

LETTER FROM BRUSSELS

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Readers of this *Journal* do not need to be told of the importance of legislation in forming and reforming ecclesiastical law. They are familiar with the division of legislative functions between Parliament and the General Synod in accordance with the Enabling Act and the conventions which have grown up around it. Where proposed Government legislation has an obvious impact on the interests of the churches, there will normally be consultation between the relevant Government department and the church authorities. The Churches Main Committee monitors and seeks to influence developments in the secular law which concern the churches, while church leaders and headquarters staff have access to policy-makers in Whitehall.

But Westminster is no longer the only source of relevant legislation. The European institutions' legislative competences seem to grow day by day, and the European Union has far-reaching legislative plans. Sometimes the legislative text will take a form (for example a Regulation) which is settled in Brussels and is the subject of no further process in national legislatures. Even a Directive, requiring implementation by national legislation, settles most of the relevant policy issues. What this means for the churches is that any input they may wish to make must come early in what is not always a very transparent European legislative process; and it needs to be made not only to their national Government but also to those who service the EU's Council, Commission and Parliament.

The purpose of this article is twofold: to describe some mechanisms the churches use in the Brussels fora; and to give some account of the potential effect of recent European developments on the churches.

CHURCH STRUCTURES IN BRUSSELS

Many churches have a presence in Brussels, and their clergy are able to combine some wider 'representative' functions with their pastoral or chaplaincy work. It is however a full-time job to monitor the mountain of paper, published or as yet unpublished, circulating within the European institutions, and there are three church offices which undertake that task.

The first is the Brussels Bureau of the Evangelische Kirche in Deutschland, the German Protestant Church. It has a small full-time staff and an office in the heart of the European sector of Brussels. Its function is to act as a channel of communication between the EU and the EKD, both keeping the German churches informed of developments and making formal and informal representations in Brussels. There is one matter of especial concern to the German churches. Under the German Constitution, the churches are guaranteed autonomy and they guard this jealously, resisting any suggestion of legislation which affects that freedom. European Directives cannot be expected to reflect the nuances of individual Member States' constitutional arrangements, and despite the Declaration on churches attached to the Treaty of Amsterdam¹ that 'The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States', the autonomy issue is one the EKD has constantly in mind.

¹ Official Journal C 340, 10/11/1997, p 133.

Close by is the office of the Church and Society Commission of the Conference of European Churches (CEC). Until 1999, this was a separate organisation known as the Ecumenical Commission for Church and Society, with a membership of mainly Western European churches including the Church of England. Its new place within the structures of CEC has brought a wider membership, notably from Eastern Europe and so from States which are not yet members of the EU. The Commission has a number of working groups, one of which is the Working Group on European Community Legislation. This meets every nine months or so, but more often if needed, and its secretary is the head of the EKD Bureau. There are currently seven members, myself from the Church of England and colleagues from the Church of Denmark, the Church of Finland (the Swedish-speaking diocese), the Netherlands Council of Churches, the Council of Protestant Churches of Portugal, the Lutheran Church of Slovakia, and the EKD (in the person of a former member of the *cabinet* of the German judge on the European Court of Justice, now working in Berlin).

Also not far from the EKD bureau are the offices of COMECE, the Commission of the (Roman Catholic) Episcopal Conferences in Europe. That also has a legal working group, and there are occasional joint meetings between this group and its CEC counterpart. They are not always as useful as might be supposed: apart from the need to have simultaneous translation into Italian, which says something about the nature of COMECE, a striking feature of the most recent joint meeting was that 80% of the talking was done by the CEC members. The CEC group probably contains more specialist knowledge, and its culture is one in which the members are expected to work very hard at the issues identified by the staff. The COMECE position is slightly complicated by the recent establishment of a diplomatic mission of the Holy See to the European Institutions, which some protestant churches understandably see as a threatening development.

