Trott in the form of a Private Members motion addressed to the General Synod.[189] It gained little support, but was discussed by the Chadwick Commission, who wisely warned against emanating a model developed in a separate legal system within the United Kingdom.

> 'We cannot take a system of law that has arisen in another part of Britain and impose it on England as though it fitted the facts, or the memories, of English life. We have to take English ecclesiastical polity as we find it and then see how it can be adapted.'[190]

This warning still remains valid today and authorities such as McLean are not shy about supporting such advice stating that 'I think the Chadwick Commission of 1970 was right in its advice.'[191] However, this does not necessarily mean that lessons cannot be learnt from the model and that some aspects may be used, or adapted, in the future.

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[185] Oliver, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504; Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire)
[186] Forrester, Duncan B. "*Ecclesia Scoticana* – Established, Free or National?" (1999) *Theology* 80-89
[187] Munro "Does Scotland have an Established Church?" (1997) 4(20) *Ecclesiastical Law Journal* 639-645, 645
[188] Oliver, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504, 503
[189] McLean, David "The Changing Legal Framework of Establishment" (2004) *Ecclesiastical Law Journal* 292-303, 293
[190] Chadwick Commission *Church and State: Report of the Archbishops' Commission* (1970) para 216
[191] McLean, David "The Changing Legal Framework of Establishment" (2004) *Ecclesiastical Law Journal* 292-303, 293

1.7 Conclusion

The analysis of the features of establishment and the relationship between the constitution in regards to the state's relationship with the Church of England has allowed some reflection on the complexity that would be required to disentangle them. These will be drawn on towards the end of this thesis in order to explore the practicalities that would be involved in disestablishment. There has already been allusion to the fact that the state's constitutional features are reflected in the church's own framework, indicating how the historical development of both has ensured they work in very similar manners within their own procedures. Arguably, the Monarch's title as head of both institutions then appears to seal what would be a problematic process of disestablishment. It is also evident that, although the established church may be considered an anachronism in need of change, support for the Church of England still remains high on a sociological level as well as the political, although in accordance with results of the 2011 Census, Christian sentiment may be on a gradual decline. Despite this, there continues to be a high degree of support for the established church from both the Monarch and the state. The next chapter will build on this and delve more deeply into other views towards the established church with the aim of determining why the question of disestablishment has become so prevalent and what effect that human rights law has had on this. What is already clear from this limited discussion is that the Church of England has also played an important part in facilitating religious freedom by maintaining a public presence and ensuring that all religions are able to participate in the public sphere.

It is also clear that modern pressures are growing, and although there continues to be support, there are also an increasing number of theorists suggesting that disestablishment may be occurring in a piecemeal fashion.[192] This will mean that it will eventually overcome the obstacles that this historical entanglement with the state has ensured. This may act to solve some of the more obvious problems that the Church of England has had to overcome in adapting its own structure. If Pitt is correct in her

[192] Oliva, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504; Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)

assessment that this is not what was first envisioned when the established church was constituted,[193] then perhaps this will enable them to reassess how far they have come and what their next step is on the churches own behalf rather than in pluralistic terms. Or equally, it may be considered that inspiration can be drawn from the Church of Scotland's structure, which appears to raise very little concern when it comes to religious freedom despite the two having very different historical development.

[193] Valerie Pitt in Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)

Chapter 2:

Why the Question of Disestablishment?

The previous chapter placed the Church of England's relationship with the state in the context of constitutional law. By looking at this from both the state's and church's perspective, we demonstrate the complexity of the relationship between the British constitution and the established church and introduce areas of law that would need to be adhered to or amended in order to sever the relationship. Here we also begin to highlight some of the arguments for and against the establishment model in the UK, both historically and in modern terms, and why these arguments are no longer appropriate or supported. The next two chapters will look at this in greater depth.

This chapter will give a brief analysis of international, regional and domestic human rights law that has effected the state's relationship with the established church, and correspondingly with all religions. As the study focuses on the UK, the primary focus will be on regional and domestic human rights law. The chapter will predominantly concentrate on the European Union and the Council of Europe, both of which have had a direct impact on the legal systems of member states; this applies particularly to the constitution of the UK, which has faced a number of challenges occasioned by the impact of Directives on the domestic legal system. Turning first to international law and the Council of Europe, the main purpose of which is the protection of human rights, this section will discuss the development the law and the institutes approach to religious freedom. Most importantly, it will consider the impact that this has had on the state's relationship both with the established church and with other religions. It will then move on to discuss the EU, whose main aim has always been primarily economic, but whose potential to influence the approach of member states to religious freedom is high. Additionally, consideration is given to the profound effects that some of the other regulatory and advisory bodies have, or could potentially have, if they so choose. With the EU continuing to understate its involvement in human rights for fear of losing sight

of its initial economic concerns and authority, these regulatory advisory bodies could have a strong influence in a subtle form.

However, before entering into an in depth analysis, consideration will be given to why the right to freedom of religion or belief is so important. As Evans once stated, 'Freedom of religion is one of the oldest and most controversial of all human rights'.[194] Historically, it has played an immense part in shaping both the international and European political landscapes and has often been blamed for the start of many wars. Rather less often acknowledged is the presence of a right to religious freedom within the laws of a number of mainstream religions. Unsurprisingly, it therefore continues to raise questions and concerns today, and because of its history, it becomes increasingly important to consider this right in a historical context before its full effects can be appreciated. This is true regardless of the fact that many theorists since the Age of Enlightenment have considered religion to be in decline, and have even anticipated its disappearance from society altogether.[195] However, as Cranmer and Oliva so rightly state, 'religious belief continues to play a very important role in contemporary society'[196] and, as seen more recently, there have been increasing calls for an interdisciplinary approach.[197] The historical context of this right has also meant that religious principles have on occasion subtly been embossed within the law. As Davies asserts

> 'the situatedness of law within a cultural context and history means that certain principles based on religion rather than reason or practicality are embedded in law: these can be difficult to remove or challenge, even when there is very good reason to do so.'[198]

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[194] Evans, Malcolm " Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict" in Lindholm, Durham & Tahzib-Lie *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004) 1

[195] Bruce's book *God is Dead: Secularization in the West (Religion and Spirituality in the Modern World)* (Oxford: Blackwell Publishing 2002) discusses the issue of the decline of religion in some depth.

[196] Cranmer, Frank and Oliva, Javier Garcia "Church-State Relationships: An Overview" (2009) 162 *Law & Justice – Christian Law Review* 4-17, 4

[197] Sandberg, Russell "Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach" (2008) 1 *Journal of Religion in Europe* 329-352

[198] Davies, Margaret "Pluralism in law and religion" in Cane, Evans and Robinson *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 79

At the same time this has meant that the Westernised view of freedom of religion has been highly influenced by Christian teachings. Whether subtle or direct, this influence has directly impacted the way that European politics and law incorporates new and minority religions. Even though arguments are made that 'modern philosophy performs the role of theology and secularisation displaces religion',[199] it is still a reality that in a historical context religious principles influence the European secular approach. As Asad and his supporters contend, this means that 'European secularism is the outcome of European history, in which Christianity played a central role'.[200] In his considerations, Ferrari states that the unfortunate consequence of this development is that many areas, especially those within the public sphere, which are 'apparently the same for all religions, are actually more demanding for non-Christian religions, whose doctrinal and organisational characteristics are less compatible with the secular profile that distinguishes the public sphere'.[201] If this is true then, although not purposeful, it means that the indirect historical outcome makes it harder for new or minority religions to manifest their beliefs in a public sphere. In the extreme, there are those that consider this to be a purposeful self-limitation by Christianity which intimates that it has no real 'resources to cope with religions that mandate greater public or political presence or have a strong communal orientation', which makes it impossible 'to accommodate community-specific rights and therefore to protect the rights of religious minorities'.[202] Although incredibly negative in analysis, this makes learning from non-Western countries essential when dealing with questions of pluralism – an important consideration when looking at changing models of establishment.

In conclusion, a detailed overview of how human rights law, specifically religious freedom and protection against religious discrimination, have developed through international and regional human rights provisions and, more locally, through the EU – particularly what effect these have had on the UK's relationship both with the established church and with other religions. The way in which this analysis will develop

[199] Blumenberg, Hans *The Legitimacy of the Modern Age* (Cambridge, 1983)
[200] Asad's views are discussed by Ferrari in his article - Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370, 360
[201] Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370, 359
[202] Bhargava, R 'Rehibilitating secularism' in C Calhoun, M Jurgensmayer, and J van Antwerpen *Rethinking Secularism* (Oxford, 2011) cited in Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370, 361

will allow lessons to be ascertained as to what the full impact of these changes have been and why this has increased sociological and religious calls for disestablishment.

2.1 International Instruments

The starting point of any investigation into international human rights is the Universal Declaration on Human Rights. Adopted by the UN General Council in 1948, this document covers a list of human rights that have been agreed and have become normative standards. However, as with all international instruments, these rights are not binding and it is each individual state which remains responsible for their protection. This is equally true of the Council of Europe which is governed by the European Convention on Human Rights. Each state chooses individually to become a member, although here the European Court of Human Rights (ECtHR) does have more of a direct impact on states, both politically and legally, partially due to its proximity and influence economically. The UK was a member state of the UN when this Declaration was agreed and it continues to play a highly active role in the UN today. When it comes to religion, Article 18 of the UNDHR is the provision of main interest. This states that

> '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 teaching, practice, worship and observance.'[203]

Over the years this Article formed the basis for a number of regional instruments that were to follow, including the European Convention on Human Rights (ECHR). The protection of religious freedom also stems from this provision, although it has grown substantively, and limitations have been introduced whereby the state is able to interfere to a certain degree. The clearest evident of this is through Article 9(2) of the ECHR. This states

> '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.

[203] A copy of the UNDHR can be found at <http://www.un.org/en/documents/udhr/index.shtml#a1>

> 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.'

Clearly reflecting the intentions of Article 18 of the UNDHR, this provision goes on to extend limitations to this freedom and is by far one of the most important regional provisions, although it was not fully debated in the UK until the enactment of the Human Rights Act 1998 and the publication of Evans *Freedom of Religion under the European Convention on Human Rights*.[204] Prior to this, the majority of authority concentrated on a general overview of the Strasbourg system and the jurisprudence of the ECtHR.

Since the UNDHR was agreed there has been a further array of International Conventions and Declarations agreed, many of which protect an individual or a specialised set of rights such as CEDAW, which covers discrimination against woman, and CRC, which covers the rights of the child, with the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief covering religious belief itself as well as protection against coercion. However, it is within the ICCPR and ICESCR, which cover a more generalised group of rights, that the most detailed provision concerning freedom of religion is found. The full provision, Article 18, states

> '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

[204] Evans, Carolyn *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001)

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'.[205]

This is a far more substantial provision than that in the UNDHR, extending its impact to the belief, the manifestation of that belief, and the ability to change one's belief. It also introduces limitations to the degree to which the state can interfere in the manifestation of a belief, and covers religious education.

In addition, a number of international organisations have been set up to monitor individual rights or individual groups of rights.[206] Again, although these bodies do not have binding authority, they are able to influence state practice and, more importantly, political relations. Temperman, in his article "Are State Churches Contrary to International Law?"[207] considers that these international organisations, through their production of guidance and soft law, as well as overseeing compliance, are slowly chipping away at states which maintain an established church. Much of this is due to an increasing number of statements on neutrality and impartiality which, while not necessarily condemning established religions, do seek to undermine the ability to treat all religions neutrally. In his book *State-Religion Relationships and Human Rights Law*, published some years earlier, he indicates that the fact that these organisations, including the UN Human Rights Committee, are even raising the issue of the establishment of religions 'reveals a concern on the part of the Committee Members about systems of establishment.'[208] In fact this Committee has repeatedly reported on the difficulties that states with established churches face in fulfilling human rights obligations within their state reporting procedures. However, although their

[205] International Convenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) Article 18. Can be viewed at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

[206] Ahdar & Leigh "Establishment and Religious Freedom" (2004) 49(1) *McGill Law Journal* 635-681

[207] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149

[208] Temperman, Jeroen *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010) 150-151

statements do raise concerns over states that feature an established church, in general their comments do not argue they are contrary to international human rights obligations. For example, in the UN Human Rights Committee's General Comment 22 they state

> 'The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including … [the right to freedom of thought, conscience, and religion and the rights of members of ethnic, religious and linguistic minorities], nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection … [of the law without any discrimination].'[209]

Critics have also concentrated on the fact that any type of established religion, no matter how benign, is capable of indirect coercion by its association with citizenship itself. Discussion on the historical development of the Church of England and how citizenship historically was conjoined between citizenship and membership of the church demonstrates how this could be the case. Potentially this could be taken as extending to the ability of individuals to interact socially. As Ahdar and Leigh explain in their article "Establishment and Religious Freedom",[210] there are some who consider themselves penalised socially for not conforming to the state religion. They state 'The terms commonly used to describe the psychological and social harms experienced by such persons are feelings of being "alienated", "stigmatized", or "ostracized".'[211] This view supplements those of sociologists such as Davie who consider an established church as a type of default religion.[212] Davie's theory also indicates that, although most theorists

[209] Human Rights Committee, General Comment 22, para. 9 (pertaining to Art.18 of the ICCPR). Found at <http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>
[210] (2004) 49(1) *McGill Law Journal* 635-681
[211] Ahdar & Leigh "Establishment and Religious Freedom" (2004) 49(1) *McGill Law Journal* 635-681, 651
[212] This was hinted at by Davie through her use of 'believing without belonging' in Davie, Grace *Religion in Britain since 1945* (Oxford: Blackwell Publishing 1994) and then extended by Davie's assertion of 'vicarious

who argue that establishment indirectly affects the ability to choose your religion are American, there are alternative views forming elsewhere that are not influenced by a non-establishment clause.

The introduction of a limitation clause in Article 18(3) was also something new that introduced an ability for states to interfere with an individual's rights under Article 18(1) and 18(2) should certain conditions be met. This is similar to Article 9(2) of the ECHR which will be discussed further below. Significantly, this incorporates a concept of balancing between the state's duty to protect individual rights and the rights of society as a whole – something that is reflective of some historical provisions used within religious law such as equity and *economia*.[213] It also mirrors some of the legal mechanisms which have been developed in Europe such as proportionality. At a basic level this involves the ability of the state to interfere with an individual's right to exercise their religious freedom so long as it is in conformance with one of the legitimate aims listed within Article 9 [2]. These include matters such as public health and welfare, and protecting public order. So long as the legitimate aim is considered proportionate to the harm caused to the individual's right, then the state's interference will be deemed legal. Vitally, there must a legitimate and democratic reason for this state interference in order to ensure the protection of certain communal or societal rights.

Before moving on to look at more regional human rights law, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief must be made. This acts directly to protect individuals against discrimination on the basis of religion, but it is supplemented by the UN Declarations and instruments mentioned above.[214] It thus does not fit within the credentials of religious freedom itself but does potentially affect the state's relationship with religion. Although there is

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religiosity' in Davie, Grace *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002)

[213] For further discussion of these principles see Adam *Legal Flexibility and the Mission of the Church: Dispensation and Economy in Ecclesiastical Law* (Ashgate Publishing Limited 2011)

[214] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010); Ghanea *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff, 2003)

uncertainty about the status of the Declaration,[215] it has been considered to extend provisions previously put in place in order to meet the needs more fully of religious communities and congregations. Sullivan also asserts that the provisions of the Declaration can be extended to non-religious beliefs despite being aimed at more Western models of religion that are separate from the state and other social institutes.[216] Although the Church of England as an established model is not separated fully from the state protection is extended to practising members despite its predominant aim towards those religious institutes not attached to the state itself.

Due to the non-binding nature of international law, there is not a lot of concentration placed on this section. There are other international positions that act in unison with the law. Some such organisations have been discussed above, and the final role to mention is that of the Special Rapporteur on Freedom of Religion or Belief. Since 2010, this position has been held by Heiner Bielefeldt, Professor of Human Rights and Human Rights Politics in the University of Erlangen-Nurnberg. In general, a large degree of freedom is given to these Special Rapporteurs and this enables them to a degree to pursue their own agendas and interests in the protection of freedom of religion or belief.[217] There is very little in place to measure their success in practical terms, which leaves them to their own commitment and dedication. This again demonstrates how ineffectual international human rights law can be, and how it is dependent upon political commitment by the states and often the individuals or organisations involved in ensuring compliance. Similarly, this makes it very difficult to estimate the impact this position has on the individual state's relationship with religions, especially an established church, as there is no practical means of measuring this. However, their influence may have a considerable political effect that contributes to international and pressures calling for the separation of state and church.

2.2 The Council of Europe

[215] *ibid*
[216] Sullivan 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82 *American Journal of International Law* 487
[217] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)

Founded upon the ECHR, the Council of Europe is signed by forty-eight member states and identifies fundamental rights, including the right to freedom of religion or belief, with the intention of protecting these rights from state interference. Where an interference is alleged, the ECtHR presides, and its judgement is binding on the countries concerned. The role of this court is not to dictate a uniform way of handling these rights, but to rule on varying interpretations in order to allow a degree of flexibility to be maintained by states. As Evans so succinctly states '[E]ven if a group of States agrees to the general principle of freedom of religion or belief in an international treaty, for example, it is quite possible that they do not share an understanding of what values are at stake in making such an agreement.'[218] The ECtHR has therefore developed innovative principles, such as proportionality, in order to allow states to maintain their sovereignty through an acceptance that different models can be equally effective in protecting these rights within a margin of appreciation. In order to appreciate how this has affected state-church relations within Europe, an analysis of the Articles must be put into context alongside the accompanying jurisprudence from the ECtHR. As with the previous chapter, a general overview will be considered with a distinct concentration on models of establishment, the most specific being the UK and the Church of England, as this is where the overriding aims of this thesis remain.

2.2.1 The ECHR and religious freedom in context

As mentioned above, echoing Article 18 of the UNDHR Article 9 of the ECHR is the main provision that protects religious freedom. However, despite its importance, it has met with a high rate of avoidance, as O'Boyle and Warbrick state:

> 'Despite the importance and breadth of the interests protected by Article 9, relatively few applications have been made alleging violations of it and only a small proportion of those have given rise to successful claims.'[219]

[218] Evans, Carolyn *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) 18
[219] *Law of the European Convention on Human Rights* (Oxford University Press 2009)

The first section of this provision, the protection of freedom of thought, conscience and religion in general, has also been used by the courts to establish a set of filtering devices. On a detailed analysis, Article 9(1) protects two aspects: the right to believe, and the right to manifest this belief. These two aspects have come to be known as the *forum internum* and the *forum externam.* The former, the *forum internum,* is considered inviolable, and the later, the *forum externam*, is capable of the subjection to limitation by the state under Article 9(2).[220] Although both provisions under Article 9(1) have been used by the ECtHR as filtering devices, as Article 9(2) allows the state to impose limitations on their exercise overall, the majority are decided on this basis. The hope is that this avoids lengthy debates on what constitutes a religion, despite the fact that traditional religions, especially those with historical roots in Europe, are quicker to be accepted than new religions. An established church especially may thereby distort domestic interpretation of what constitutes a religion, as analogies on some level will inevitably be drawn. This can also be seen in interpretations of belief, with Christianity being the most prevalent example of a religion in Europe. These belief systems may be considered a default example of 'views that attain a certain level of cogency, seriousness, cohesion and importance',[221] with the judiciary themselves admitting a lack of qualification to decide on such matters, especially when touching upon religious doctrines.[222]

Inherently linked with the above is the dichotomy between the *internum* and *externam fora*. This is the distinction between a person's internal consciousness or beliefs and the external way in which these beliefs are manifested in the public sphere. The former is

[220] Evans, Carolyn *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001) discusses the distinction between *internum* and *externum fora* noting that '[N]either the Court nor the Commission has explained what is meant by this term in any detail' (72). However, as Davie states, it is commonly accepted that the internal forum protects the 'cerebral, the internal and the theological … dimensions of religion and belief' which are matters of individual conscience, and the external forum refers to the external manifestation of these beliefs in private or public. See Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370, 367

[221] *Campbell and Cosans v United Kingdom*(1982) 4 EHRR 293. Cited in Doe, Sandberg & Hill *Religion and Law in the United Kingdom* (Kluwer Law International 2011) 68; Hunter-Henin, Myriam *Law, Religious Freedom and Education in Europe* (Ashgate 2012) 311. Further description was given to belief in *R (Williamson) v Secretary of State for Education and Skills* UKHL 15 [2005] 2 AC 246, where Lord Nicholls stated that it must 'be coherent in the sense of being intelligible and capable of being understood' as well as relating to 'matters more than merely trivial. It must possess an adequate degree of seriousness and importance.'

[222] *R (Williamson) v Secretary of State for Education and Skills* UKHL 15 [2005] 2 AC 246

inviolable and the latter is not subject to legitimate limitations. In practice this means the ECtHR will attempt to protect the former but not the latter. As Ferrari states,

> 'If the data emerging from the analysis of the European Court case law are correct, the dividing line mentioned before does not run primarily between different religions but between two different ways of conceiving and experiencing religion, one more focused on the *forum internum* and the other on the *forum externum*.'[223]

In turn this increases the pressure on society to accept the privatisation of religion rather than to allow open manifestations or displays in public space. Having an established church runs contrary to this, as it places religion in the public sphere, allowing open debates and a visible presence.

Case law also appears to suggest that decisions concerning the manifestation of an individual's race or ethnicity are somehow 'more solid and easy to accommodate from a legal point of view'[224] than those of religion. With religious symbols often being curtailed by the courts as motivated by religion rather than being a manifestation,[225] this has again resulted in a position whereby minority religions receive greater protection than Christian religions, and that individuals themselves are brushed over for the debatable benefit of the remainder of society. Consequently the greater emphasis when deciding such cases is the collective religious body, or public, rather than the individual whose Article 9 rights are alleged to have been infringed. Arguably, this contravenes the whole purpose of these rights to begin with. It also becomes complicated when it comes to established religions such as the Church of England, as

[223] Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370, 367
[224] Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304, 297
[225] *R (Shabina Begum) v Headteacher and Governors of Denbigh High School* [2004] EWHC 1389; *R (Playfoot) v Governing Body of Millias School* [2007] EWHC 1698 (Admin); *Eweida and Chaplin v UK* Application nos. 48420/10 and 59842/10 – where it was stated, 'The fact that not all Christians choose to wear a cross should not necessarily undermine the rights of those Christians for whom the display of the cross is an essential and reasonable aspect of their autonomous interpretation of their faith.' Para 15.

identifying membership is so problematical and as a number of practices have come to be viewed by many individuals as cultural rather than religious.[226]

The way in which more traditional religions are protected is also reflected in the court's third filtering device which works to limit its application when a person chooses to self-limit their own religious freedom within their work or educational choices. As this is not something which directly affects the state's relationship with the established church, this is not an area that will be dwelt upon; however, as it has effected the interpretation of religious freedom significantly in relation to pluralism, it equally needs acknowledgement. The importance of accepting the presence of a multitude of religions makes it essential to ensure that a solution which encourages pluralism is sought, and this means that any pressure on a religious group to change its practices must be avoided at all costs – especially where pluralism can be encouraged and when an alternative way of achieving that aim is available and appropriate.[227] There is also a danger that this encourages the judiciary to look again at what constitutes a genuine belief. In doing so, there is a danger that more traditional religions will, again, attract a higher degree of protection, as their core beliefs are easier to identify and may be accepted at face value. This has already been seen in some countries which more readily accept traditional religions, or those that look similar. Logically, it also means that the only realistic way of searching for the authenticity of a person's belief is to stretch the bounds of the *forum externam* in order to establish how integral it is to the individual in question.[228] However, arguably this not only stretches its bounds to the place where the *forum externam* meets the *forum internum*, but it actually crosses over the boundary into the *forum internum*. This essentially penetrates the inviolable sphere of personal belief. However, if McCrudden's interpretation of *Eweida v British Airways*[229] is correct and religion is treated differently to other matters of discrimination purely due to it

[226] *Lautsi v Italy* App. No. 30814/06, [2011] Eur. Ct. H.R. (G.C); Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304

[227] McCrudden, Christopher "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38

[228] This is reflected in the case law discussed above.

[229] [2010] EWCA Civ 80

being an external choice, then judges may have no option but 'to enter the internal viewpoint in the future.'[230]

Article 14 is closely associated with a number of these cases. Acting as a subsidiary claim alongside one of the more substantial rights (including freedom of religion) this Article protects the area of non-discrimination. It reads

> 'The enjoyment of the rights and freedoms set out in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status.'

As this right does not constitute an individual substantive human right it has been found that domestic law is often more able to protect individuals against discrimination. This was seen in the *R (on the application of Watkins-Singh) v Aberdare Girls High School Governors*,[231] where discrimination law provided the foundations for an argument against a school dress code that prevented the applicant wearing a Kara bracelet. Although Article 14 was not argued in conjunction with Article 9 in this case, but with Article 8, the result reinforced the notion that the ECHR merely acts as indicators of what rights are to be protected, thus acting as a safeguard against deliberate unjustified interference. This gives minimal protection to citizens whilst allowing states to offer superior protection under their own domestic law. However, Temperman believes that this Article could be seen as fundamental to arguing that established churches are essentially discriminatory as they require the state to view them and their members in a different way than others. Although this may not be reflected in legislation, it may be manifested in social and political trends. He states that

> 'The general reference to any right set forth by law means that in addition to all rights granted by European Convention, any other legal right under national law must be guaranteed in an egalitarian fashion. Accordingly, under the updated

[230] McCrudden, Christopher "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38, 28. This would also indicate that Petkoff's interpretation of religious symbols as presentations rather than representations is also correct. Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304, 297

[231] [2008] EWHC 1865

> Convention it would seem that (constitutional) laws that create a system whereby some people are *de jure* member of the official, state protected religion whilst other people are *de jure* member of an unprivileged group are untenable. Future cases will show how willing or unwilling the European Court of Human Rights (which in fact has in related areas already started to look into complaints alleging a violation of the general prohibition of discrimination) is to consider state church systems in light of the autonomous equality principle and revise previous case law.'[232]

As Temperman states, it is only through future cases that we will be able to answer whether the court is now willing to revise this previous case law in light of the principle of autonomous equality.

2.2.2 The effect this has on church-state relationships

The entrance into the Council of Europe has had a varying effect on the state's relationships with established churches. As was seen in Robbers tripartite system, established churches come in a number of differing forms and their presence does not necessarily indicate strong constitutional ties in any practical sense. This means that in countries such as Greece, or the UK in relation to the Church of Scotland, very little effect has been felt. However, for countries such as Denmark, whose 'folk church' is seen as akin to a governmental department, and the Church of England, which enjoys a number of legal and political privileges, the effects have been more apparent. As seen, these effects have not always been highlighted through legal cause but through social changes influenced and moulded by the change in perceptions to human rights, specifically religious freedom. Political and legal theorists have also been more eager to reject religion within the political arena, arguing that its presence counters secularism. Whether this will now dwindle in light of post-secular theories has yet to be seen.[233] What is certain is that its importance cannot be ignored, as political debate often mirrors changes in majority views. Changing attitudes towards the established church in the UK can be considered two-fold. First, it is apparent that questions concerning the

[232] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149, 135

[233] These will be discussed in the following chapter.

privatisation of religion are being asked, and second, questions are being raised towards the role of the Monarch not only as the Supreme Governor of the Church of England but also as Head of the State. The second question here will be addressed at greater length in subsequent chapters, but it is important to note that, should one of these titles be rejected, the other may be substantially weakened.

Finally, in relation to state churches more generally, it has been noted that, although accepted by international law, there is a constant chipping at their legitimacy by international and regional monitoring bodies. These bodies, which are responsible for overseeing compliance to international human rights law, are unafraid to question the legitimacy of state legislation that may contravene international obligations, even where the legislation was in force prior to the signing and ratification of the relevant International Treaty. As noted, this matter is discussed fully in Temperman's recent article "Are state-churches contrary to international law?",[234] where he demonstrates, through challenges to laws prohibiting sodomy, the way in which states are challenged to change their laws, even though these laws were enacted prior to their entry into the international organization. Undeniably, there is a significant difference between attempts to counter sodomy laws and constitutional matters such as church-state models, as he acknowledges:

> 'There is a significant difference between states that had sodomy laws (and other such laws or policies) in place, and states that had state church regimes in place at the time of ratification: the former concerns a concrete policy area (norms of propriety and sexual taboos), whereas the latter concerns an aspect of the internal political system (viz., the desired constitutional church-state model). It is, accordingly, only to be expected that monitoring bodies are more deferential and must display restraint in meddling in the latter affairs.'[235]

However, the constant chipping away and subtle criticism increases political and social pressure to re-evaluate models of established churches in order to conform with wider accepted models, as well as constant statements that it is harder for such states to

[234] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149
[235] *ibid* 122

comply with their duties under international and regional human rights law.[236] What is more, as Temperman illustrates, there is even more pressure put on models that are undemocratic to change, and the longer that international monitoring bodies continue to insinuate that models of state church or established churches are undemocratic, the quicker questions of change will be raised. As he states

> 'Contemporary human rights theory and practice have reduced the number of acceptable options. Even though the precise degree is still subject to intense debate, some minimal form of formal democracy is considered indispensable, implying also that downright anti-democratic policies and situations do engage international law. It is no longer deemed a legitimate sovereign decision to adopt an outright anti-democratic political system.'[237]

This gives states very little option but to conform under international scrutiny through a constant 'nibbling away at the margins of the unacceptable rather than through the imposition of a perceived universal ideal.'[238]

To a lesser extent this was also seen in the Eastern European expansion of the EU when those who became members in 2004 and 2007 looked to the west in order to ensure that their governmental relations with religions fit within acceptable democratic models. The problem they faced was that there was no uniformity in acceptable models in the west, which left them open to criticism when, and after, they joined.[239] However, as has been asserted on more than one occasion, international monitoring and enforcement bodies must be careful not to encroach on state sovereignty too forcefully, as it may risk weakening their authority and the loss of their own legitimacy as well as their founding Treaty, especially should they begin to outlaw certain state laws or frameworks.[240]

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[236] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)
[237] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149
[238] *ibid* 123
[239] Stan, Lavinia & Turcescu, Lucian *Church, State, and Democracy in Expanding Europe* (OUP 2011)
[240] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149; Stan, Lavinia & Turcescu, Lucian Church, State, and Democracy in Expanding Europe (OUP 2011)

2.3 European Union

The European Union is quite a different creature. Based on a regional area and designed on voluntary cooperation by states, the organization came into being in 1957 through the Treaty of Rome. At the time it was called the European Economic Communities (ECC; now the European Union (EU)) and consisted of only six signatory countries.[241] This soon grew, and now membership stands at twenty-eight member states.[242] The institutional model itself derives from the European Coal and Steel Community (ECSC), which came into being five years prior, and the two were merged together under the Merger Treaty in 1965. At the time of their inception, the institutes had no interest in human rights and would not have had any effect on the state's relationship with religion whatsoever. Their intention, although not exclusive, revolved around economic policies, with a view to developing a single common market within Europe. However, in 1992, the Treaty of Maastricht introduced cultural and social rights, and this included religious freedom. This meant that the EU began to be influential on the state's relationship with religions, through implicit recognition to begin with, and now through their increased inter-religious approach.

Since the recognition of cultural and social rights, the EU's approach to human rights has broadened, and it has been stated that all member states are directly required to abide by the human rights set out in the ECHR, and that all new member states must comply with the ECHR if they do not conform already. Their approach to the relationship between member states and religious organisations has also changed, and the more recent Treaty of Lisbon recognized respect for the status of churches, religious associations or communities, as well as comparable philosophical and non-confessional organisations.[243] The section below will discuss the EU's approach to religion, why this is of importance, and the impact this has had on state's relations with religion.

2.3.1 The EU's approach to religious freedom

[241] France, Belgium, Germany, Italy, Luxemburg and the Netherlands
[242] A full list can be found on the Europa website at <http://europa.eu/about-eu/countries/> last accessed 25th April 2013
[243] The Treaty of Lisbon Article 17

Although religion itself has never been the main focus of the EU at any point, there remains much to be said about the place of religious organisations within the Union. Since the recognition of cultural and social rights in 1992, religion has been identified as contributing to the individual's sense of personal identity and, more collectively, to a European identity. This factor is recognized directly within the Treaty of Lisbon, and Council decisions are increasingly calling for a more disciplinary approach towards religion, in order to encourage neutrality towards religion and to recognise the diverse religious landscape of Europe. Law, being recognized by Doe as 'the place where religion and politics meet',[244] plays an important role in developing a more unified approach to the attitude of member states to religions generally. This means that although a trend towards separation of church and state may 'constitute[s] a 'common denominator'…. that does not impede collaboration, agreement and synergies.' According to Casuscelli, this means that, 'In Europe a form of contractual separation, or of collaborative neutrality, is thus becoming established.'[245]

Before the Treaty of Lisbon was complete, this collaborative neutrality was far from agreed and discussions were raised over the inclusion of religion itself within the European Constitution's preamble, particularly in relation to Europe's Christian roots. Although ultimately rejected, this was an important indicator of the significance that religion plays within Europe both in present times and more significantly in historical developments. In fact, historically religion has been used by a number of European states, not least the UK, to establish a Monarchical and political authority. The strength of this argument comes from knowing that their power had been sent by God himself who is infallible. It is only in more recent times that a separation between state and divine authority has been acknowledged and, as will be discussed further below, state church models have been identified by some as inextricably linked to the development of the European royal families.[246] This makes it quite apparent that history, politics and religion are entwined within the building fabric of Europe, with each mutually

[244] Norman Doe "Towards a 'Common Law' on Religion in the European Union" 141-160 in Leustean, Lucian N. & Madeley, John T.S. *Religion, Politics and Law in the European Union* (Taylor & Francis 2010), 141
[245] Casuscelli, Giuseppe 'State and Religion in Europe' 131-146 in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 135
[246] Temperman, Jeroen *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010)

supporting the other in order to fully embody the authority of the state. It thus comes as no surprise that it has also been used to establish a foothold of power, and as Rivers states

> 'It is hard for a constitutional preamble to avoid drawing attention to the ultimate source from which it derives its political values. It is thus common, even in modern constitutions, to invoke God as the supreme authority in human affairs'[247]

It is natural to assume that this history has influenced current state leaders to fight for its inclusion within the European Constitution. However, the fabric of Europe itself has changed, and political and legal theorists have very much swayed towards a separation of state and church, as seen in the recent emergence of post-secularism writings.[248]

Ultimately, the inclusion of religion within the preamble was rejected. Instead, a number of provisions were entered making reference to respect for religious associations and their philosophical equivalents.[249] These are identified within the Treaty as well as other secondary sources. More generally, Professor Doe has identified four main sources that relate to religion within Europe.[250] These are formal sources, general principles common to and induced from similarities between the laws on religion in member states, the ECHR and the laws of religious traditions themselves. His theory deems that, within these four sources, eight fundamental principles of the European law of religion can be found, each indicating a common European framework. All of these principles identify the importance of religious autonomy and state sovereignty within Europe whilst conforming to set standards of religious freedom. However, although he states that 'The evidence suggests that broadly the claim is accurate: these eight proposed principles are loosely consistent with the principles of religion law common to the member states', he then concedes that 'the position appears to be more complex than this', stating that 'only an articulation of the 'common law' of religion in member states could reveal the complexities involved and yield more

[247] Rivers, Julian "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union" (2004) 7(34) *Ecclesiastical Law Journal* 267-290, 269

[248] These will be discussed fully in the next section.

[249] A copy of the full text can be downloaded from <http://europa.eu/lisbon_treaty/full_text/index_en.htm>

[250] Norman Doe "Towards a 'Common Law' on Religion in the European Union" 141-160 in Leustean, Lucian N. & Madeley, John T.S. *Religion, Politics and Law in the European Union* (Taylor & Francis 2010)

conclusive evidence'.[251] This, as Doe indicates, would be no easy task, and may reveal the same inconsistencies and problems as attempts to define religion have. This leaves the question of a common framework open ended, with problems and possibilities from the top and the bottom.

In contrast to the main provisions of the ECHR that relate to religious freedom, those in EU law are not as directly effective. They are based very much on recognition and respect rather than actual changes to a state's relationship with religion, a relationship that remains recognised as subject to individual state sovereignty. The only exception to this is where religions are granted an express exemption from certain obligations or regulations. In a practical sense the effect of such exemptions are similar to that of the margin of appreciation that features highly within jurisprudence of the ECtHR. This allows individual states to develop their own approach to religion so long as they recognize a form of equality within their treatment. The majority of these rules come in the form of soft law, with no real method of enforcement or associated mechanism, which also gives little incentive to strengthen their approach to religious freedom. Often, documents relating to such matters are hidden in the depths of websites or documents relating to issues perceived as more socially pressing. This results all too frequently in little practical attention being paid to them.

