EUROPEAN PERSPECTIVES ON ECCLESIASTICAL LAW AND RELIGIOUS EDUCATION

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INTRODUCTION

In February 1988 a group of German, Italian and Spanish scholars, principally professors of ecclesiastical law, met on the politically if not theologically neutral ground of Geneva to consider the creation of a European body linking scholars working in this field in the various member States of the European Community.

The English reader of that opening paragraph may be excused if he experiences something of a culture-shock. We had, until the formation of the Ecclesiastical Law Society marked a turning-point, become familiar with the precarious state of the study of ecclesiastical and canon law in England. Learning had become concentrated in dangerously few individuals, and the absence of the subject from our universities and theological colleges deprived the study of ecclesiastical law of the institutional support which can ensure that a discipline prospers. There is, so far as I know, no professor of ecclesiastical law in England; it is many centuries since Canon Law was taught in our ancient universities. So the thought of a room full of such professors addressing the future of their subject within the European Community does come as a novelty. In many European countries, canon law and ecclesiastical law maintain their place in the university curriculum. Professorial chairs exist in Faculties of Jurisprudence, or in Institutes of Public Law or of International Law; the law, and related issues of church and state relationships, are the business of the public universities of the avowedly secular republics and are not banished to the seminaries and institutes of Catholic or Protestant churches (though, notably in Germany, such institutes exist and carry out distinguished work).

The Geneva meeting agreed upon an ambitious programme of study, and set about creating the necessary organisation and raising the funds required for a series of Workshops examining different themes. The results are the emerging European Consortium for Church and State Research, in which I have been invited to occupy the place reserved for the United Kingdom (each Member State of the Community having one guaranteed place within a maximum membership of 30); funding from the Erasmus Programme of the Community; and a projected series of three or four international meetings, the first of which was held in Italy in October 1989.

The Italian meeting examined state financial support for churches and for religious education. This article draws primarily on the discussions of the second topic, to which a notable English contribution was made by Professor John Hull, professor of religious education in the University of Birmingham; the first, more general, topic will be the subject of a report at the Society's Day Conference in March 1990. Subsequent European Consortium meetings will examine aspects of labour law as they affect the churches, matrimonial law, and issues of religious freedom. A continuing theme is the search – I suspect a difficult one – for common European approaches.

The arrangements for the initial meeting set a very high standard. Sessions were held in the ancient splendours of the University of Milan, within walking distance of the Duomo (recently cleaned); and, after a 100-kilometre coach journey, in the more modest buildings of the University of Parma surrounded by the great beauty of that town. In case the reader should suppose that this was a mere sightseeing trip, he should know that the participants worked from 9.30 am to 6.00 pm, principally in French (with no interpreters) and that conversations continued over a communal meal until at least 11.00 pm. It was an exhausting, but a very rewarding, experience. Participants came from universities and institutes in seven of the twelve Community member States (France, Germany, Greece, Italy, the Netherlands, Spain and the United Kingdom) and a written report was sent from Portugal.

THE LEGAL CONTEXT

The prevailing legal context for any European discussion is inevitably that of the civil law tradition. This has a striking effect on the sources of authority on which legal analysis is based, and upon the style of that analysis. So far as sources are concerned, this means not just a preference for Codes rather than case-law; it also involves reference with surprising frequency to international law documents. The written Constitutions of our continental neighbours (and France, Germany, Italy, Portugal and Spain all have Constitutions dating from the period since the Second World War, and in the last two cases much more recent times) recognise and guarantee a variety of rights, and the supreme Constitutional Courts of those countries interpret these guarantees with reference to such documents as the European Convention on Human Rights and the various Protocols to the United Nations Covenants in related areas.

So, for example, Professor Martin Sańchez of the Free University of Madrid took as his starting point in discussing religious education in Spain article 9 of the European Convention: "Everyone has the right to freedom of thought, conscience and religion; this right includes . . . 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." From there he moved on to examine the carefully balanced provisions of the Spanish Constitution. Having guaranteed "freedom of choice of education", that document goes on to define the purpose of education as "the full development of the individual's personality, respecting democratic principles of co-existence and fundamental rights and freedoms" and guarantees parents the right for their children to receive religious and moral education according to their own (i.e. the parents') beliefs. It is no wonder these provisions have been politically controversial and have received the close attention of the Constitutional Court.