The relationship between CEC and COMECE and the European institutions is expressed in a number of ways. The custom has grown up of a meeting with the appropriate Government minister of the incoming 'presidency' of the Union, setting out the churches' views on the issues to be faced during the coming six-month term. More specialist work is done by attending meetings, presenting evidence, and in the gentle art of lobbying the influential. Sometimes the initiative will come from the European Commission itself, which under President Prodi has taken a real interest in attempting to articulate the 'values' or the 'soul' of Europe.

SOME OF THE ISSUES

A full account of the developments in European law of relevance to the churches is contained in each annual volume of the *European Journal for State and Church Research* but a flavour of the issues raised by the work in Brussels can be gained from the agendas of the CEC group over the last three years.

The two Conventions

Twice in recent years, the EU has used the device of a 'Convention', with representatives of national parliaments as well as members of the European bodies, to formulate proposals for what were seen as major developments in the process of European integration. The first use of this method was in connection with the EU Charter of Fundamental Rights. The European legislative process can take many years but the idea of a Charter, endorsed by the Cologne 'summit' in June 1999, was taken to completion within the year 2000. It was for long unclear whether this would be based on the European Convention on Human Rights (ECHR), which does of course contain

an article of freedom of thought, conscience and religion² and is becoming much more familiar since the coming into force of the Human Rights Act 1998. An alternative view was that a much more staccato listing of fundamental rights, with very general limits or qualifications, the effect of which would be worked out in the case-law of the European Court of Justice, was better suited to what might become Book I of a future European Constitution. In the event the ECHR approach largely prevailed, and article 10 of the Charter, which has no formal legal effect, reflects the earlier text on freedom of religion. As events moved on, the CEC group monitored the process via the website of the Convention and engaged in a lively and at times chaotic series of e-mail exchanges.

The second use of the Convention device is in the current, much more open-ended, work on 'the Future of Europe'. No-one knows whether the Convention's decisions will be expressed in terms of revised Treaties or a 'constitutional' text. The CEC group is anxious that any material on the 'values' and objectives of the EU should include references to the religious or the transcendent, using perhaps language chosen selectively from the Laeken Declaration which led to the Convention: that an objective of the Union should be 'to build a continent of humane values, liberty and solidarity reflecting the richness and diversity of its cultural, religious and philosophical traditions'. Similarly, any 'constitutional' text on citizenship and participation should make reference to the churches, possibly along these lines:

The Union, desiring to promote the widest participation of citizens, acknowledges the important roles of organised civil society, churches and religious communities. The Commission shall have the task of promoting structured consultation and dialogue with organised civil society, churches and religious communities.

This drafting is far from elegant, but it picks up language already used in EC texts about the role of and consultation with the 'social partners', i.e. both sides of industry. There is a strong concern to emphasise the distinctive nature of the churches, and not to have them subsumed into 'organised civil society'.

Anti-discrimination

Of major interest is the EU's work in the field of anti-discrimination. Article 13 of the EC Treaty as revised at Amsterdam provides

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The European Commission promptly produced two draft Council Directives under article 13. The strategy is gradually to fill in a matrix, containing both provisions addressing discrimination in a wide range of contexts on a particular ground, such as that of race or ethnic origin, and those addressing discrimination on a wide range of grounds in a particular context, such as that of 'employment'. The CEC group spent much time on both drafts, which became Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin³ and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occu-

² ECHR, art. 9.

³ Official Journal L 180, 19/07/2000, p 22.

pation.⁴ Particular matters examined and relevant to each Directive were the definition of harassment and the provisions as to burden of proof. On the latter, article 10(1) of the employment Directive requires Member States

to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.⁵

Of greater interest to the churches is the fact that the term 'employment' is shorthand. In the Directives, the full reference is to 'employment, self-employment or occupation'.⁶ I would find it difficult to argue that service as an ordained minister was not an 'occupation'. This opens wider issues, for the churches have always succeeded in their argument that the service of ordained ministers is *not* 'employment', and have avoided the question of the identity of any employer. This may now be set to unravel.