Many of the newly joined Eastern European countries came from a communist background and therefore had a history of control and persecution over religious organisations. It is only since 1989 that these states have been able to develop their relationship with churches in a constructive manner and religions have been given their freedom. Consequently, most of their constitutions reflect religious freedom, with some states being directly reactant to their vision to join the EU. Under Robbers' tripartite system,[252] most of these counties would be recognized within the hybrid model.[253] However, as Professor Stan demonstrates, upon closer analysis these states express a

[251] *ibid* 152

[252] The tripartite system will be discussed more fully within chapter 5. The model consists of three frameworks, the state church model, the separation model and the hybrid model. See Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)

[253] The hybrid model features a degree of separation between the state and church coupled with a recognition that the two have a set of common tasks which directly link the state relationship with religions.

variety of models, none of which are based on a single document.[254] This, she states, is unsurprising, as "the EU did not ask for the adoption of a unique church-state relations model beyond the observance of fundamental human rights",[255] and as western European models express no uniform church-state relations, no standard benchmark was provided for them to emulate. This meant that although religious freedom was essential, no specific guidance was given to incorporating such freedom into their legal and political system, or to the development of their relationship with religions. In her most recent publication, Stan, by considering these relations at an individual country level, identifies three models. First is the church-state separation model, as found in the Czech republic. Secondly, the pluralist model, as found in Hungary, Bulgaria and Latvia, sees society as being "made up of complementary autonomous spheres",[256] such as education, family and religion, each of which deserves support and recognition. Thirdly, the dominant religion model accounts for all remaining eastern European states from the 2004 and 2007 expansion. This is where, although not recognised formally, one religion is given informal recognition through historic precedence and privileged ties to the state. This is slightly wider than Robbers use of the state-church model which required the formal recognition of a religious organisation within the country's legal constitution. This would mean, contrary to Robbers model, that countries such as Ireland would be classified as a dominant church model rather than the hybrid model due to their overwhelming support for the Catholic Church. However, there are a number of similarities that can clearly be drawn between the two authorities.

Through this more concentrated analysis at state level there is a danger of losing sight of the wider cooperative model that has broadly been observed throughout member states of the EU. The importance of cooperation and neutrality is not that states are prevented from identifying one religion, but that each citizen is dealt with impartially by the state which remains neutral on the issue of what type of life they lead.[257] This means that concentration should not be on the religions themselves but on the impact

[254] Stan, Lavinia "Church-State Relations in the Expanded Europe: Between Religious Pluralism and Church Establishment" (Conference paper 2009) < http://www.academia.edu/1657571/Church-State_Relations_in_the_Expanded_Europe_Between_Religious_Pluralism_and_Church_Establishment> accessed 06/06/2013

[255] *ibid*

[256] Stan & Turcescu *Church, State, and Democracy in Expanding Europe* (OUP 2011), 13

[257] A definition taken from Madeley, John and Enyedi, Zsolt *Church and State in Contempory Europe: the chimera of neutrality* (Routledge 2003)

the state has on individuals and the formation of their beliefs[258] – a matter that becomes more complicated when national identity is tied closely to a specific religion, as has been the case in most European countries historically, regardless of which models are used to categorise them. It is also important not to forget that religion also has an impact on the state and that religious actors can have a serious influence over governmental action.[259] This is especially true for Christian religions, which historically have been rooted within the European political landscape at both regional and domestic levels.

Although, as discussed, this historical recognition of Christian history was not recognised within the preamble of the Treaty of Lisbon, other avenues of recognition, and more importantly discourse, have been opened. Article 17 of the TFEU under the Treaty of Lisbon specifically facilitates this stating

> 1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
> 2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
> 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

Notably this idea of open dialogue is not new, having originated from the Declaration No 11 to the Treaty of Amsterdam. Also, in 1970 diplomatic relations were entered into with the Holy See. Furthermore, in 1990, President Jacques Delors began to hold regular dialogue meetings between the European Commission and the European Ecumenical Commission for Church and Society (now the CSC). These meetings continue today and are now extended to the Commission of the Bishops' Conferences of the European Community (COMECE), and a range of dialogical platforms between EU

[258] This was best demonstrated in an EU Statement on Freedom of Religion or Belief given in 1999 when it was stated "matters governing religion, belief and conscience are not to be decided by the state, but in the individual's conscience. The role of the state is not to decide religious truth, but to promote tolerance so that people can pursue truth as individuals and in communities. Rather than endorsing any particular religion or belief, the EU endorses the notion that people should be free – at any time – to have, to profess, to maintain, to adopt, and to change their own beliefs." Found at <www.cesnur.org/testi/EU_stat.htm>

[259] Stan & Turcescu *Church, State, and Democracy in Expanding Europe* (OUP 2011)

officials and European religious organisations and networks has been seen.[260] Although such platforms are not binding, a clear intention to open channels of discourse is evident and Article 17 reinforces the regularity of such measures. It also provides a degree of transparency between church, state and the bodies of the European Union, as well as citizens who are able to access documents online.

2.3.2 The impact this has had on church-state relations

One of the main problems faced by the EU when it comes to the relations between member states and the church is the question of state sovereignty. This is true of all human rights, as the EU essentially forms the basis of an economic, monetary and commercial organisation that supports human rights but considers direct interference with the approach of member states to these rights as outside their remit. Should they choose to pursue this avenue (direct interference), the result may have a detrimental effect on their authority in all matters. For example, should they choose to enact legislation directly effecting state-church relations by prohibiting established churches, it may call into question the legitimacy of the EU in its approach to financing charitable organisations. It may also introduce a peculiar situation whereby the EU has stronger views and intentions than the Council of Europe. This would effectively create a conflict in authority and legitimacy as the Council of Europe has a more direct interest in such matters with its formation in human rights protection. These institutes are finely balanced and, although imperative that they support each other, it is equally important that they maintain concentration in their own sphere of authority. To do otherwise would create conflicts and raise questions as to their intention, legitimacy and purpose. However, as Temperman asserted on a more international scale, there is a sense that through increasing volumes of guidance and soft law, there is a constant chipping away of established church structures, with increasing encouragement for neutrality and impartiality.[261] This means that although no direct interference comes from the EU, a

[260] COMECE and Article 17 on the Functioning of the European Union (2010) Doc 8.1 (EN) found at <http://humanistfederation.eu/wp-content/uploads/2011/01/94-COMECE-CEC-Article-17-submission-2010.pdf>

[261] Temperman "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149

continuation of critical statements, debates and reports may be effective in gradually eroding the ties between states and state churches, creating difficulties in defending the legitimacy of an established church such as the Church of England. This could be said to be supported by increases in dialogue with all religions, as all religions are included on a neutral basis, creating a uniformity in treatment which does not preclude individual member states from favouring a religion, but demonstrates the equal standing of all on a regional scale.

However, this argument could also be used to contend that such discourse inadvertently supports established churches as these critical statements do not affect the ability to treat all religions neutrally in their dialogue, either externally or internally. Consequently, this means that having an established church does not have to effect a state's ability to protect religious freedom. As Evans and Christopher state

> 'While establishment certainly presents some dangers to religious freedom, and many states with an established religion have very poor protection of religious freedom, it does not follow that establishment will necessarily lead to the oppression of religious freedom for those who do not belong to the established church.'[262]

A more detailed discussion on this matter is considered below. However, it is worth noting that this statement is somewhat supported by the jurisprudence of the EctHR, although their reasoning is bound within the margin of appreciation and proportionality. It is also considered important to maintain the superiority of the Council of Europe in matters concerning human rights.

In their book, *Church, State, and Democracy in Expanding Europe*, Stan and Turcescu introduce the view that it is essential to consider not only state~~s~~ interference in religious affairs but also the other side of the coin, the 'impact of religious actors and symbols on state institutions and public policies'.[263] There is a tendency to forget this, but it is evident that potentially, established, national or privileged churches are as influential on the state as the state is on them. This position would be considered contrary to religious freedom and the EU's approach to neutrality. The effect that a

[262] Evans, Carolyn and Thomas, Christopher A "Church-State Relations in the European Court of Human Rights" (2006) *Brigham Young University Law Review* 669-725, 707

[263] Stan and Turcescu *Church, State, and Democracy in Expanding Europe* (OUP 2011) 6

church has politically can potentially influence the laws made, and this can often have a lingering effect on citizens which can effect social structures and perspectives alike. If this is true then a neutral approach would be impossible when an established church is present. In order to fully appreciate the truth of this statement, further in depth studies would be needed on individual countries such as Poland and the Czech Republic, which have a high Catholic influence, and the UK, where the bishops of the Church of England sit in the House of Lords.[264] However, it is equally true that the presence of an established church is not conclusive of political influence, as the Church of Scotland demonstrates.[265] This theory therefore requires further study before any conclusions are drawn and presently may be considered more illustrative of historical and social connections rather than of legal and political connections. These churches generally have very strong historical connections and high membership which, as was seen in Scandinavian and Eastern European countries, is inextricably linked to national identity. So long as their influence is not high within the political structure, then such relations do not necessarily threaten the state's ability to fulfil its duty to facilitate religious freedom.

It is also worth noting that although the EU supports the Council of Europe and requires each member state to adhere to the ECHR it is not yet a signatory itself. Consequently, this means that it is currently unable to issue proceedings for alleged breaches of the convention rights. It is however currently in negotiation with the Council of Europe as of the 16th February 2010.[266] If successful, this would mean that they would have to comply with the convention rights themselves and, more importantly, they would be able to bring proceedings against states for alleged breaches of the ECHR. It would also mean that their Charter of Fundamental Rights may lose part of its significance in relation to human rights as they would already be covered by the ECHR.[267] Before this happens there are a number of serious issues that will have to be discussed, not least the fact that all domestic courts must be taken prior to initiating proceedings under the

[264] Some such research has been conducted on the position of Church of England Bishops in the House of Lords, however more is needed. See Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490

[265] The Church of Scotland is discussed in more detail on pages 48-52.

[266] Cranmer, Frank "The Churches and European Law" 29/06/2010 found at <http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf last> accessed 07/06/2013

[267] *ibid*

ECHR. This would become complex if consideration is given to the ability to seek an opinion from the European Court of Justice. Clarification would be needed on when this is required, and this may not be possible until such circumstances have been encountered.[268]

There has, however, undoubtedly been a positive effect in encouraging inter-religious communication between religions on a regional level. Organisations such as the CSC and COMECE are effective in regional discourse and provide an abundance of material for domestic churches. This has also enhanced religious cooperation within states by setting an example of how religions can work together to enhance their impact both socially and politically.

2.4 Conclusion

It can be seen from the above that no specific international or regional instruments give a clear indication of what constitutes a good state relationship with religion. However, it is equally evident that more regional instruments are able to mould models of best practice through guidance, statements, judgements and comments. It may also be considered that regional instruments are able to monitor legal provisions more successfully due to more intimate political relationships and the areas within which they are working. Within the Council of Europe, the ECtHR has introduced a number of filtering methods and interpretational tools to help with their application of law, and some of these have also filtered out into member states. The down side to working within such an area is that due to the region's Christian history, many of the states, the UK being one of them, feature a very close relationship with a Christian church, and this has been acknowledged by academic authorities.[269] Although none of these instruments have outlawed established churches, a growing concern that such states will become unable to fulfil their human rights duties has been expressed and, as with the Church of

[268] *ibid*

[269] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149; Stan and Turcescu *Church, State, and Democracy in Expanding Europe* (OUP 2011); Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)

England, consideration has been made as to whether disestablishment is occurring already on a piecemeal basis partly as a result of such pressures.[270]

It has also been seen that the minimum threshold set for protection by the ECHR clearly demonstrates a number of deficiencies within regional protection of human rights, and it has been considered that this could be detrimental to the law-making capabilities of regional bodies. As Stan and Turcesca state

> 'There are signs that the quality of the legislation may suffer from the lowest-common-denominator style bargaining among so many member states with diverging standards, interests, priorities, and goals.'[271]

The use of the margin of appreciation and proportionality also allows a large divergence in case judgements, leaving applicants and states in a precarious position. In turn, this feeds down to domestic courts who refer to the judgments of the ECtHR. Earlier reference was made to how this led to the UK courts continuing to enforce the 'specific situation' rule sometime after the ECtHR had rendered it virtually redundant.

However, regardless of the above, these provisions allow recognition by a wider range of regional and international bodies and enforce greater sociological and political pressure on states to change in order to move in line with new models of democracy. This appears to support a co-operational model of church and state which facilitates the neutral treatment of religions. Church-state models including established churches are strongly rejected politically though not deemed illegal. This political rejection is mirrored in monitoring agencies and a continuous reinforcement of this is working to gradually chip away at such models. Stronger emphasis is also being put on sociological factors, as is reflective in Temperman's statement

> 'In light of the empirical evidence increasingly available, the subsidiarity defense of establishment would be of a similar caliber to maintaining that as long as it is theoretically possible for a non-democratic state to fulfill all of its human rights obligations, we should not criticize authoritarian regimes *in se* – state practice so

[270] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)
[271] Stan, Lavinia & Turcescu, Lucian Church, State, and Democracy in Expanding Europe (OUP 2011) 3

overwhelmingly indicates that *full* compliance *is* excluded that the time is right to start addressing the underlying systemic defects.'[272]

As these criticisms become louder and more insistent, it is highly likely that some form of change is going to come in the not so distant future. In order to prevent such a change, states with established churches will have to convince critics that they are capable not only of facilitating religious freedom but of treating each religion in a completely neutral way. Alternatively, they will have to look more seriously at the practicalities of disestablishment.

[272] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149, 143

Chapter 3:

Establishment v Disestablishment

Building on the prior section, the aim of this chapter is to produce an informed discussion on some of the debates that have developed over whether the established Church of England can continue to be justified in today's society, or whether it would be more appropriate for disestablishment to occur. Some of these debates have been directly influenced by the preceding discussions on international and regional human rights law, and some have their roots in more historical theories. Many of those that feature within the secularisation section began as a direct result of the religious reformation and have progressed towards theories that did not rely on a divine entity to grant state authority. These theories will be the starting point for this chapter, and it should be noted that at times they have constituted a direct threat towards established religions due to their determination not to connect state authority with any religion.

Following on from this will be a discussion on the viewpoints of other religions. For many there is a temptation to approach this discussion with a preconception that other religions will automatically be opposed to an established religion due to the number of benefits they receive from the state in comparison to their own organisations. Their privileged status can be interpreted as giving them special priority, both constitutionally and in practice. However, as this section unfolds it will become clear that such assumptions are not necessarily correct. In fact, the Church of England enjoys considerable support from other religions who view its approach to inter-religious communication and plurality within the state legal structure as beneficial to all. This is especially so when it comes to its ability to voice concerns within the public sphere that then facilitate the ability of other religions to participate in society. Often this has meant that the representatives of the establishment that work within the political system are subject to high degrees of lobbying. Although those concerned are not always certain how to respond to such lobbying, and their success is not easy to

measure, they are able to address issues put forward by others.[273] Other religions thereby may not be keen on the way that religion is kept in the public sphere but they demonstrate high levels of concern about this public element being withdrawn.

Before concluding, consideration will be drawn from the Church of England itself. The analysis given in the last two chapters has had a direct effect on the way views within the established church have changed. There is a reflectiveness of how new theories which are detached from religion have developed, and whether it be secularist theories, religious diversity, varying political approaches or the influx of human rights law, all of these have influenced the way that the Church of England views itself in society. It has already been noted how it has had to become more plural in its approach to other religious organisations in order to defend its relationship with the state, and how this relationship was not what was envisioned when the Church of England was first constituted. It is therefore unsurprising that attitudes towards establishment, or more importantly towards the question of disestablishment, have begun to be asked within the church itself. For example Archbishop Ramsey (before he took office) gave several statements concerning disestablishment,[274] and subsequent Archbishops of Canterbury have also discussed the matter.[275] This change in attitudes has no doubt influenced the approach of the church towards its relationship with the state and this will be an important consideration of this thesis. Should calls for disestablishment become too loud within the church itself it is likely that the relationship will change significantly, although in practical terms there may be an unwillingness to move disestablishment forward alone. It is likely that the church would seek support from the state, the Monarch and from society generally. These matters will be discussed within the penultimate chapter in order to analyse the practicalities of disestablishment.

Notably, what is not covered within this chapter is political theory. This is due to the constraints of the thesis itself and because a number of these theorists are covered within the final chapter when discussing the practicalities of any attempt to disestablish

[273] Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490

[274] Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623

[275] Cumper, Peter "Religious Liberty in the UK" in Van der Vyver and Witte Jr *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Press, 1996) 205-242

the church itself. It is felt that this chapter is best concentrated on those areas that challenge the established structure outside of the state and how these potentially influence the state's relationship with religions, and to a certain degree with comparable non-religious organisations.

3.1 Secularisation and establishment

The historic terms of the state's relationship with the church has been touched upon in the preceding pages and it has been seen how the state used the church to socially engineer governmental authority, with the state's power deriving divine decree. At first, during Medieval times, this affirmation was given through the relationship with the Roman Catholic Church. During the religious reformation, Henry VIII chose to break this relationship and affirmed his own authority through statute and the use of force. His newly established church, The Church of England, was given authority straight from the Lord, and he, as Supreme Head of the Church of England, was given divine authority to rule in both secular matters *and* spiritual matters. Although considerable tensions arose from the Royal family during the subsequent Tudor reigns, which cost many Anglican and Catholic lives, the established church was fully restored under Elizabeth I, who inaugurated the title 'Supreme governor of the Church of England'[276] which continues to be used today. From this point onward until the Toleration Act 1689 there was only one church within the realm and membership and citizenship were as one.[277] The Age of Enlightenment brought with it new types of theorist who rejected any grant of divine authority by separating out the secular and spiritual authority. This reflected changes to society's views on religion which impacted both their own framework, and their relationship with the state. These changes in thinking echoed throughout Europe, whose citizens and leaders began to reject the dominance that the Roman Catholic Church hitherto held. New theories were conceived in an attempt to justify state authority without using religion as a basis. This meant taking a step away from political

[276] Act of Supremacy 1559

[277] Rivers, Julian The Law of Organized Religions: Between Establishment and Secularism (Oxford: Oxford University Press, 2010); Furlong, Monica *The C of E: The State it's in, the past and the Present* (2000, SPCK); Outhwaite, R.B *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006)

theory and introducing conceptions that drew from the way that society conformed to laws and chose to obey them for their own self-preservation. These theories are sometimes referred to as transcending religious sectarianism,[278] and some consider them to have developed from the Lutheran belief that the kingdom was ruled by two equal bodies, one governing the temporal spheres and the other the spiritual. As Gearon quotes from the Augsburg Confession,

> 'The task of the church, in the words of the Augsburg Confession (written by Melanchthon in consultation with Luther) "was to preach the Gospel and administer the sacraments," while "temporal authority is concerned with matters altogether different from the Gospel."[279]

The separation itself appears to indicate that all matters other than that of the Gospel belong to the state and are consequently a matter for the secular authority rather than the church. This would mean that the state has far more authority over most matters and are able to legislate on any matters that are removed from spiritual concerns that may be linked to the Gospel. The Gospel is then confined to those matters concerned with the salvation of souls. One of the most difficult areas in which to divide jurisdiction was that of human rights, which was considered by some a matter of soteriology and by others a matter for the state. Above we saw how some theorists separated the secular and spiritual spheres completely, placing human rights, as they involved morality, within the spiritual sphere. Luther's writings appeared to support this, and statements such as 'In the same way that the doctrine of justification by faith affirms God's unconditional acceptance of the sinner, human rights must be conferred on all people unconditionally'[280] were used to link the two. However, not all agreed with this interpretation of Lutheranism and some, including Trutz, saw human rights as remaining a secular phenomenon despite this statement. The fact that the church encouraged members to become actively involved with politics also appeared to indicate that a cross-over was possible between secular and ecclesiastical matters, with human rights being one of the more obvious areas for this to happen. Calvinists took a

[278] Ishay, Micheline R *The History of Human Rights: From Ancient times to the globalization era* (2004, University of California Press)
[279] Gearon, Liam *Human Rights & Religion: A Reader* (Sussex University Press, 2002) 109
[280] *ibid* 110

very different view, believing that politics were essentially the 'affairs of God to be discerned within Scripture and rationally tested within the community of faith.'[281]

Fundamentally, both the Calvinist and the Lutheran debates revolved around the same concept, that of the common or communal good, and this is a concept that is inherent to all religions. As Ishay states

> 'They all urge protection for the poor, the disabled, the sick, and the powerless, praise good and impartial rulings, encourage some forms of powerless, praise good and impartial rulings, encourage some form of social and economic justice, condemn arbitrary killing, offer moral prescriptions for wartime, and so forth.'[282]

All religions thereby offered a moral standpoint on important matters that affected the common good. The problem that secularist theorists had was not the ideals that this vision entailed, but the justification of the mission itself. It was here that their views split, and new authorities arose developing theories that were not reliant on spirituality. These new theorists continued to use the term natural law, but they concentrated on an attempt to solve some of the previous problems in society which had remained despite religious interference and arguably had demonstrated religion's inability to unite everyone. They attempted to develop a more logical basis for human rights and state-church relations. The immediate repercussions of these statements are that these new theories did not support a close relationship between the state and church, and this meant that established religions would become marginalised as a consequence. For example Locke, in his belief that all persons should live in a state of equality and freedom, presented a theory that bound humans together through a social contract. This social contract empowered the state to act on behalf of its citizens,[283] which meant that the government's authority came directly from the people and not from God or any other metaphysical source. This constituted a direct contrast to Christian teachings which argued that state authority originates directly from God, and thus logically

[281] *ibid* 112
[282] Ishay, Micheline R *The History of Human Rights: From Ancient Times to the Globalization Era* (2004, University of California Press) 60
[283] Shestack, Jerome J, "The Philosophic Foundations of Human Rights" (1998) 20 *Human Rights Quarterly* 201-234

rejecting models of state religion that united state or secular authority under a divine heading. Locke's theory rendered the relationship between state and church redundant. According to his theory, human rights, which have both a spiritual and secular connection, were said to be inherent to individuals alone, and were merely protected by the state. Established churches played no part in Locke's theories. Vitoria and Suarez, who were also opposed to religious conformity, developed theories that echoed the natural law theory of the state.[284] This meant that all rights, such as the right to own property, were granted by the state and therefore were given by positive law, and this meant that natural law was no more than a positive system of rights laid down by the state. Thus, any rights or state protection granted were by human-made law, and this amounted to a complete rejection of any metaphysical layer of law that transcended human rationality. Locke and his contemporaries were somewhat opposed to this, believing that there was a natural system of law that transcended positive law. This would mean that a right, such as the right to hold property, was not merely a privilege granted by the state but a right of nature;[285] these natural law theorists led to the more modern natural rights theory, the theories most closely associated with the modern human rights debate. These theories did not just involve a revolt against religion and thereby established churches, but also against absolute monarchy. As Shestack states:

> 'Natural rights theory makes an important contribution to human rights. It affords an appeal from the realities of naked power to a higher authority that is asserted for the protection of human rights. It identifies with and provides security for human freedom and equality, from which other human rights easily flow.'[286]

However, as with all theories that exist around self-evident ideals, problems occur in identifying which rights are to be considered natural, and in response there are those who consider that by removing human rights from their religious foundations, they lose their metaphysical grounding.[287] This meant that essentially, however logical they appeared, these rights lacked a solid foundation and were only theoretical in nature. In

[284] Freeman M.D.A *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008) 102
[285] *ibid*
[286] Shestack, Jerome J, "The Philosophic Foundations of Human Rights" (1998) 20 *Human Rights Quarterly* 201-234, 208
[287] *ibid*

turn, this meant they were only effective if a person believed himself bound by them. By having a religious input, they were bound to some ideal that made them binding, particularly if an established church influenced their development. This meant that having an established church helped consolidate state authority and made laws binding. However, when these new theories began to emerge, regardless of whether they could instil a justification for binding citizens, they developed quickly, and as Ishay asserts 'the value of individuals and their capacity to reason was further strengthened by a burst of scientific breakthroughs'.[288] Although these scientific breakthroughs came some time after the introduction of these theories, they are another example of theories of logic which grounded what could, and could not, be proved. When taken together, these theories appear to encapsulate the changes that brought about jurists switching from the classical perspective of seeing a right, *ius*, as a thing to the modern perspective where 'a right is a power'.[289] This is one of the most important transitions, though one of the hardest to understand, with no one point being discernible as the instigating factor.

In many ways this was the beginning to the more modern perception of secularism 'as the opposite of religion'.[290] What religion considered the 'common good' was turned on its head to produce individual substantive rights that belonged to each and every person. However, this perception is not entirely justified, and is adopted without a real understanding of the full context of what was being said. In his statement, Rousseau went on to say that 'Human beings are born good; it is society that corrupts them'.[291] In asserting this, Rousseau could easily be understood to be indicating that the church continues to play an important part in society by ensuring this corruptness did not spread. However, his belief in human equality and democracy indicates a rejection of religious interference with politics despite his belief that religion, and more aptly religious pluralisation, is an important part of society. In his view society is in itself an aggregate of overlapping theologies and doctrines which converge within the social

[288] Ishay, Micheline R *The History of Human Rights: From Ancient Times to the Globalization Era* (2004, University of California Press)
[289] Tierney, Brian *The Idea of Natural Rights* (1997, Published by Scholars Press for Emory University)
[290] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)
[291] Six, Jean-Francois *Church and Human Rights* (1992, St Paul Publications, Slough) 53

contract theory. There is only one social group in society which he purely rejected, and this was the atheists. This, he explained, was due to their lack of fear of divine punishment, which he believed made them untrustworthy.[292] He believed that without this fear, there was nothing to link them to the fact that by breaking a rule, a punishment would be enforced. Without this fear, there is no incentive to follow laws – therefore when they do so, their motivation is questionable and this makes them untrustworthy.

Such negativity towards atheists and agnostics may be at the heart of the view that secularists have no moral conscience, as their views are removed from any religious roots. In more recent terms, the discussion has moved more towards a separation of religion within the political debate, allowing only for the perception of religion in terms of a competing interest group. This opinion is supported by many secularist theorists and it works to switch the argument to the inclusion of those parties interested in protecting their religious freedom, and thus defending the ability of members of their organisations to manifest their beliefs, rather than the direct inclusion of religion within the political debate. A similar argument is used by pluralists and neo-pluralists who believe that politics is made up of a number of interest groups, none of whom can be completely dominant.[293] Politics is merely what results from the competing interests of these groups who are all there for the purpose of facilitating a peaceful and harmonious society. There are, however, those within this school of thought who argue that there are elite groups who have a more dominant presence than other interest groups. For example, Dahl and Linblom argue that political preference is given to those who are better off, and justify the need to do so in order to maintain political effectiveness. They also illustrate the privileged position of businessmen in politics.[294] According to Manley, Lindblom later elevates these business interests and introduces the concept

[292] Rousseau, Jean-Jacques *The Social Contract* (Wordworth Classics of World Literature) (Wordworth Editions Limited 1998)
[293] Lindblom *Politics and Markets* (Macmillan 1974). Although Manley is quick to state that this work is badly flawed; Manley "Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II" (1983) 77(2) *The American Political Science Review* 368-383
[294] Dahl & Lindblom *Politics, Economics and Welfare* (University of Chicago Press 1976)

that property dominance also plays a part in politics.[295] Pluralists also recognise that there is a direct imbalance in political and economical power which is not distributed evenly, and that this affects the ability of such interest groups to contribute effectively to political debate.[296] In the context of this thesis, the importance of these debates centres on the fact that religion remains a mainstream competing interest group which is able to contribute to the political arena but is not a dominant force, especially in comparison to the corporate interests which dominate the political arena. It is also important, for equality's sake, that the established church does not have more of a voice than other religions within the political sphere. This then protects religious freedom, but at the same time having an established church ensures that the voices of religious organisations cannot be isolated from political debate, as it constitutes a part of the political structure to begin with. Essentially, established churches potentially compromise this theory by threatening the dominance of these other groups, whether religious, economic or social. On the other hand, having an established church may be immaterial as they are beginning to be marginalised naturally within society, and their separation from political debate has already begun to happen in the UK, as was seen in 1919 when the Church of England's law-making powers were partially separated from that of the state.[297]

Despite this marginalisation, modern secular debates became further complicated by the position of established churches whose presence they strongly opposed. Although countries with an established church are becoming rarer, countries such as the UK, Denmark and Greece, who continue to support this model, remain a distinctive problem to secularists, with their structure considered to create the potential for excessive involvement both from the church to the state and from the state to the church. Consequently, such models continue to be viewed with suspicion, especially when there is an entanglement of governance, such as is the case in the UK. Casuscelli asserts that

[295] Lindblom *Politics and Markets* (Macmillan 1974). Although Manley is quick to state that this work is badly flawed; Manley "Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II" (1983) 77(2) *The American Political Science Review* 368-383

[296] Manley "Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II" (1983) 77(2) *The American Political Science Review* 368-383

[297] Although as has been seen, bishops from the Church of England remained within the upper body of the state's legislative body and the laws of the Church of England continued to be required to pass through Parliament.

> 'Systems with a State Church, a dominant religion or a Church established by law have indeed become increasingly extraneous to a society which experiences at the same time the achievement of its secularization and the development of its religious fragmentation.'[298]

The presence of an established church therefore appears to contradict such developments and secularists are quick to point this out. Audi goes as far as to state that 'religious disagreements are likely to polarize government'.[299] Although he concedes that secular disputes can also cause polarisation, he argues that they have less tendency to do this and are less likely to produce irreconcilable differences. He uses the comparative examples of Denmark and France, and the United Kingdom and the United States to illustrate this, although this negates the fact that historically all have been politically polarised by religious debate at some point in the past.

As can be appreciated, such discussions really take away from the utility of an established church and are more ready to accept that moral claims could be drawn from other sources, and more importantly, sources other than religion. Not only this, but as Ellis states, 'a person who can understand a moral claim without accepting or being motivated by it can surely understand a religious claim and also accept it without being motivated by it'.[300] Although used in a different context, this can be interpreted as meaning that secularist theorists are capable of accepting religion as a competing voice within political debate as humans are able to accept religious moral claims without being directly influenced by them. Laborde, through her analysis of Eisgruber and Sager, illustrates this notion in terms of governmental endorsement of religious symbols. She states

> 'What is wrong, however, with governmental endorsement of religion as opposed to other views and symbols with equally controversial expressive content? The state, after all, is not barred from promoting patriotic rituals,

[298] Casuscelli, Giuseppe 'State and Religion in Europe' in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 131-146, 135
[299] Ellis, Anthony 'What is special about religion?' (2006) *Law & Philosophy* 219-241, 223
[300] *ibid*

> teaching Hegel and sexual education in its schools, or sponsoring the causes of antiracism, antisocialism, feminism, or the death penalty.'[301]

Although taken from an American context, this demonstrates the importance of including religion within the political sphere in order to make it equal to all other social groups. The effect of privatising religion would be contrary to any egalitarian view, as it would completely isolate religious organisations and make them unequal within society itself. This does not help justify established religion, but it does mean that the lines are only drawn when established churches are considered to have political dominance over other religious and philosophical voices. The real question is whether an established church, especially one with a high entanglement within the political or legislative state bodies such as that in the UK, is already breaking these boundaries. If so, then surely they must already be considered to be contrary to this theory. Alternatively, in theory, so long as they remain neutral in terms of political dominance, they remain acceptable, although, as with all theories, there will always be an extreme faction that remains highly opposed to such entanglement, no matter how uninvolved the religious group may appear to be.

3.2 Other religions and establishment

When considering the views of other religions towards the established church, it becomes quite clear that there is room for further research. Although there are some specialised books and research papers, such as Modood's 1997 book, *Church, State and Religious Minorities,*[302] and Cranmer, Luca and Morris' research, *Church and State: A Mapping Exercise*,[303] as well as articles such as Oliva's "Sociology, Law and Religion in the United Kingdom",[304] which analyses the relationship between the state and the established church – the majority rely on interviews with leaders of different religious organisations. There is an overwhelming preference for focusing on sociological

[301] Laborde "Equal liberty, nonestablishment, and religious freedom" (2014) 20(1) *Legal Theory* 52-77, 61
[302] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)
[303] Cranmer, Frank, Luca, John and Morris, Bob *Church and State: A Mapping Exercise* (London: Department of Political Science 2006)
[304] (2004) 153 *Law and Justice* 8-26

factors and the benefits received by the Church of England from the state.[305] As Rivers states, this is not only true of legal texts at the turn of the century, but dates back to authorities such as Hart and Maitland. These authorities appeared to be solely interested in the law of blasphemy, one of the benefits protecting the Church of England, rather than the Church of England's entanglement with the constitution itself.[306] From Rivers' writing, it also appears evident that both Maitland and Hart considered religious liberty to be present and sufficient at the end of the eighteenth century, when the established church was even more entangled with the constitution, especially with the legislature. He uses Maitland's assertion that 'The legislation by which disabilities have been imposed and then removed is very complicated, but at the present moment we may, I think, say that religious liberty and religious equality is complete'[307] to support this. Their views towards the state's relationship with the established church and other religions were that there was no contention between any of the parties. They believed all religions were treated fairly and thus no problems resulted. However, as time has passed, views changed, and this was illustrated when international human rights instruments began to demand a positive approach by the state to religious freedom, and increased pressure has been put on the state to ensure neutral treatment of religion. This has forced a more critical opinion of the state's relationship with the established church, especially within secularist theories, as was seen in the section above.

However, the focus on religious freedom and a positive duty to facilitate the ability of religious persons to manifest their beliefs does not necessarily mean complete opposition to having an established church, and recognition has been given to the fact that states can still offer religious freedom within what Robbers would term as a state-church model.[308] The UK Home Office reflected this opinion in their document

[305] Davie, Grace *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002); Doe, Norman "A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe (2004) 152 *Law and Justice: Christian Law Review* 68; Doe, Sandberg & Hill *Religion and Law in the United Kingdom* (Kluwer Law International 2011); Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490; Oliva, Javier "Sociology, Law and Religion in the United Kingdom" (2004) 153 *Law and Justice* 8-26; Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011)

[306] Rivers, Julian "The Secularisation of the British Constitution" (2012) *Ecclesiastical Law Journal* 371-399

[307] *ibid*

[308] As recognised in *Darby v Sweden* [1990] ECtHR 24 (No. 11581/85) where it was stated 'A State Church system cannot in itself be considered to violate Article 9 [thought, conscience and religion] … such a system

"Working Together: Cooperation between Government and Faith Communities" in 2004 stating that

> 'Where they still exist, as in England and Denmark, established churches are not an obstacle to the widespread recognition of the rights and equality of religious minorities. On the contrary, mainstream churches play a fundamental role in facilitating public policies aimed at social integration and cohesion. Individual and collective rights concerning the practice of religion are well recognized; and co-operation between faith communities and state agencies is successful and productive'[309]

Further support for this interpretation can be found in Modood's book *Church, State and Religious Minorities*, which strongly indicates that other religions are supportive of an established church so long as it is proactive in recognising, and at times defending, other religions. As Modood states

> 'Religion also provides a valuable counterweight to the state, and nurtures sensibilities that give political life spiritual depth. Just as we need opposition parties to check the government of the day, we need powerful non-state institutions to check the statist manner of thinking, including the glorification of the state. Again, religion is a source of important moral and social values and has inspired many emancipatory movements such as those against slavery and racism.'[310]

Again, this is reiterated some years later by Hill in his chapter "Church and State in the United Kingdom: Anachronism or Microcosm?" where he states that

> '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 speaks volumes for the

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exists in several Contracting States and existed there already when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to satisfy the requirements of Article 9, include specific safeguards for the individual's freedom of religion. In particular, no one may be forced to enter, or be prohibited from leaving, a State Church.' (45)

[309] As stated in Ventura, Marco "States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 181-185, 181

[310] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997) 21

> weight to be given to matters of faith and belief in the governance of the population at large. 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.'[311]

In an earlier publication, Hill also commented that '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'.[312] These statements reflect the importance of religion within both the public and political sphere, with most religions supporting the established church as a conduit to ensure all religious voices are heard. However, it was also stated that an established religion that was not so supportive of multi-faith dialogue and increasing discourse for all religions within the public sphere would not have such avid support from other religions, and this was again reflected in Modood's research, with some comments being directed almost as warnings to the Church of England not to forget the importance and the responsibility that comes with being a church supported constitutionally by the state.[313]

The positive duties enforced through human rights instruments have thus pre-empted established churches such as the Church of England into actively becoming engaged with supporting minority religions. Their function as a state church has had to evolve and in the UK this has been reflected in the more recent speeches of the former Archbishop of Canterbury, Dr Rowan Williams.[314] Established churches have had to become more open in ensuring all religious voices are heard, rather than dominating

[311] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209, 208

[312] Quoted in Ventura, Marco "States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 181-185, 184

[313] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)

[314] Dr Rowan Williams *Relations between the Church and state today: what is the role of the Christian citizen* (1/3/2011) found at <www.archbishopofcanterbury.org/articles.php/2009/relations-between-the-church-and-state-today-what-is-the-role-of-the-christian-citizen> last accessed 9/8/2011; Dr Rowan Williams *Civil and Religious law in England: a religious perspective* (7/2/2008) found at <www.archbishopofcanterbury.org/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective> last accessed 9/6/2011. In his 2011 speech Dr Williams makes it clear that the only justification for the public presence of a church in society is to keep the debate on civic virtue, shared responsibility and the common good alive. These debates he argues are best placed in the public domain rather than being swept away behind closed doors: a very different image than what was first conceived for the Church of England as the country's established church.

over moral decisions of the country. They have had to give unified statements or joint statements to reflect religious feelings or, at times of crisis, show spiritual leadership. Some have commented on how this has left the church in a very different shape than what had ever been envisioned by the founders of the established church itself, and in many ways this view is correct.[315] Henry VIII, in establishing the Church of England, would never have considered the future of the church to be defending and at times protecting other religions, often at the cost of its own theological arguments. Even politically, as members of the state legislature, the church is often unable to protest alongside other religions against laws they have helped to create.[316]

More keenly, religious freedom has had a negative effect in encouraging more direct state interference, placing a greater obligation on the state to interpret different religious beliefs and decide what constitutes an action that is motivated by, or is integral to, an individual's religious belief.[317] This aspect of religious freedom has often been overlooked by academics, and has only really become pervasive as legal debates have developed on religious symbols and dress, as well as the recognition of religions by states to confer benefits on such organisations. The cases of *Church of Scientology Moscow*[318] and *Eweida v United Kingdom*[319] give pressing examples of this, demonstrating how such interpretations can be conflicting and how much force such decisions can have on the future of religions or religious freedom. There is also some question over the consistency of decisions, especially those coming from the ECtHR, with some beginning to consider that further encroachment on the *forum internum*, which should be infallible, is becoming inevitable. This is due to the fact that our choices in manifesting belief and our choice to believe come from the *forum internum*, but are being pushed into the *forum externam* because they become entangled in our identity.[320] Furthermore, because religious identity is classified as a self-chosen

[315] Valerie Pitt in Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)
[316] Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490; Hill, Mark "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180
[317] D'Costa, Evans, Modood & Rivers *Religion in a Liberal State* (Cambridge University Press 2013)
[318] *Church of Scientology Moscow v Russia* [2007] ECHR 258
[319] *Eweida v United Kingdom* (48420/10) [2013] I.R.L.R. 231
[320] Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304

characteristic of a person's identity, as opposed to gender, sexual identity and ethnicity, which are given at birth, they are capable of being scrutinised as they constitutes a personal choice. It can therefore also be changed, and something that appears as a manifestation can be interpreted as something completely different when seen in a different light. This is demonstrated in the quote below,

> 'It is open to question whether this clearly defined distinction between acts motivated by religious aims, and acts religious in their nature ['manifestations'] is really defensible. Consider an individual with their hands clasped, reciting the Lord's Prayer aloud – This would seem to constitute an act religious in nature. Add the individual's atheism, a camera crew, and a line in a film script 'Actor Prays' and it is no longer religious in nature. The distinctive feature is the presence of absence of religious motivation.'[321]

However, essentially the biggest issue in viewing religion as a self-chosen form of identity is that it is capable of infringing on other given forms of identity[322] and this immediately causes a potential conflict, with religious identity being incapable of trumping given identity factors. By doing so the courts are effectively suppressing manifestations of beliefs that are as much of a person as their sexual relationships. As Petkoff states

> 'Religious symbols are 'taxed' because they inconvenience the public by way of manifesting private and personal choices that are considered to be superior choices within the context of the multiple moral paradigms available.'[323]

In doing so this also casts a shadow over the manifestation of religion within the public sphere in general. Social judgement on what is classed as acceptable and unacceptable or what constitutes a true manifestation become central questions, with the press also playing a key role in social perception. At the same time, similarities can be drawn from the above section whereby religion becomes one competing interest within the political

[321] Edge 'Current Problems in Article 9 of the European Convention on Human Rights' (1996) *Juridical Review* 42, 45-46

[322] D'Costa, Evans, Modood & Rivers *Religion in a Liberal State* (Cambridge University Press 2013)

[323] Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304, 303

sphere. Here, each individual becomes a member of a competing group, arguing that their individual manifestation is of a belief that is integral to the religious group. As these voices become louder, although not often more conflicted, arguments for the removal of religion from the public sphere become more insistent. However, at the same time, courts continue to be forced to consider such matters, again bringing the issue into the public sphere and reflecting social judgements. Thus, the arguments become circular in nature.