The emphasis on the language of 'rights' produces a style of debate which is much more theoretical than would be common in comparable English discussion. It was a source of gentle amusement that the English participants tended to categorise on the basis of practice (for example, whether teachers of religious education were themselves taught wholly in church seminaries or other special colleges, or were the product of the ordinary teacher-training institutions) rather than ask more abstract questions as to the response of a constitutionally 'secular' state to the confessional element in religious education. It is as if sections 84(13), 85(5) and 86(4) of the Education Reform Act 1988, which provide inter alia that no person shall be disqualified by reason of his religious opinions from being employed in former county schools or (otherwise than as a teacher) in former controlled, aided or special agreement schools, had to be expressed in a Bill of Rights, subject to interpretation by a special Constitutional Court of the United Kingdom.

Not unrelated to this is a general question about the relationship of a 'secular' State to the churches, and especially to the majority church. There is a tension between the constitutional declarations that the State is secular and democratic, which require 'ideological neutrality' in public institutions, and the existence of Concordats between many such States and the Holy See giving the Catholic Church important rights in respect, for example, of the content of religious education and the selection of the teachers who may deliver it. The approach which identifies the practice of the Catholic faith as part of the cultural patrimony of the people – although undoubtedly true as a matter of fact – is a not wholly convincing resolution of the legal and constitutional issues.

RELIGIOUS EDUCATION IN STATE SCHOOLS

In England, this is now largely regulated by section 84 of the Education Reform Act 1988 which appears to be unusual in the European context in providing for collective worship "wholly or mainly of a broadly Christian character" as well as for religious education. As is well-known, religious education is part of the "basic curriculum" of the former county schools and must be in accordance with the appropriate "agreed syllabus" (s.84(7)). As the Established Church, the Church of England has a privileged position in the procedures for agreeing such a syllabus, its representatives having a right of veto. This was interpreted by observers from other countries as indicating a bias in favour of an Anglican content; they were surprised to be told that the privileged position of the Church of England was and remained subject to the principle, established in the Cowper-Temple clause dating from 1870, that the syllabus shall not provide for religious education "by means of any catechism or formulary which is distinctive of any particular religious denomination" (s.84(8)). In other words the Anglican position extends only to approving or withholding approval from a non-denominational form of religious education.

The only other State represented at the Milan/Parma meeting with an Established Church was Greece, where virtually the whole population is Orthodox. Until 1986 Greek law provided that no non-Orthodox could teach in a primary school, for the duties of a primary class-teacher included the giving of religious education in accordance with the tenets of the Greek Orthodox Church. In all Greek schools the content of R.E. remains confessional, but provision is now made for the use of other Orthodox persons to teach R.E.

Generally speaking, three different approaches could be discerned in the States represented at this meeting:

(a) Some made little or no provision for religious education in State schools. This is the position in the Netherlands, where the exclusion of religious education is total, and in a modified form in France. There religious education in primary schools in the public sector was abolished in 1880. So far as post-primary education is concerned, the parents (and in some cases the pupils) of the various types of *lycées, collèges* and professional schools may request the appointment of a teacher of religious education from outside the school. This *aumônier* is usually the parish priest or other minister, and receives no stipend from the State, which provides merely a space and a time for religious matters.

(b) Some provide for a non-denominational form of religious education such as has become familiar in England. The religious and political history of Germany produces a complex situation, but in a few of the *Länder*, a similarly non-denominational pattern exists.

(c) The greatest number of States, however, demonstrate their neutrality on matters of religion by providing for different forms of confessional, denominational, religious education to co-exist in the same school where the traditions of parents and children so require. This is most clearly illustrated in Germany, where 'religious co-education' is the norm. This means that, provided only that a minimum number of students are involved, religious education of a Catholic or Evangelical (or Jewish or Muslim) nature will be provided. By Constitutional provision, such education must be in harmony with the principles of the religious community concerned. Although the teachers are ordinary members of staff, and the subject has a normal place on the syllabus, the prescribed books are subject to negotiation with the religious authorities, and the teacher of religious education requires the authorisation of those authorities – the *missio canonica* of the Catholic bishop or the *vocatio* of his Protestant equivalent. Equivalent provisions are in force in three departments of France formerly under German rule (Haut-Rhin, Bas-Rhin and Moselle). The Spanish and Italian systems are not dissimilar, though the overwhelmingly Catholic allegiance of the population means in effect that religious education is Catholic education, the content and choice of teachers being under church control. In Italy, the State has agreements, parallel to its Concordat with the Holy See, with the Waldensians, the Assemblies of God and the Seventh Day Adventists; but the tiny numbers involved create a situation described as 'potential pluralism' rather than visible pluralism.

