VESTIGES OF ESTABLISHMENT
The Ecclesiastical and Canon Law of the Church in Wales

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A distinction which has been much discussed by those concerned with the laws governing churches, especially perhaps the Church of England and to a lesser extent the Church in Wales, is that between canon law and ecclesiastical law. At times, the terms appear to be used synonymously, whilst at others, there is a clear distinction. It is submitted that both views can be correct. However, they are correct only while certain conditions prevail.

It may perhaps be instructive to commence the discussion with a sidelong glance at a jurisdiction in which a clear distinction between ecclesiastical and canon law is admitted. In Italy, the legal doctrine propounds that canon law is the law by which the church governs its internal affairs, while ecclesiastical law is that part of the public law by which the State governs its relationship with the church.[1] In other words, canon law is not part of the law of the land, but is binding upon church members and enforceable in church courts, while ecclesiastical law is part of the law of the land and is therefore enforceable in the state courts. An important part of this distinction is that while ecclesiastical law is, therefore, made by the state legislature, canon law is made by the church itself. It is the law of the people of God made by the people of God for the people of God. The same distinction prevails in most of the civil law jurisdictions of Europe.

Prior to the Reformation, this view of canon law would have prevailed throughout western Europe; canon law was the law of the church, made by the church for the church. In England, however, the Henrician Reformation in the sixteenth century established a national church, within which the people of God in England were, as a group, almost entirely synonymous with the population. Whilst this situation obtained, it was perfectly appropriate that their canon law was the law made for them by those who were their governors in matters spiritual and temporal, thus creating a coincidence between ecclesiastical and canon law in the senses given above. However, with the growth of religious tolerance in the later eighteenth and in the nineteenth centuries, giving subjects the right to choose between competing denominations or even to choose against having a religious faith at all, the people of God became a distinct sub-group of the population. The laws made for the Anglicans within this sub-group by their governors in matters ecclesiastical as well as temporal were no longer laws made by the people of God for the people of God, but rather laws imposed upon them by the State. By virtue of this change, which ended the coincidence of church and State, ecclesiastical law ceased to be a law made for the church by the church, and became a law made for the church by the State. One is very near here to the distinction as it is applied in the continental countries, such as Italy, where canon law is the law by which the church governs its internal affairs, while ecclesiastical law is that part of the public law by which the State governs its relationship with the church. In England, however, that point has not been reached, for, while the

1. Vide, G.L. Certoma, *The Italian Legal System*, (London, 1984) p.76ff.

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State has freed itself from the Church of England, in that those who are not members of the church do not find themselves under political and social disabilities any longer, it has not freed the Church of England from its legal dependence on the State. The ecclesiastical law made by the State for the church therefore encompasses the canon law as well, leaving the church dependent upon the good offices of its secular governors with regard to its canonical progress. Even in those areas in which the people of God have authority to frame their own regulations, in England they do so as a form of delegated legislation which derives its validity from the secular arm.

This situation has not obtained in Wales since 31st March, 1920. It was on that date that the Welsh Church Act, 1914 came into force and effect and disestablished the Church of England in Wales and Monmouthshire. Thereafter, in the words of the statute, "the ecclesiastical law of the Church in Wales shall cease to exist as law".[2] Instead, the ecclesiastical law of the Church of England at the moment of disestablishment became binding upon the members of the Church in Wales in the form of a contract which the statute imposed upon them. This contract was to be binding upon them "in the same manner as if they had mutually agreed to be so bound".[3] However, for the future, the Church in Wales was to have full powers to alter and modify the terms of this contract, even when the terms were contained in an Act of Parliament, which changes were to be effected through its own institutions and procedures.[4] In other words, while the Church in Wales ceased to have ecclesiastical law at disestablishment, that is a law made for it by the State, it had acquired a canon law. From disestablishment onwards, this canon law has been valid within the Church in Wales either because the church has continued to accept its validity or because it has itself enacted it. The Church in Wales has a canon law in the Pre-Reformation or civilian sense of a law made by the church for the church.