In general, another drawback to having such debates in public is that social judgements are often more inclined to recognise the validity of religions, and thus manifestations of belief, that are linked to more traditional religious organisations. Such organisations are usually enshrined historically in a country's evolution, thereby understandably building the foundation to what citizens will view as a religion. In countries where established churches exist, this can cause an immediate conflict with direct comparisons being drawn subconsciously by society before the question is asked. Furthermore, when it comes to court intervention, Rivers asserts that 'where the law engaged with religion it did so largely to preserve residual Christian establishment, unproblematic only in its insignificance, and to obstruct in questionable ways a range of unconventional beliefs and practices. Constitutional principles had very little to do with it.'[324] Essentially this means that historically the courts were interested in preserving the traditional structure of the Church of England, and such considerations, especially in a common law system, have a tendency to leave echoes within the courts jurisprudence. Although this may not reflect what is occurring within the country at present, the influential factors cannot merely be cast aside, and social judgement can play an important part in the legal system of any country, even more so under a common law jurisdiction.

From what has been said in the last chapter about the different structures of the two established religions in the UK, it is unsurprising that most attention is given to the Church of England. The Church of Scotland to a large degree remains undiscussed in

[324] Rivers, Julian "The Secularisation of the British Constitution" (2012) *Ecclesiastical Law Journal*, 371-399, 372

terms of challenges to other religions in the country. The autonomous nature of this church does not obviously infringe on other religions, political discourse or indeed the constitution of the UK. In the same way, there has never been any talk of the Church of Scotland as a default religion or as a challenge to religious freedom. As Munro asserts, this may be due to the opinion that 'The Act of 1921 may be regarded not so much as constitutive, but rather as a recognition by the state of a concordat which allowed that the Church had its own sphere of jurisdiction.'[325] He states that this view is strongly supported in the recent case of *Logan v Presbytery of Dumbarton*[326]. Even so, it is an Act of Parliament which sets out the relations of that church and the state, whereas there is no corresponding legislation found – or necessary – in respect of other churches.'[327] This means that for all intents and purposes the Church of Scotland, although recognised as an established church, is treated as any other religion in the UK. There are, however, certain aspects of the Church of Scotland that are treated differently, and thereby given greater recognition than their religious equals. For example, '[t]he Church's own courts are treated as courts of the realm, as the Court of Session has recognised'.[328] When analysed at this level there are certainly characteristics which see this second established church being treated differently by the state than other religions. Despite this, very few scholars contemplate the Church of Scotland in the same terms as the Church of England, and constitutionally it is not considered a significant threat to other religions in the same way.

Hill also considers that by continuing to place religion within the public sphere, this has helped to curb the dominance of secularism within the political and social sphere. He states that

> 'In a typical English manner the subtle placing of religion within public life, combined with the growth in pluralism, has helped in preventing secularism gaining a more dominant hold. A positive recognition of the spiritual element

[325] Munro "Does Scotland have an Established Church" (1997) 4(20) *Ecclesiastical Law Journal* 639-645, 644
[326] (1995) SLT 1228 CS (OH)
[327] Munro "Does Scotland have an Established Church" (1997) 4(20) *Ecclesiastical Law Journal* 639-645, 644
[328] *ibid* 645

> embraces agnosticism and humanism and is a constant reminder of the benefits which result from the recognition of a healthy mix of belief systems.'[329]

This also appears to be developing into a common model more generally within Europe. Inter-faith dialogue with the state included is becoming more common in order to increase neutrality in the treatment of religion and, as stated, most states are moving towards a form of contractual separation, or collaborative neutrality. As Casuscelli states

> 'It is a model that excludes neither recognition nor State support of religious communities, cultivating dialogue between public institutions and religions and, sometimes, even seeking their 'collaboration' or 'cooperation' commensurate with the historical and sociological factors pertaining to individual countries.'[330]

While this does not mean that disestablishment is a necessity, it does suggest that the majority of states are attempting to disengage with direct support with individual religions and increase neutrality of state recognition. The cooperation between church and state is thus becoming a 'common denominator' in Europe, and disestablishment is not inevitably becoming a necessity and is slowly dying out naturally as other less intrusive models become the norm.

Despite this, there are still those from other religions who would avidly defend the established church and continue to argue that disestablishment is unnecessary in a pluralist society. Furthermore, maintaining the established church furnishes the advantages of increasing public recognition and accountability, both political and social, outweighing the benefits of privatising religion. In 2010 Modood stated

> 'Disestablishment therefore does not just diminish the church, or Anglicans or Christians, or even just religious people. It diminishes society by narrowing our

[329] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209, 208
[330] Casuscelli, Giuseppe 'State and Religion in Europe' in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 131-146, 135

political and value horizons and removing a visible reminder of the limits of state power.'[331]

Other religions, and even those outside of religion, must therefore continue their support for the established church, notwithstanding that it is a model that relies on the accountability and openness of an established church to listen to all religious needs and maintain a pluralist attitude. The moment the Church of England becomes insular and no longer recognises its responsibilities to other religions will be the moment that their support is withdrawn, and this is something that the Church of England must always bear in mind if they are to continue to be entangled within the British constitution as an established church.

3.3 The Church of England and establishment

The Church of England has undoubtedly changed from its original form when established in the sixteenth century. They have had to evolve as society has, to be sensitive to the cultural needs of their increasingly diverse surroundings in order to ensure their own survival. Such changes are not unique to the Church of England, but are natural to any type of organisation when they work closely with the population of a country. Even on a smaller scale an organisation such as a chess club must continually revise its structure in order to meet the needs of its members. In the case of the Church of England this could be considered even more important as it owes its survival to continued support through the state's political structure. Former leaders of the Church of England have recognised these changes and, according to the former Archbishop of Canterbury, Rowan Williams, the church should now be seen as 'a community where we argue about what's good for the human race'. [332] The problem is that not all members view this change as a good thing, and ironically, even the person who gave this statement formerly stated that he

[331] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997) 8

[332] Williams, Dr Rowan *Relations between the Church and state today: what is the role of the Christian citizen* (1/3/2011) found at <www.archbishopofcanterbury.org/articles.php/2009/relations-between-the-church-and-state-today-what-is-the-role-of-the-christian-citizen> last accessed 9/8/2011

> 'had ten years as a Bishop in a disestablished Church in Wales without noticing a great deal of difference a lot of the time. So I don't believe in the general principle that disestablishment is lethal for the Church, or that the establishment in its present form is a ditch the Church would have to die in. I have more faith in the Church than that.'[333]

This statement, although given on what the effects of disestablishment would be, demonstrates how those high in the hierarchy of the Church of England do not believe that disestablishment would be by any means catastrophic to its future. Saying this, it is equally true to say that calls from within the established church itself have gone from virtually none to many.[334]

When considering the Church of England's position on the issue of establishment, it is important to consider this in theological terms as well, and this is influenced by history. Much of this is reflective of how attitudes have changed in general towards establishment and the state's relationship with religion. With classical exponents of establishment basing themselves on a theology of the state,[335] it comes as a surprise to some that not all theories support a completely united relationship between the state and church. For example, Gealasius's theory on duality, the two swords approach, describes a close relationship with the state, but at a distance. The relationship is one of mutual respect for each other with the intention of producing cooperation rather than interference. By accepting that their ultimate missions are different, they are able to work in conjunction with each other. During the religious reformation, this analogy was built on by Luther in his two kingdom's doctrine, where God was described as ruling by two kingdoms, the government, or state, who ruled the earthly kingdom, and the church, who ruled the heavenly kingdom.[336] The distinction was best described in

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[333] Williams, Dr Rowan (statement given in 2008) cited in Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire) 188

[334] Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire); Furlong, Monica *The C of E: The State It's In - The Past and the Present* (2000, SPCK); also see Cumper, Peter 'First amongst equals: The English state and the Anglican Church in the 21st Century' (2006) 83(5) *University of Detroit Mercy Law Review* 601-623 who quotes former Archbishop Ramsey as stating 'I wish … that the Church would become worthy of it – would become so annoying to the state that it had disestablishment forced upon it.' (219)

[335] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (2nd edn, Oxford: Oxford University Press 2013)

[336] Concerning the salvation of souls, soteriology. MacCulloch, *The Reformation: A History* (Penguin, 2003)

Calvin's doctrine which highlighted three distinguishing factors. Vandrunen expresses these thus,

> 'First, he considers the civil kingdom a realm of God's providential care, but not of his redemptive grace. Second, he sees the spiritual kingdom as spiritual and heavenly while he sees the civil kingdom as external and earthly. Finally, Calvin teaches that the spiritual kingdom finds expression in the present age exclusively in the church while he teaches that the civil kingdom finds expression especially in the civil government, along with other cultural matters such as scientific and artistic endeavours.'[337]

Some year's later Rutherford made a similar distinction 'between one kingdom ruled by God as creator (and hence temporal and mundane) and the other kingdom ruled by God as redeemer (and hence spiritual and heavenly)'.[338]

Although this distinction appears to show a clear separation of the church and the state's missions, this does not necessarily mean that the two are completely separate. Under the doctrine itself both are said to come from the same source, God. One controls the internal belief and the second the external human interactions in day to day life. As is the case in the established Church of Scotland, both command autonomy, with recognition of the importance of the other. Recognition for the church is given in the Act of Union 1707[339] and the importance of the state is recognised in the first section of the church's *Second Book of Discipline*.[340] In essence the two act as individual units; the *Second Book of Discipline* goes on to detail their authority, and furthermore, where this authority comes from. They are two very separate and distinct sides of the same coin.

Other classical definitions such as 'The King participated in Christ's rule *pedes in terra* (feet on earth), while the Episcopal authority imagined Christ's rule *caput in caelo* (head

[337] Vandrunen "The Two Kingdoms Doctrine and the Relationship of Church and State in the Early Reformed Tradition" (2007) *Journal of Church and State* 743-763, 747
[338] *ibid* 751
[339] Subsequently the Church of Scotland Act 1921
[340] Where it is stated 'The magistrate commands external things for external peace and quietness amongst the subjects; the minister handles external things only for conscience cause… The magistrate handles external things only, and actions done before men; but the spiritual ruler judges both inward affections and external actions, in respect of conscience, by the word of God' (1.11-12)

in heaven)',[341] appear to mirror this 'two swords' approach whereby the two authorities come from the same place but rule over two different realms of the person. Furthermore, it appears that none of these definitions are directly opposed to a positive relationship between the state and the church so long as neither interferes directly with the other's mission. However, the focus of all of these relationships is the tie between the state and the church, which means that due to the period in history when this was said, the state's relationship was with Christianity, with no contemplation of any other religions. This means that none were written with the thoughts of integrating other religions within society, and whilst one may view the state as one sword, it appears that the modern extension would be that the second sword, which guides the spiritual or soteriological element of humanity, has multiplied exponentially in order to accommodate every other religion that has appeared. Metaphorically this produces quite an obscure picture, with one single sword being surrounded by many that ultimately could threaten each other as well as the state itself. This threatened reality produces a worrying scene where this single temporal sword becomes almost a mediator between these competing spiritual swords so as to maintain some form of order, whilst asserting their own hold over matters temporal. As Gomes asserts, 'both Church and state are not opposed to the legitimate exercise of their interests, but rather oriented to the service of people, they should seek dialogue, cooperation, and reciprocal solidarity'.[342]

In a similar manner Helmholz also proposes a mutual cooperative relationship between the church and state. He believes that there are three ways in which the state and church interact and each should be aware of these and act together to ward against any problems this may cause. These interactions occur first, where the state and church clash, secondly, where they decide to cooperate, and thirdly, in areas where there is a reciprocal interest.[343] The first is demonstrated by the clash between the threat of excommunication and the threat of civil financial penalties during the medieval period.

[341] Hittinger, Russell F. 'The Declaration on Religious Liberty, Dignitates Humanae' in Lamb & Levering *Vatican II: Renewal within Tradition* (Oxford University Press, 2008) 359-383, 363

[342] Gomes, Evaldo Xavier, "Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of *Laicite Positive* (2009) 48 *Journal of Catholic Legal Studies* 201, 212

[343] Helmholz, Richard H, *The Spirit of Classical Canon Law* (University of Georgia Press, Georgia, 1996)

The second concerned mutual assistance and the example used is of the cooperation that occurred when fees owed to the Royal courts by clerics were collected. When a cleric refused to pay such fees a writ of execution was issued by the Royal courts to their bishop in order to direct the collection of payment through the ecclesiastical property of the church. Although the evidence appears to indicate a degree of evasion by the bishops, who often argued that the property belonged to the church and not to the cleric, there did appear to be an unwritten agreement that the state will allow the church a degree of control over the enforcement of these fines rather than chasing the individual responsible. In regards to reciprocal influences, two examples were given, the law of defamation, which is of primary importance in both the ecclesiastical courts and the state courts, and the law of bankruptcy.

Although a number of Helmholz's examples could now be considered outdated, it is clear that his initial argument is still relevant. There will still be occasions where the laws of any, or all, religions clash with the state, where cooperation is needed and where there is reciprocal interest. However, it is also true, as Hittinger states, that 'Today one rarely thinks of the state as a body, much less one shared with the church'.[344] Religion does not claim the same public authority as was apparent historically and has found itself to be forced back into the private sphere. As a result the state's temporal authority often brandishes more power than that of the church, and increasing religious diversity has helped to facilitate this separation, producing the effect of segregating religion and forcing it into the private sector. On this level religions can compete openly with each other for members, and their legal systems can act as an attraction to new members who feel penalised by their own faiths. The competing model analysis which results will be discussed further below, but it illustrates how theological interpretations can act as a tool to compete against other similar religions. Something that would not have been envisioned by theologians historically, in the same way as the type of separation, and the attempts at the privatization of religion, that has occurred between the church and state would not have been envisioned. More recently, in the mid-nineteenth century, this has been reflected in Pope Gregory XVI's statement,

[344] Hittinger, Russell F. 'The Declaration on Religious Liberty, Dignitates Humanae' in Lamb & Levering *Vatican II: Renewal within Tradition* (Oxford University Press, 2008) 359-383, 363

> 'anything that threatens religion also threatens the state; whatever threatens the state also threatens religion; this is of prime importance to governments of any kind, because their first responsibility is the maintenance of order and the fight against subversion of any sorts'.[345]

This would mean that the relationship between state and church is integral to ensuring peace is maintained in society, and so an established church must be supported. In theological terms, the church has at times moved away from this notion, although Pope Pius X in 1906 condemned any move towards the separation of the church and state, including those 'wishing to seek a compromise between temporal and spiritual affairs'.[346] Pope Pius X's statement appears to be reflective of the Carolinian age, where theories of partial separation were rejected in a move towards complete unification. However, such theories, which were termed *caesaropapism,* although seeming to support an established church, are often perceived as problematic, and comments on such regimes appear to indicate that there was a recurrence of the intermittent power struggle between the state and the church. This was recognised distinctly by Madeley in his recent publication *Church and State in Contemporary Europe*, where he stated 'from as early as Weber's discussion of hierocracy and *caesaropapism*, concentrate on the question of which two institutional actors, church or state, has the upper hand'.[347] Two such conflicting theorists are Gomes, who recognised *caesaropapism* as an attempt to restore those practices of pre-Christian societies which imposed the secular authority (Emperor) over religious authority (Pope)',[348] and Papastathis, who argued that the legal form of religion considered in the term is where the legal structure of established churches is derived. This, he states, is where 'the state itself adheres to the teachings of a particular religion'.[349] The meaning is not necessarily that the state succumbed to the church, but it used the church's power and authority to establish its own authority and in so doing created an interlocking dependant relationship between the two. Moving back to Pius X and the consequence of his interpretation, it appears that such theories of interrelation between the state and church was the basic rejection of any attempt at

[345] Six, Jean-Francois *Church and Human Rights* (1992, St Paul Publications, Slough) 65
[346] *Ibid* 68
[347] Madeley, John *Church and State in Contemporary Europe: The chimera of neutrality* (Frank Cass Publishers 2003)
[348] Gomes, Evaldo Xavier, "Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of *Laicite Positive* (2009) 48 *Journal of Catholic Legal Studies* 201, 203
[349] Papastathis, Charalambos "Tolerance and Law in Countries with an Established Church" (1997) 10(1) *Ratio Juris* 108-113, 108

complete separation, and he went as far as to condemn states such as France, who opted for a rule of complete non-interference, although he did accept that some secular regimes could work so long as they continued to work towards the common good.[350]

This would strongly suggest that some form of theological relationship between the state and church is integral to having a stable, peaceful and spiritually nurturing society. As O'Donovan asserts, every society treats moral decisions as normative questions and thereby 'makes definite religious judgments about the proper content of religious belief and practice'.[351] If society were to be completely secular, with no religious influence, this would mean that these moral teachings would conflict with religious doctrines. It also means that these moral judgements must be based on some other metaphysical theory. The importance here is that, for religions, their relationship with the state is integral to ensuring their own place in society within practical terms. The pure separation of the state as a 'quasi mechanical system, incapable of moral and spiritual acts' which are left to the church is merely an 'abstract conception'.[352] The basis must come from somewhere.

Consideration must also be given to the church's role in formulating a moral framework governing how individuals in society relate to each other. A view taken from early modern liberalism 'implied not only lawful government but a community susceptible to it; it comprised a set of expectations about how human beings might live together'.[353] This would mean that such teachings must come from somewhere and historically, with religion being such an integral part of individual's lives, it is rational to think such sociological lessons were borne out in church. Although the support for religion may be considered to have changed drastically as attendance to church has decreased, the basis of the lessons themselves may be considered to have carried through for centuries. This makes the relationship between state and church integral to ensuring that people are themselves amenable to a system of legal rules that help to govern their lives and accept the forfeiture of certain liberties in order to ensure that a healthy and peaceful society is able to flourish.

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[350] Six, Jean-Francois *Church and Human Rights* (1992, St Paul Publications, Slough)
[351] O'Donovan, Oliver *The Desire of the Nations* (Cambridge: Cambridge University Press 1996) 247
[352] *ibid* 247
[353] *ibid* 249

The basic lesson learned here is that both theologically and in practical terms the Church of England does support its position as the established church. It does not aim to interfere with the state in any purposeful manner, but strives to ensure that the government is held to account, with the bishops only voicing concerns over matters of sociological importance in order to protect the less able and cared for members of society.[354] It is, however, true that their position has changed since their establishment, but older theological theories can still be used to defend their structure and support their entanglement within the constitutional framework of the country.

3.4 Conclusion

From the above it can be seen that there is very little support for full disestablishment. Those that do argue for the pure separation of the church and the state stand on the extreme outskirts of opinion, which sees the potential benefits of keeping religion within the public sphere. This said, there is a history within some of these authorities, namely those from other religious and non-religious organisations, to approach the issue with hostility; this is especially true of secularist theorists, who began their journey fighting against the influence of the Catholic and established churches that had aided the persecution of religions through eras of intolerance. To many modern theorists, there is also an underlying concern that having an established church continues to threaten the state's ability to treat all religious and comparable non-religious organisations equally, or neutrally, and this is especially important in light of religious freedom under regional and international human rights law; there is an implication that the state's duty to treat religions neutrally cannot be fulfilled without constitutional separation. For example, Larbode's concentration on egalitarian theorists in her article "Equal liberty, non-establishment, and religious freedom"[355] states that religious and non-religious groups who provide a comparable service must

[354] Harlow, Anna, Cranmer, Frank and Doe, Norman 'Bishops in the House of Lords: a critical analysis' (2008) *Public Law* 490
[355] (2014) 20(1) *Legal Theory* 52-77

be treated in an evenhanded manner, from financial support to constitutional matters, and although the UK already does this in financial matters, there is a certain lack in constitutional provisions.[356] This type of argument forms the underpinning of a number of theories, both secular and from leaders of other religions. Ultimately, the bottom line remains that some form of public and political presence is better than none, especially when this helps to increase the public voice of both other religious organisations and comparable non-religious organisations. However, with this power comes a harsh warning to the established religion that such support will only continue whilst they engage with other organisations and ensure that their voices are heard. With insecurity from representatives of the Church of England as to their effectiveness in doing so, there is some cause for concern~~s~~.

There is also a growing concern within the international sphere that states which maintain a state church, however loosely, are undergoing unnecessary pressure in their attempts to fulfil their duties under religious freedom. As Hill states

> 'Majority Churches (whether established or not) carry a heavy responsibility, which is routinely discharged in various States of Northern Europe. This responsibility includes the promotion of all religions and belief systems, an essential instrument of ecumenism. It 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 fragile but an effective means of promoting tolerance and religious freedom. The state also carries a heavy responsibility. 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.'[357]

This is heavily reflected in those attitudes discussed from other religions. The pressure to ensure that the concerns of other religions are considered is not something envisioned for the Church of England, and although attempts are made, it is questionable how long the established church can continue this. Laborde's concentration on egalitarian theorists and increasing calls for neutrality of religion do

[356] This statement is implied from the text and not stated directly.

[357] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Ashgate Publishing Limited, 2010) 199-209

appear to give the Church of England an onerous duty, and the state must ensure that they are careful to encapsulate rules that facilitate equality of treatment. As stated earlier, it must be noted that political attitudes are not discussed fully within this chapter, but it is clear that political views and sociological views do overlap to a certain extent, and a feeling of some political influences can be felt within the chapter. What is not reflected in the chapter is the state's addresses of support towards the established church through both the executive and the Monarch. These will be reflected on fully in the penultimate chapter when tackling the practicalities. The reason for this omission here is to avoid repetition and to ensure that we do not become too distracted with theoretical issues rather than with the legal outcomes.

Hill's statement also reflects the fact that the Church of England has had to become more pluralist in its own approach to its position within the public sphere. The above discussion demonstrates how this has at times become a source of contention within the established church itself, with further calls for disestablishment being made from within. However, these voices do not appear to be strengthening, and more recent writing appears to indicate more acceptance, and overall from all parties, there is a quieter discourse reflecting many sociological debates which tend to reflect the waves of the sea: loud and turbulent in times of storm, and quiet and considered in times of calm. The voices from within the Church of England will be reflected on further in later chapters, but what is clear here is that no calls for complete separation are being made. Whether from a sociological approach or from a religious perspective, all appear to accept that some form of religious discourse between the state and religion is needed, despite their views on establishment. What this effectively means is that the practicalities of disestablishment may not outweigh the call for disestablishment itself.

Before moving on to look at comparative models of the state's relationship with religion, one final proviso must be observed. Within many of these theories, there appears to be a high concentration of consideration of authorities from America. Although there is nothing wrong with this in and of itself, caution must be taken over the fact that they are primarily discussing the state's relationship with religion from the basis of an anti-establishment clause, and not from an established religion. This means that some approaches, especially those from a sociological perspective, can appear distorted, and

attempts to transpose such theories are not always successful. America itself is discussed at some length in the following chapter which analyses different models of state religion relations in an attempt to draw out some appropriate comparisons and learn from different structures, in order to work towards the future of the Church of England's relationship with the state and how this relationship would work should disestablishment occur.

Chapter 4:

Models Of State-Religion Relationships And Their Impact On Establishment

As well as a number of differing views from sociologists, religions other than the established church, and the Church of England on the matter of disestablishment, it is important to consider more practical matters such as those models of state relations with religion that already exist. A number of the models developed are centred on members of the EU or the European continent itself. Although this chapter moves off topic slightly, such models have had an impact on the way that establishment is viewed and it potentially could give some incentive to disestablishment. The types of frameworks could be drawn on by the UK to mould their future relations with the former established church, and indeed all other religions, should disestablishment occur. For this reason its inclusion is essential to redressing a focus on future models, playing a vital role in assessing the types of models already present, their acceptance by scholars and lawyers, and how these might contribute to the UK's future relations. Some of the models that have emerged are from a more formulaic analysis concerning individual aspects of the state's legal relationship with religions. Comparisons are drawn as to how different religions are treated by individual states in order to place them within legal and academic frameworks. However, one of the main problems that occurs is that many of the state structures overlap between the different models, which leaves some uncertainty about the success of the models themselves. This has resulted in a number of criticisms that have helped to produce further insights into the future of the state's relationship with religions.

Before beginning the analysis of how these frameworks operate, a brief description of how human rights have changed within Europe and why these models have become a feature of the European landscape will be undertaken. This will partially recap on some

of the details from the second chapter, but will concentrate more on the importance of religion within Europe and the influence it has had in establishing the framework for substantive individual human rights. It will illustrate the part that human dignity plays, and inferences can be drawn as to how this reflects the importance of religion within the public sphere.

The chapter will then move on into a purer analysis of the main source of these formulaic frameworks. Robbers in his book *State and Church in the European Union*.[358] identifies three different models of state-church relations. These three models are based on an examination of member states within the EU and analyse different areas such as social and cultural factors, historical developments, financial affairs, and different areas of law, in order to place states within one of the models.[359] One of the most significant factors is that of the constitutional position of religion within states, and much emphasis has been put on such legal sources to identify into which of the three models within the tripartite system a state falls. The models are that of separation of state and church, the state-church model, and the hybrid model, which is somewhere in between the two. Although this system has been criticised as 'over-formulaic'[360] and not giving a clear view on the similarities and differences between state models, Robbers does, with a complete reading, give a clear analysis of each state and within these identifies a number of anomalies in states that sees them overlapping with a second classification. This makes it an invaluable source of information when looking at the legal intricacies of the state's relationship with religion. It gives a clear analysis and interpretation of each state's constitution and legal frameworks.

Although Robbers' classifications are based on member states of the EU, it appears that one of the clearest examples of a model of separation is that of the USA, due to their non-establishment clause. This clause, the 1st Amendment of the US Constitution, reads 'Congress shall make no law respecting an establishment of religion, or prohibiting the

[358] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)
[359] Such as Family and Marriage, Labour law, Discrimination law and Media law.
[360] Sandberg, Russell & Doe, Norman "Church-State Relations in Europe" (2007) 1(5) *Religious Compass* 561-578, 570

free exercise thereof''[361] and thereby prevents the state having any involvement in religious matters, especially any behaviour which may be viewed as advancing or inhibiting religion.[362] This model is comparative to those models of separation under Robbers' tripartite system and for this reason will be used as a comparative model with France below to further discuss this model. This will be followed by a brief analysis of the state-church model using Denmark and the United Kingdom, and the hybrid model using Italy and Ireland.

Once completed, an analysis of some of the criticisms and alternative theories on the state's relationship with religion will be made, looking at how they may influence the constitutional position of the Church of England within the UK. Ultimately these theories will be drawn on in order to offer some insight into some of the models that might be used by the UK should disestablishment occur. Should this happen, such models could potentially offer an insight into the types of relationship that work best, thus placing the UK in a better position to mould itself in its path ahead that will be successful for both the state, the former established church, and all other religions.

4.1 The effect of religion on human rights within the European public sphere

The international and regional instruments described in chapter two have tended to dominate modern perceptions of the state's relationship with religion. Several tiers have been recognised, and although religious freedom has been the main source of contention, the whole strand of human rights law generally has created an era of rights that attach to each individual. The recognition of these rights internationally and, more

[361] 1st Amendment of The American Bill of Rights. A full copy can be found at <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html>

[362] A clear and recent analysis of some of these issues can be found in Strasser, Mark *Religion, Education and the State* (Ashgate Publishing Limited, 2011). Although based on religion, education and the state it features much of the case law that has affected the state's relationship with religion.

importantly, regionally came at a vital time in Europe's history, the end of the Second World War. The savageness and brutality of both World Wars saw a distinctive change in international relations and governments. Consequently, scholars began to move away from the view that states had an equal and implicit authority to interfere with their own subject's rights. Some view the effects as the precipitation of morality within international law, with human rights becoming a central point of unity. They ultimately began to build a system very much separate from the religious connections of medieval times and more akin to secularist systems concentrated on individuals' substantive rights. However, the fact that many religious leaders played a direct role in negotiating the content of these rights indicates that they remained an important consideration.

Many of the instruments involved have already been described in chapter two, and an analysis will not be repeated here. The instruments themselves reflect a remarkable shift away from religious authority despite the involvement of religious figures in the formation of these international and regional documents. Religious figures contributed equally to these documents as those from a secular, political or legal background, with the group consisting of a diverse cultural mix. The end result was an agreement on those rights which were universally viewed as inalienable and should be equally available and accessible to all. It is interesting that, although there was a clear withdrawal from religion, the use of natural law theories drew them back to the concept of 'human dignity', which mirrors the intentions of medieval Canon law through the use of duties and responsibilities. Examples of this term can be seen directly in the wording of provisions in the UDHR. Article 1 states, 'all members of the human family are born free and equal in dignity and rights … and should act towards one another in a spirit of brotherhood.'[363] The preamble of the UNDHR, ICCPR and the ICESCR all refer to 'the inherent dignity … of all members of the human family' and to the 'inherent dignity of the human person.' The ICCPR and ICESCR then continue to insist that this is where "the equal and inalienable rights of all members of the human family … derive". The use of this term as the basis for these rights has unearthed a heated debate as to their grounding and whether human beings are deserving of human dignity. As these arguments have deepened, philosophies on what makes us human and why this means

[363] Can be found at <http://www.un.org/en/documents/udhr/>

we are all equally deserving of these rights over other creatures has resulted. Many of these arguments are not relevant to our own present concerns, but their importance is highlighted through the meeting of these theories on whether they can be explained without resorting to religious grounding,[364] and these debates are also central to discovering who is able to claim these rights. As Mahan highlights, 'Understanding the basis of our alleged inviolability is crucial both for determining whether it is plausible to regard ourselves as inviolable, and for fixing the boundaries of the class of inviolable beings.'[365]

The basic argument here is that if we are unable to identify the basis of human dignity, then it is equally impossible to identify who is able to claim these rights, and what their parameters should be. In practice this may mean that a Nazi can persecute a Jew within the boundaries of human rights as, in their view, human rights are not attributed to Jews, as they are not human in the same way as themselves.[366] Solhenitsyn explains this theory in the following way:

> 'To do evil a human being must first of all believe that what he's doing is good, or else that it's a well-considered act in conformity with natural law. Fortunately, it is in the nature of the human being to seek a justification for his actions … Ideology – that is what gives evildoing its long-sought justification and gives the evildoer the necessary steadfastness and determination. That is the social theory which helps to make his acts seem good instead of bad in his own and others' eyes, so that he won't hear reproaches and curses, but will receive praise and honors. That was how the agents of the Inquisition fortified their wills: by invoking Christianity; the conquerors of foreign lands, by extolling the grandeur of their Motherland; the colonizers, by civilization; the Nazis, by race; and the

[364] Kohen, Ari *In Defence Of Human Rights: A Non-religious Grounding in a Pluralistic World* (Routledge, 2007)
[365] MacMahan quoted in Perry, Michael J "The Morality of Human Rights: A nonreligious ground" 54 *Emory Law Journal* (2005) 97-150, p.105
[366] Richard Rorty explains this well in *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge University Press, 1998) where he states that everything turns on who counts as a fellow human being, as a rational agent in the only relevant sense – the sense in which rational agency is synonymous with membership in our moral community.' p.178

> Jacobins (early and late), by equality, brotherhood, and the happiness of future generations.'[367]

Roughly interpreted this means that the essential ingredients of human dignity and thereby human rights gives the justification of why human rights may, or may not, be attributed to certain groups of people. A discovery of why human dignity classes all humans as equal is therefore essential to an interpretation of human dignity.

Perry argues that the attribution of human rights equally to all humans is due to the fact that we are all sacred and thereby equal before the eyes of God. Theoretically this would mean that a religion must interact with the state to support this precept and such a theory would support an established church that works integrally with the state. Perry then goes on to draw on the notions of religious dignity, sacredness and morality as all being religious conscripts and therefore the basis of human rights. He even draws on the origin of the word 'religion' to back up his argument,[368] and religious statements such as that of Paul VI in 1965 appear to affirm this connection.

> 'What you are proclaiming here are basic human rights: dignity, freedom and above all religious freedom. We feel that you are giving expression to what is highest in human wisdom, we might almost say, it's sacred in character.'[369]

Perry's theory is not the only one to base itself in such religious terms; many before him have equally argued that the conception of human dignity and sacredness cannot be detached from religion, or, as Murphy states, 'at least from a world view that would be properly called religious in some metaphysically profound sense.'[370] Close relations such as establishment would thus be supported.

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[367] Solzhenitsyn in Thomas P. Whitney *The Gulag Archipelago1918-1956: an experiment in Literary Investigation, Parts I-II trans*. (New York: Harper & Row, 1974) cited in Kohen, Ari *In Defence of Human Rights: A Non-religious Grounding in a Pluralistic World* (Routledge, 2007) 24-25

[368] Perry, Michael *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998)

[369] Six, Jean-Francois *Church and Human Rights* (St Paul Publications; Slough1992) 77-78

[370] Murphy, Jeffrie "Afterword: Constitutionalism, Moral Skepticism, and Religious Belief" in *Constitutionalism: The Philosophical Dimension* (Alan S. Rosenbaum, 1988) p.239 & p.248

However, critics of this theory would be completely opposed to an established church, or any close relationship between the state and religion. They would argue that theories such as those above are pure fallacy. They would state that the equality of humans could equally be interpreted in a secular way. Cloud, for example, directly challenges Perry's theory, stating that he has made an unwarranted leap from the inherent nature of human dignity to the inviolability of each human being. By doing so, Perry makes these rights impractical in the real world in which their adherence is based on the rule of law and 'practical pursuit of social, political and economic justice.'[371] Scharipo goes further, arguing that such theories, by basing themselves on religious grounding, are potentially hazardous to a universal commitment to human rights, as they may be rejected by those who do not believe in religion, such as atheists and agnostics. Another problem, highlighted by Gerwith, is that Perry's conclusions are completely impossible to prove through empirical research. He argues that such theories, by grounding themselves on irrefutable or self-evident facts, are easily cast aside as they are impossible to measure accurately and thus impossible to prove.[372] He also asserts that the majority of theories arguing that human rights are based on God are reliant on notions such as altruism, an equally unprovable notion. He argues that this is illogical and such theories must be dictated by the consistency of actions. Logically, consideration must be given to the ability to plan ahead and execute actions as primary to any theories of human rights based on equality.