Within this last type of system, there are difficulties both practical and legal. Italian teachers of religious education are increasingly sensitive to the unsatisfactory nature of their tenure; their authorisation from the church authorities is for a year at a time, and can even be withdrawn during the year. The teachers' association is, understandably, pressing for greater security of tenure. In Spain, Constitutional Court decisions have developed the notion of "freedom to teach" which "empowers the teaching staff to resist any order to give their teaching a particular ideological orientation; . . . freedom to teach is a notion incompatible with the existence of official science or doctrine." The special status of R.E. teachers plainly represents a significant qualification on this concept of freedom to teach.

PRIVATE SCHOOLS

In most countries, the State accepts the obligation to provide a universal system of public education; it is one of the pillars of the 'social' or 'welfare' State. Equally, most countries regard the right to establish private schools outside the State system as a freedom worthy of explicit or implicit Constitutional protection. Because in practice most private schools are denominational in their origin, and are free to provide a religious education of a catachetical or confessional nature, their existence is very relevant to the whole question of the place of R.E. within the educational system as a whole.

There are very important differences in the financial position of private schools. In the Netherlands, as part of the settlement of acute controversies at the turn of the century, private schools with a religious foundation receive exactly the same level of State subvention as schools in the public sector. In Italy by contrast no State finance is available. In other countries such as France and Spain, private schools may seek financial assistance but the degree of financial help tends to be accompanied by a degree of State control; this is very clearly the case in France where schools may contract with the State at different levels not unlike the 'controlled' and 'aided' levels familiar in England but with greater degrees of control over the curriculum than were found in England at least before the 1988 Act. (The degree of centralisation in the French system is notorious; a national debate over whether Wednesday was a good day for R.E. is almost unthinkable in any other country!)

In this, as in some other contexts, the English position is distinct. To the outsider, the fact that the State pays the salaries and operating costs of the former aided and controlled schools, and almost all the maintenance costs of buildings in the voluntary sector, appears to represent massive State support for private schools. But that observation is often based on the assumption that private schools are extra to, and quite outside, the universal provision of education by the State at primary and secondary levels; the concept of a 'dual system', a partnership in education based on the historical contribution of the churches prior to 1870 and more recently, is very unfamiliar except perhaps in the Netherlands and in some parts of Germany.

QUESTIONS

The exchanges in Milan and Parma revealed some similarities – certainly at the level of the place held by religious education in the educational system viewed as a whole – but many differences of method as a result of both religious and political history. Napoleon Bonaparte has a lot to answer for! But there are some unanswered questions which will perhaps assume a greater prominence in future.

The first is the arrival in European countries of communities of non-Christian believers – Muslims in particular. It is not only in England that separate Islamic education, and separate treatment for Muslim girls especially, is being sought. My impression is that as a matter of *law*, as opposed to educational policy, this need present few difficulties. The various texts about the provision of religious education as requested by the parents, and about the establishment and financial support of private schools, 'work' for non-Christian religious groups. There is room for some greater anxiety about pseudo-religious organisations, often of North American origin, claiming the privileges given to churches in some systems; the point is familiar in English charity law.

The second was asked in Parma by Professor Hull; it was perhaps significant that it received no answer. Discussion of the 'right' to give or receive religious education, especially where religious authorities control the content and delivery of that teaching, rests, it seems, on a notion of religious education which is primarily one of the transmission of faith. If religious education has a critical dimension, transcending mere transmission, which gives it a rather different educational focus, does the language of 'rights' become less appropriate?

CONCLUSIONS

An English presence in these developing European discussions was greatly helped by the existence of our Society, further evidence of the timeliness of its formation. It is difficult to imagine the English accepting Community intervention in educational curricula, and especially in religious education; still less in the wider aspects of church-state relations. Yet as European political institutions develop apace, and grow in assertiveness, there will be legal developments which will affect the churches. The European equivalent of our Churches Main Committee may yet be needed. In the meantime a better understanding of different systems is of great value, and hopefully the European Consortium will bring it about.