There are, however, areas in which the Church in Wales continues to operate in accordance with norms not of its own making. These two areas are marriage and burial. There can be no doubt that the original intent of the legislature was complete disestablishment, with every vestige of the church's once privileged position under the law removed. However, this was not to be. In the two areas mentioned, the legislature was forced to back-pedal, and as a result it can be argued that the Church in Wales is still subject to a modicum of ecclesiastical law in the sense outlined above, namely laws made for the church by the State.

As a result of its position as an established church, the Church of England continues to enjoy special privileges with regard to the solemnization of Holy Matrimony. Whereas other religious denominations are permitted to have weddings solemnized in their places of worship, in the eyes of the law, such weddings are civil ceremonies which take place outside the normal place for such ceremonies, namely the Register Office. The place of worship to the law is "a registered building" and, if the services of the civil registrar are not required, this is because the officiating minister or the person who will complete the register is an "authorised person". A Church of England wedding is, however, a different matter. Such a ceremony follows the publication of banns, an ecclesiastical not a

2. Welsh Church Act, 1914, section 3(1).
3. *Ibid.*, section 3(2).
4. *Ibid.*, section 13(1).

civil formality, and in the eyes of the law, this is not a civil ceremony in a registered religious building, but an ecclesiastical ceremony of equal validity.[5] Indeed, the ecclesiastical ceremony is the older of the two institutions, the civil ceremony having been introduced during the nineteenth century as one of the concessions to dissent mentioned earlier.[6] That the ecclesiastical ceremony was the original norm was a relic of the notion that church and state were synonymous, although this was not really the case by the time that Lord Hardwicke's Marriage Act was passed in 1753 making the ecclesiastical ceremony essential for the contracting of a valid marriage. Insofar as an ecclesiastical ceremony had once been necessary for the solemnization of a valid marriage, it followed that there was a duty upon the established church to solemnize the marriages of all subjects of the State, regardless of their religious persuasion or lack of one. Not long after the passing of Lord Hardwicke's Act, it was held in the courts that a clergyman who refused to solemnize the marriage of a duly qualified person committed an ecclesiastical offence, although he was not liable to an action for damages, nor as was later determined, to a criminal prosecution.[7] It does not appear to have been decided whether the clergyman's obligation to marry a duly qualified parishioner could be enforced in the civil courts by a prerogative order of mandamus, although, as this is a discretionary remedy and a civil marriage ceremony is now available, it appears unlikely that the courts would seek to overrule a reasonable refusal based on canonical principle, for instance, on the basis that the parties were unbaptized.

The intention of the framers of the Welsh Church Act was to bring to a close the recognition of ecclesiastical marriage in the Church in Wales, and to place the disestablished church on an equal footing with other denominations. Section 23 of the 1914 Act provided that from disestablishment:

> "the law relating to marriages in churches of the Church of England (including any law conferring any right to be married in such a church) shall cease to be in force in Wales and Monmouthshire, and the provisions of the Marriage Acts, 1811 to 1898, relating to marriages in registered buildings, shall apply to marriages in churches of the Church in Wales".

If this provision had actually been carried into effect, marriage by banns, common licence or special licence would have ceased to be possible in Wales from the date of disestablishment.

However, it was not carried into effect, for section 23 was repealed before disestablishment by virtue of section 6 of the Welsh Church (Temporalities) Act, 1919. This section provided that nothing in the Welsh Church Act, 1914 or the 1919 Act itself should affect the law with respect to marriages in Wales and Monmouthshire. Thus the 1919 Act retained for the Church in Wales a privileged position with regard to the solemnization of Holy Matrimony.