Argument can also be made that the grounding of the morality of human rights within religion is misconceived, as religions have a history of human rights abuses. Two clear examples of this can be seen in the use of torture in the criminal courts and in slavery. During medieval times, torture was commonly used within the ecclesiastical courts and was manifest throughout the second part of the thirteenth century right up until the eighteenth century. As historian Edward Peters writes, "torture was part of the ordinary criminal procedure of the Latin Church and of most of the states of Europe".[373] Slavery also survived until the nineteenth century, even though accepted as a clear violation of human rights in modern times. However, such arguments may not give

[371] Cloud, Morgan "Human Rights for the Real World" 54 *Emory Law Journal* (2005) 151
[372] Kohen, Ari *In Defence of Human Rights: A non-religious grounding in a pluralistic world* (Routledge, 2007) 20
[373] Peters, Edward "The Queen of Proofs and Queen of Torment" in *Torture* (Oxford 1985)

enough weight to the provisions set out in Medieval Canon law and Roman law which evoked an ethical relationship between master and slave. This relationship required a master to act humanely towards his slave, and provisions such as these are commonly used in support of the claim that religion founded human dignity. Similarly, in relation to torture, it is not only some religions that have a history of supporting torture. There are also some socialist groups who support torture under certain conditions. The ticking bomb theory, which has gained increasing attention since 9/11, is one such theory. Many theorists, such as utilitarians, liberalists and consequentialists, believe that this would be justifiable.[374] In fact Cloud argues that it would be 'easy to imagine that even supporters of a strict human rights regime might conclude that torture is justified in these circumstances.'[375] However, if this is the case, then surely the assertion of absolute human rights, such as Article 5 of the UDHR,[376] a right not to be subjected to torture, cruel, inhuman or degrading treatment, are wrong. Absolute rights are only absolute as long as they don't contravene what is best for the community, or society, as a whole. Deontological theorists and those who adopt an approach grounded in human dignity would disagree. To them rights, such as those detailed under Article 5 of the UDHR, are absolute and, although it may be considered ironic given their history, a Christian understanding would come to the same conclusion. This is reflected in the Pontifical Commission which states that the Christian basis of any theory of human rights 'is respect for the human person as an end in himself, not as a social instrument.'[377] Their relationship with the state might thereby become central to ensuring the armed services or secret services do not make use of such torture. They also ensure that such debates are maintained publically and that political debate is kept natural. As representatives of the established church are present (and representational of all religions in the UK) within the legislature, they are also able to command influence when laws are proposed concerning torture or the use of violence and curtailment of

[374] See Brecher, Bob *Torture and the Ticking Bomb* (Blackwell Publishing 2007); Posner *The Best Offence*, The New Republic (Sept 2nd 2002) who states that 'If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used--and will be used--to obtain the information.... No one who doubts that this is the case should be in a position of responsibility.'

[375] Cloud, Morgan "Human Rights for the Real World" 54 *Emory Law Journal* (2005) 20

[376] Article 3 of the ECHR

[377] Pontifical Council for Justice and Peace, Towards Reforming the International Financial and Monetary Systems in the Context of Global Public Authority (Vatican City 2011) cited in McCrudden, Christopher "Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?" (2012) 1(1) *Oxford Journal of Law and Religion* 185-201, 190

individual rights. Arguably this makes the presence of an established church a benefit to all citizens.

The same is true of ensuring public debate is maintained in respect of balancing the communal good against individual rights. A notion that again reflects Christian beliefs, including that of the established church. The theory that individual rights must be balanced against the communal good is not revolutionary and reflects the way that many internationally protected human rights are qualified through the allowance of state interference under certain conditions.[378] There are also provisions allowing derogation from certain rights should circumstances call for it. This acts as a clear reminder that these documents are not meant as a decisive list of rights that individuals are able to wield over the state[379] but as 'a superior international standard, established by common consent.'[380] As Evans explains, they are to be viewed as a "tool, as a methodology for addressing the tensions that arise within the governance of society".[381] In his view they are not to be seen as an ethical code. They should simply be considered as -

> 'inputs, many highly contentious, often largely political, and the subject of intense negotiation. They are not the distillation of any great particular form of wisdom. They are the product of a pragmatic process and have to be engaged with as such, as important statements of how the international community believes it can and should configure itself, but not in any sense as absolutes.'[382]

Viewed in their written form they are not like anything that has been seen historically. They consist of interpretational instruments that can be used by states through their legislators, executive and most importantly the judiciary in considering whether there has been a breach by the state of individual human rights. They give guardian status to

[378] Article 8, 9 and 10 of the ECHR are all qualified. This means a breach can occur if prescribed by law and necessary in a democratic society in the interests of national security, public safety, the protection of public order, health or morals or the protection of other rights and freedoms. (These are slightly different for each article but are similar in their effect)

[379] Ronald Dworkins is amongst those who believe this is the case classing 'rights as trumps'

[380] Paul Sieghart, cited in Lerner, Natan *Religion, Secular Beliefs and Human Rights: 25 years after the 1981 Declaration* (Martinus Nijhoff Publishers, 2006) 15

[381] Ghanean, Nazila, Stephens, Alan & Walden, Raphael *Does God Believe in Human Rights?* (Nijhoff Publishers 2007) 11

[382] *ibid* 11

the judiciary in checking that the state does not abuse its authority when it comes to rights incorporated into these international agreements. In practice this is not dissimilar to the use of *aequitas* in medieval law,[383] indicating a loose connection with religious law historically. The difference is that these rules are now documented.

In many ways it is this documentation of rights that has been revolutionary, especially with the authors coming from such different backgrounds. This is echoed in Jacques Maritain's (one of the key contributors to the UNDHR) response to a person who was 'astonished that such champions of violently opposed ideologies had been able to agree on a list of fundamental rights.'[384] Maritain responded by stating 'Yes, we agree about the rights but on condition no one asks us why.'[385] Some view this as critical evidence that we should stop asking why these rights were agreed on and start working towards their universality in order to build a grounded and more stable future. Equally, whether religious leaders would have made such a tangible contribution had many states not had such a close relationship with religions to begin with is a good question. Having an established church within state's models may thereby have directly ensured their position within international and regional debates as well. It also indicates that attempts to look backwards become merely speculative, and the debates that result ultimately benefit nobody in terms of establishing such rights, regardless of where influence is drawn from. In a sense, this would confirm Gerwith's argument that no metaphysical theory can ever be empirically measured or proved. Nietzsche goes further, stating 'People have the tendency to overemphasize the importance of the past and become absorbed in a love of history.' He then goes on to 'poke fun at those who can find fault with everything associated with the present.'[386] However, Kohen criticises Nietzsche's extremism, stating that the disregard for history completely can be equally as damaging. However, equally, if not more importantly, we must not become absorbed in historical interpretations. Consideration must be given equally to the collective

[383] *Aequitas* is a rule within canon law that allows judges to deviate from a rigorous reading of the law in order to preserve soteriological concerns should the circumstances call for this. It has been described as the highest source of justice and the synthesis of justice and commiseration. See Landau, Peter "'Aequitas' in the 'corpus iuris canonici'" (1994) 20 *Syracuse Journal of International Law & Commerce* 95, 103

[384] Kohen, Ari *In Defence of Human Rights: A non-religious grounding in a pluralistic world* (Routledge, 2007) 20

[385] *ibid*, 20; Lerner, Natan *Religion, Secular Beliefs and Human Rights: 25 years after the 1981 Declaration* (Martinus Nijhoff Publishers, 2006)

[386] Kohen, Ari *In Defence of Human Rights: A non-religious grounding in a pluralistic world* (Routledge, 2007) 32

intentions of creating a workable international document that ensures that the individual's rights are protected against state interference in order to prevent the atrocities seen in the first half of the twentieth century. As Lerner asserts, in the same way as scratching a scab will leave the skin weaker and scarred beneath, if we scratch too much at the foundations of these international human rights documents, it will leave them weaker and more susceptible to challenges,[387] and as these rights strengthen, more pressure is put on the state's relationship with the church in order to mould a model of separation. States such as the UK with an established church may thus become more marginalised but have not been ruled as contrary to human rights.

4.2 The separation model

Although outside of Europe, America is a classic example of a state based on complete separation from religion. As stated above, the core of this separation comes from the 1st Amendment which reads 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.[388] The courts have keenly preserved this, as is demonstrated in the case of *Lemon v Kurtzman*,[389] where three criteria were enumerated in order to clarify the boundaries of this separation.

> 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'[390]

The closest analogous state within Europe is France, although their approach to religions is very different. Rather than an anti-establishment clause, they have chosen to recognise religious freedom directly. This was reflected within the French

[387] *ibid*
[388] 1st Amendment of The American Bill of Rights. A full copy can be found at <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html>
[389] 403 US 602 (1971)
[390] Cited in Cranmer, Frank and Oliva, Javier Garcia "Church-State Relationships An Overview" (2009) 162 *Law & Justice – Christian Law Review* 4-17, 7

Declaration of Rights in 1789[391] and reiterated in the 1946 Constitutional Council preamble and Article 1 of the French Constitution.[392] However this respect for religious freedom is, as Adrian contends, somewhat 'deceptive'[393] and is not given on its own merit but is based on the wider concept, freedom of opinion. When analysed at a deeper level it can be seen that a more accurate depiction of the legal relationship between the state and religions is that of positive *laicite* which is said to impose 'positive obligations on the State compatible with a regime of separation'.[394] This means that the state is under a positive obligation to ensure that all citizens have the possibility of attending religious ceremonies, but that religions themselves are allowed complete autonomy to practice and manage their own affairs.

Although both systems are built on some form of neutrality, it is clear that occasional advantages can be gained by being recognised within certain legal categories or through exceptions being granted in case law. In France for example, there are certain privileges to be found under Article 4 of the Law of 1905 which give certain tax benefits to those associations recognised as *associations culturelles*. These benefits allow for the application of funds reserved for the repair of listed monuments.[395] This in itself gives a disproportionate advantage to older religions, as their property is likely to fall within the category of buildings and monuments that are able to claim from such funds. Although this demonstrates how the state favours certain religions in a historical context, the guise of separation is maintained as the system is not based on religious purposes but on preserving buildings of cultural and historical significance. Any favouritism is merely a by-product. There is also a separate provision for buildings belonging to the Catholic Church which was unwilling to register as *associations culturelles* due to its fear of losing its hierarchy and independent authority. This has meant that responsibility for those buildings has been vested directly to the state, giving

[391] Article 10 states 'No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.'
[392] Chelini-Pont "Religious Freedom and Freedom of Expression in France" 225-239 in Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Ashgate Publishing Limited, 2010)
[393] Adrian, Melanie "France, the Veil and Religious Freedom" (2009) 37(4) *Religion, State and Society* 345-374, 345
[394] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)
[395] *Ibid* 163-164

the church a historically beneficial position constitutionally which is not in line with a model of separation but rather with that of a state church.

Again, in America, although the judgement of *Lemon v Kurtzman*[396] has produced some uniformity in judgements, such as that of *Engal v Vitale*,[397] *Wallace v Jaffree*[398] and *Santa Fe Independent School District v Doe,*[399] all of which involved the saying of prayers or sponsoring of prayers before a class or sporting activity at school.[400] Other cases, most in the last half century, have been decided in a way that conflicts with these decisions. For example, contrary to those listed above it, was decided in *Marsh v Chambers*[401] that the Nebraska Legislature could begin each session with prayers that were officiated by a state-paid chaplain. This ruling was subsequently used to allow Christmas displays that contained Christian elements to be constitutional so long as secular symbols were also included.[402] These cases led to the question of whether displays are an endorsement of religion being changed to whether the display coerced the public's view on religion.[403] Often these cases are accounted for by allowing concessionary measures to be put in place and this has allowed the state to extend laws in order for equal treatment to be allowed of religious and secular choices. In *Mueller v Allen*[404] this occurred through the granting of tax-deductions for parental expenditure on textbooks, transportation and tuition to parents whose children attend church schools, a measure that was already in place for those attending public schools. However, this approach has not increased clarity on how potential challenges to the 1st Amendment will be treated. If anything, it has caused more confusion, with two clearly conflicting cases being handed down in the space of a day during 2005. These cases both concerned displays containing the Ten Commandments. In the first, *Van Oden v Perry*[405] a monument engraved with the Ten

[396] 403 US 602 (1971)
[397] 370 US 421 (1962)
[398] 472 US 38 (1985)
[399] 530 US 290 (2000)
[400] Other similar matters have involved the reimbursement of teachers' salaries, textbooks and instructional materials at private church schools (*Lemon v Kurtzman* 403 US 602 (1971); *Aguilar v Felton* 473 US 402 (1985)), and the public displaying of symbols (*Stone v Graham* 449 US 39 (1980))
[401] 463 US 783 (1983)
[402] *Lynch v Donnelly* 465 US 668 (1984)
[403] Griffin, Leslie C "No Law Respecting the Practice of Religion" (2007-2008) 85 *Detroit Mercy Law Review* 475
[404] 463 U.S. 388 (1983)
[405] 545 US 677 (2005)

Commandments on the grounds of the State Capital in Austin, Texas was found to be constitutional. However, in *McCreary County, Kentucky v American Civil Liberties Union of Kentucky*,[406] a display that included the Ten Commandments on display in the county courthouses of McCrary and Pulaski in Kentucky were both found to be in violation of the 1st Amendment.

These cases have demonstrated a clear discrepancy in the interpretation of the 1st Amendment and how far the state is able to support religious freedom within their legal constraints. The fact that uncertainty has occurred may be reflective of a more proactive approach to religious freedom and the ability of religion to play a part in the public sphere. Many of these cases touch directly upon the education system and the ability to disseminate information to students. As Ellis explains:

> 'the Establishment Clause of the First Amendment makes it unconstitutional for public schools to teach as true the religious doctrines of the majority church – even if those doctrines are held by an overwhelming majority of citizens, or by an overwhelming majority of philosophers and theologians'.[407]

This means that the public, whether school children or the more general population, are viewed as able to make rational choices between moral, scientific or philosophical arguments, but are considered in need of protection when it comes to matters of religion.[408] This seems a somewhat unfair judgement when you consider some of the extreme theories that are unconnected to religion. When considered in these terms fuel can be given to the argument that the First Amendment potentially discriminates against religion, singling it out as a matter from which the public needs protecting. This is despite a number of cases indirectly supporting or financially accommodating religious belief and judicial attempts to prevent the exclusion of religious symbols.[409]

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[406] 545 US 844 (2005)

[407] Ellis, Anthony 'What is special about religion?' (2006) *Law & Philosophy* 219-241, 220

[408] Griffin, Leslie C "No Law Respecting the Practice of Religion" (2007-2008) 85 *Detroit Mercy Law Review* 475

[409] Durham, Cole W and Smith, Robert T "Religion and the State in the United States at the Turn of the Twenty-first Century" in Ferrari, Silvio and Cristofori, Rinaldo *Law and the Religion in the 21st Century: Relations between States and Religious communities* (Ashgate Publishing Limited, 2010) 79-110. For more on the topic of religion in education within America please see Strasser, Mark *Religion, Education and the State* (Ashgate 2011)

Political theorists on occasion have also commented on the matter but have drawn a very different picture of the marginalisation of religion in America. O'Donovan points out that the separation of state and religion through the First Amendment is a result of Christians themselves who had a large input on the new constitution and 'thought they had the interests of the church's mission at heart'.[410] After the religious turmoil of preceding years, these Christians wished to prevent state interference in religious affairs and gain complete autonomy. However, inadvertently they ultimately promoted the state's role in society whilst excluding themselves from participation. In summation,

> 'The paradox of the First Amendment is that a measure first conceived as a liberation for authentic Christianity has become, in this century, a tool of anti-religious sentiment, weakening the participation of the church in society and depriving it of access to resources for its social role.'[411]

At the time the unfortunate repercussions could not have been anticipated. The drafters, whose intentions were genuinely meant to protect religions from the state, resulted in isolation from important political matters.

Theoretically some similarities can be drawn from the French's approach to new religious movements. The state itself has struggled with how to recognise what constitutes a new religion, and with a more general reluctance to define religion, they struggle due to a lack of positive legislation which allows the recognition of religions, particularly when these religions attempt to apply for the types of benefits more traditional religions enjoy, such as registration with *associations culturelles*. As a result of this lack of clarity, the majority of decisions relating to new religions are left to the judiciary, with no clear guidance on how to judge such matters. However, this is not an uncommon problem and similarities have been found in the majority of countries, both in Europe and outside of Europe. Sandberg's article "Defining religion: towards an

[410] O'Donovan, Oliver *The Desire of the Nations: Rediscovering the roots of political theology* (Cambridge University Press 1996) 244
[411] Cited in O'Donovan, Oliver *The Desire of the Nations: Rediscovering the roots of political theology* (Cambridge University Press 1996) 244

interdisciplinary approach"[412] discusses this matter in depth, considering the different models used judicially to filter out non-religions using a string of cases to illustrate the problem. The issue becomes pertinent to France when religions vie for what little financial benefits are available through registration.

There is thereby a lack of consistency in the ability of religions to enjoy benefits within both states, and problems continually arise in defining religions, especially new religions, as states are not able to interfere in religious matters or support religions within the public sphere. This is well illustrated by the problems that minority religions face in the wearing of religious symbols, and more recently this became a real media sensation within France with the lead up to the banning of the wearing of face coverings in public in 2010.[413] As Van der Shift and Overbeeke point out, this ban, although termed in a neutral fashion, is 'generally considered to be a law banning the burqa from being worn in public',[414] and it was preceded by a ban on the wearing of headscarves and other religious symbols in French state schools,[415] a debate precipitated by the expulsion of three girls from the *College Gabriel-Havez de Creil* in 1989 for wearing headscarves.[416] The legislation itself was the result of years of public debate and a Commission report[417] that had considered different legal, philosophical and sociological views towards the veil, as well as the contemporary meaning of the term *laicite*. They interviewed numerous individuals and held over 60 public and private hearings including advice from government ministers such as Luc Ferry, the minister of

[412] (2008) *Revista General de Derecho Canonico y Derecho Eclesiastico del Estado* 1-23
[413] Law 2010-1192 of October 11 2010
[414] Gerhard van der shyff and Adriaan Overbeeke "Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans" (2011) 7(3) *European Constitutional Law Review* 424-252, 426
[415] Law 2004-228 of March 15 2004, pursuant to the principle of secularism, the wearing of signs or dress manifesting a religious affiliation in schools, colleges and public schools.
[416] According to Adrian there is an unofficial version of this story that states the problem traces back to 1988 when Israeli students of the Association des Maisons d'Enfants Laversine near Creil ignited controversy when they did not attend school on Saturday mornings and began school more than a week after the official school starting date. This had caused uproar within the teaching staff and a decision was made to prevent further absences for religious reasons. When the issue of headscarves came up there was a feeling that if they were to be strict on the issue of a secular school system against Jewish students they must be equally strict against Muslim students. Adrian, Melanie "France, the Veil and Religious Freedom" (2009) 37(4) *Religion, State and Society* 345-374, 356
[416] Adrian, Melanie "France, the Veil and Religious Freedom" (2009) 37(4) *Religion, State and Society* 345-374, 346
[417] The Stasti Commission 2003-2004

education at the time, and Jean-Paul Costa, the vice-president of the ECHR. They also heard from religious leaders, the chief inspector of police, as well as those working within the schools that would be affected. Once collated, this information was scrutinized and four different models were considered. The end result came in 2004 with the banning of the Muslim veil at state schools. Crucially however, the ban did not come in the form of a straight ban against the veil but against any 'ostentatious religious symbols'.[418] This term is considered by some to be a 'legalistic afterthought',[419] presented to ensure the law did not discriminate against one religion alone, as to do so would have been a breach of their religious freedom as set out in Article 9 of the ECHR. A similar tactic was used in the 2010 Act whereby the 'provisions are framed in a neutral fashion so that it is not aimed at burqas specifically but at face coverings as such',[420] and importantly the Constitutional Courts ensured that the ban did not extend to places of worship that were open to the public. This, they considered, would constitute a violation of their right to religious freedom.[421] The actual general validity of the ban came to a head in 2011 when a woman argued a breach of her ECHR rights when asked to remove her full face veil within a public space. The case was taken right up to the Grand Chamber of the ECtHR where no violation was found, a demonstration of how the ECHR does not prevent member states from framing their own approaches to their relationship with religions.

There is however a sense of neutrality within the judgements of the ECtHR with the case of *Eweida and others v United Kingdom*[422] equally viewing the banning of wearing a crucifix and other such matters as not constituting a violation of individuals' rights. The focus of such case law is that if such a ban occurs, it is applied neutrally to all religions and this approach, though different in grounding, appears to reflect some of what is happening with the jurisprudence of America. The conflicts centre on the issue of

[418] Adrian, Melanie "France, the Veil and Religious Freedom" (2009) 37(4) Religion, State and Society 345-374
[419] Adrian, Melanie "France, the Veil and Religious Freedom" (2009) 37(4) Religion, State and Society 345-374, 256
[420] Gerhard van der Shyff and Adriaan Overbeeke "Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans" (2011) 7(3) *European Constitutional Law Review* 424-252, 426
[421] Decision No. 2010-613 DC of 7 October 2010, para 5. See also Gerhard van der shyff and Adriaan Overbeeke "Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans" (2011) 7(3) *European Constitutional Law Review* 424-252
[422] (48420/10) [2013] I.R.L.R. 231

discrimination and have begun to concern the equal treatment of religion rather than the doctrinisation of religion. This is reflective of the terminology used in the banning of the wearing of face coverings, first at schools and then in general, and again within the issues of *Eweida and others v UK*[423] where Sedley LJ contrasted issues of protection accorded to discrimination on various different grounds including age, disability, gender reassignment, race and sexual orientation with that of religion or belief. He considered the difference in treatment to be due to judge's treatment of religion and belief as an external choice and asserted that judges would have to attempt to understand religious issues from an internal viewpoint in the future.[424] Such issues have not been as strongly felt in American jurisprudence; however, the conflicts in case law do appear to show similar traits to those appearing in Europe, with the main issue being that of the manifestation of religious belief in the public sphere. This indicates that even the imposition of an 'Establishment' clause that creates theoretically a pure separation of state and religion cannot prevent issues of religious freedom affecting state interpretation.

The two models described above demonstrate how even within models of separation there is an unavoidable area where the state must interact with religions, whether it be through a non-establishment clause or under regional human rights instruments. The judiciary is especially involved in such matters and older traditional religions are often more protected than newer religions.

4.3 The state-church model

The state-church model contrasts with the separation model described above, and according to Temperman is 'exclusively associated with the relationships between

[423] *ibid*
[424] McCrudden, Christopher "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38

states and Christianity' and is said to be 'largely a European phenomenon and is inextricably linked with the history of Europe's royal houses'.[425] It features a close relationship between the state and a particular religious community which is often given special legal status and is able to enjoy certain benefits that do not extend to other religious groups. This type of relationship is often termed as 'state', 'national', 'established', or 'folk' churches. State-church models have been highly criticised in recent years for being unable to accommodate religious freedom due to their special treatment of one individual religious community and consequently some states, such as Sweden, have chosen to relinquish their links. The UK, however, has retained two established churches which have been described extensively in the first chapter of this thesis. Below, this will be used to demonstrate how this model operates, and Denmark, whose model of a very integrated state church will be used as a comparison.

Denmark has featured a state church since 1536 when Christian III was crowned as Lutheran King. He quickly dismissed all the bishops and confiscated all Episcopal landed estates. It was not until 1849 that compulsory membership of this church was revoked,[426] and in the same year the Danish Constitution named the Lutheran Church as the "Folk church". This made separation from the State formally impossible without a change to the Constitution itself. A number of primary legislation instruments concerning matters such as the economy of the church, its property, employment and education provisions, as well as that of baptism, confirmation and burial, all make the question of disestablishment complex. It is also accorded standing in Parliament, and the Minister of Ecclesiastical Affairs is appointed to oversee regulation. It does, however, have its own Synodical Constitution which gives it autonomy over ecclesiastical matters, although its governance is more akin to a state agency, with clergy and employee's being classed as civil servants. This is in complete opposition to other religions, which are given status as private associations. State subvention also accounts for 12% of the "folk church's" finances.[427]

[425] Temperman, Jeroen *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010) 44
[426] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)
[427] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)

Although this close relationship with the state has come under considerable criticism over the years for infringing religious freedom, the Danish government continues to defend its position. As Ventura states:

> 'mainstream churches play a fundamental role in facilitating public policies aimed at social integration and cohesion. Individual and collective rights concerning the practice of religion are well recognized; and co-operation between faith communities and state agencies is successful and productive.'[428]

This is reflective of much of what has been stated about the position of the Church of England within the UK constitution. Much support has been seen from other religions who view the position of the established church as beneficial to facilitating the ability of all religions to participate in the public sphere. With this matter being central to this thesis, the matter has been discussed in more depth in previous chapters but is essential to note here. Notably, and importantly, there are certain privileges that have been viewed as overly beneficial at times but that are often criticised by non-religious groups rather than other religions. The main example of this is the position of the 26 bishops within the House of Lords. As described above, this contrasts with other religions who have no direct representation in the House of Lords, and although recent recommendations have been made to attempt to correct this imbalance,[429] as yet they have not been incorporated into any recent reform proposals, which merely address a reduction in Spiritual Lords.[430] Although in many ways this appears highly beneficial to the Church of England, there are ways in which it hinders their ability to act impartially towards the state. Hill gives a detailed account of how this can be seen through their inability to unite with other religions in opposing legislation that has passed successfully through the House of Lords. [431] The effect of this has led to criticisms that

[428] Ventura, Marco "States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment" in Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious communities* (Ashgate Publishing Limited, 2010) 181-187, 185

[429] Royal Commission on the Reform of the House of Lords, *A House for the Future* (The Stationary Office, 2000) Cm 4534; HM Government *The House of Lords: Reform* (The Stationary Office, 2007) Cm 7027

[430] House of Lords Reform Bill (May 2011) Cm 8077

[431] Hill, Mark "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180. Mark Hill discusses the exception fought for by an alliance of religions against the Gender Recognition Act 2004 which came to fruition through the Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) Order 2005

they are 'dangerously out of step with wider society'.[432] This in itself could be potentially dangerous to the Church of England from the viewpoints of other religions, who are supportive so long as it continues to represent all other religious viewpoints.[433]

Also, as noted in chapter 1, in contrast to the Church of England, the UK's second established church, the Church of Scotland, does not have representation within the country's political system. They appear in constitutional terms as a completely separate, autonomous system mirroring an example of almost complete separation of state and church. However, there are certain features which separate the Church of Scotland from other religions, which are treated more as unincorporated associations. These religions consist of voluntary members who agree to abide by the organisation's rules and regulations. The relationship that this creates between members is often referred to as a consensual compact and was described in the case of *Scandrett v Dowling*[434] as 'a willingness to be bound to it because of shared faith' rather than 'the availability of the secular sanctions of State courts of law'.[435] To a large extent these organisations are left to their own devices, with state courts only involving themselves in matters of finance and property that cross over into secular concern. The case of *R (on the application of E) v JFS Governing Body*[436] affirms this, where the judiciary summed up the principle set out in the historical case of *Forbes v Eden*[437] as decided in 1867. Here, it was stated that 'It has long been understood that it is not the business of the courts to intervene in matters of religion'[438] but that courts would interfere if 'the divide is crossed when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts'.[439] Again, this was confirmed in the more recent case of *HH Sant Baba Jeet Sing Maharaj v Eastern Media Group Ltd*[440] when

[432] Piggott, "What does women bishops decision mean for the Church" (13th July 2010) BBC News UK found at <www.bbc.co.uk/news/10616553> last accessed 13/08/2011
[433] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997); Oliva, Javier "Sociology, Law and Religion in the United Kingdom" (2004) 153 *Law and Justice* 8-26
[434] [1992] 27 NSWLR 483
[435] Cited in Sandberg *Law and Religion* (Cambridge: Cambridge University Press, 2011) 73
[436] [2009] UKSC 15
[437] (1867) LR 1 Sc & Div
[438] *R (on the application of E) v JFS Governing Body* (n.83) para 157
[439] *R (on the application of E) v JFS Governing Body* (n.83) para 158
[440] [2010] EWHC (QB) 1294

Justice Eady referred to the 'the well-known principle of English law to the effect that the courts will not attempt to rule upon doctrinal issues or intervene in the regulation or governance of religious groups'.[441] Instead, courts will merely apply the rules or doctrines of the religion without involving themselves in questions concerning the truth of religious beliefs.

This type of interference is not uncommon within hybrid models, which only become involved in matters of religion when needed and only on neutral terms. In terms of such interference the state is equally neutral towards their involvement with the Church of Scotland and the Church of England, with the exception that their courts have legal status. Furthermore, questions have been raised in regard to the Church of England as to the constitutional status of the Parochial Church Councils (the bodies concerned with the day to day running of parish churches), especially in light of Section 6 of the Human Rights Act.[442] As yet no such cases have been successful with the leading case, *Aston Cantlow and Wilmcote with Billesley, Warwickshire, PCC v Wallbank*,[443] not dismissing the close links between the Church of England and the state but emphasising that the PCC has 'nothing whatever to do with the process of either central or local government'.[444] This relationship, as put by Lord Hope of Craighead, was one of 'recognition, not of the devolution to it of any of the powers or functions of government' and, as stated:

> 'It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual.'[445]

[441] *ibid*
[442] This introduces the concept of hybrid public bodies which covers not only public bodies but also private bodies exercising a public function. For more on this see Oliver, 'Functions of a Public Nature under the Human Rights Act' (2004) *Public Law* 328-351; McGarry '"Functions of a public nature" under the Human Rights Act 1998: the decision of the House of Lords in *YL v Birmingham City Council*' (2007) *Web Journal of Current Legal Issues*
[443] p2003] UKHL 37
[444] Aston Cantlow and Wilmcote with Billesley, Warwickshire, *PCC* v Wallbank [2003] UKHL 37, 59
[445] Aston Cantlow and Wilmcote with Billesley, Warwickshire*, PCC v Wallbank* [2003] UKHL 37, 59

This means that when it comes to human rights, the Church of England is to be treated as a victim under the Human Rights Act in the same way as other religions.

This contrasts with the structure of the Danish Folk Church, with each Folk Church having a status similar to a state agency with its legal regulation part of public law. Again, similarly to the UK situation, all other religions are viewed as private associations with their rules only binding between members themselves. However, unlike the UK, the established church benefits from state finance with the state supplementing the amount received by members. This means that they do contribute to the overheads of the church, including minister's wages. As seen in Craighead's comment above, this is not the case with the Church of England which is fully responsible for its own finances and gains no individual tax benefits. In fact, it has been noted that in financial terms the Church of England is one of the most disestablished churches in Europe, and as Sims states, 'Establishment in England has long ceased to entail legal disabilities or social and political exclusion for non-established churches and their members'.[446] This would mean that in financial terms, as well as some others, the established church in the UK fits more within the separation model, or even that of a hybrid model, with the state working closely with religions to help facilitate their ability to manifest their beliefs. The Danish Folk church, however, remains a more traditional model of state church and although defended by Queen Margaethe, who fears that disestablishment would 'only serve to marginalise religion,'[447] it does come rather close to discriminating against other religions. However, there are many legislative measures in place to ensure non-discrimination against all religious bodies and Article 78, which guarantees the freedom of association, can be used to protect new religious movements. There are also a number of Acts relating to the "folk church" which engage in building positive relationships with other religions, of which the Act on Participation by the Folk Church in Interchurch Cooperation[448] and the Act of Economy of the Folk Church[449] are good

[446] Chapter 4 Sims, Nicholas A "A Quaker Point of View" in Morris, R.M. *Church and State: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008) 36; It is however important to note that the question of PCC's forming a public body under the HRA was not dismissed and there may still be circumstances were it could be applied.

[447] Cited in Cranmer and Oliva, "Church-State Relationships An Overview" (2009) 162 *Law & Justice – Christian Law Review* 4-17, 6

[448] (334/1989)

examples.[450] Religious freedom is also guaranteed by Articles 67-70 of the Constitution, and, as Papastathis states, 'no one can be lawfully denied his civil and political rights in virtue of his religious convictions'.[451]

The way in which human rights are moving may easily mean that such models are in danger of extinction; however, for the time being they remain able to function legally and are able to ensure all religions are catered for within their laws. As the UK already features this model, lessons may not be drawn directly, as it opposes the concept of strict disestablishment. However, there are features of loose establishment that may aid a partial amendment to their structure in an attempt to create a more autonomous model of establishment.

4.4 The Hybrid Model

Hybrid states or cooperationist systems are characterised by 'a simple separation of state and church coupled with the recognition of a multitude of common tasks that link state and church activity'.[452] In other words these states, although they may acknowledge a religion as the majority religion in the country, have no formal links with any religion. Instead, they recognise and facilitate links between the state and church whilst remaining neutral. This can either be in the form of Treaties, Concords or other forms of agreement or registration. Theoretically, these form the most neutral states that harbour equality between religions through their equal treatment; however, many states find it difficult to remove themselves and their laws from their historical backgrounds and any links that follow. In many ways this could be argued to imitate a 'relaxed' form of establishment. The main difference is the attempt to treat all religions

[449] (37/1997 S 12)
[450] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)
[451] Papastathis, Charalambos "Tolerance and Law in Countries with an Established Church" (1997) 10(1) *Ratio Juris* 108-113, 109
[452] Sandberg & Doe "Church-State Relations in Europe" (2007) *Religion Compass* 561-579, 563

neutrally. However, as many such frameworks indicate, these attempts are often flawed, as foremost recognition is given to those religions traditionally embedded in the country's history.

Both Italy and Ireland suffer from this historical difficulty. Both have been intricately tied to the Catholic Church in the past and continue to feature a strong Catholic population.[453] Although Ireland has attempted to move away from state recognition[454] and no longer recognises the Catholic Church within its Constitution Article 44 continues to have a distinct Christian feel to it ,reading 'The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.' Italy also attempted to distance their ties with the Catholic Church during the nineteenth century when they enacted a number of laws restricting certain sociological and educational matters that had previously been overseen by the Catholic Church. These included control of welfare and charitable organisations, and Catholic resistance to these changes was immense, with accusations of state interference in church autonomy being raised. The situation was eventually dispelled by the enactment of the Lateran Treaties in 1929 which, although they have undergone some change, remain in place today.[455] Other religions that were already established in Italy followed suit, with agreements being made with organisations such as the Valdensians, Lutherans and Jews.[456] However, the remaining religions are left to rely on the general laws governing freedom of association and they are excluded from privileges enjoyed by those that hold legal agreements.

[453] Statistics are always hard to come by and their accuracy can be questionable; however, according to the 2008 Census in Ireland, 84% of the population was baptized Catholic. In Italy 90% of state school pupils take part in Catholic religious educational classes and 70% of all marriages that take place occur in accordance with Catholic rites, with a high percentage of citizens baptized. Figures are taken from Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)

[454] This featured highly in the Constitution prior to 1972 where the state recognised 'the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of citizens.' The Constitution of the Irish Free State 1922 Article 44.1 No.2

[455] The most recent form of the Lateran Treaty was signed in 1984 and it was only at this point that the Catholic Church relinquished its position as the state-supported church.

[456] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)

Notably, the Italian constitution does not guarantee religious freedom. There are a number of Articles that promote non-discrimination and equality of religious belief, but no provisions exist for religious freedom itself. For example, Article 8 declares that 'all denominations are equally free before the law,' Article 19 guarantee's freedom to profess and promote one's religious belief, alone or in association with others, and Articles 2, 3 and 20 recognise non-discrimination and equality. In recognition of the Lateran Treaties, Article 7 refers to the Catholic Church directly as 'independent and sovereign' within its own sphere. Interestingly, when taken together, these Articles have been recognized by the Italian courts as embraceing the principle of *laicita*, which, according to the court, 'does not involve indifference towards religion' but 'promotes a *positive attitude* towards all religious denominations'.[457] This is a very different system of *laicita* to that seen in France which, as we have seen, involves a complete separation of church and state. As stated, such constitutional references to the Catholic Church have now been removed from the Irish constitution; despite this, it retains a high degree of influence over the education and social welfare systems, with a large percentage of schools having been founded by the Catholic Church.[458] Although funded by the state through either direct capital grants or block grants,[459] this system of education has come under criticism by the UN Human Rights Committee and the ECHR. As a response, the Irish Teachers Organisation and the National Council for Curriculum and Assessment both issued statements aiming to tackle issues of growing migration and diversity, as well as concerns that may be raised concerning food, jewelry and clothing.[460] As is the case in many other European Countries, the issue of wearing headscarf's has also had to be tackled, but unlike their counterparts, decisions have been decided at a local level. In 2008 this resulted in a controversial decision being made to allow a 14-year-old girl to wear the hijab in one area. The result was a Joint Statement from the Department of Education which stated that the 'wearing of clothing which obscures a facial view and creates an artificial barrier between pupil and teacher'

[457] Ronchi, Paolo "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" (2011) 13 *Ecclesiastical Law Journal* 287-297, 288

[458] Generally Catholic or Protestant. In 2006 it was found that 95% of primary school children attended Catholic schools, with a further 3% attending Protestant schools.

[459] Robbers, Gerhard *State and Church in the European Union* (2nd edition, Nomos 2005)

[460] Mullally, Siobhan & O'Donovan, Darren "Religion in Ireland's "public squares": education, the family and expanding equality claims" (2011) *Public Law* 284-307

is dismissed as a hindrance to 'proper communication'.'[461] As Mullally and O'Donovan state, this echoes 'distinctions that have arisen in the UK courts and before the UN Human Rights Committee',[462] making it not dissimilar to state church models and that of separation.