The employment Directive addresses discrimination on a number of grounds, set out in article 1: religion or belief, disability, age or sexual orientation.

So far as age is concerned, article 6 contains some careful exemptions. To take a type of case that the General Synod's Legal Advisory Commission has examined in a related context, article 6(c) allows the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Discrimination on the ground of religion and belief is obviously of particular interest to the churches, both as a matter of general principle and as employers. Plainly a Christian body must be able to refuse to ordain someone who denies the truth of Christianity. When the Commission published its draft Directive, the attempt to cover this area was crude and cumbersome, and much work was done by CEC and other bodies to facilitate a better draft.

The outcome is seen in Article 4 on 'occupational requirements':

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private

⁴ Official Journal L 303, 02/12/2000, p 16.

⁵ See, to similar effect, the earlier Directive 97/80/EC of 15 December 1997 on burden of proof in cases of discrimination on grounds of sex.

⁶ See in particular article 3, which defines the scope of the Directive as including inter alia 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'.

organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

The last sentence of paragraph 2 was intended to make it clear that religious principles may not be relied upon to justify discrimination on the basis of, *inter alia*, sexual orientation. This may well prove a difficult matter for the churches when the Directive is implemented. The Directive takes no account of the fact that many in the churches (and in other faiths) have a *religious* objection to homosexuality. It is of course orientation rather than behaviour which is the legal issue, but a church might well decline to ordain or employ a self-proclaimed, 'crusading', homosexual regardless of any issue as to his or her celibacy. Such a case would fall outside article 4, unless the circumstances were such as to bring them within the narrow terms of article 4(1).

There will inevitably be debate on the scope of the circumstances where 'by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. What about a lay parish secretary, who in the social context is the first point of reference for bereaved persons seeking funeral arrangements; a cathedral administrator; the matron of or a nurse in a church hospice; or the head or other teacher in a church school? The fact that some of these issues are settled in England by legislation, some of it very recent, is irrelevant: the Directive could require those issues to be re-opened.

It will be seen that if a similar approach is adopted in the rest of the matrix, and so in a revised Directive on sex discrimination, the safeguards in the Priests (Ordination of Women) Measure 1993 may prove incompatible with European law.

Some other matters

Other matters can be noted more briefly. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community⁷ (one of the matters of concern to the German churches on account of the 'autonomy' issue), provides in article 3(2) that

Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

⁷ Official Journal L 80, 23/03/2002, p 29.

That will clearly include the churches, but also many related charitable bodies.

Also on the CEC group's agenda have been the Commission's proposal in October 2000 for a new Directive on the activities of institutions for occupational retirement pensions; a possible review of the Data Protection Directive,⁸ on which the predecessor of the present group had spent much time; and possible developments in the field of public procurement which could have implications for major schemes undertaken by parishes, if they are regarded as 'public bodies'.

Both CEC and COMECE groups were concerned by the extraordinary report of the European Parliament's Committee on Women's Rights and Equal Opportunities published in October 2001. Much of the material in the report was quite acceptable (for example that on female circumcision and the lack of opportunity in some cultures for women and girls to receive education). However, the report went on to 'deplore the interference of the Churches in public and political life'; to declare that the rights of women cannot be breached 'on the pretext of religion ... or law'; to reject the exclusion of women from leading positions in the religious hierarchy; to urge the Commission to set up training programmes for women on secularisation; to declare that the separation of Church and State is 'the only acceptable form of government in a democratic society'; and to call on the Pope to change his attitude to lesbians. The report was much amended, though retaining its position on the separation of Church and State, prior to its eventual adoption by the Parliament on 13 March 2002.

Resolutions of the Parliament have little effect, but the overall message of this article is that the work of the European institutions is as significant for the future of ecclesiastical as for other branches of law.

* Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995, p 31.