Historically, similar provisions have been seen within the provisions of other social services including hospitals and orphanages. According to Fahey, during the mid-1960's the Irish Church 'was the most heavily staffed of any national church in the Catholic world'.[463] However, from this point on, their involvement in practical terms began to decline. This coincided with a general decline in the Irish Catholic Church and with the introduction of a modern State welfare program. Pope Paul VI was also beginning to change the approach to welfare within the Catholic Church, allowing more local autonomy instead of a top-down management approach. The result was more involvement of the lay community in practical terms which allowed a greater involvement in influencing debates on social justice.[464]

When this entanglement with social policies and the Catholic Church is considered, it is not surprising that legal changes in family law have been slower in Ireland than in their European counterparts. For example, divorce was only legalised in 1996 by the Family law (Divorce) Act 1996. This Act, which came into force a year later, was the result of a 50.3 per cent majority vote in a referendum held in 1995. Abortion is also still very controversial, and although in 1992 a right, under certain circumstances, to travel for abortion was granted, it is still illegal to perform an abortion in Ireland. This position is

[461] Cited in Mullally, Siobhan & O'Donovan, Darren "Religion in Ireland's "public squares": education, the family and expanding equality claims" (2011) *Public Law* 284-307, 297-298

[462] Mullally, Siobhan & O'Donovan, Darren "Religion in Ireland's "public squares": education, the family and expanding equality claims" (2011) *Public Law* 284-307, 297. Examples can be seen in *Asmi v Kirklees Metropolitan Council* [2007] IRLR 434 (EAT) and *R (on the application of X) v Headteachers and Governors of Y School* [2007] EWHC 298 (Admin)

[463] Fahey, Tony "The Catholic Chruch and Social Policy" (1998) 49(4) *The Furrow* 202-209, 203

[464] Fahey, Tony "The Catholic Chruch and Social Policy" (1998) 49(4) *The Furrow* 202-209

unlikely to change in the near future as the ECHR in 2010 held that women had no right to an abortion.[465]

The above indicates that although it is considered a hybrid model, Catholicism remains intertwined with Irish society and politics. This fact is reflected in the Catholic Church's continuing influence over family law and education, leading to some, such as Mullally and O'Donovan, to conclude that Ireland 'could not be defined as secular'.[466] The state-church relationship is also highly connected with historical developments and analogies can be easily drawn with systems such as France, a model of separation, and the UK, which has an established church.

In the same way the Catholic Church remains an integral part of Italian society and this is reflected in the recent case of *Lautsi v Italy.*[467] The case involved the display of a crucifix on classroom walls. After the Constitutional Court claimed lack of jurisdiction, it was decided by the Regional Administrative Court (Tribunale Amministrativo Regionale) that the crucifix in state schools did not offend the principle of *laicita* but, on the contrary, 'actually affirms it."[468] They went on to identify the crucifix as a symbol of Italian history, culture and Italian identity. This decision was affirmed in 2006 by the Supreme Administrative Court (Consiglio di Stato), which viewed the symbol as 'suitable for expressing the fundamental values of civil life … which constitute the values underlying the principle of *laicita* in the Italian legal order'.[469] Again, although initially rejected, the decision was confirmed by the ECtHR in 2011 when the Grand Chamber

[465] *A. B. and C. v Ireland* [2010] ECHR 2032
[466] Mullally, Siobhan & O'Donovan, Darren "Religion in Ireland's "public squares": education, the family and expanding equality claims" (2011) *Public Law* 284-307, 306
[467] Tribunale Amministrativo Regionale Veneto, decision No 1110, 17 March 2005
[468] Ronchi, Paolo "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" (2011) 13 *Ecclesiastical Law Journal* 287-297, 290
[469] Consiglio di Stato, decision No 556, 13 February 2006, para 3, cited in Ronchi, Paolo "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" (2011) 13 *Ecclesiastical Law Journal* 287-297, 290

held in favour of the Italian State[470] viewing the display of a crucifix in state school classrooms as falling within the margin of appreciation granted to states.[471]

From these facts it can clearly be seen that Italy also crosses over into the state-church model through the recognition of the Catholic Church in the Constitution, by the Lateran Treaties and through the cultural and historical elements of their judicial judgments. However, that being said, there are no features within either country that actually link the church directly to the state, only recognition that they are 'independent and sovereign, each within their own sphere'.[472] Equally the national Italian courts and ECtHR has recognised in Italy that a system of *laicita* is present even though traditionally such systems have featured a high degree of separation between state and church. It has also now been accepted academically and at judicial level that there is no uniform definition of the principle of *laicita* and that the principle can therefore also be interpreted as featuring a positive relationship between religion and the state.[473]

Hybrid models are therefore very difficult to define with certainty, and often there is a predominance of one church within these frameworks due to historical developments. The result is an immense overlap with state-church models, although there are also some features of separation, depending again on the state's history. The model is thereby ripe to be drawn from in re-assessing the UK state's relationship with religions should disestablishment occur. The overlapping of different elements could work to make this a progressive process, allowing time to be taken in developing new relationships and acknowledging the country's religious past in the process.

[470] Thus overturning the judgement at first instance (2009)
[471] This overturned a number of other decisions such as *Dahlab v Switzerland* [2001] ECHR 42393/98 which had held crucifixes as powerful religious symbols. Consequently school children, especially young school children, needed protecting against them.
[472] Article 7 of the Italian Constitution
[473] See Consiglio di Stato, decision No 556, 13 February 2006, para 3, cited in Ronchi, Paolo "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" (2011) 13 *Ecclesiastical Law Journal* 287-297

4.5 Other models affecting establishment

Grace Davie takes a very different approach to the relationship between state and religion. Instead of identifying specific models and separating them into groups, an interdisciplinary approach is used. This takes into consideration the impact of sociological, historical and legal evidence on a state's relationships with religion, leading to a broad view that Europe shares a common approach to religion – an approach that is unique to its secular historical evolution.[474] Her book *Europe: The Exceptional Case – parameters of faith in the modern world* explores a number of theories that attempt to explain patterns of behaviour between the state and religion, including those of leading sociologists. She then draws comparisons with other global regions where the state remains strongly linked with religion, with 'scant evidence for secularisation',[475] in order to explain why Europe alone has chosen a more secularist approach.

Within her study a distinction is drawn between the Protestant North and the Catholic South. This distinction, as Doe and Sandberg state, is markedly different 'from that employed by most academic lawyers',[476] especially that of Robbers. Davie argues that the Protestant North consist of states which often embody a State Church in a benign form which forms not only a person's religious identity but also their national identity. Such countries appear to exhibit a low percentage of religious activities, but, as Davie states, 'there is little evidence of hostility between Church and people… Indeed very positive relationships towards the state churches continue to exist'.[477] An illustration of this can be seen through high residual membership in the Nordic countries. However, this high membership appears to relate more to the sense of national identity than to a citizen's commitment to the church. This is indicated by figures relating to attendance,

[474] Davie, Grace *Europe: The Exceptional Case – parameters of faith in the modern world* (Darton, Longman and Todd Ltd, 2002)
[475] Davie, Grace *Europe: The Exceptional Case – parameters of faith in the modern world* (Darton, Longman and Todd Ltd, 2002)
[476] Sandberg & Doe "Church-State Relations in Europe" (2007) *Religion Compass* 561-579, 562
[477] Davie, Grace *Europe: The Exceptional Case – parameters of faith in the modern world* (Darton, Longman and Todd Ltd, 2002) 12

taken around the time of publication, that show many of the Nordic countries had the lowest rates of attendance in Europe despite their high membership.[478]

Conversely, the Catholic South is based on a degree of separation, and this is described as being due to a 'series of confrontations with its alter ego', the state. In Davie's analogy these southern states have developed in a highly secular manner, at times 'consciously embodying an alternative ideology'.[479] In the same way as Robbers did, Davie uses France as an example of how the country's history has influenced a strongly secular ideology which embodies a complete separation of state and religion. Other countries appear to have a milder historical evolution and are more willing to work with religions through mutual agreement. This helps to facilitate religious freedom whilst keeping churches at arms-length. Attendance and membership in such countries is not as clearly linked with national identity, but surprisingly countries that fall within the Catholic South do exhibit a higher rate of attendance.[480]

The above distinction between the Protestant North and Catholic South was very different from what had come before and was therefore not accepted by all, especially as it did not appear to have any direct effect in legal terms. Partly this was due to the fact that Grace Davie was writing from a sociological background rather than a legal background, and as with all writers this ultimately affects their purpose and perspective. In response, Davie herself has more recently personified the relationship between lawyers and sociologists by stating that 'lawyers are more interested in the stage and social scientists are more interested in the politico-religious drama that takes place within this',[481] and, as she explains, it is inevitable that the stage 'affects the presentation of the 'play' which from time to time raises issues of such import that the structure itself is called into question – and in extreme cases has to be reconfigured

[478] *ibid*
[479] *ibid* 12
[480] *ibid*
[481] Here the stage is the church-state relationship and the act is what takes place within these parameters. Davie, Grace "Law, Sociology and Religion: An Awkward Threesome" (2011) 1(1) *Oxford Journal of Law and Religion* 1-13, 2

before the subsequent act can begin'.[482] This means that their positions are inextricably linked and have a sometimes subtle but direct affect on the development of each other. The politico-religious drama feeds off the parameters given and the parameters are sometimes forced to change due to the development of the politico-religious drama, making it important for lawyers and sociologists to take note of each other's perspectives in order to envision the whole play. If lawyers were to ignore this then they would fail to notice changes in not just politico-religious drama but in society itself.

Although reluctance still exists, many have now acknowledged that a more interdisciplinary approach is needed at present. Both Doe and Sandberg have produced articles criticising Robbers' tripartite models as 'overly formulaic'[483] and accepting that an interdisciplinary approach must be accepted.[484] More recently Doe, in his book *Law and Religion in Europe*,[485] has chosen to analyse comparatively how different approaches are used within Europe to accommodate religion within different areas of law. This has allowed similarities and differences to be examined in order to appreciate approaches that work, and those that do not, and in turn this has enabled a list of principles of good practice, or similarity, to be fashioned. As a result, a general array of 50 principles common to the States of Europe, have been produced.[486] The way in which his work encompasses a cross-border comparative analysis of various areas of law to conceptualise this set of common principles is, in itself, ground breaking. However, Doe still chooses to begin his analysis with Robbers' tripartite system and these principles when considered in depth are somewhat repetitive and vague, giving really only a beginning that is in need of elaboration.

[482] Davie, Grace "Law, Sociology and Religion: An Awkward Threesome" (2011) 1(1) *Oxford Journal of Law and Religion* 1-13, 2
[483] Sandberg, Russell & Doe, Norman "Church-State Relations in Europe" (2007) 1(5) *Religious Compass* 561-578, 570
[484] Although a proviso is given to be aware that sociologists may have their own agenda which is different to a lawyer's. Sandberg, Russell "Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach" (2008) *1 Journal of Religion in Europe* 329-352
[485] Doe, Norman *Law and Religion in Europe* (Oxford University Press, 2011)
[486] Doe, Norman *Law and Religion in Europe* (Oxford University Press, 2011)

There are other technical issues with Davie's distinctions, specifically about her interpretation of the Protestant North in which state churches exist in a benign form. This benign form is questioned by Temperman, who argues that 'Looking at the facts, actual state practice, there is no such thing as 'benign establishment'.[487] This is so, he argues, because establishment itself does not allow an egalitarian approach to religion, and by instilling religion as a part of a person's individual and state identity, it adversely coerces citizens into becoming members. This fact may not have any practical effect on increased attendance and practicing members, it does affect sociological religious trends and a personal identity on the *forum internum* – something that effectively is contrary to human rights law. As Nussabaum states 'even benign establishment is a dangerous policy'.[488] This would mean that regardless of these European common principles, the presence of an established church inadvertently affects the psyche of individuals and communities, making it essentially a negative influence that is contrary to religious freedom.

Other authorities discuss the issue by using distinctions similar to those of Robbers. These include models of theocracy, erastianism, cooperation or pluralism, and strict separation. In practical terms these are incredibly similar to Robbers' tripartite distinctions within Europe, but these models are used to analyse models on a global level by splitting the 'State-church' model into two distinct categories based on theocracy and erastianism. The difference between the two is that a theocracy 'assumes that religion is supreme and that the machinery of state is to further religious interests'[489] and erastainism 'assumes the state is ascendant and that religion is to be used to further state policy'.[490] This is an incredibly important distinction if Islamic states, whose political and social authorities are structured in accordance to the Sharia, are to be taken into consideration. They can then be distinguished between those states, mainly Christian in nature, whose systems are based on unity whereby the church is in practical terms subservient to the state.[491] Adhar and Leigh use these

[487] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2012) *Oxford Journal of Law and Religion* 119-149, 141
[488] Marta Nussabaum *Sex and Social Justice* (Oxford University Press, 2000) 103
[489] Ahdar & Leigh *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 70
[490] Ahdar & Leigh *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 71
[491] These in practicality are the same states discussed within the State-church model above.

models, alongside the neutrality and competitive market model, to attempt an answer to which model best advances religious liberty. More recently these distinctions have been picked up on by Cranmer and Oliva in order to give an overview of church-state relationships. However, their article "Church-State Relationships: An Overview", does come with a bleak warning:

> 'the persistence of religion in modern industrialised societies and the multiplicity of ways in which the secular public authorities may relate to religious denominations mean that any attempt to analyse those relationships from an international perspective and then fit them into a neat, predetermined taxonomy is doomed to failure from the start.'[492]

This means that before they even begin they are fully aware of the flaws in their categories and express an acceptance of Sandberg and Doe's criticism on Robbers' tripartite model being 'overly formulaic' as well as arguing that although Davie's analysis is useful in purely sociological terms, is unable to 'reflect the degree of variation across the global legal and institutional landscape'.[493] They do, however, agree that the majority of European countries fall within the boundaries of 'mixed systems', indicating an element of commonality within Europe that is found within proponents of Davie's theory. Following Sandberg and Doe's[494] lead, they argue that a 'purely legal analyses may be insufficient',[495] further arguing that a 'cross-jurisdictional approach is necessary in order to provide an adequate response to the religious dimension'.[496]

4.6 Conclusion

[492] Cranmer, Frank & Oliva, Javier Garcia "Church-State Relationship: An Overview" (2009) *Law & Justice – Christian Law Review* 4-17, 4
[493] Cranmer, Frank & Oliva, Javier Garcia "Church-State Relationship: An Overview" (2009) *Law & Justice – Christian Law Review* 4-17, 17
[494] Sandberg, Russell & Doe, Norman "Church-State Relations in Europe" (2007) 1(5) *Religious Compass* 561-578; Sandberg, Russell "Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach" (2008) *1 Journal of Religion in Europe* 329-352
[495] Cranmer, Frank & Oliva, Javier Garcia "Church-State Relationship: An Overview" (2009) *Law & Justice – Christian Law Review* 4-17, 17
[496] Cranmer, Frank & Oliva, Javier Garcia "Church-State Relationship: An Overview" (2009) *Law & Justice – Christian Law Review* 4-17, 17

The above demonstrates how subtle changes are being made within Europe to produce some form of consistency in the states relationship with religion. At present most of these changes appear to be made at a sociological level, with various legal approaches being made. Although Robbers tripartite system forms a good starting point for any study involving the European Union, there are obvious crossovers between the models, and it leaves the framework open to criticism. Many put these changes down to the influence of religious freedom, which is slightly ironic when the religious influence of human dignity is taken into consideration. It may be that in the same way as Christians attempted to protect their position by supporting the non-establishment clause in America, the religious influence in producing the ECHR has created a distancing of state relations with religion.

However, the distancing of the state relationship with religion within Europe may not be considered a bad thing. The effect has not been to marginalise religion but to help neutralise the states approach to support religions and allowing a less constrained ability to practice their faith. More recent studies, again based mainly within the EU, have demonstrated more consistent principles being used by member states which support a potential unified approach to religion within Europe. However, these principles are quite loose and could be open to criticism. Doe himself admits that further research is needed.[497] His study is merely the beginning of what could be a fascinating and dynamic area, especially if models of establishment are to become a thing of the past.[498] Equally, it is worth remembering that historical connections cannot simply be cast aside. The case of *Lautsi v Italy*[499] clearly demonstrated this, whereby both state courts and the ECtHR agreed that attaching a crucifix on the wall of a school classroom did not constitute a breach of the applicant's rights but was a cultural and historical symbol of the country.

[497] Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011)
[498] Davie, Grace *The Sociology of Religion* (London: Sage Publishing 2007)
[499] Tribunale Amministrativo Regionale Veneto, decision No 1110, 17 March 2005

With each of these models having their own strengths and weaknesses, it is highly possible that some of the elements can be used in reformulating an appropriate and acceptable model within the UK, should it be needed. The way in which most countries already overlap within Robbers' tripartite model gives a strong indication as to how a universal model may be developing and this is reflective in some of Davie and Doe's literature. In the following chapter this information will be used in an attempt to establish what issues may be produced and how lessons can be learnt from other neighbouring models should disestablishment of the Church of England become a reality. It will look at both the practical measures that would have to come to pass and also draw on the past chapters in order to suggest some models of best practice that could be used in the future between the state, the disestablished Church of England, and other religious organisations.

Chapter 5:

If Disestablishment Were To Occur

Prior chapters have set out the current constitutional framework that has developed in the UK between the state and the Church of England. The closeness of this relationship in constitutional terms means that it is very difficult to see how the two institutions can be detached. However, theoretically, in having an unwritten constitution, the UK has a large degree of flexibility which it can use to its advantage when making changes to the relationship they hold with the Church of England. As the UK has been subjected to increasing criticism in relation to international and regional instruments, this is an aspect of its structure that could prove beneficial. Added to this, sociological theories have begun to view the structure in negative ways, especially in terms of religious freedom, and other religions have also raised their own criticisms of the state's legal relationship with the Church of England. All of these matters have worked towards raising the issue of disestablishment as a real possibility, and as the established church has had to become more plural in its outlook, there have been calls from within towards freeing it from its constitutional position.

This chapter will use this background to discuss the practical ways in which the Church of England could potentially become disestablished. The area itself is one that often is ignored by researchers who concentrate on more specialist matters, looking at one intricate detail, or on a more generalised framework. As has been seen, a number of criticisms have been made on the structure of the established church in the UK, and alternative secular and political models have been developed to counter the state's religious attachments which have become an integral part of the country's legal, social and political structure. This will involve analysing the different parties who could initiate the process and the effect that this would have both on the constitution and on the Church of England. The three parties, the Monarch, Parliament, and the Church of

England, could each begin proceedings; however, each would be subjected to a number of constraints and the benefits they would receive in doing so are questionable. The likelihood of each deciding to initiate the process will therefore also be discussed, as well as the possibility of all three working together.

Reflection will also be rendered on how the unwritten nature of the UK constitution works to complicate the matter of severing some of the ties that have historically linked the state with the church. Much of this material will reflect on the first chapter, which considered where the UK constitution stands now and how this links with the Church of England. Many aspects of the complications of having an unwritten constitution will be drawn on, and this would have to be tackled at a greater depth before disestablishment becomes a viable option. Research on this matter would need to be extended in order to tease out the specific details. Also addressed will be the potential effect on constitutional matters within the former colonial countries, another matter that is often neglected, although has been highlighted by some of the legal intricacies involved with the new Succession to the Crown Act 2013. Here, a change in the law touching succession was considered to have touched on the provisions laid out in the Preamble of the Statute of Westminster which reads:

> 'any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.' [500]

In the same way, a law changing the Royal Title may have to undergo the same process, and this will need to be taken into account. Otherwise it may result in the curious position that the Monarch remains recognised as the Supreme Governor of the Church of England in some countries despite a legislative change to the Monarch's title in the UK.

[500] Full wording of the Statute can be found at <http://www.legislation.gov.uk/ukpga/Geo5/22-23/4/introduction>

The final part of this chapter will tackle future potential models that may be developed as an alternative to the model of establishment currently used in the UK. Although the state already holds an amicable relationship with other religions, including those churches that have been disestablished already, changes will need to be made between the state and the Church of England, and this may mean considering whether the new structure could immediately fit within the framework or whether the relationship with all religions will need to be re-assessed alongside these changes. The last chapter, which discussed a number of other models used within Europe, will be invaluable in this discussion in order to draw some aspects of best practice from other models in order to mould a suitable model for the future.

The aim here is to enable a picture to be drawn of how disestablishment may occur in practical terms and some of the potential problems that may arise, drawing on the materials already discussed which considered disestablishment from different perspectives. Alternative models can then be drawn up in order to consider some realistic prospects for any future relationship that may occur should disestablishment become a reality.

5.1 Initiating Disestablishment

In order to disestablish the Church of England in constitutional terms it can be accepted that some form of legislation will be required. This means that the legislation must be initiated by someone and, in reality, on a constitutional level, there are only three parties capable of doing so. All others are only able to lobby these parties in order to make their voices heard. The first of the three, the Monarch, is able to initiate the change through her twin positions as the Head of the State and Supreme Governor of the Church of England. Although largely ceremonial, the Monarch's role still involves a number of important political and legal prerogatives. Many of these are now

constitutionally restrained, but an analysis of the potential to initiate disestablishment will be highly interesting, not least as Royal Assent would be needed for any legislative proposals by either of the other two parties.

The two other legal authorities who might instigate the process are Parliament (by the executive or a Private Members Bill) or the Church of England, through the introduction of primary legislation. A proposal of a Disestablishment Bill by Parliament would turn into statutory law, and a Measure outlining disestablishment would also need to pass through Parliament. However, both of these authorities are subject to constitutional restraints that may prevent them from being able to complete the procedure alone. In order to examine the realistic prospects of each of these authorities proposing such a change, each will be evaluated below. This will include a discussion on how likely each is to begin such a process and the effect this might have on their own positions.

5.1.1 The Monarch

As discussed above, the United Kingdom remains a constitutional Monarchy. Roughly translated, this means that 'the hereditary monarch provides ultimate legitimacy for state institutions, but the powers of the monarch are constitutionally constrained.'[501] In 1965 Diplock LJ described it as personifying 'the executive government of the country.'[502] The lack of a written constitution means that the relationship between the state and the Crown has never been fully defined, and in recent times this has caused problems, and it has been subjected to a number of criticisms concerning its acceptance in today's democratic society.[503] This is despite the fact that the Monarch's, or Crown's, ability to act independently has been severely restricted by a series of common law interventions, constitutional conventions and legislative provisions. Instead, a democratically elected government exercises these powers on behalf of society. The Monarchy has thereby taken a more ceremonial stance, publically distancing itself from political discourse and maintaining its position as a key figurehead both nationally and

[501] Harvey, Adrian "Monarchy and Democracy: A Progressive Agenda" (2004) 75(1) *The Political* Quarterly 34-42, 35
[502] *BBC v Johns* [1965] Ch 32, 79]
[503] Hunt, Tristan "Monarchy in the UK" (2011) 17(4) *Public Policy Research* 167-174

internationally. Tristan Hunt once described this changing role as 'reflecting Britain's shifting social and economical status'.[504] He describes how the Monarch's role throughout the ages has shifted from executive power to today's 'welfare monarchy', supporting civil society by emphasising the importance of the voluntary sector.[505] Although many may disagree with this view of the monarchy, it is clear that its position has evolved into a more symbolic stature which maintains its importance throughout society. Society reflects this importance by joining in key events, especially in recent years with the Golden Jubilee, Prince William's marriage to Kate Middleton and the birth of their first son, George Alexander Louis.

The Monarch's relationship with the Church of England is also enshrined by the Act of Settlement 1701, and when taking the throne, the Monarch swears to abide by the terms of the Coronation Oath. This imposes a number of duties upon the ruler, some of which relate directly to the Church of England. The words are very specific and the terms are set out in Volume 8 of Halsbury's Laws. Here, the duties imposed between sovereign and subjects are listed as

1. to govern the peoples of the United Kingdom of Great Britain and Northern Ireland, and the dominions etc belonging or pertaining to them according to their respective laws and customs;
2. to cause law and justice in mercy to be executed in all judgments, to the Monarch's power;
3. to maintain the laws of God, the true profession of the Gospel, and the protestant reformed religion established by law, to the utmost of the Sovereign's power;
4. to maintain and preserve inviolable the settlement of the Church of England, and its doctrine, worship, discipline and government as by law established in England; and

[504] *ibid* 169
[505] *ibid*

5. to preserve unto the bishops and clergy of England, and to the Churches there committed to their charge, all such rights and privileges as by law do or shall appertain to them or any of them.[506]

Essentially this means that any constitutional changes initiated, or even agreed to by the Monarch, must be compatible with these duties. It is beyond question that any attempt to disestablish the Church of England could not be interpreted as maintaining and preserving the inviolable settlement of the Church of England. Any constitutional change disestablishing the Church of England would thereby force the Monarch to breach these duties. This is also considered true in other matters, such as the disestablishment of the Scottish Presbyterian Church and Scottish independence, although it was not problematic in disestablishing the Church in Wales.

This view is not unanimously supported within academia and the effect of these duties may not prevent Royal Assent being given to a Bill disestablishing the Church of England. In his article, "By law established? The Crown, constitutional reform and the Church of England", Leigh states that,

> 'Precedent does not favour such an argument. In similar situations both Queen Victoria, in 1869 on the disestablishment of the Church of Ireland, and King George V, in 1914 on the disestablishment of the Church in Wales, gave their assent to the relevant legislation, despite corresponding coronation oaths to protect those churches respectively. The oaths of their successors were then amended to reflect these changes.'[507]

In reality this may be true; however, in each of those instances a section of the church remained established. Although support for Leigh's assertion is strong when considering that it is only upon Ministerial advice that Royal Assent is withheld, and even though statutes that effect the Constitutional Monarchy must be referred to the Monarch before their second reading in Parliament, it is still only upon Ministerial

[506] Halsbury's Laws Vol 8(2) paras 28 and 29. Cited in The House of Commons Library – The Coronation Oath SN/PC/00435

[507] Leigh, Ian "By law established? The Crown, constitutional reform and the Church of England" (2004) *Public Law* 266-273, 271

advice that such reforms are not supported.[508] In realistic terms, this means that such methods of referral are more often used as Ministerial tools to prolong or block unwanted legislation. For example Ministerial recommendation was withheld in 1868 for The Peerage (Ireland) Bill and in 1964 for the Titles (Abolition) Bill, preventing either from continuing their passage through Parliament.[509] Such intricacies are often neglected within debates contemplating constitutional changes to the Monarch's position, and it is important that they are acknowledged, regardless of whether overwhelming calls are heard from society for disestablishment. Having said that, little is known about what goes on behind the scenes when such matters are referred, and it is not implausible to think that the Monarch has more power than we might perceive. It is also worth considering what the practical impact of enacting such legislation would be. Changes to their Coronation duties may have a drastic impact on the future of the Crown's authority, and may, inadvertently, lower social perceptions of the Monarchy itself. This becomes even more apparent if calls for changes to the Monarchy's position, including disestablishment, reflect any uncertainty in society. Leigh goes as far as stating that 'the refusal of assent, even in most extreme circumstances, would be bound to provoke constitutional crisis'.[510] This does not just refer to the lack of societal support but also the political legitimacy of Parliament under the prerogative powers of the Monarch. Under such circumstances support for the Monarchy may wane, and in the case of disestablishment, may be coupled with the loss of support from the Church of England, which support and allegiance has always been unquestioned.[511] The distancing of this relationship may have more severe effects than predicted, creating a distance between the two that is reflective of the support given by other religions who do not necessarily support the Monarchy.

[508] Rodney Brazier "Legislating about the Monarchy' (2007) Cambridge Law Journal 86-105
[509] Both examples are used by Brazier *ibid*, 96
[510] Leigh, Ian "By law established? The Crown, constitutional reform and the Church of England" (2004) *Public Law* 266-273, 272
[511] This was reflected on page 20-21 when a quote from the queen was given stating 'The concept of our established Church is occasionally misunderstood and, I believe, commonly under-appreciated. Its role is not to defend Anglicansim to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country.' Cited from The Queen's speech at Lambeth Palace, (15th February 2012) The Official Website of the British Monarchy, accessed 11/08/2013 <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx>

There would also be an impact in the recognition of the Monarch as Supreme Governor of the Church within the laws of the Church of England. The church's Canons, the 39 Articles and the rubric of the Book of Common Prayer would have to undergo a series of amendments in order to change any references to the Supreme Governor of the Church of England. This is not to say that all statements supporting the relationship between the Monarch, or state, and church would have to be replaced; but any reference to the Monarch as the Supreme Governor of the Church of England or the church itself as the established church would have to be amended. For example, Canon A1, which begins by stating, 'The Church of England, established according to the laws of this realm under the Queen's Majesty', and Canon A7, which concerns Royal Supremacy, would both need removing, or revising. At present Canon A7 states:

> 'We acknowledge that the Queen's excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil.'[512]

Such dramatic action would therefore ultimately create a backlog of needed legislative amendments both in ecclesiastical law and civil law, and this would take up much of Parliament's time, especially as presently Church Measures must be passed through Parliament too. It is probable that such procedures would be amended through an Act of disestablishment, leaving it up to the church to amend the relevant provisions.

It is important to acknowledge the sociological impact of the Monarch's position as Head of the State and Supreme Governor of the Church of England as well. As Hunt states

> 'Despite the anarchronism of the monarch being Supreme Governor of the Church of England, the Anglican faith of the royal family is a source of comfort and admiration to millions of fellow Christians but also prompts little concern

[512] The Canons of the Church of England (6th edn, 2000 Church House Publishing) A7. A full copy of the Code of Canon Law can also be found in Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)311-371

among members of other faiths. What is appreciated is the act of belief, rather than the specific denomination.'[513]

Even the Fabian society concedes that, 'The Monarchy is much more than the duties and powers of the office: it plays an important role in British society and national identity',[514] and at times of crisis the Monarch's, or state's, connection with the Church of England is emphasized as it plays a key role in consoling the community; it has been stated that the country comes together 'to mourn under the spiritual guidance of the Church of England'.[515] The Archbishop of Canterbury or another high standing bishop will often appear on national television or radio,[516] consoling those who have lost relatives and been affected by the events of a tragedy, encouraging people to come together in order to overcome such events, and offering up prayers for all those affected. This allows a central point around which society may grieve, and allows a pastoral voice to be heard that is supported by the state. As society has progressed, the Church of England has also acknowledged that recognition of other religions has become important when delivering pastoral care to communities which calls on the need for joint statements[517] that act to unify all religions rather than marginalise minorities. This is especially so in the wake of terrorist attacks such as the London Bombings of 7/7, not least in order to distill anti-Muslim feelings, and also in instances of national disasters such as volcanic eruptions, tsunamis and earthquakes.

It is also important to state that the Monarch herself has shown no intention of considering disestablishment. Her continued existence as Supreme Governor has never truly been questioned and the only calls for change from the Royal Family have come from Prince Charles. These calls were in relation to the Monarch's title 'Defender of the Faith' which he believed should be amended to 'Defender of Faith'.[518] However, support for such a change has not been forthcoming, and a number of polls have indicated that

[513] Hunt, Tristan "Monarchy in the UK" (2011) 17(4) *Public Policy Research* 167-174, 170
[514] The Fabian Commission on the Future of the Monarchy, *The Future of the Monarchy* (Fabian Society 2003) 6
[515] BBC, Church of England (last updated 25/6/2009)
<http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml> last accessed 9/6/2011>
[516] Mission and Public Affairs Council, *Facing the Challenge of Terrorism* (October 2005) found at
<http://www.churchofengland.org/media/45479/gs1595.pdf> last accessed 9/6/2011 para 64
[517] Mission and Public Affairs Council, *Facing the Challenge of Terrorism* (October 2005) found at
<http://www.churchofengland.org/media/45479/gs1595.pdf> last accessed 9/6/2011 para 64
[518] Dimbleby *The Prince of Wales: A Biography* (Little, Brown, London 1994)

the majority of citizens recognize the importance of the Monarch's role in faith and believe the Queen should keep the title 'Defender of the Faith'.[519] The importance of this title thus remains strong, and sociological support is always a large consideration when debating such changes, especially for the Royal family themselves, as they are reliant on social support. However, in practical terms such a change may not have such a vast impact. By all accounts the Monarch has indicated that the Church of England's role, and her own, is not to defend the Church of England against other religions but to protect the ability of all religions to practice freely. This was made clear in her speech at Lambeth Palace in February 2012 where she stated that

> '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.'[520]

This is an incredibly altruistic stance and, as we shall discover below, the effects of the Church of England's duty to other religions, and to society as a whole has created a voice of concern within the church itself. However, what does appear clear is that the initiation of proceedings to disestablish the Church of England is very unlikely to come from the Monarch. Such calls would not be reflective of the Monarch's stance in relation to the established church, making them highly unlikely to be made, especially due to the restraining of the Monarch's power through legislation, constitutional convention and the common law. More likely is that sometime in the future the Monarch will be faced with whether to agree to a debate on a Disestablishment Bill and will grant Royal Assent. As constitutional convention dictates that such procedures will only be withheld under Ministerial advice, it is likely that the Monarch facing this decision will feel compelled to abide by Parliamentary will, though not bound to. One of the more interesting changes that is more realistic is in pursuance Prince Charles' wishes to

[519] Strangewayes-Booth, Alex "Queen 'should remain Defender of the Faith' – BBC poll" (15th May 2012) found at <http://www.bbc.co.uk/news/uk-england-18056322> accessed 11/08/2013

[520] The Queen's speech at Lambeth Palace, (15th February 2012) The Official Website of the British Monarchy, accessed 11/08/2013 <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspeechatLambethpalace15February2012.aspx>

amend the Coronation ceremony to reflect a more inter-faith occasion.[521] This is an important consideration if the ceremony is to reflect the country's multicultural and multifaith population. As Morris states, 'Unchanged, a ceremony which formerly helped unite British society could instead emphasize division'.[522]

However, although unlikely, it is not impossible for the Monarch to initiate disestablishment. In his article "Legislating about the Monarch",[523] Brazier demonstrates that although the majority of changes to the constitutional Monarchy have come from external sources, such as the Commonwealth, it is not impossible for them to come from within. This is reflected by certain changes initiated by Monarchs in the past, the most clear example being that of the Abdication Act required following Edward VIII's quitting of the Crown. Another example can be seen by the Accession Declaration Act 1910, when the wording of oaths was amended in preparation for George V's accession, as he had refused to accept the anti-Catholic wording.[524] This means that, should society undeniably call for such action and be ignored by Parliament, the Queen by voicing her wishes may initiate such proceedings, but the legal stage of initiation must come from Parliament. After all, as Morris indicates,

'While at first sight detaching the sovereign from the religious supremacy may seem revolutionary, it is but to recognize that the head of state's role changes when society changes and it is undesirable for it to be so intimately associated with one particular religious form whether in England or Scotland.'[525]

5.1.2 Parliament

Parliamentary sovereignty is one of the key principles governing the UK constitution. Remaining a keystone for constitutional order, parliamentary sovereignty was once

[521] The Observer, 26th January 2003, cited in The Fabian Commission on the Future of the Monarchy, *The Future of the Monarchy* (Fabian Society 2003) 71
[522] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire) 208
[523] (2007) *Cambridge Law Journal* 86-105
[524] Brazier "Legislating about the Monarchy' (2007) *CLJ* 86-105, 93
[525] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire) 211

described as 'a clear expression and vehicle of an evolutionary constitutional logic'.[526] In their status they are able to make and unmake any laws they wish,[527] and the case of *Jackson v Attorney General*[528] illustrated the fact that once made, these laws are not challengeable. Importantly, when discussing Parliament's ability to initiate legislation, we are really referring to the executive's power to do so. As we have seen, the executive, as appointed by the Queen, consists of the political party that commands the majority of seats in the House of Commons after a democratic election takes place. Consisting of two Houses, Parliament is responsible for the scrutinising of and enacting of all UK legislation. It is normally the executive which is responsible for initiating legislation, usually in realising their manifesto promises. There is also the possibility of individual ministers initiating any bill through a Private Member Bill. Ultimately, this means that parliament could potentially initiate a bill to disestablish the Church of England at any point, but it must consider its restraints under constitutional conventions if such a bill is to be successful. Recalling sections of the first chapter, it is important to remember that, although Parliamentary sovereignty is still recognised as one of the key constitutional principles in the UK, there is a sense in which it is now qualified. This was seen in the Wade[529] – Allan[530] debate during the 1990's which first highlighted the "new" view that some statutes needed something more than normal legislative change to be repealed. This will be further illustrated in a discussion of constitutional conventions below.[531]

The Government continues to support the Church of England, following the Monarch's example. Although, to some degree there are some Prime Ministers who have voiced an some reservations and in recent times they have resigned themselves to an increasingly

[526] Walker, Neil 'Our constitutional unsettlement' (2014) *Public Law* 529-548, 530
[527] This is one of the 3 principles set out in the doctrine of parliamentary sovereignty which Dicey defined as follows - 'The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e., as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.' Dicey, A V *Introduction to the Study of the Law of the Constitution* (8th ed reprinted IN: Liberty Fund 1982) 3-4
[528] [2005] UKHL56
[529] Wade W "Sovereignty: Revolution or Evolution?' 112 *Law Quarterly Review* 568-575
[530] Allan T R S 'Parliamentary Sovereignty: Law, Politics, and Revolution' 113 *Law Quarterly Review* 443-452
[531] Allison J.W.F "History to understand, and history to reform, English public law" (2013) 72(3) *Cambridge Law Journal* 526-557

symbolic and purely procedural role in church matters. Even so, they have on the whole continued to support the constitutional position of the Church of England and the Monarch's position as Supreme Governor. This is reflected in the recent proposals to reform the House of Lords where the presence of the Bishops is maintained. In the 2008 White Paper *An Elected Second Chamber*,[532] it was stated that:

> 'The relationship between the Church and State is a core part of our constitutional framework that has evolved over centuries. The presence of Bishops in the House of Lords signals successive Governments' commitment to this fundamental principle and to an expression of the relationship between the Crown, Parliament and the Church that underpins the fabric of our nation.'[533]

Further support for the church is found in David Cameron's statement given when unveiling the present reforms to Crown succession in 2011. He stated:

> '…we have agreed to scrap the rule which says that no-one who marries a Roman Catholic can become monarch. Let me be clear, the monarch must be in communion with the Church of England because he or she is head of that church. But it is simply wrong that they should be denied the chance to marry a Catholic if they wish to do so.'[534]

This clearly demonstrates that although the state and Monarch are willing to change with the times, their support for the Church of England as the established church continues. Simultaneously, some warn that even minor changes to the constitutional position of the Monarch or the Church of England, such as those now in force under the Succession to the Crown Act 2013, may create a domino effect, leaving few able to maintain arguments for other legislative changes against legal provisions that directly or indirectly privilege the Church of England.[535] This is despite the changes themselves being very small, and some already argue that when it comes to disestablishment, this has already begun at a gradual pace in a piecemeal fashion.[536] What is certain, however,

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[532] (Cm 7438)
[533] Cited in Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire) 217
[534] Cameron, David 'Prime Minister unveils changes to succession', (28 October 2011) accessed at <www.number10.gov.uk/news/prime-minister-unveils-changes-to-royal-succession> last accessed 08/09/2014
[535] Brazier "Legislating about the Monarchy' (2007) *Cambridge Law Journal* 86-105
[536] Furlong, Monica *The C of E: The State It's In* (London: SPCK 2000)

is that such legislation inevitably raises the potential for radical-thinking Parliamentarians to question the desirability of other rules concerning both the Monarch's position and disestablishment.[537] With the Succession to the Crown Act 2013 now in force, we shall see if these fears come to pass.

It is important to remember that the Church of England does have a voice within Parliament. At present, 26 Bishops sit within the House of Lords and although often mentioned by academics, there is a decided lack of information about their position and efficiency. As noted above, the most substantial study comes from Harlow, Cranmer & Doe in 2008 and is entitled "Bishops in the House of Lords: a critical analysis."[538] It discusses both the history of the Bishops' position, the possibility of reforms, and their own views on both their input and effectiveness. The focus is specifically on the bishops' oral contributions during Lords proceedings in the 2006-2007 session and a number of questionnaire interviews conducted by Anna Harlow with some of the bishops serving in the House of Lords at that time. At the time the answers to these questions were enlightening and in many ways mirror the Queen's view of the Church of England above. On their position in the House of Lords, the majority interviewed did not consider themselves representatives of the Church of England but as 'spiritual peers' with a 'responsibility to oversee and address the spiritual interests of citizens as a whole.'[539] Although no real explanation of this is given of any legal link to this assertion, it is true that historically the bishops have at one time been viewed as the most influential members of the House of Lords.[540] However, this was at a time when they largely sat in political positions as well as ministerial ones, and their number in the House of Lords has been gradually reduced since the Act of Supremacy in 1534. In 1847 their position was put on a statutory footing under the Bishopric of Manchester Act. Since then although, the number of dioceses has changed, the number of bishops in the House of Lords has not. Their purpose has also changed, and in practical terms they are present 'to read prayers at the start of the day and to participate in the business of the

[537] Brazier "Legislating about the Monarchy' (2007) *Cambridge Law Journal* 86-105
[538] Harlow, Anna, Cranmer, Frank & Doe, Norman "Bishops in the House of Lords: a critical analysis" (2008) *Public Law* 490-509
[539] *ibid*, 498
[540] House of Lords Note, *House of Lords: Religious Representation* (25th November 2011) LLN 2011/036

House'.[541] A prayer rota is set up in order to ensure the presence of a bishop at each session, and at other times their attendance is not compulsory but they may attend if they wish to contribute to debates of interest. In real terms this means their authority to act on behalf of all citizens derives from their own perception of their responsibilities rather than any legal obligation, although, questionably, this may trace back to their historical roots during feudal times.

On the whole, the government does not contest the overall presence of bishops in the House of Lords, but argues for a greater cross-representation of faiths. In the past this has been called for by other religions, but significantly not at the cost of losing the Bishops in the House of Lords, which is considered by them as better than having no religious representation.[542] In summary, it appears that their position is thereby considered important to many different parties and is set to continue. It is also worth noting that the church itself at times must sacrifice its own religious sympathies to stand by Parliamentary decisions that are being contested unanimously by all other religions. To act with these other religions would mean opposing their political responsibility within Parliament.[543] However, from within Parliament they maintain an important sociological and moral voice actively involved in areas of mental and physical health, offender management, immigration and asylum and border control.[544]

From this analysis it can be deduced that when considering the implications of having the bishops present in the House of Lords in relation to Parliament's potential to disestablish the Church of England, it is clear that they will not necessarily be automatically opposed to such a Bill. If, as indicated, their position is to act as 'spiritual peers' in parliament on behalf of the British public and other religions, then their prime consideration will not be the effect that disestablishment might have on their own

[541] Church of England website Bishops in the House of Lords, found at <https://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx> last accessed 11/8/2015
[542] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)
[543] Hill, Mark "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180
[544] Harlow, Anna, Cranmer, Frank & Doe, Norman "Bishops in the House of Lords: a critical analysis" (2008) *Public Law* 490-509

church, but how it would affect those outside of the church as well. This matter has already been touched upon in the first chapter, where their role in the House of Lords was criticised and discussion was made as to whether their position remains beneficial. Theoretically this means that, should the vast majority of society call for disestablishment along with other religions, then the bishops themselves may be obligated to support this. An argument could also be made that it would give them more time to look after their parishes and allow them to refocus on internal matters, and matters of doctrine, rather than their obligations to protect freedom of other religions and spirituality of all citizens.

In fact, this may be true of Parliament on the whole. It appears very unlikely that a constitutional change of such significance will be initiated without overwhelming societal support. Furthermore, consideration must be given to whether a disestablishment Bill may have any adverse impact on the Monarch's position. Opinions have been mixed on this, with some believing that the Church of England has distanced itself far enough away from the state for disestablishment to be successful. However, a more forceful voice has been heard indicating that the removal of the Queen from her position as Supreme Governor of the Church of England would create animosity about her position as Head of the state as well. As Morris states 'This is to suggest a mutual dependency between Church and throne where disestablishment would be fatal to the monarchy but not, actually, to the Church.'[545] Leigh supports this assertion, stating that 'the two stand or fall together in terms of historical rationale'.[546] Any proposals by Parliament to disestablish the Church of England must therefore be considered in a wider reality than just the disestablishment itself. The broader consequences could include similar effects to those that, in the same way as minor changes to the Monarch's title or role could create a domino effect that has serious consequences on the Monarchy, and also the legitimate and divine authority under which the government operates. The only path forward if such a domino effect was created would be to adopt a written constitution in order to validate governmental authority and create order.

[545] Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire) 197
[546] Cited in *ibid* 197

This would take an immense amount of time and effectively put on hold any other reforms Parliament was in the process of considering.

This may be why Ministers are said to have the tendency to 'take refuge behind the doctrine of unripe time'.[547] Even some of the small changes that would be needed to begin the unraveling process that would lead to disestablishment would take up valuable Parliamentary time, and if, as predicted, a small change led to full blown constitutional changes, this could lead to ever increasing demands on Parliamentary time. This would give some truth to Brazier's statement that disestablishment itself would require 'a fundamental reconsideration of the relationship between church and state, of a kind not essayed since 1688'.[548] It could be argued that such an amount of time could never truly be justified unless the established church became a threat to public safety or to the state's authority.

Politically, it would also take time to discuss such changes with former colonial countries, whose consent would be required to make the changes effective internationally. Without such amendments to their own laws, such changes enacted in the UK would not be given recognition within these other borders. This mirrors the current position of the Succession to the Crown Act 2013. Although these countries have agreed informally that these changes will be made, this discounts the time and complexities of changing their own written constitutions; this would have to be taken into consideration when considering the disestablishment of the Church of England. Some countries may not be ready to allow the complete separation of state and church in the United Kingdom, especially those whose churches are members of the Anglican Communion, which is led by the Archbishop of Canterbury. Greater consideration will be given to this matter below, but not before highlighting Brazier's comment that this may not only be a source of division outside of the UK, but also within. As he states

> 'It would cause an adverse reaction in parts of the Protestant community in Northern Ireland; the welcome given to it by some Scots would not be shared by

[547] Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire) 92
[548] Brazier "Legislating about the Monarchy' (2007) Cambridge Law Journal 86-105, 89-90

other Scots. Ministers would quite properly have to judge the extent of such a reaction and to measure it against the benefit of the proposed legislation.'[549]

Ultimately this could result in political and social turmoil and, especially at present, when tensions in Northern Ireland continue to be high,[550] may not be considered politically wise or wanted. In fact, it may even be considered dangerous. As Hill states during his discussion on the state's responsibilities towards religions

> 'The state also carries a heavy responsibility. 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.'[551]

Finally, it would be negligent not to consider the fact that disestablishment may be initiated through any independent Minister acting alone in a Private Members Bill. Historically, Private Members Bills do not have a good rate of success and this is significantly so in reference to proposals relating to changes to the Monarchy, including the disestablishment of the Church of England. This was most emphatically seen during the 2004-2005 Parliamentary session when three Private Members Bills concerning succession of the Crown failed.[552] Arguments against the 2004 Bill introduced by Labour Peer Lord Dubs, included: 'that it would undermine the basis upon which other hereditary titles are inherited'; that it would undermine the establishment of the Church of England; and that it would increase the risk that the monarch's heir would be a Catholic, who could not be in communion with the Church of England.'[553] More recently this was seen in the rejection of the Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill introduced by the Liberal Democrat Dr Harris.[554] More specific to the Church of England were two failed Private Members Bills detailing

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[549] *ibid* 90

[550] Bell, John 'For God, Ulster or Ireland? Religion, Identity and Security in Northern Ireland' (March 2013) *Institute for Conflict Research*

[551] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209, 209

[552] These were as follows: Succession to the Crown Bill H.L. Bill 11 (withdrawn); Succession to the Crown (No. 2) Bill H.C. 36 (dropped); Succession to the Crown and Retirement of the Sovereign Bill (negative). Cited in Brazier "Legislating about the Monarchy' (2007) Cambridge Law Journal 86-105. 92

[553] Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401

[554] Although this Bill did act as the catalyst for governmental support which resulted in the Succession to the Crown Act 2013.

the disestablishment of the Church of England in the 1980's, and more recently, the issue was debated in 2002. A recent Early Day Motion, ironically numbered 666, was also dismissed.[555] This means that realistically a Bill calling for disestablishment must be supported by the government from the outset, especially if it were to be referred to the Monarch; this would be required due to the changes this would cause to her title and position. Any attempts that are not thus supported can almost certainly be considered doomed before they begin.

5.1.3 The Church of England

The final body that could theoretically instigate disestablishment is the established church itself. This could be done in conjunction with the state, through mutual agreement which would likely result in the introduction of a Bill, or through its own legislative powers through the introduction of a Measure into the General Synod. This process has been described in basic terms above, and if agreed within the General Synod, it would be passed through Parliament by the same procedure as all other primary legislation. Hill in his book *Ecclesiastical Law*[556] explains this process concisely but the basic essence of what this means is that the Measure would have to pass through scrutiny within the church's legislative body, then the state's legislative body, before finally gaining Royal Assent from Monarch.

Although increasing calls for disestablishment are coming from within the established church, this opinion is far from representative of the church as a whole. This matter was fully discussed in chapter three, but the arguments are echoed in studies such as Harlow, Cranmer & Doe's study on the bishops in the House of Lords discussed above.[557] Notably, these appear to mirror the Queen's speech in Lambeth, and much of the same feeling appears to emanate from statements from the government as well. The bishops themselves view their positions not as representatives of the established

[555] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)
[556] (3rd edn, Oxford University Press, Oxford, 2007)
[557] Harlow, Anna, Cranmer, Frank and Doe, Norman "Bishops in the House of Lords: a critical analysis" (2008) *Public Law* 490

church but as '"spiritual peers", with a responsibility to oversee and address the spiritual interests of citizens as a whole'.[558] Former Archbishop of Canterbury Rowan Williams also strongly supported this view, despite his statement concerning how little difference was felt as the Archbishop of the disestablished church, the Church in Wales. His address, "Relationships between the Church and state today: What is the role of the Christian citizen",[559] given at Manchester University during a joint visit with the Bishop of York, was highly supportive of the established church's position as a type of political unit involved in nourishing and encouraging civil virtue in order to encourage and develop discussions over what is best for society in general, with a moral and Christian outlook. If this is correct, then the established church plays a vital function in balancing purely political discourse with humanist values embedded in the Christian principles of charity and goodwill. Furthermore, Dr Williams does not attempt to monopolise this agenda, but sees the established church as one of many political units involved in such debate. However, even if these views are accepted, there is little evidence to indicate that this would change should disestablishment occur. The Church of England in its own right could continue to develop such debates and support the welfare of others without maintaining its connections to the state. More apparent for our purposes is that their position does allow greater public and political coverage, which is likely to discourage the church from initiating a process to disestablish them.

Furthermore, an attempt to disestablish the church, even by the church itself, could be considered a challenge to the Monarch's authority as Supreme Governor of the Church of England, and if deemed so, this arguably could be held to be an act of Treason. On some level this proposition may appear comical, and there may be serious repercussions if such a challenge was made. The offence of Treason remains a serious crime, despite the fact that it is based on a number of ancient Acts and has been enforced minimally in modern times, save in times of War.[560] Furthermore, in more recent times, this offence has been more related to challenges to the political

[558] *ibid*, 498

[559] Dr Rowan Williams *Relations between the Church and state today: what is the role of the Christian citizen* (1/3/2011) found at <www.archbishopofcanterbury.org/articles.php/2009/relations-between-the-church-and-state-today-what-is-the-role-of-the-christian-citizen> last accessed 9/8/2011

[560] The Law Commission *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (1977) Working Paper No. 72, 30-31

constitution of the Monarch as well as their own personal wellbeing. In 1977 the Law Commission commented that

> 'As it exists today treason still requires a breach of a duty of allegiance, but this may be either a breach of personal duty to the Sovereign or a breach of a duty to the constitutional system of the realm, which has its embodiment in the Sovereign.'[561]

In reality, this has been the case for some years; the concept of political sabotage has just been emphasised in a greater manner as the Monarch's position has become more constitutionally symbolic. Its historical roots are reflected in the case of *R v Sheanes*[562] when it was stated that compassing and imagining the death of the Sovereign included

> 'forming conspiracies to usurp by force and in defiance of the authority of Parliament, the government of the kingdom, to destroy its constitution and in so doing to destroy the monarchy'[563]

As the Monarch's position has become more ceremonially viewed this has meant that challenges to the political framework of the country have become more substantive, and when considered objectively, it is clear that the instigation of disestablishment proceedings would be a challenge to the Monarch's constitutional position, and thus the political validity of the state itself.

This contention is furthered if considered in conjunction with the Coronation Oath. This Oath was discussed above in relation to the Monarch's duties towards her subject's; however, the Coronation ceremony itself also invests the Monarch with her powers, including all prerogative powers, and thereby governmental authority. Essentially, this means that any attempt to disestablish the Church of England would legally be withdrawing the Monarch's divine power over her subjects and thereby her government's power as well. It is by no means a stretch of the imagination that to question her divine authority could be viewed as Treason. The historical connection

[561] The Law Commission *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (1977) Working Paper No. 72, 9
[562] (1798) 27 St. Tr. 255
[563] (1798) 27 St. Tr. 255, 387; cited in The Law Commission *Codification of the Criminal Law: Treason, Sedition and Allied Offences* (1977) Working Paper No. 72, 8

between the two who have worked side by side since the English reformation, is also unlikely to be challenged by the Church of England, which supports the divine power of the Monarch.

A challenge to the Monarch's power in this way may also challenge the church's authority and legitimacy within society. By removing its connection with the state, it would place it on the same footing as other religions in the UK, who are said to work by consensual compact. This consensual compact, which has been described above, binds those who agree to be bound by a religion's laws together in a contractual relationship.[564] By doing so, some of the most well-known obligations of the church towards its parishioners are removed,[565] and, as seen, many of these have become sociologically recognised as cultural rights of passage. However, by separating the church and state and removing the Monarch as the Supreme Governor of the church not only withdraws the availability of these religious ceremonies from any who are not members, but also withdraws the Church of England's powers to grant these to all citizens unless bound by primary legislation that has not been automatically repealed by disestablishment. For example, due to the complexities of removing a citizen's automatic right to burial, the state may prolong the church's obligations even once disestablished. This would create an unbalanced discrimination against the Church of England which would be bound unnecessarily to additional obligations above all other religions. If contemplated realistically, disestablishment would therefore not be something the Church of England might consider advantageous to initiate itself.

Earlier, it was mentioned that such a change would not only mean disentangling the constitutional provisions binding the state and church, but also the Canon law of the Church of England itself, and this would be no simple feat. Within the Canons themselves, the Thirty-Nine Articles and the Rubrix of the Book of Common Prayer, there are numerous provisions instilling the divine right of power to the Monarch. It is

[564] Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011)

[565] For example to marry, baptise and bury parishioners. Although this would not necessarily be the case automatically as there are a number of elements the Church of England is Statutorily bound by which would not automatically be repealed by a Disestablishment Act.

not suggested that all of these provisions would necessarily need removing should disestablishment occur; however, it is suggested that consideration would have be given to this and any amendments or repeals enforced. It is also important to remember that the removal of the Monarch as Supreme Governor, and separation of the church and state, does not automatically mean that the Monarch will no longer be a member of the Church of England. Indeed, by all accounts the current Queen has a strong faith, and this is not likely to change in response to the disestablishment of the church. There is also a strong possibility that the Monarch could be asked to be Patron of the Church of England, thereby maintaining her association with the church even after it is separated legally from the state.

Equally it cannot be forgotten that a number of authorities have supported this type of separation. Buchannan, a keen supporter of disestablishment, commented in 1994 that 'he did not think that it was lucky to be an Established Church'[566] as the privileges were far outweighed by the disadvantages, and this view has been supported by others. Modood, in commenting on Pitt, an Anglican supporting of disestablishment, stated,

> 'She points out that the benign vision of the Church of England as a moral conscience of and social worker to the nation is not what Henry VIII had in mind when he proclaimed himself to be the Supreme Governor of the Church. She thinks that a history of subordination to state purposes has spiritually corrupted her church.'[567]

Modood continues in his book to illustrate the views of other religions towards the established church, with results that at the time appeared surprising. The overall view was that establishment was supported by other religions due to its flexibility and ability to 'preside over the multi-faith situation with sensitivity, toleration, respect and non-interference'.[568] One of the biggest criticisms came from Rosser-Owen who criticised the Church of England for adequately recognising and reciprocating the support that Muslims gave, and can continue giving, to establishment.[569] Some may argue that such

[566] Furlong, Monica *The C of E: The State It's In* (London: SPCK 2000) 238
[567] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997) 8
[568] *ibid* 11; this comment was based on the Sikh view of establishment.
[569] *ibid*, 11

recognition and reciprocity has now been extended due to the increased joint statements given publically, and also to the development of inter-religious discussion groups that have at times been initiated by the state itself.[570] However, this will never replace the automatic presence of the Church of England in the political and legal system from which they alone benefit. During the same period, a working party consisting of a number of academics from the Church of England and the disestablished Church in Wales, as well as some living abroad, was set up to discuss the possibility of disestablishment and other matters that may arise.[571] Unfortunately, this working party was ultimately equally divided over whether disestablishment was needed, and in light of changing attitudes, it was dissolved in 2002 without ever coming up with any blueprint on how disestablishment might be approached.[572]

From the above we can determine that there is a general positive consensus towards the established church and that calls of inclusiveness will not be solved by disestablishment. As Leigh states,

> 'the significance of the establishment is as a symbolic reminder to those in authority that there is a spiritual sphere to life. It is clear that at least some members of religious minorities would feel more alienated in a disestablished state than under the present one, with its weak form of institutionalised Christianity.'[573]

This would mean that some religions, or persons, may feel more marginalised through not having a religious presence in the political structure of the UK. Regardless, this does not help those such as Pitt who feel their religion is being torn from its roots in order to fulfil the needs of others. Here, as Morris states, 'While the Church may not be an entirely free agent, it is not without resource and is quite capable of initiating a process

[570] For example, The Interfaith Network for the UK (http://www.interfaith.org.uk/index.htm); Christian Muslim forum (http://www.christianmuslimforum.org/); Faiths Forum London (http://www.faithsforum4london.org/); Churches together in Britain & Ireland (http://www.ctbi.org.uk/)

[571] Spafford, George "Working party on "disestablishment" report (2002) 6(30)*Ecclesiastical Law Journal* 264-269

[572] *ibid*

[573] Leigh, Ian "By law established? The Crown, constitutional reform and the Church of England" (2004) *Public Law* 266-273, 273

of change should it wish to do so'.[574] Should it wish, the Church of England could therefore initiate disestablishment proceedings through the introduction of a Measure or through political pressure. Furthermore, Morris points out that amendment by Measure to the Thirty-Nine Articles and s.8 of the Act of Supremacy which entitles the Monarch Supreme Governor of the Church of England would not lead to changes of the royal style or title that would attract the need for Commonwealth amendment.[575] This would only be needed should the Act of Supremacy 1701 be amended. The process might thereby be easier for the Church of England to initiate, although the state may need to follow this up with an amendment to this Act. However, stark warnings have been given to such measures from within the church as well as outside, as can be seen in Cumper's statement, 'The Archbishop of York has warned that any loosening of the links between church and state might ultimately cause the entire British constitution to disintegrate'.[576] Caution must therefore be exercised by the Church of England and the consequences of such a drastic change to the constitution must be intensely considered first.

5.2 Disestablishment in Practice

Whilst considering the initiation of the disestablishment process a number of legal issues have been highlighted. When viewed in conjunction with the constitutional framework, it becomes clear that a number of these legal issues would need amendment. This brings into focus a number of legal consequences that would need to be taken into consideration when analysing the process of disestablishment. As mentioned at several points, one of the biggest constitutional obstacles to any amendments within the UK is the unwritten nature of the constitution itself. Whilst

[574] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire) 206
[575] *ibid*
[576] Cumper, Peter "Religious Liberty in the United Kingdom" in Witte & van de Vyver *Religious Human Rights in Global Perspective* (Martinus Nijhoff Publishers 1996) 240

making it flexible in nature, it also makes it very difficult to recognise any changes that do occur which results in a degree of uncertainty. It also means that, because of the way that the Church of England's relationship with the state has developed, it may be impossible to unravel the intricacies by enacting a single legislation. This would mean that several laws will be needed in order to unravel all the attachments, and there is a high possibility that not all features are remembered within the first enactment. This will be discussed further below.

There is also the matter of "constitutional" legislation. These were highlighted in the first chapter, where questions were raised as to whether laws dealing with the constitutional status of the Church of England would constitute "constitutional" legislation. If this is the case, then the enactment of a law through the normal procedures may not be sufficient to automatically repeal the Church of England's former legal structure. The answer may be as simple as clearly stating this intention within the Act, but this matter will have to be considered and further investigation into the matter may be needed at some point.

In a general sense, when discussing the legal disestablishment of the Church of England there are three main elements that need addressing. First, the title Supreme Governor of the Church of England must be withdrawn from the Monarch, and the coronation ceremony must be amended as well as the coronation oath. Secondly, the bishops must be removed from the House of Lords. If the state and church are to be separated, their position would be unwarranted, regardless of whether their presence is supported by other religions or not. To do otherwise would be to give unnecessary favour to a single religion. Thirdly, the Church of England's legislative process must be revised. It is hard to justify the compulsory process of generating primary legislation when the Church of England amends or creates laws. Should the state disestablish the church this would have to be revised.

It is easy to see how each of these three components could be achieved with either three separate pieces of legislation, or one longer and more complex Act. However, the consequences of these changes might be more profound. For example, historically, amendments to the coronation ceremony have occurred in order to adapt to modern conditions. However, the effect of disestablishment would tear at the foundation of the coronation procedure itself, even down to the grant of authority from divine power. The real question here would be the source of the Monarch's authority and whether any sociological terminology would be interpreted as having the same weight. An alternative interpretation may be to consider the words as having more historical and cultural connections in the same way as the crucifixes on school classroom walls in *Lautsi v Italy*.[577] Furthermore, Leigh asserts that 'it is no exaggeration to say that the reason why the members of the Windsor family enjoy their current position is solely because their ancestors provided a guarantee of a Protestant succession to the throne'.[578] If this is true then an attempt to 'airbrush history'[579] removes the authority of the Royal family itself. Arguments can be made in a similar manner to the removal of the bishops from the House of Lords and amendments to the legislative procedures of the Church of England. Although amendments to the first of these, the removal of the bishops from the House of Lords, has been much in discussion in modern times, although the present government has put on hold any proposals for the time being. Importantly, none of these reforms have seriously challenged the position of the bishops in the House of Lords, only reduced their number.[580]

The point here is not that these matters might be complex, but that they may require more attention than would be warranted in a single Act. The complexities themselves are longer and must be considered seriously to stem unwanted consequences. It might also be considered unwise to instigate a single legislative Act due to these complexities. The process could be handled in a more long-term procedure by first removing the bishops from the House of Lords, then amending the coronation oath and ceremony,

[577] (18th March 20ll) Application no. 30814/06
[578] Leigh, Ian "By law established? The Crown, constitutional reform and the Church of England" (2004) *Public Law* 266-273, 269
[579] *ibid* 269
[580] House of Lords: Reform (2007) Cm 7027

and finally severing the legislative ties between the church and state. The Fabian Society gave a hint of this approach within their own study, *The Future of the Monarchy*.[581] This study was not aimed at disestablishment but at amendment to the Monarch's position in society. They commented that,

> 'Disestablishment of the Church of England is usually spoken of as if it were an all or nothing choice. In fact it is quite possible to separate the three constituent elements that make up the establishment of the Church. As we have seen, these are the monarch's role as Supreme Governor, the appointment of bishops and their position in the House of Lords, and the parliamentary control of Church legislation.'[582]

They suggest, in a similar manner as above, that each of these elements could be tackled separately and independently. If society's support does not fully reflect a want for disestablishment, this could be an approach warmed to by a government that does. However, as the bishop's place within the House of Lords has been defended more recently within governmental reports regarding reforms to the House of Lords, which would be the simplest aspect of disestablishment to tackle, it seems unlikely that this short-term approach is being considered at present. Maybe this is due again to the 'doctrine of unripe time.'[583]

There is also quite a fair assessment that viewing these three elements as the only factors that would need reviewing in order to ensure full disestablishment is too narrow. There are many other aspects that privilege the established church, and we have seen how some aspects of the relationship between the state and the Church of England are governed by constitutional conventions, rules of which are usually reserved to the state itself. Being difficult to pinpoint, these conventions may be impossible to cover, but equally may merely become redundant once disestablishment occurs. There is also the question of how easy it would be to repeal some of the more fundamental aspects of the established church, for example, the right to burial, should such a right be found fundamental and the statute thereby attract the status of "constitutional" statute.

[581] The Fabian Commission on the Future of the Monarchy, *The Future of the Monarchy* (Fabian Society 2003)
[582] *ibid* 72
[583] Morris, R.M *Church and State in 21st Century Britain* (2009, Palgrave Macmillian, Hampshire) 92

Other aspects of a lesser nature, such as the role of the Church of England within education, have been omitted from some of the biggest studies, such as the Fabian Society's research. Biggar, for example, indicates that the established church's contribution to State education is warranted; however, it does give additional privileges to them.[584] At present the Church of England is the only religion to have automatic presence on the SACRE under the Education Act 1996.[585] Realistically, should disestablishment occur, then matters like this would become unwarranted and argument would dictate that their position must change. Having said that, it is clear that not all would agree. Biggar, using Leigh and Ahdar's arguments, contests that,

> 'an historic religion that is supported more or less actively by a majority of citizens, and which performs valuable social, educational and cultural functions, might deserve certain privileges. Unequal treatment may have cogent reasons that do not amount to an offence against the equal human dignity of citizens. Inequality can still be equitable.'[586]

If this is so, then such peculiarities could be kept; however, this would also question why disestablishment was necessary to begin with.

Perhaps this is part of the problem to start with. There is so much emphasis on disestablishment being the severing of ties between the state and church that we forget to allow for matters that need to be governed by statute. As Spafford states, 'No Church can be fully 'disestablished' so that it is outside the control of Parliament'.[587] It must therefore be remembered that disestablishment does not necessarily mean the severance of all ties but only those aspects that enshrine the religion into the UK's constitutional law. Morris states this clearly in the passage below,

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[584] Nigel Biggar "Why the 'establishment' of the Church of England is Good for a Liberal Society" in Chapman, Maltby and Whyte *The Established Church: Past, Present and Future* (T&T Clark International, 2011) 1-25

[585] Formerly the Education Reform Act 1988. It is important to note that under Schedule 31 paragraph 4, a representative must be present on behalf of 'other Christian denominations and other religions and denominations of such religions as, in the opinion of the authority, will appropriately reflect the principal religious traditions in the area.'

[586] Biggar "Why the 'establishment' of the Church of England is Good for a Liberal Society" in Chapman, Maltby and Whyte *The Established Church: Past, Present and Future* (T&T Clark International, 2011) 1-25, 19

[587] Spafford, George "Working party on "disestablishment" report (2002) 6(30)*Ecclesiastical Law Journal* 264-269, 265

> 'Disestablishment is not itself a term of art for the same reasons that establishment is an ambiguous catch-all for a complex of relations themselves constantly changing over them, informally as well as formally. In disestablishment's most extreme form – total severance of the state from Christianity – it is impossible to see what good would be done unless the aim were to punish an institution that has contributed to the life of our society for longer than the state itself.'[588]

Morris's argument is compelling and appears to replicate the attitudes of all those implying that the established church is there for the benefit of multi-faith society and not its own purposes. With the complexities being so intense and the consequences so wide when considering legislating for the purpose of disestablishment, it arguably appears unneeded, and serious deliberation must be given to what aspects of the relationship will be severed in order to attain disestablishment.

5.3 Disestablishment and the Law

In furtherance of the above section, it is clear that there are a number of individual statutes that will be in need of amending or repealing. Both Measures and Statutes will need to be considered, and problems may still remain whereby a number of duties are set under common law (as was the case for Wales in matters such as burial). There will also be complex differences between what laws might need repealing in terms of affecting 'high' establishment and what in terms of 'low' establishment. Equally, there are a number of laws which can immediately be identified as needing to be repealed or amended in light of disestablishment as a whole.

[588] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire) 211

An obvious example can be seen in the Church of England Assembly (Powers) Act 1919. This Act, as furthered by the Synodical Government Measure, lays the foundations for the law-making process of the Church of England, including the main bodies, their authority and the process itself. The Act itself would need repealing and the laws created by the new disestablished church would become binding on members only and not all parishioners. The Welsh Church Act 1914 may provide a good template from which to work in order to create this. Having disestablished the Church in Wales itself, it creates a working legislative framework for future legislation and the bodies which will be responsible thereof. It also removes the authority of the bishops of the Church in Wales to sit and vote in the House of Lords,[589] which is another feature that would need to be removed in light of disestablishment.

Although the power of the bishops does not originate from statute but from their status as royal tenants by barony, their position has been put on a statutory footing, first through the Clergy Act 1661, and subsequently through the Bishopric of Manchester Act 1847, which fixed the number of bishops to 26.[590] Related is the more recent Lords Spiritual (Women) Act 2015 which ensures at least one of the bishops within the House of Lords is female. Each of these would need repealing in order to effectively revoke their legal entitlement to sit within the House of Lords and say prayers at the opening of the sessions. The Welsh Church Act as a template would effectively do this. What this might be replaced with is another question, and one that has been addressed in different sections of this thesis. Whether this would effectively help increase religious neutrality is questionable, although many would support the notion. Even then, there may be reluctance to leave nothing in their place. What is certain is that it would help to create legal disestablishment.

The other clear candidate for repeal is the Coronation Oath Act 1688. This is the Act that sets out the form which the Coronation Oath will take and imposes the duty to administer the oath. The words themselves have been updated, with a number of

[589] Welsh Church Act 1914 s.2
[590] House of Lords Note, *House of Lords: Religious Representation* (25th November 2011) LLN 2011/036

awkward phrases being removed, but the substantive elements have been retained. The statutory requirement placed on the monarch to take the oath has been reinforced through the Act of Settlement 1701 and the Accession Declaration Act 1910. The repeal of these Acts may be introduced as a new provision to a template of the Welsh Church Act. Again, what would remain would have to be considered in order to ensure any new system meets society's needs. Once more, this is not something with which this section is primarily concerned, but it would be negligent to omit any comment on this at all. Discussion has been laid out in relation to this in previous sections, and although it may be complicated, it would be possible, as Parliament remains sovereign. The Monarch's position would also not be jeopardised as she would remain Head of State. There may, however, be associated complications when it comes to amendments of the Monarch's full title within the colony as discussed below.

In terms of 'low' or 'earthed' establishment, there are a number of Acts which govern the church's relationship with individuals at a parochial level. However, although many of these Acts regulate the administration of religious rites, most originate from common law,[591] such as the right to present your children for baptism, the right to be married in your local parish church, and the right to be buried by the Church of England. As Rivers asserts, this means that although these areas are not governed by statute, they are part of the general law, and on occasions where the civil law has then departed from the rules of the Church of England, 'an exception has had to be created in the general law in order to secure to the established church the freedom which would automatically be enjoyed by any other religion.'[592] In theory, should the Church of England be disestablished, such rights could be absolved through an Act of Parliament.

As Parliament is sovereign and may enact any legislation it wants, this will always be a valid option. The advisability of such an action is a completely different matter. Again

[591] Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)

[592] *Ibid* 182. Rivers gives the example of the Matrimonial Causes Act 1965 which allows a priest to refuse to marry a divorce(e), or parties related other ways, on grounds of conscience. Guidance is then given on a canonical basis.

focusing on the three rites – baptism, marriage and burial – there remains a sociological expectation at a grassroots level and amending or removing the ability of parishioners to approach their parish priest on these matters may create dissatisfaction, as was seen earlier in the case of a rural parish church in the Rhondda.[593] In order to counter such dissatisfaction, the state may have to engage in discussions at a grassroots level in order to gauge the public's opinion and awareness on such matters. Their sentiment towards such changes must be such as to ensure that disestablishment can be effective both legally and sociologically whilst maintaining political allegiances from those that may be affected. On a social level this also means that the state would have to increase availability of alternative baptism, marriage and burial procedures in order to replace the ability of parishioners to approach the church, despite these being religious rites. This is due to the aforementioned shift in perceptions towards cultural rites of passage, rather than viewing these matters as religious. Although, this said, an attempt to introduce a compulsory non-religious welcoming ceremony before the registrar was defeated by Parliament when introduced by Frank Field MP in 2004.[594] Perhaps this was due to the compulsory nature rather than the introduction of an alternative to religious ceremonies.

A further consideration in terms of disestablishment is the position of Measures. Although the effect of disestablishment may be quite clear on future Measures, questions may be drawn remain as to the treatment of Measures already enacted. As discussed, these Measures will already have primary legislative force and are thereby binding on all citizens. This prerogative will no longer be attached to the Church of England's legislation, and they will thereby be unable to update statutory provisions to suit their organisation as they have done in the past. A key example of this is seen in the Synodical Government Measure 1696, which amended sections of the Church of England Assembly (Powers) Act 1919. Amongst other things, this Measure reconstructed the legal structure of the legislative bodies and redefined their authority. However, such administrative changes constitute an internal matter and will be accommodated as an internal matter, making it easier than it previously has been to

[593] Archbishop offers Rhondda church protestors talks (11th July 2011) BBC news <www.bbc.co.uk/news/uk-wales-south-east-wales-14116158> last accessed on 16/08/2011. See chapter 1 for further discussion.
[594] Right of Passage (Welcoming and Coming of Age) Bill

amend such matters. Areas that may be more problematic are where a Measure has substantially amended the terms of a statute in order to allow the Church of England freedom to give parishioners a wider ability to exercise a right. A good example of this can be seen in the Pastoral Measure 1983 where, amongst other things, the Church of England amended the Marriage Act 1949 in order to allow for banns to be called in one church within a parish group, and for the marriage to take place in another. In order for the same result to be achieved in the Church in Wales a primary legislative change had to be requested.[595] This would mean that, should all past Measures become only binding on present members of the Church of England, such provisions would lose their primary legislative force and a subsequent Act of Parliament would have to be sought. Furthermore, it may cast doubt as to whether marriages that were performed in light of such a provision would be considered legally binding. Presumably the rules surrounding retrospective legislation would still be taken into consideration and this would mean the effects of the change would only impact on future marriages.

These matters may complicate the question of dissociating the state from the Church of England on a legal basis, but the case remains that so long as Parliament is sovereign, it may enact any legislation it wishes, and this includes a disestablishing Act. As stated, the most logical form this might take would be to use the Welsh Church Act 1914 as a template; however, the church and the state must be aware that the situation will not be as simple as the previous disestablishment process, as there will no longer be any established church left behind.[596] It may be advisable for the state and the Church of England to ensure any potential complications, such as the amendments seen through the Pastoral Measure 1983, are identified prior to removing the legislative force of Measures in order to counter any future problems. Otherwise, it may be parishioners themselves who bear the consequences unknowingly. Alternatively, provisions may be made to maintain former Measures status whilst ensuring any future Measures are binding on members only.

[595] Cranmer, Frank Disestablishing the Church in Wales – at last? (15th June 2013) *Law and Religion* <http://www.lawandreligionuk.com/2013/06/15/disestablishing-the-church-in-wales-at-last/> last accessed 30/08/2015.

[596] Apart from the Church of Scotland which may be disestablished through a similar basis without many of the complications mentioned.

5.4 Disestablishment and the Commonwealth

In discussing amendments to the rules of succession there has been wide discussion on whether consultation with Commonwealth countries is needed.[597] These discussions, although not directed towards disestablishment, relate closely to problems that could occur with amendments leading to disestablishment. The Statute of Westminster states clearly within its preamble that 'alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom'.[598] That said, a number of critics have asserted that this provision is now outdated and would not need to be conformed to except out of courtesy. However, it is equally important to remember that such changes may have a constitutional effect on their own laws. Twomey recognises this stating,

> 'whether the commitment in the Statute of Westminster to obtain the parliamentary approval of the Dominions continues to be applicable, but as a matter of comity, consultation will still be necessary as changes to the law in the United Kingdom may have constitutional ramifications for Commonwealth Realms.'[599]

This means that the UK must take the initiative in order to ensure all commonwealth countries act in uniformity, whether at the same time or in response to such legislative changes by the UK parliament. As Cown states, it must be recognised that 'there are separate countries with a *common* law of succession and this fact binds these countries in constitutional links by virtue of the shared monarchy'.[600] If changes occur in the UK, these must be reflected by the constitutions of these separate countries.

[597] Blackburn, Robert "Constitutional amendment in the United Kingdom" in Xenophon, Contiades *Engineering Constitutional Change: A comparative perspective on Europe, Canada and the USA* (Routledge 2013); Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401
[598] Preamble of the Statute of Westminster 1931
[599] Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401, 401
[600] Cown, Zelman "The Crown and Its Representative in the Commonwealth" (1992) 18 *Commonwealth Law Bulletin* 303, 306-307

The only modern statute to initiate such changes available for comparison is that of the recently enacted Succession to the Crown Act 2013. This Act removes anti-Catholic provisions relating to succession and also repeals the rule of primogeniture. Much deliberation was made as to whether consultation with other commonwealth countries was needed and also if their consent should be acquired first. Twomey's article "Changing the rules of succession to the throne"[601] specifically addresses the complexities that might arise in different commonwealth countries in response to the Succession to the Crown Act, specifically within five of the commonwealth countries. What is discovered through this article is that the procedure to enforce these changes will be quite burdensome and lengthy in many of the commonwealth countries. Some, such as Australia and Canada, must also consider whether one Act of Parliament is sufficient to cover the whole country or whether separate acts are needed for the states or provinces of that country. Furthermore, in relation to disestablishment, it cannot be foreseen how all of these countries will react to such amendments. Those with a strong Christian base may be unwilling to support these changes as it may also affect their feelings towards the Anglican Community. This would not prevent such amendments but may potentially cause complications to these countries' own constitutions and cause unease politically.

Regardless of the political consequences that might be encountered by choosing not to accommodate such amendments to their constitutions, it is also well documented that none can prevent the UK parliament from enacting disestablishment. This is the choice of the UK alone, and each of the Commonwealth countries will have to choose to accommodate this within their own legal systems separately. It is also noted that the provisions of the Statute of Westminster acknowledge when other commonwealth countries have amended their constitutions in relation to the monarch's title. This was the case in 1974 when New Zealand enacted the Royal Titles Act.[602] It has also now been well documented that the Statute of Westminster cannot require the assent of all commonwealth legislators prior to enacting changes to the monarch's title; however, consultation must remain a consideration. As Harvey states,

[601] Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401
[602] *ibid*

> 'Changes to the succession will necessarily have a direct impact on the constitutional affairs of those [commonwealth] countries, although the extreme possibility – different countries adopting different rules of succession, and therefore having different members of the British royal family as head of state – seems highly improbable. There is no question but that those countries would need to be consulted about any decision in this field; nevertheless, the idea that other states should have a veto on the UK's right to reform its constitutional affairs is as unacceptable as it would be for the UK to interfere in the constitution of any other sovereign country.'[603]

This is a reasonable and sensible way of viewing the effects that the preamble of the Statute of Westminster 1931 now continues to have on our own constitutional affairs. It does not, and never did, give any commonwealth country a power of veto but ensures, for practical reasons, that Commonwealth countries are consulted and made aware of the impact on their own constitution. Although the most extreme interpretation of a pure simplistic reading might consider 'different countries adopting different rules of succession, and therefore having different members of the British royal family as head of state', Harvey states quite simply that this outcome would be improbable. It takes a simple common sense approach to understand that this would be unwarranted and unhelpful, both politically and socially. A year earlier the Fabian Society came to the same conclusion in their own report, stating,

> '[N]o other country can exercise a veto on a constitutional change proposed by the UK for itself. It is inconceivable that the UK would interfere in the right of sovereign states to choose their own Head of State, including those countries who currently have the Queen in that office. But equally the UK could not allow other states to prevent reform of its Head of State simply because they currently share the same incumbent.'[604]

Although again, these statements were given in consideration of changes to succession to the Crown, the same arguments would be true if disestablishment and the removal of the Supreme Governor of the Church of England were to occur. None of the other fifteen

[603] Harvey, Adrian "Monarchy and Democracy: A Progressive Agenda" (2004) 75(1) *The Political Quarterly* 34-42, 38

[604] The Fabian Commission on the Future of the Monarchy, *The Future of the Monarchy* (Fabian Society 2003) 91

commonwealth countries would have a power of veto over the UK legislative; however, their constitutions would have to be altered in order to recognise the changes this would make to the monarch's position.

Ultimately, as Twomey concludes in relation to the Succession to the Crown Act,

> 'Ultimately, however, the law of succession to the Crown of the United Kingdom is a constitutional matter for the United Kingdom to determine. No Commonwealth Realm has a right of veto upon such change and consultation, although appropriate, does not pose a constitutional barrier to reform.'[605]

The same is true of disestablishment, remembering also that it would only be the amendments to the title of the Crown that this relates to and not any other constitutional amendments needed for disestablishment. This is why such consultation, and implications towards the commonwealth, would not necessarily be needed should the Church chose to initiate such measures through their own legislative process. Any changes to the bishops in the House of Lords would not need such consultation and nor would the amendment of the parliamentary control over the church's legislative amendments, or their position within the education system.

5.5 Alternative Models after Disestablishment

Should disestablishment occur, it will be important for the UK to move forward with an acceptable model that conforms to the expectations of equality and neutrality in light of religious freedom. This thesis has highlighted a number of elements that will have to be taken into consideration, and although there is no uniformly accepted model of best practice, it is clear that there is a move within member states of the EU to a system of contractual separation. Furthermore, this appears to be happening without states

[605] Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401, 401

purposefully approaching this method of partial separation, but they are aware of the need to meet their regional duties under the ECHR and thus distancing themselves whilst maintaining indirect connections. Although not unanimous, there is also a perception that religious freedom -

> 'stands 'at the crossroads of other fundamental rights of individuals and primary interests of states' increasingly religious freedom goes beyond the boundaries of mere profession of faith or exercise of worship, and emerges in the legal fields where ulterior interests operate in a specific way' the latter also being connected or connectable to the fundamental rights of the individual.'[606]

This means that although this system of collaborative neutrality is not a requirement, meaning that state church separation is not a necessity, there is a push to improve policies and ensure that representation within the political and social sphere is broadened. In some cases, such as when new members of the EU joined and found themselves under a duty to ensure their state practice complied with their duties under human rights law, there was a tendency to overly promote certain approaches by borrowing models that were already in place in neighbouring countries. This also encouraged a more tolerant approach to religions and cultures outside of Europe, as well as those within their borders. However, neither the EU nor the rights detailed within the ECHR call for equal treatment and as some academics, such as Hill, are beginning to recognise '[e]qual treatment does not mean identical treatment'.[607] Equally, equal treatment does not mean that all religions are equally recognised and given the same treatment, but that states are neutral about their treatment of religion. Thus, each religion is treated neutrally on its own merit and needs and not treated uniformly as this may inadvertently create inequality by not actually meeting the needs of the individual religion.

[606] Casuscelli, Giuseppe 'State and Religion in Europe' in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 131-146,138

[607] Hill, Mark "Church and State in the United Kingdom: Anachronism or Microcosm?" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 199-209, 209

This atmosphere of collaborative neutrality was also recognised by Davie who indicated that Europe broadly has a consistent common approach to religion.[608] This idea was followed by Doe some years later and there appears to be truth in the statement, with elements of commonality being introduced in specific areas of law when religious organisations are effected.[609] The piecemeal effect of this has been discussed within the background material for this thesis but can be drawn on in order to establish elements of best practice moving to the future. It will be important not to allow '[a] market without rules, governed by the rules of competition, and where the primacy of public politics is absent'.[610] Such an insular system would encourage isolation of religions and create an inherent discrimination against minorities who would be unable to compete with the more well established and larger religions. It is important that the state recognises this and enables not only equal treatment of religion but also the neutral ability for religions of all sizes to exercise their right to manifest their religious beliefs in society. Thus human rights law encourages states to support religion in a collaborative way, and a sure way to do this is to introduce systems of inter-faith dialogue in order to understand religious needs, and for religions themselves to understand each other's needs. Furthermore, this dialogue must be transparent in order to create social acceptance and to encourage tolerance within society. If this does not occur, there may be a negative move towards a competitive market model that induces a perception of distrust and intolerance.

The competitive market analysis is based more around economic factors rather than sociological or legal elements. It features a model of competing sects and relies on the fact that 'where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest'.[611] All things considered, this sounds quite attractive to a country attempting to neutralise their approach to religion; however, the integral problem to the competitive market analysis is that dominant religions are able to dominate the market place also thereby failing to successfully solve the problem.

[608] Davie, Grace *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002)
[609] Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011)
[610] Casuscelli, Giuseppe 'State and Religion in Europe' in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 131-146, 140
[611] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (Oxford: Oxford University Press 2005) 93

Furthermore, policing the market then becomes essential. The theory that as long as there is enough competition between religions, there will always be a healthy balance of religious neutrality in society, thus appears flawed, and the suggestion that, according to economic analysis, this means that participation will also increase as religions will be forced to offer a 'commodity at least as attractive as its competitors'[612] becomes doubtful. This means that governmental regulation in order to maintain the equilibrium becomes essential. According to Ahder, Rex and Leigh, this means that in economic terms,

> 'If the vitality of religion and the level of spiritual and ecclesiastical consumption is primarily dependent upon 'supply side' factors, the state's role becomes pivotal. A state's endorsement of a single church will have a dampening effect upon religion as measured by citizens' participation in organized religions. To the extent the religious market is already 'monopolized', state action to 'deregulate' it – by abolishing any state religion and lowering the barriers to entry to newcomers – ought to see an increase in religious vitality. The broad lesson appears to be that if a state values religion, it should create and encourage a competitive market.'[613]

This means that by supporting a single church, such as a national church, the state negatively impacts upon the overall religious market. The state thereby has a pivotal role in ensuring that religions are able to benefit equally from state support and in turn this helps religions flourish. This subsequently helps prevent any form of monopoly emerging. Conversely, Ahdar believes such a monopoly would be 'marked by widespread religious apathy and low rates of active participation'.[614] In support of this assertion prior research has shown that among Protestants

> 'church attendance and religious belief both are higher in countries with numerous competing churches than in countries dominated by a single church. The pattern is statistically significant … Church attendance rates, frequency of

[612] Iannaccone, Laurence, Finke, Roger and Stark, Rodney 'Deregulating Religion: The Economics of Church and State' (1997) 35(2) *Economic Inquiry* 350, 351
[613] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (Oxford: Oxford University Press 2005) 94
[614] *ibid* 94

> prayer, belief in God, and virtually every other measure of piety decline as religious market concentration increases … the vitality of a religious market depends upon its competitiveness.'[615]

Critics, however, believe that this model is over simplistic. Basing itself purely on economics, it has lost its grasp on the complexities of religious belief that other models such as the neutrality model or the pluralist models manage to capture. For example, the pluralist state captures the importance of religion by recognising 'the ultimate significance of faith in people's lives and where the functions of the state and religious concerns overlap, the state seeks to work together with the organisations of religions in question'.[616] However, in the eyes of critics, all of these models suffer from the same deficiency: all of them attempt to privatize religion and withdraw the question of faith from the public sphere. As Ahdar and Leigh assert

> 'A thoroughgoing privatization of religion by the state, compounded by official endorsement of secular beliefs, denies many faiths the public witness they desire, and indeed are obliged, to make.'[617]

In an article published a year before this, Ahdar and Leigh also state that even some separationalist models do not go as far as to privatise religions to the extent that they play no part in public life at all. They argue more that separation itself is an important instrument in the larger picture of protecting religious freedom. In their arguments, they use Adams and Emmerich's quote to reinforce this point. They stated that

> 'The separation concept … is really a servant of an even greater goal; it is a means, along with concepts such as accommodation and neutrality, to achieve the ideal of religious liberty in a freed society.'[618]

Their emphasis on separation as a tool to advance religious freedom is softened when followed by the advancement that having a disestablished church does not alone

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[615] Iannaccone, Laurence, Finke, Roger and Stark, Rodney 'Deregulating Religion: The Economics of Church and State' (1997) 35(2) *Economic Inquiry* 350, 351-352

[616] Rivers, Julian 'Irretrievable Breakdown? Disestablishment and the Church of England', in Schluter, M *Christianity in a Changing World* (Marshall Pickering 2000) 63-80

[617] Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (Oxford: Oxford University Press 2005) 95

[618] Ahdar & Leigh "Establishment and Religious Freedom" (2004) 49(1) *McGill Law Journal* 635-681

guarantee religious freedom, as some of 'the most disestablished societies in the twentieth century are those governed by totalitarian regimes'.[619] This statement is vitally important to those considering models of separationalism as it ensures that relations are not severed but more that a distancing exercise is undergone in order to ensure no unnecessary support is given that might be interpreted as favouritism.

Such theories have sparked debates on the separation of the Church of England from the state. The established Church of England thus becomes an integral problem preventing this from happening. This has had a direct impact on the way that not only the public in general view the Church of England but also religious minorities them.[620] For example, archaic laws such as the law of blasphemy have had to change in order to address the need for equality in the protection of religions in accordance with public pressure after cases such as the Rushdie affair.[621] In fact, during the 1990's, although some minority religions such as Muslims showed some desire to support the established church, they also expressed clear anguish at the fact that the laws of blasphemy only protected the Church of England and not other religions which in fairness should be protected equally, as is now the situation under the Racial and Religious Hatred Act 2006.[622] Alongside this, debate within the Church of England itself has not gone amiss. In fact, since the 1970's, the issue of pluralism and multiculturalism has been debated not only by the Church of England but also the World Council of Churches (WCC), with various committees internationally and nationally having been established to discuss how to tackle and communicate with those from other religions.[623]

[619] Ahdar & Leigh "Establishment and Religious Freedom" (2004) 49(1) *McGill Law Journal* 635-681, 653
[620] Morris, R.M. *Church and State: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008)
[621] *R v Chief Metropolitan Stipendary Magistrate, ex parte Choudhury* [1991] 1 QB 429
[622] Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)
[623] For a wider discussion on tackling inter-faith dialogue please see Canon Dr. Anne Davidson 'The Church of England's Response to Religious Pluralism' (August 2000). Available online at <http://www.anglicanism.org/admin/docs/coereligiouspluralism.pdf> last accessed 30/07/2011

Going back to basics and considering Robbers' tripartite formula[624] is equally unhelpful as the complexion of each state model means that even when placed within one of the three featured models (separation, state-church or hybrid model), there are always characteristics that are exceptions which lead to better placement elsewhere. The UK, for example, is considered to fall within the state-church model as it has two established churches. However, the state's relationship with the Church of Scotland could be described as more of separation than state-church, and with the Scottish referendum for independence[625] having been so close this, may be even sooner than expected. This may mean that the state's relationship with the Church of England could be considered more akin to that of a state-church; however, there are many features that would indicate a hybrid model, or model of cooperation. More detailed examples are given in the last chapter, but the main point here is that by using such a simplistic formula in considering a path forward for the Church of England in the UK, it evades many inter-winding characteristics between the state and church that cannot be as easily isolated and boxed within one model. The fact that the country has two established churches equally does not help the method and means that both have to be considered together even though their features are very different. However, the advantage of beginning discussions using Robbers' formula is that it gives a good starting point to build from. By identifying and drawing out features that do not fit neatly within these models, it allows those proposing a new model the ability to cater for all of the state's individual areas of law and move forward with a better model that will suit the specific circumstances.

Drawing on international and regional debate is also important in considering future models, especially if Temperman is correct in his prediction that pressures from international regulatory bodies and organisations will eventually wear down models of established churches until they are forced to disentangle their relationship and disestablish their church.[626] Although this may not be something that can be initiated by direct regulation, it is not impossible to see how this could occur through indirect

[624] Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005) discussed in further detail in chapter 4.
[625] For more information see The Scottish Government: Scotland's Referendum at <www.scotreferendum.com>
[626] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2012) *Oxford Journal of Law and Religion* 1-31

political and social pressure which already appears to be having a direct effect on state-church relations within European countries. International organisations are increasingly being recognised as holding an ever-growing number of powers, often through state transference, and the area of public international law has been growing at incredible speed during the last century.[627] Academic interest has thereby also grown, and theories of the rule of law have even been manipulated to try and accommodate for its effectiveness.[628] As Duquet et al state 'Norms and standards are considered legally non-binding but may have legal effects'.[629] This means that accountability also needed to be monitored, and as international organisations increase, Koppell has considered their interaction as 'creating linages that begin to weave a web of transnational rules and regulations'.[630] Organisations are also setting up panels of experts to judge on individual cases of legislative reviews within certain areas, with one such area being the law effecting religion or belief. These panels are increasingly active, and the ODIHR Panel of Experts on Freedom of Religion or Belief, which was set up in 1997, illustrates a prevalent example to this thesis. Since its inception, it has produced a number of documents which help to guide states on legislating on matters effecting religion or belief. The *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*[631] and *Guidelines for Review of Legislation Pertaining to Religion or Belief*[632] show how they have used modern case law to aid states into developing more standardised approaches. Although these guidelines are not binding on states, they do help to govern and guide states into certain practices, helping to diffuse any potential problems before they become an issue, thus creating a sense of uniformity within member states. They add to Duquet and Koppell's image of transnational rules and regulations which can have legal effect. Such Panels also allow states to ask for advice on whether their legislative measures are sufficient to fulfil their duties under human rights law, allowing a positive interaction and again, although their advice is not binding, it is highly unlikely that a state will not follow it when it is the state which has approached the panel for their advice to begin with. Political pressures may also

[627] Dan Sarooshi *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press 2005)
[628] *ibid*
[629] *ibid* 76
[630] Koppell *World Rule. Accouuntability, Legitimacy, and the Design of Global Governance* (University of Chicago Press 2010) 12
[631] Can be found at <http://www.osce.org/odihr/29154>
[632] Can be found at <http://www.osce.org/odihr/13993>

influence the effects of the panel, and all of this helps to induce a system of cooperation that is common to all states.

These types of international organisations give clear examples of the kind of external pressures that states have to contend with when considering their relationship with religious organisations in modern times. Although seemingly informal in nature, these organisations hold an incredible amount of political and social power, as well as wielding what appears to be an increasing amount of legal authority over those states that have voluntarily agreed to concede sovereignty to them. Vitally, they do remain dependent upon state cooperation and have no legal power unless conferred by one of the international law-making bodies which are governed solely by state cooperation. This is why such law remains within the bounds of soft law which as Duquet et al state 'requires more consultation and input from stakeholders than hard law, since … to be effective, it also needs to be accepted and implemented'.[633] The influence that international organisations have on individual state's relationships with religions are thereby wholly voluntary and often reliant on state input in order to agree models of acceptance within a smaller framework. As previously discussed, this may be why regional mechanisms are more successful than global mechanisms, as a region's historical development allows shared experiences to draw up a working model that is acceptable to all.

These models demonstrate that pressures are coming from inside and outside the UK and that potential alternatives can be drawn inside and outside our borders. Not only do we have an alternative model of an established church which demonstrates a far more autonomous structure, but we also have models of disestablished churches such as the Church of Wales,[634] and whilst maintaining a public presence for religion in the public sphere will remain important, it remains equally important that all religions are treated neutrally and given an equal place within the public sphere. There is also a common theme that seems prevalent in most of the models discussed and that is that

[633] Duquet et al. "Upholding the rule of law in informal law making processes" (2014) 6(1) *Hague Journal on the Rule of Law* 75-95, 83

[634] The Church in Wales has been disestablished now for 100 years under the Welsh Church Act 1914

separation cannot come with the cost of losing all connections. Inter-religious and state discourse remains vital to ensuring religions are accommodated within society, and international and regional bodies echo this notion. Essentially this means that should disestablishment of the Church of England occur, the severance of all ties is not a realistic option. Furthermore, it must be acknowledged that this is only one option and that in the eyes of many, establishment remains an option so long as the political ties are tied. The complexion of disestablishment must also be accepted in order to assess the reality of moving forward in this way. The conclusions in the final section will look more extensively at this process in order to explore whether in reality this is a practical way forward for the state's relationship with religion.

5.6 Conclusion

The above makes it clear that the process of disestablishment is not something that can be initiated without deeper thought. The analysis of those who could potentially initiate the procedure appears to indicate that none of the three entities considered could do so alone. Each would need the full support of at least one of the other actors and, due to constitutional conventions, it is likely that all three would need to work together if disestablishment were to be successful. It is also apparent that none of these potential instigators gains any great benefit in beginning the process. Equally, it is clear that even if such a procedure were initiated, it may not be a high priority of Parliament and this may once again slow down the procedure. In 1919 this was one of the problems that pre-empted the separation of the law-making body of the Church of England with the UK Parliament[635] and this 'doctrine of unripe time' may easily be the element that prevents disestablishment reaching the law books at present. This is likely to remain the case whilst models of establishment are considered consistent with religious freedom. However, this may change quite suddenly should political and social perceptions change.

[635] Church of England Assembly (Powers) Act 1919; for a fuller discussion see Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)

The above has also highlighted the fact that disestablishment may not mean the severing of all aspects of the state church relationship. Authorities such as Biggar,[636] Morris[637] and Spafford[638] all argue that pure disestablishment is impossible and that a certain degree of cooperation must occur between all religions and the state. They also argue that as aspects of establishment become looser and cracks begin to form within the relationship, disestablishment will begin to occur in a piecemeal fashion regardless. If this is true, then such a drastic approach to disestablishment through the enactment of a wide statute would be unneeded and ill advised. However, it is equally true that implementing small changes in such a piecemeal fashion may, as warned by Brazier,[639] cause a domino effect that ensures that a barrage of amendments is needed to separate the two, causing a backlog to Parliament which may make it not worth attempting any amendments thereof. This is especially so as at some point an amendment of the monarch's title will be needed to complete disestablishment, and this will have to be considered with the commonwealth in order for their opinions to be obtained and to address any internal constitutional matters that may result in their own country.

It will also be important to consider the future relationship between the state and the Church of England before the process of disestablishment is initiated. This is to ensure that there is at least a certain degree of certainty about what this relationship will look like, and how this will compare to other religions within the UK. As certain rights are claimable against the established church, the state will have to consider how these rights will be fulfilled by the secular state, as to continue their attribution to a then-disestablished church could be considered to constitute an unfair disadvantage on the Church of England and might even go so far as to infringe its religious freedom. Although extreme, if taken to its logical conclusion, matters such as maintenance of

[636] Biggar "Why the 'establishment' of the Church of England is Good for a Liberal Society" in Chapman, Maltby and Whyte *The Established Church: Past, Present and Future* (T&T Clark International, 2011)
[637] Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)
[638] Spafford, George "Working party on "disestablishment" report (2002) 6(30) *Ecclesiastical Law Journal* 264-269
[639] Brazier, Rodney "Legislating about the Monarchy' (2007) *Cambridge Law Journal* 86-105

graveyards, the right to burial, marriage and baptism, which have all been considered to now constitute cultural rites rather than religious rites alone, could all be viewed as discriminatory burdens placed upon the Church of England. It will therefore be important for the state to consider alternative models from their continental neighbours, and although there may not be one unified model accepted by the EU, indications have been made that a system of mutual cooperation works best. This may mean that the UK wishes to review its approach to all religions, or merely to re-evaluate its relationship with the established church in order to ensure it are in a comparable situation to other religions when disestablished.

Conclusion

Concluding Remarks

This thesis set out to investigate the practical realities of disestablishing the Church of England from the state. It considered the constitutional peculiarities of the UK and how this relates to the established church in order to understand the types of constitutional reform that would have to occur in order to separate the two. Furthermore, it considered both international and regional changes that have placed pressure on the relationship, as well as various sociological arguments that have developed on the matter of establishment versus disestablishment.

In order to examine the practicalities it was important to begin from a working framework, and the study very much began from an introduction of the framework of the Church of England and how this fits within the UK constitutional structure. An analysis of the Church of England's relationship with both the constitution and the state was thereby discussed in order to achieve an understanding of the legislative attachments that need to be cut in order for disestablishment to occur.

The research itself demonstrated the complexity of the constitutional framework of the UK, and although it has indicated that an unwritten constitution enables a high degree of flexibility and speed when changing this framework, it also illustrated how uncertainty can occur in the framework itself. Constitutional conventions especially are difficult to pinpoint and even harder to prove, or to change. Some can disappear due do disuse, but others continue to be supported centuries later: so long as they can be identified, the parties continue to believe they are bound by them and there is a rational

reason behind the convention.[640] Importantly, these conventions, having been considered 'the flesh which clothes the dry bones of the law',[641] are usually only effective between the institutions of the state but do extend to their relationship with the Church of England, especially the General Synod which is responsible for making church law. These conventions prevent the state from interfering directly with the legal affairs of the church by preventing Parliament from enacting legislation that will directly affect the Church of England without prior consultation. Reading between the lines, the fact that these conventions are used to govern this relationship may also be taken to imply that the General Synod is a state institution as well, especially in light of the fact that the laws they produce are given primary legislative power.

The fact that their laws constitute primary legislation is also a highly contentious issue and unique to the Church of England. The research demonstrated that the effects of this are twofold. First, that the Church of England is the only religion in the UK that is not governed by consensual compact. Even the rules of those formerly established[642] are only binding between members who join through choice. Secondly, the effect of having laws that equate to primary legislation means that they are binding on all citizens in the UK, and this creates a two-way relationship between individuals and the church. Effectively, this creates a relationship of rights and duties between parishioners and the church which is reflected in a parishioner's ability to have their children baptised, be buried in their parish graveyard and get married in their local church.

Within this research a number of other privileges were identified, leading to a number of benefits unique to the Church of England, with all other religions being subjected to different treatments. However, also illustrated were a number of burdens felt by the established church alone which are equally unique to their relationship with the state. Due to the lack of codification of the UK constitution, the majority of these benefits and burdens have been allowed to develop gradually which has resulted in their complete entwinement within the constitutional system, creating difficulties in identifying a clean

[640] Dicey, A V *Introduction to the Study of the Law of the Constitution* (8th ed reprinted IN: Liberty Fund 1982)
[641] Jennings, Ivor *The Law and Constitution* (5th edn, University of London Press 1959)
[642] The Church in Wales and the Church in Northern Ireland.

way to separate the two. Furthermore, even a separation similar to that of the Church in Wales would cause problems when it comes to the impact of past Measures, as they may need re-enacting in statute to remain binding in the future.

Interestingly, the research has also identified parallels between the two different systems which both stem from the authority of the monarch. The two structures appear to mirror each other's law-making processes and their legal frameworks demonstrate incredible similarities too. Historically, this may be attributed to the fact that they stem from the same source, the Monarch as authorised by God, or merely because their structures have been left to evolve side by side. In reality, it is most probably partially attributable to both and this is despite their missions being very different in nature.

Ultimately, despite their historical entanglement, what was really illustrated in this first chapter was that the relationship that had developed between the state and the established church no longer fits the needs of modern society. Although once used as a tool for social engineering, this need has now passed and although the Church of England can be considered to meet some form of pastoral need for society, this may no longer outweigh the privileges enjoyed by the church. Their association with the state has also been considered to have a negative effect on attendance rates,[643] although sociological theories have been produced to try to counter such arguments with terms such as 'vicarious religiosity' and 'believing without belonging' featuring keenly within more recent writings.[644]

In the end the research indicated that although the state and Church of England had developed a deeply rooted entanglement in constitutional terms, the two had moved on

[643] North and Gwin 'Religious Freedom and the Unintended Consequences of State Religion' (2004) 71(1) *Southern Economic Journal* 103-117. They stated that 'Using survey responses on the frequency of attendance at religious services, we find that government establishment of state religion reduces religious attendance, whereas enduring constitutional protection of religion increases religious attendance.' 104

[644] These terms stemming from Davie's original book *Religion in Britain since 1945* (Oxford: Blackwell Publishing 1994)

sociologically and that this has meant that the relationship no longer fits as well in both legal, political and social terms as was the case when the Church of England was first established.

The second chapter has extended this study into the area of international and regional human rights in order to understand how these have influenced new thinking towards the antithesis of establishment, disestablishment. The purpose here was to demonstrate how substantive human rights have changed perceptions towards the state's relationship with religion and the effect that religious freedom has had on the Church of England in its relationship with the state and with other religions.

The research found that religion is dealt with by all generalised human rights law instruments and that there are also some specialised international instruments such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief which cover religion directly. However, its recognition within these instruments is more directly linked to the concept of religious freedom or is referred to in regards of discrimination rather than recognising that religion has a place within the public sphere itself. Equally, it does not attempt to mould the state's relationship with religion into any type of generic structure, but instead allows states to be in full control of their own approach to religion so long as it conforms to the minimum standards set out in their instruments.

Also highlighted is the ability of the state to limit the right to religious freedom so long as certain conditions are fulfilled. This means that the right itself is qualified, and so long as the state is acting legally and fulfilling a democratic need within certain given areas, they are able to limit religious freedom. Although certain judicial principles have been developed to ensure that such limitations are deemed proportionate, this places a considerable restraint on religious freedom and one that has been argued may soon begin to infringe on the *forum internum* as well as the *forum externam*, despite this

being considered inviolable.[645] This would mean that judges will begin having to make value judgements on what an individual's true beliefs are and how closely they hold these in regard to their religious convictions. This is an area that has always been considered outside of judicial authority and is considered to constitute very dangerous ground for judges to be treading. However, the research appears to indicate that the effects have begun to be seen in terms of religious symbols, though clouded behind alternative terminology.

In terms of international and regional human rights legislation, the research illustrated that international monitoring bodies and organisations are also beginning to have an indirect effect on the state's relationship with religion, especially those such as the UK that continue to feature an established church, making them highly relevant to this thesis. This is due to what is viewed in Temperman's[646] article as the slow chipping away of models of establishments due to increased statements on state neutrality and impartiality and this is re-iterated in concerned statements about the ability of states with established churches to fulfil their regional and international obligations.

Despite this slow chipping away, what this research also found was that regional instruments are stronger than international instruments especially in Europe where the ECHR has formed a powerful instrument in the protection of the rights of individuals from state interference. The OSCE has also been key in the development of guidance addressing the state's relationship with religion and guiding a path forward despite some domestic legislation being found to have protected individuals against discrimination to a higher degree than the ECtHR. With the EU having brought these rights into their founding principles, research indicates that this has had the effect of producing a number of similarities between member states, especially new member states.

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[645] Petkoff, Peter "Religious Symbols between *Forum Internum* and *Forum Externum*" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 297-304

[646] Temperman, Jeroen "Are State Churches Contrary to International Law?" (2012) *Oxford Journal of Law and Religion* 1-31; Some of these views are also mentioned in his book *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010)

In the end this appears to indicate that an atmosphere of cooperation between states and religion is being harnessed within the EU, and although religion is a matter that is left entirely within state sovereignty, an increasing number of references are being made within EU documents. However, equally illustrated is the danger of too much involvement from the EU who, if found to be meddling too much within human rights matters, may be found to jeopardise their authority in economic and market matters, which are the areas that their whole structure was initially based on.

The third chapter extended the study into different theories and viewpoints on the state's relationship with religion. It considered how the sociological and religious demographics have changed within the country and the impact this has had on people's views towards the established Church of England. Importantly, it extended this study to views from within the church itself in order to establish whether support for establishment remains strong within the institution itself.

What the research shows is that although theories of state supremacy have moved away from reliance on a divine grant of power, the importance of religion within the social and political structure of the country remains. Although some contest this view, the general feeling is that even as a competing viewpoint, religions have a valuable contribution to make to the political and social debate. The only problem comes when one religion has a greater voice than any other, and this is also true if its voice is louder than any non-religious group, such as atheists or agnostics, and economists or liberalists.

It also demonstrated the way in which the Church of England has had to adapt its structure in order to include other religious voices within its discourse with the state and protect not only its own interests but those of all religious and non-religious organisations. This is necessary in order to ensure that the state is able to fulfil its role under human rights law. However, many secularists continue to feel aggrieved by the

state's relationship with the established church, and calls for disestablishment are not likely to disappear entirely.

It was further discovered that, although a number of religions viewed the close relationship of one religion with the state as undesirable, they were willing to accept it so long as this religion was willing to express the concerns of other religious voices within the political and public sphere. Ultimately, the effect of doing so would enhance the ability of all religions to interact in the public sphere, and the state recognises that accepting mainstream churches in society has helped facilitate public policies that have been aimed at social integration and cohesion.[647] This is especially true when religion is so linked with identity in the modern world and the courts have to be aware of the danger of suppressing the manifestation of beliefs through public gestures such as religious wear.

Although an analysis of the Church of England did indicate there were occasional expressions of doubt concerning their current status, the overwhelming majority remains in support of establishment. Historically and doctrinally, there is wide support for a close relationship with the Church of England, and although they have become more distanced in modern times, there is a sense that they are able to keep a political check over the state and help to create an overall moral framework that is acceptable to all religious and non-religious organisations without becoming too dominant.

In the end it was found that not only does sociological and religious debate on the established church play an important part in keeping the established church in check, but that having an established church also works to ensure there are constant visual reminders of the limits of state power. Thus, by ensuring that debates on establishment continue, it also ensures that the Church of England does not become too powerful a voice politically or socially, that even its pastoral role is more plural in nature, whilst

[647] in Ventura, Marco "States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment" in Ferrari, Silvio & Cristofori, Rinaldo *Law and Religion in the 21st Century* (Surrey: Ashgate Publishing ltd, 2010) 181-185, 181

ensuring that visible reminders of the accountability of state power remain. The only danger is to the Church of England itself, that must ensure that its mission is not stretched to the point that it becomes detached from its own doctrinal law and that its power does not become too excessive.

The fourth chapter focused on different models of state relationships with religion and touched briefly on how human rights have influenced their development. With the UK being the main focus of this thesis, the major part of this chapter is based on models within the EU, and on a wider context the European continent, although comparisons are drawn in from America.

The research demonstrated that the majority of models within Europe, including international instruments governing the state's interaction with individuals in terms of human rights, have some basis in historically religious principles. This was demonstrated by the inclusion of human dignity within a number of international instruments, but also by the inclusion of religious input in state systems. Even those models of separation and hybrid models owe their basis to some form of religious input. In America's case, this was due to the Christian church wishing to maintain autonomy from the legal and political system. In others, such as France, it was due to a complete fall out.

The analysis demonstrated how different models have been drawn up in order to enable a clear separation of systems to be identified, and although heavily criticised as overly formulaic, Robbers' tripartite system has maintained a degree of continuity throughout any criticisms made. His models, that of separation, state church and the hybrid model, each have their own individual features which are illustrated through a comparison of states within these models. The result was that, although these models are able to give a starting point to any study of EU member states' relationships with religions, they are only helpful to a certain limited degree.

The reason for this limited usefulness is that they are too centred on boxing each state into a model based purely on legal semantics, disregarding what occurs in practice. Each of the states analysed shows clear overlaps with at least two different models, which indicates that in practical terms none fit neatly within any one model. In response, further studies have gone on to indicate that it is more apparent that an overall system of cooperation appears to be developing within Europe. Although not directed by the EU itself, theorists have considered this to be a result of the EU's new approach to human rights law and the requirement of new members to become signatory's to the ECHR.

Also illustrated by the research is a new surge of inter-disciplinary research. This is especially so between sociology, religion and law, but there are other disciplines that may add to the academic richness of the material. For example, political theories and even psychological studies may help to enrich the material demonstrating how these matters are influenced and why individuals choose to identify with sociological, religious or legal models.

In the end the analysis of these models demonstrated that any attempt to confine states within individual frameworks is futile. There are too many overlaps which cause problems and cracks in the integrity of these models. Instead, a more generalised and interdisciplinary approach is more appropriate, and studies of comparative areas of law are able to encapsulate some principles of best practice, although more research is needed in the area.

The fifth and final chapter deals directly with the practical issues that would have to be tackled should the state decide to disestablish the Church of England. Effectively drawing on all the past chapters, this section discusses who would be capable of initiating disestablishment, the benefits they would gain from doing so, and all the legal technicalities that may have to be tackled should the process become a reality. This

includes an indication of what laws would need amending or repealing and how this might be modelled.

The research indicates that the process of disestablishment within the UK would not be simple, although technically Parliament may enact any legislation it wishes. Linking strongly with constitutional law, there are a number of legal intricacies that would have to be given deeper consideration before the process could begin. Although three main characteristics have been identified as needing to be amended in order for full disestablishment to occur, it is clear that there are other constitutional matters that need addressing, and the state will also need to consider some of the duties that have been delegated to the established church.

It is also clear that, although there are bodies that could instigate disestablishment, none of these bodies would clearly benefit from doing so. There are also a number of constitutional restraints that would prevent each of these bodies from instigating the process without consulting with either one or both of the other bodies. This means that in realistic terms, disestablishment is only likely to be initiated if all three bodies decide to work together.

The research illustrated that one of the biggest problem faced by any attempt at disestablishment is the amount of time this would take. Parliament already struggles with the volume of work it faces, and there are clear indications that a number of constitutional and legal matters often missed by academics will need to be addressed. This includes the potential need to address the matter with commonwealth countries and how they are likely to respond.

It is equally clear that the process would not necessarily involve the complete severance of all ties with the state, although Parliament could ensure this if it wished. Several authorities have been quite forthright in their argument that complete separation is not

practical or desirable, especially on a sociological level. After all, the state still has a relationship with other religions, and a choice would have to be made by the state as to whether to mimic this relationship in their new relationship with the Church of England or whether to reassess its relationship with all religions in general. In considering the future of this relationship, it is also possible to draw on the second model of an established church in the UK. A number of more integral decisions will also have to be made in relation to whether religion needs a political or public voice, and this may be influenced by the jurisprudence of the ECtHR or by other European models that appear to work effectively on the basis of cooperation. What is argued throughout is that any such change might be more suitable to the adaptation at a grassroots level rather than from a top-down approach.

In the end, this research demonstrates that although disestablishment is possible there are an incredible number of constitutional ties that will have to be untangled in order to do so. It is also submitted that support for disestablishment is not as strong as many assume.

Future Recommendations and Comments

First of all, it is clear from this thesis that although researchers have attempted to analyse and unravel certain aspects of establishment, there is still a vast gap in the practical realities of the impact of the established church. For example, in practice no research has been conducted as to whether the status of Measures having primary legislative force has any direct effect on citizens themselves and how deeply it would affect them if this were to change both for future Measures and retrospectively. In fact, it is highly unlikely that the vast majority of citizens even know this fact. The reality of the situation is that it is only a legal anomaly which is left over from the constitutional development of the two bodies, the state and the church. This anachronism is an

example of how society and law must overlap. If we are considering disestablishment purely on a legal basis then this is unrealistic. The effect it has on individuals has to be considered as well, and this is so regardless of whether some of the religious rites recognised within the church have become more cultural rites of passage or not.

This means that increasing studies must be made using an inter-disciplinary approach, and research such as Harlow, Cranmer and Doe's article 'Bishops in the House of Lords: a critical analysis',[648] which are confined to the views of the bishops themselves, must be extended to consider external matters. Their research opens doors that must be utilised by others or extended to cover wider material. This is because, although this study demonstrates how the bishops do not consider themselves representatives of the Church of England in their role but as 'spiritual peers' representative of a moral voice in the House of Lords, it does not extend to how others view their input. While other comments have been noted, it would be interesting to consider the views of other Lords on their input and whether they also view them as a spiritual voice or as representatives of the Church of England.

The study has also highlighted a number of issues that may seem light-hearted in nature but legally constitute a real quandary that would need addressing before the process could continue. It may seem laughable that the Church of England could be accused of treason should they choose to introduce a Measure disestablishing their own body from the state, but in real legal terms this would be a challenge to the Monarch's title and, through a literal interpretation, this would constitute an act of treason. Whether any challenge to the Measure on such terms would be made is another question and is not one dealt with here.

Tied to this is the matter of constitutional conventions. With each body being constrained by convention it is highly probable that they would not act alone. The benefits of doing so would also be questionable and each would benefit more through

[648] (2008) *Public Law* 490

acting cooperatively rather than against one another. This draws back to the fact that the majority of ties to the state are very much legal intricacies that do not necessarily impact on individuals within society.

There is also a high degree of mounting pressure coming from international agencies, monitoring bodies and human rights law. The more regional the legal instrument or organisation, the more effective these measures are. Often, when looking internally at how to change a state's framework, these comments and views are neglected and attention must be made to such matters. Future research needs to accommodate such matters by drawing on any indirect references and ensuring that any recommendations are acted on in order to facilitate a future model that is acceptable in an international framework.

However, in stating this, caution must also be considered. It is common to look at the ECtHR's jurisprudence in assessing the acceptability of an established church. Continued references to the case of *Darby v Sweden*[649] demonstrate how old cases continue to be used to defend such models, even when more recent statements may not look so kindly upon them.

There is also a quiet voice being raised as to whether the standing of an established church sits as a default religion for all citizens. However, it is submitted that such an understanding of society is flawed. There is a sense that vicarious religiosity does occur to a certain extent, but this does not affect the ability of the state and the established church to act autonomously, without interference in each other's affairs. The research appears to demonstrate that such instances do not effectively discriminate against other religions, but in reality constitute a discrimination against the Church of England itself which is unable to direct their services to those members who have dedicated themselves to the church.

[649] App. No. 11581/85 (1989)

At first instance this submission may appear to support the disestablishment of the Church of England although in reality it does not. The one element which has not been considered fully within this study is the matter of the church's mission. This mission incorporates an altruistic nature that is integral to their position as the established church. When established, they were the only church accepted by the state and they therefore worked towards the greater good for all of society. This mission has not changed. The state's relationship with other religions has. It has moved from persecution to acceptance and now, in light of religious freedom, towards a neutral approach to religion. The Church of England's mission has thereby not changed but the religious affiliations (or non-religious affiliations) of the people for whose benefit they are working have. This means that because it has had to act in response of the state's own approach it has had to become more pluralist in its ways, but essentially are continuing to work for the benefit of the citizens of the UK.

Finally, it is submitted that one primary piece of legislation disestablishing the Church of England could be enacted by Parliament through agreement of the church, state and Monarch using the Welsh Church Act as a template. Parliamentary sovereignty will always make this a valid option. However, it is argued that such a drastic measure is both unneeded and undesirable, and could potentially cause a negative effect for all parties. A loose relationship with religion will always be more advisable, but working towards a more neutral approach may be more beneficial. In order to do so a more detailed analysis of small matters such as discussed in chapter 5 needs to be considered on a wider scale. Many laws will need amending or repealing, and doing so without evaluating some of the more subtle effects this might have at a grassroots level is arguably undesirable. The state also may be required to give more consideration to the impact it might have on their own duties to citizens in respect of burials and so-called cultural rights of passage, as well as more cumbersome matters such as the amount of

Parliamentary time future amendments (such as was the case with Marriage Act 1949 for the Church in Wales[650]) may require.

In many ways the final conclusion to this study is that before contemplating disestablishment a lot of further research needs to be conducted, and this is not confined to purely legal matters but to how these laws affect individual members of society. Those aspects of vicarious religiosity may be true, but should the church become disestablished, many of the rites that individuals have come to recognise as cultural may no longer form a right against the parish, and, if those legal anachronisms do not hinder the greater good of society altogether, then it must be asked whether such a drastic change is actually worth the benefits that may be gained. It may look better on paper, but essentially what is important is that each religion is treated in a neutral manner in line with what their needs are, with no discrimination. In this sense maybe the answer is seen through the judgement of *Lautsi v Italy*[651] whereby the historical development of religion within a country is integral to an individual's identity and this cannot merely be torn away at the roots but must be allowed to evolve slowly. Only then will it be seen if disestablishment is what is needed, and it will then occur naturally as society evolves.

[650] Discussed in Chapter 5, subsection 5.3, Disestablishment and the Law.
[651] (18th March 20ll) Application no. 30814/06

Bibliography

Adam, Will *Legal Flexibility and the Mission of the Church: Dispensation and Economy in Ecclesiastical Law* (Ashgate Publishing Limited 2011)

Ager, lastair 'Faith and the discourse of secular humanitarianism' (2011) *Journal of Refugee Studies* 456-472

Ahdar & Leigh "Is Establishment Consistent with Religious Freedom" (2004) 49(1) *McGill Law Journal* 635-681

Ahdar, Rex & Leigh, Ian *Religious Freedom in the Liberal State* (2nd edn, Oxford: Oxford University Press 2013)

Ahmed, Farrah and Perry, Adam "The coherence of the doctrine of legitimate expectations" (2014) 73(1) *Cambridge Law Journal* 61-85

Aikens LJ 'The legal consequences of Scottish independence' (2014) 3(1) *Cambridge Journal of International and Comparative Law* 162-172

Allan T R S 'Parliamentary Sovereignty: Law, Politics, and Revolution' 113 *Law Quarterly Review* 443-452

Allison J.W.F "History to understand, and history to reform, English public law" (2013) 72(3) *Cambridge Law Journal* 526-557

Armstrong, Kenneth 'An independent Scotland in the European Union' (2014) 3(1) *Cambridge Journal of International Comparative Law* 181-195

Aroney, Nicholas 'Reserved matters, legislative purpose and the referendum on Scottish independence' (2014) *Public Law* 422-445

Avis, Paul *Church, State and Establishment* (SPCK 2001)

Avis, Paul *The Identity of Anglicanism: Essentials of Anglican Ecclesiology* (London: T&T Publishing 2007)

Beal, Coriden and Green, *New Commentary on the Code of Canon Law*, (Paulist Press, New York, 2000)

Bedi, Sonu "Debate: What is so Special About Religion? The Dilemma of Religious Exemption (2007) 15(2) *The Journal of Political Philosophy* 235-249

Bell, Christine "Constitutional transitions: the peculiarities of the British constitution and the politics of comparison" (2014) *Public Law* 446-471

Bell, John "For God, Ulster or Ireland? Religion, Identity and Security in Northern Ireland" (March 2013) *Institute for Conflict Research*

Blumenberg, Hans *The Legitimacy of the Modern Age* (Cambridge, 1983)

Brazier, Rodney "Legislating about the Monarchy' (2007) *Cambridge Law Journal* 86-105

Brecher, Bob *Torture and the Ticking Bomb* (Blackwell Publishing 2007)

Briden and Ombres "Law, Theology and History in the Judgments of Chancellor Garth Moore" (1994) *Ecclesiastical Law Journal* 223-211

Brink, Jaco van den and Napel Hans-Martien Ten "The State, Civil Society and Religious Freedom" (2012) *Oxford Journal of Law and Religion* 1-17 doi:10.1093/ojlr/rws043

Bruce, Steve *God is Dead: Secularization in the West (Religion and Spirituality in the Modern World)* (Oxford: Blackwell Publishing 2002)

Brunyate, John *Equity: A Course of Lectures by F.W. Maitland* (Cambridge University Press, 1909)

Brundage, James *A Medieval Canon Law* (Pearson Education Limited, 1995)

Buchanan, Colin *Cut the Connection: Disestablishment and the Church of England* (London: Darton, Longman and Todd Ltd 1994)

Byers, Dohrman W "The Morality of Human Rights: A Secular Ground" (2010-2011) 26 *Journal of Law and Religion* 1-42

Cane, Evans and Robinson *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008)

Chaplin, Jonathan "Law, Religion and Public Reasoning" (2012) *Oxford Journal of Law and Religion* 1-21 doi:10.1093/ojlr/rwr026

Chapman, Mark, Maltby, Judith and Whyte, William *The Established Church: Past, Present and Future* (T&T Clark International, 2011)

Cloud, Morgan "Human Rights for the Real World" 54 *Emory Law Journal* (2005)

Corecco, Eugenio, *The Theology of Canon Law* (Duquesne University Press, Pittsburgh, 1992)

Coulton, Nicholas "God, the Bible and Human Rights" (2012) 14 *Ecclesiastical Law Journal* 275-291

Cown, Sir Zelman "The Crown and Its Representative in the Commonwealth" (1992) 18 *Commonwealth Law Bulletin* 303

Cranmer, Frank, Luca, John and Morris, Bob *Church and State: A Mapping Exercise* (London: Department of Political Science 2006)

Cranmer, Frank and Oliva, Javier Garcia "Church-State Relationships An Overview" (2009) 162 *Law & Justice – Christian Law Review* 4-17

Cranmer, Frank "Judicial review and Church Courts in the Law of Scotland" (1998) *The Denning Law Journal* 49-66

Cranmer, Frank "Disestablishing the Church in Wales – at last?" (15th June 2013) *Law and Religion* <http://www.lawandreligionuk.com/2013/06/15/disestablishing-the-church-in-wales-at-last/ last> accessed 30/08/2015

Cranmer, Frank "The Churches and European Law" 29/06/2010 found at http://www.law.cf.ac.uk/clr/networks/Frank%20Cranmer_%20Church%20&%20State%20in%20W%20Europe.pdf last accessed 07/06/2013

Crawford James "Perspectives on the Scottish independence referendum" (2014) *Cambridge Journal of International Comparative* Law 136-138

Cumper, Peter "First amongst equals: The English state and the Anglican Church in the 21st Century" (2006) 83(5) *University of Detroit Mercy Law Review* 601-623

Dahl & Lindblom *Politics, economics and welfare* (University of Chicago Press 1976)

Dark, K.R *Religion and International Relations* (Macmillan Press, 2000)

Davidson, Canon Dr. Anne "The Church of England's Response to Religious Pluralism" (August 2000) at <http://www.anglicanism.org/admin/docs/coereligiouspluralism.pdf> last accessed 30/07/2011

Davie, Grace *Europe: the Exceptional Case. Parameters of Faith in the Modern World* (Longman & Todd 2002)

Davie, Grace "Law, Sociology and Religion: An Awkward Threesome" (2011) 1(1) *Oxford Journal of Law and Religion* 1-13

Davie, Grace *Religion in Britain since 1945* (Oxford: Blackwell Publishing 1994)

Davie, Grace *The Sociology of Religion* (London: Sage Publishing 2007)

D'Costa, Evans, Modood & Rivers *Religion in a Liberal State* (Cambridge University Press 2013)

de Castro & Oliva "Sociology, Law and Religion in Italy and Spain" (2004) 153 *Law & Justice* 44-67

Dicey, A V *Introduction to the Study of the Law of the Constitution* (8th ed reprinted IN: Liberty Fund 1982)

Dimbleby, J *The Prince of Wales: A Biography* (Little, Brown, London 1994)

Dobbs, Joy, Green, Hazel and Zealey, Linda *National Statistics: Focus on Ethnicity and Religion* (Palgrave Macmillan 2006)

Doe, Norman "A Sociology of Law on Religion – Towards a New Discipline: Legal Responses to Religious Pluralism in Europe (2004) 152 *Law and Justice: Christian Law Review* 68

Doe, Norman *Law and Religion in Europe: A comparative introduction* (Oxford University Press 2011)

Doe, Norman "The Apostolic Constitution *Anglicanorum Coetibus*: An Anglican Juridical Perspective" (2010) 12 *Ecclesiastical Law Journal* 304-323

Doe, Norman, *The Legal Framework of the Church of England* (Clarendon Press, Oxford, 1996)

Doe, Norman "Toward a Critique of the Role of Theology in English Ecclesiastical and Canon Law" (1992) *Ecclesiastical Law Journal* 328-346

Doe, Sandberg & Hill *Religion and Law in the United Kingdom* (Kluwer Law International 2011)

Domingo, Rafael "Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom" (2012) *Oxford Journal of Law and Religion* doi:10.1093/ojlr/rws042

Donald, Alice "Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?" (2013) *Oxford Journal of Law and Religion* 1-22 doi: 10.1093/ojlr/rwt002

Duquet et al. "Upholding the rule of law in informal law making processes" (2014) 6(1) *Hague Journal on the Rule of Law* 75-95

Dworkin, Ronald *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011)

Edge "Current Problems in Article 9 of the European Convention on Human Rights" (1996) *Juridical Review* 42

Elliot, Mark and Thomas, Robert *Public Law* (2nd edn, Oxford University Press 2014)

Ellis, Anthony "What is special about religion?" (2006) *Law & Philosophy* 219-241

Errazuriz, Carlos Jose (translated by Gray, Jean) *Justice in the Church: A Fundamental Theory of Canon Law* (2009, Wilson & Lafleur Ltee, Canada)

Evans, Caroline & Thomas, Chris "Church-State Relations in the European Court of Human Rights" (2006) *Brigham Young University Law Review* 669-725

Evans, Carolyn *Freedom of Religion under the European Convention on Human Rights* (Oxford University Press, 2001)

Evans, Carolyn "Religious Education in Public Schools: An International Human Rights Perspective" (2008) 8(3) *Human Rights Law Review* 449-473

Evans, Malcolm *Religious Liberty and International Law in Europe* (Cambridge University Press, 1997)

Fahey, Tony "The Catholic Church and Social Policy" (1998) 49(4) *The Furrow* 202-209

Feldman, David "The nature and significance of "constitutional" legislation" (2013) 129(Jul) *Law Quarterly Review* 343-358

Ferrari, Alessanro "France and Greece: Two Approaches to Religious Pluralism" (2004) 152 *Law & Justice: Christian Law Review* 27-43

Ferrari, Silvio "Law and Religion in a Secular World" (2012) 14(3) *Ecclesiastical Law Journal* 355-370

Ferrari, Silvio and Cristofori, Rinaldo *Law and Religion in the 21st Century: Relations between States and Religious Communities* (Ashgate Publishing Limited, 2010)

Ferre, F *Basic Modern Philosophy of Religion* (Allen and Unwin, 1967)

Finnis, John *Natural Law and Natural Rights* (1979, Oxford University Press, Oxford)

Forrester, Duncan B. "*Ecclesia Scotcana* – Established, Free or National?" (1999) *Theology* 80-89

Fox, Jonathan "Separation of Religion and State and Secularism in Theory and in Practice" (2011) 39(4) *Religion, State and Society* 384-401

Freeman M.D.A *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008)

Furlong, Monica *The C of E: The State it's in, the past and the Present* (2000, SPCK)

Gearon, Liam *Human Rights & Religion: A Reader* (Sussex University Press, 2002)

Gerosa, Libero, *Canon Law* (1996, The Continuum International publishing Group Inc, North America)

Ghanea, Nazila *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff, 2003)

Ghanea, Nazila, Stephens, Alan & Walden, Raphael *Does God Believe in Human Rights?* (Nijhoff Publishers 2007)

Gilbert, Howard "Redefining manifestation of belief in *Leyla Sahin v Turkey"* (2006) 11(3) *European Human Rights Law Review* 308-326

Goldmann, Matthias "We need to cut off the head of the king: past, present and future approaches to international soft law" (2012) 25(2) *Leiden Journal of International Law* 335-368

Gomes, Evaldo Xavier, "Church-State Relations from a Catholic Perspective: General Considerations on Nicolas Sarkozy's New Concept of *Laicite Positive* (2009) 48 *Journal of Catholic Legal Studies* 201

Greenwalt, Kent "The Implications of Protestant Christianity for Legal Interpretation (???) 23 *Journal of Law and Religion* 131-140

Greer, Steven *The European Convention on Human Rights: Achievements, problems and prospects* (Cambridge University Press 2006)

Griffin, Leslie C "No Law Respecting the Practice of Religion" (2007-2008) 85 *Detroit Mercy Law Review* 475

Griffiths, Leslie C *McElroy Lecture: No Law Respecting the Practice of Religion* (2007-2008) 85 U. Det. Mercy L. Rev. 475

Griffiths, Peter "Protecting the Absence of Religious Belief? The New Definition of Religion or Belief in Equality Legislation" (2007) 2 *Religions and Human Rights* 149-162

Grim, Brian J "Religion, Law and Social Conflict in the 21st Century: Findings from Sociological Research" (2012) *Oxford Journal of Law and Religion* 1-23

Harding *The Law Courts of Medieval England* (Harper & Rowe Publishers Inc, 1973)

Harlow, Anna, Cranmer, Frank and Doe, Norman "Bishops in the House of Lords: a critical analysis" (2008) *Public Law* 490

Harris, Sam *The End of Faith: Religion, Terror, and the Future of Reason* (Free Press 2004)

Harvey, Adrian "Monarchy and Democracy: A Progressive Agenda" (2004) 75(1) *The Political* Quarterly 34-42

Helmholz, Richard H, *The Spirit of Classical Canon Law* (University of Georgia Press, Georgia, 1996)

Hennessy Lord "A political perspective on the Scottish independence referendum" (2014) 3(1) *Cambridge Journal of International Comparative Law* 159-161

Hill, Mark, *Ecclesiastical Law* (3rd edn, Oxford University Press, Oxford, 2007)

Hill, Mark, *Religious Liberty and Human Rights* (2002, University Press of Wales, Cardiff)

Hill, Mark "Voices in the Wilderness: The Established Church of England and the European Union" (2009) 37(1-2) *Religion, State and Society* 167-180

Hill, Mark and Sandberg, Russell "Is nothing sacred? Clashing symbols in a secular world" (2007) *Public Law* 488-506

HM Government *The House of Lords: Reform* (The Stationary Office, 2007) Cm 7027

HMSO, *The Governance of Britain* (2007) CM7170

Hooker, Richard *Of the Laws of Ecclesiastical Polity* (Oxford: Clarendon Press 1845)

Hufton, Olwen *Historical Change & Human Rights: the Oxford Amnesty Lectures 1994* (BasicBooks: A division of HarperCollins Publishers, 1995)

Hunter-Henin, Myriam *Law, Religious Freedom and Education in Europe* (Ashgate 2012

Hunter-Henin, Myriam "Why the French don't like the Burqa: Laicite, National Identity and Religious Freedom" (61(3) *International and Comparative Law Quarterly* 613-639

Hunt, Tristan "Monarchy in the UK" (2011) 17(4) *Public Policy Research* 167-174

Iannaccone, Laurence, Finke, Roger and Stark, Rodney "Deregulating Religion: The Economics of Church and State" (1997) 35(2) *Economic Inquiry* 350

Ishay, Micheline R *The History of Human Rights: From Ancient times to the globalization era* (2004, University of California Press)

Jackson, Bernard S "Jewish Approaches to Law (Religious and Secular) (2010) 164 *Law & Justice* 63-74

Jennings, Ivor *The Law and Constitution* (5th edn University of London Press 1959)

Kohen, Ari *In Defence of Human Rights: A non-religious grounding in a pluralistic world* (Routledge, 2007)

Koppell *World Rule. Accouuntability, Legitimacy, and the Design of Global Governance* (University of Chicago Press 2010)

Laborde, Cecile "Equal liberty, nonestablishment, and religious freedom" (2014) 20(1) *Legal Theory* 52-77

Lamb, Matthew L and Levering, Matthew *Vatican II: Renewal within tradition* (2008, Oxford University Press, Oxford)

Landau, Peter "'Aequitas' in the 'corpus iuris canonici'" (1994) 20 *Syracuse Journal of International Law & Commerce* 95

Langlaude, Sylvie "The Rights of Religious Associations to External Relations: A Comparative Study of the OSCE and the Council of Europe" (2010) 32(3) *Human Rights Quarterly* 502-529

Lavinia, Stan & Turcescu, Lucian *Church, State, and Democracy in Expanding Europe* (OUP 2011)

Lavinia, Stan "Church-State Relations in the Expanded Europe: Between Religious Pluralism and Church Establishment" (Conference paper 2009) <http://www.academia.edu/1657571/Church-State_Relations_in_the_Expanded_Europe_Between_Religious_Pluralism_and_Church_Establishment> accessed 06/06/2013

Leahy, Brendan "The Role of Canon Law in the Ecumenical Venture: a Roman Catholic Perspective" (2011) 13 *Ecclesiastical Law Journal* 15-25

Lefebvre, Charles "Natural equity and Canonical equity" (1963) 8 Natural Law Forum 122

Leigh, Ian & Ahdar, Rex "Post-Secularism and the European Court of Human Rights: Or how God never really went away" (2012) 75(6) *Modern Law Review* 1064-1098

Leigh, Ian and Lustgarten, Laurence "Making Rights Real: The Courts, Remedies, and the Human Rights Act" (1999) 58(3) *Cambridge Law Journal* 509-545

Leigh, Ian "By law established? The Crown, constitutional reform and the Church of England" (2004) *Public Law* 266-273

Leigh Ian "Recent developments in religious liberty" (2009) 11(1) *Ecclesiastical Law Journal* 65-72

Lejune, Michael, "Demythologizing Canon Law" (87) 21 *Studia Canonica* 5-16

Lerner, Natan *Religion, Secular Beliefs and Human Rights: 25 years after the 1981 Declaration* (Martinus Nijhoff Publishers, 2006)

Leustean, Lucian N. & Madeley, John T.S. *Religion, Politics and Law in the European Union* (Taylor & Francis 2010)

Lindblom *Politics and Markets* (Macmillan 1974)

Lindholm, Durham & Tahzib-Lie *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004)

MaClean, Majory "The Church of Scotland as a National Church" (2002) 149 *Law and Justice: Christian Law Review* 125-133

MacCulloch, *The Reformation: A History* (Penguin, 2003)

Madeley, John and Enyedi, Zsolt *Church and State in Contempory Europe: the chimera of neutrality* (Routledge 2003)

Maher, Julie "Eweida and others: a new era for article 9" (2014) 63(1) *International Comparative Law* Quarterly 213-233

Manley "Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II" (1983) 77(2) *The American Political Science Review* 368-383

Martinez-Torron, Javier *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition* (Duncker & Humblot GmbH, 1998)

McCrudden, Christopher "Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?" (2012) 1(1) *Oxford Journal of Law and Religion* 185-201

McCrudden, Christopher "Religion, Human Rights, Equality and the Public Sphere" (2011) 13 *Ecclesiastical Law Journal* 26-38 doi:10.1093/ojlr/rwr019

McLean, David "The Changing Legal Framework of Establishment" (2004) *Ecclesiastical Law Journal* 292-303

Megoran, Nick "God on our side? The Church of England and the Geopolitics of Mourning 9/11" (2006) 11 *Geopolitics* 561-579

Melanie, Adrian "France, the Veil and Religious Freedom" (2009) 37(4) *Religion, State and Society* 345-374

Millbank, John "Against Human Rights: Liberty in the Western Tradition" (2012) *Oxford Journal of Law and Religion* 203-234 doi:10.1093/rwr014

Modood, Tariq *Church, State and Religious Minorities* (London: Policy Studies Institute 1997)

Modood, Tariq "Multiculturalism, secularism and the state" (1998) 1(3) *Critical Review of International Social and Political Philosophy* 79-97

Monsma, Stephen V and Soper, Christopher J. *Church and State in Five Democracies: The Challenge of Pluralism* (2nd edn, Plymouth: Rowman & Litterfield publishers 2009)

Morey & Yagin *Framing Muslims: Stereotyping and representation after 9/11* (Harvard University Press, 2011)

Morris, Bob "The Future of Church Establishment" (2010) 12(2) *Ecclesiastical Law Journal* 214-218

Morris, Bob "The Future of 'High' Establishment" (2011) 13 *Ecclesiastical Law Journal* 260-273

Morris, M.R *Church and State in 21st Century Britain: The Future of Church Establishment* (2009, Palgrave MacMillan, Hampshire)

Morris, R.M. *Church and Sate: Some Reflections on Church Establishment in England* (London: Department of Political Science 2008)

Morris, R.M "Succession to the Crown Bill" (2013) *Ecclesiastical Law Journal* 186-191

Mullally, Siobhan & O'Donovan, Darren "Religion in Ireland's "public squares": education, the family and expanding equality claims" (2011) *Public Law* 284-307

Munro "Does Scotland have an Established Church" (1997) 4(20) *Ecclesiastical Law Journal* 639-645

Murphy, Jeffrie "Afterword: Constitutionalism, Moral Skepticism, and Religious Belief" in *Constitutionalism: The Philosophical Dimension* (Alan S. Rosenbaum, 1988)

Murray, R. King "The Constitutional Position of the Church of Scotland" (1958) *Public Law* 155-162

North, Charles M and Gwin, Carl R "Religious Freedom and the Unintended Consequences of State Religion" (2004) 71(1) *Southern Economic Journal* 103-117

Nussabaum, Marta *Sex and Social Justice* (Oxford University Press, 2000)

Nwagwu, Mary G. A, *Theology and Methodology of Canon Law* (Lifevest Publishing, United States of America, 2006)

O'Boyle & Warbrick *Law of the European Convention on Human Rights* (Oxford University Press 2009)

O'Dair, Richard and Lewis, Andrew *Law and Religion: Current Legal Issues: Volume 4* (Oxford University Press 2001)

O'Day, Rosemary and Heal, Felicity *Continuity and Change: Personnel and Administration of the Church in England 1500-1642* (Leicester University Press, 1976)

O'Donovan, Joan Lockwood, *Theology of Law and Authority in the English Reformation* (1991, Scholars Press for Emory University)

O'Donovan, Oliver *The Desire of the Nations* (Cambridge: Cambridge University Press 1996)

O'Donovan, Oliver and O'Donovan, Joan Lockwood, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (1999, William B. Eerdmans Publishing Company Grand Rapids, Cambridge)

Oliva, Javier "Church, state and establishment in the United Kingdom in the 21st century: anarchronism or idiosyncrasy?" (2010) *Public Law* 482-504

Oliva, Javier "Sociology, Law and Religion in the United Kingdom" (2004) 153 *Law and Justice* 8-26

Orsy, Ladislas, *Receiving the Council: Theological and Canonical Insights and Debates* (2009) Collegeville: Liturgical Press)

Orsy, Ladislas, "Theology and Canon Law: An Inquiry into their Relationship" (1990) 50 *The Jurist* 402-434

Orsy, Ladislas, *Theology and Canon Law; New Horizons for Legislation and Interpretation* (The Liturgical Press, Minnesota, 1992)

Outhwaite, R.B *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006)

Papastathis, Charalambos "Tolerance and Law in Countries with an Established Church" (1997) 10(1) *Ratio Juris* 108-113

Perry, Michael *The Idea of Human Rights: Four Inquiries* (Oxford University Press 1998)

Perry, Michael J "The Morality of Human Rights: A nonreligious ground" (2005) 54 *Emory Law Journal* 97-150

Peters, Edward "The Queen of Proofs and Queen of Torment" in *Torture* (Oxford 1985)

Piggott, "What does women bishops decision mean for the Church" (13th July 2010) BBC News UK found at <www.bbc.co.uk/news/10616553> last accessed 13/08/2011

Posner *The Best Offence*, The New Republic (Sept 2nd 2002)

Regan, Ethna *Theology and the Boundary Discourse of Human Rights* (Georgetown University Press, 2010)

Rivers, Julian "In Pursuit of Pluralism: The Ecclesiastical Policy of the European Union" (2004) 7(34) *Ecclesiastical Law Journal* 267-290

Rivers, Julian "Irretrievable Breakdown? Disestablishment and the Church of England" in Schluter, M *Christianity in a Changing World* (Marshall Pickering 2000)

Rivers, Julian *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010)

Rivers, Julian "The Secularisation of the British Constitution" (2012) *Ecclesiastical Law Journal* 371-399

Robbers, Gerhard *State and Church in the European Union* (2nd edn, Nomos 2005)

Rodes, Robert E , Jr *Ecclesiastical Administration in Medieval England: The Anglo-Saxons to the Reformation* (1977, University of Notre Dame Press, Indiana)

Roers, Maurice R "An Analysis of Roman Catholic Human Rights Doctrine" (1996) *Macalester Journal of Philosophy* 90-101

Roger of Earlsferry, Lord, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh: Edinburgh University Press, 2008)

Ronchi, Paolo "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" (2011) 13 *Ecclesiastical Law Journal* 287-297, 288

Rorty, Richard *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge University Press, 1998)

Rousseau, Jean-Jacques *The Social Contract (Wordworth Classics of World Literature)* (Wordworth Editions Limited 1998)

Ruston, Roger *Human Rights and the Image of God* (2004, SCM Press, London)

Sandberg, Russell "Church-State Relations in Europe: From Legal Models to an Interdisciplinary Approach" (2008) *1 Journal of Religion in Europe* 329-352

Sandberg, Russell & Doe, Norman "Church-State Relations in Europe" (2007) 1(5) *Religious Compass* 561-578

Sandberg, Russell *Law and Religion* (Cambridge: Cambridge University Press 2011)

Sarooshi, Dan *International Organizations and their Exercise of Sovereign Powers* (Oxford University Press 2005)

Sagovsky, Nicholas, 'Human rights, divine justice and the Churches' in Hill, Mark *Religious Liberty and Human Rights* (Cardiff, 2002)

Shadid and van Koninsveld *Religious Freedom and the Neutrality of the State: The Position of Islam in the European Union* (Peeters, 2002)

Schanda, Balazs "Church and State in the New Member Countries of the European Union" (2005) 8(37) *Ecclesiastical Law Journal* 186-198

Shestack, Jerome J, "The Philosophic Foundations of Human Rights" (1998) 20 *Human Rights Quarterly* 201-234

Shupack, Martin "The Churches and Human Rights: Catholic and Protestant Human Rights Views as Reflected in Church Statements' 6 *Havard Human Rights Journal* 127

Six, Jean-Francois *Church and Human Rights* (1992, St Paul Publications, Slough)

Smith, Peter "Engaging with the State for the Common Good: Some Reflections on the Role of the Church" (2009) 11 *Ecclesiastical Law Journal* 169-180

Spafford, George "Working party on "disestablishment" report (2002) 6(30) *Ecclesiastical Law Journal* 264-269

Starkey, David *The Reign of Henry VIII: Personalities and Politics* (Vintage 1985)

Strasser, Mark *Religion, Education and the State* (Ashgate 2011)

Stancliffe, D "Baptism and Fonts" (1993) 3 *Ecclesiastical Law Journal* 141

Strangewayes-Booth, Alex "Queen 'should remain Defender of the Faith' – BBC poll" (15th May 2012) found at <http://www.bbc.co.uk/news/uk-england-18056322> accessed 11/08/2013

Sumption Lord 'The disunited kingdom: England, Ireland and Scotland' (2014) 3(1) *Cambridge Journal of International Comparative Law* 139-158

Taylor "Disestablished Establishment: High and Earthed Establishment in the Church in Wales" (2003) 18(2) *Journal of Contemporary Religion* 227-240

Temperman, Jeroen "Are State Churches Contrary to International Law?" (2013) 2(1) *Oxford Journal of Law and Religion* 119-149

Temperman, Jeroen "Blasphemy, defamation of religions and human rights" (2008) 26(4) *Netherlands Quarterly Human Rights* 517-545

Temperman, Jeroen *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Netherlands: Martinus Nijhoff Publishers 2010)

Tierney, Brian *The Idea of Natural Rights* (1997, Published by Scholars Press for Emory University)

Twomey, Anne "Changing the rules of succession to the throne" (2011) *Public Law* 378-401

Urresti, Theodore I.J, "The theologian in interface with canonical reality" (1982) 19 *Journal of Ecumenical Studies* 146-175

Van Dijk, Pieter, Van Fried, Hoof et al Theory and Practice of the European Convention on Human Rights (4th edn, 2006, Intersentia, Oxford)

Van der shyff, Gerhard & Overbeeke, Adriaan "Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans" (2011) 7(3) *European Constitutional Law Review* 424-252

Van de Wiel, Constant, *History of Canon Law* (1991, Peters Press Louvain)

Vyver, Johan van der "Morality, Human Rights and Foundations of the Law" (2005) 54 *Emory Law Journal* 187-200

Van der Vyver and Witte Jr *Religious Human Rights in Global Perspective: Legal Perspectives* (Martinus Nijhoff Press, 1996)

Vandrunen "The Two Kingdoms Doctrine and the Relationship of Church and State in the Early Reformed Tradition" (2007) *Journal of Church and State* 743-763

Voas, D & Ling, R "Religion in Britain and the United Kingdom" in Park A *British Social Attitudes 2009-2010: the 26th Report* (London, 2010)

Wade W "Sovereignty: Revolution or Evolution?' 112 *Law Quarterly Review* 568-575

Walker, D.M *The Scottish Legal System* (6th edn; W. Green 1992)

Walker, Neil "Our constitutional unsettlement" (2014) *Public Law* 529-548

Weller, Paul *Time for a change: Reconfiguring Religion, State and Society* (2005, T & T Clark International)

Williams, Dr Rowan *Civil and Religious law in England: a religious perspective* (7/2/2008) found at <www.archbishopofcanterbury.org/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective> last accessed 9/6/2011

Williams, Dr Rowan *Relations between the Church and state today: what is the role of the Christian citizen* (1/3/2011) found at <www.archbishopofcanterbury.org/articles.php/2009/relations-between-the-church-and-state-today-what-is-the-role-of-the-christian-citizen> last accessed 9/8/2011

Witte, John Jr and Alexander, Frank S. *Christianity and Human Rights: An Introduction* (Cambridge University Press 2010)

Young, Alison L "Hunting sovereignty: Jackson v Her Majesty's Attorney-General (2006) *Public Law* 187-196

Xenophon, Contiades *Engineering Constitutional Change: A comparative perspective on Europe, Canada and the USA* (Routledge 2013)