5. Vide, Marriage Acts, 1949 to 1986.
6. Vide, Marriage Acts, 1836.
7. *Argar* v *Holdsworth* (1758) 2 Lee 515; *Davis* v Black (1841) 1 QB 900; *R* v *James,* (1850) 3 Car. & Kir. 167. *Argar* v *Holdsworth* is a case concerning marriage by common licence, and it is unclear from the report whether the ecclesiastical offence was refusal to marry or contempt of the directions of the diocesan bishop. The decision also dates from the time when only Church of England ceremonies constituted valid legal marriages.

Marriage following banns and common licences, the ecclesiastical formalities, remained valid in Wales, as also did the Archbishop of Canterbury's powers with regard to the issue of special licences.[8] Thus, despite having been disestablished, the Church in Wales continues to enjoy a privileged position with regard to the solemnizing of marriages and remains subject to the powers of the Archbishop of Canterbury with regard to the issue of special licences.[9]

This raises the vexed question of the extent to which the disestablished Church in Wales remains obligated to perform marriage ceremonies for parishioners who are not communicants of the church, and especially with regard to the unbaptized. As with the Church of England, the clergy of the Church in Wales enjoy a statutory right to refuse to marry divorcees in their churches,[10] but no such protection is afforded with regard to the unbaptized. As indicated above, refusal to marry a duly qualified person is an ecclesiastical offence. However, an ecclesiastical offence is an offence under the ecclesiastical law and, by section 3 of the 1914 Act, the ecclesiastical law of the Church in Wales has ceased to exist as law and has become merely the terms of the contract which binds the members of the church together as members of an unincorporated association. Thus, any offence is committed against the terms of that contract not against the law of the land, and the only persons who can complain of that contract being broken are parties to it, that is members of the church. It would appear, therefore, that unless the unbaptized person can find a willing church member who is prepared to support the complaint, the Church in Wales cleric is safe in his refusal to marry the unbaptized. He is certainly not liable to criminal prosecution or to an action for damages, and, as has been said, a reasonable refusal is unlikely to meet with the issue of a prerogative order of mandamus requiring the cleric to solemnize the wedding.

The other vestige of establishment which continues to cling to the Church in Wales relates to burials. The extent of the confiscation which the Welsh Church Act sought to inflict upon the Church in Wales can hardly be evidenced better than by the elaborate provisions for taking from the church the very churchyards surrounding its churches, together with any other church burial grounds. While allowing existing incumbents to enjoy their rights to the freehold in all such burial grounds, including churchyards, the Welsh Commissioners[11] were thereafter to transfer the burial grounds into the hands of the appropriate secular authority.[12] The inconvenience of this proposal is nowhere better attested than in the Act itself, where provision had to be made for allowing the church authorities a right of way across the churchyard to get to the church, to prevent funerals being held so as to interfere with divine service, to compel the maintenance of paths leading across the churchyard to the church and to allow extensions to the church to encroach upon the churchyard land.[13] The manifest inconvenience of this proposal to virtually all concerned is apparent on the face of the

8. Welsh Church (Temporalities) Act, 1919, section 6.
9. Marriage Act, 1949, section 5*(B)*.
10. Matrimonial Causes Act, 1965, section 8(2).
11. "The Commissioners of Church Temporalities in Wales" referred to as the Welsh Commissioners; vide, Welsh Church Act, 1914, section 10.
12. Welsh Church Act, 1914, section 8(1) *(b)*.
13. *Ibid.* section 24(3).

Act, and the provisions are a monument to the disaffection existing between the established church and the non-conformist population prior to disestablishment. However, the inconveniences were so great that in 1945 the policy was reversed.

The Welsh Church (Burial Grounds) Act, 1945 repealed section 8(1) *(b)* of the 1914 Act, and provided that the Welsh Commissioners, while continuing to honour the freehold of any surviving pre-disestablishment incumbents, should transfer burial grounds not to the secular authorities but to the Representative Body of the Church in Wales.[14] Moreover, the 1945 Act provided that in the case of burial grounds that had already been handed over to the secular authorities, the Representative Body should be allowed to negotiate their retransfer to the church.[15] Thus, churchyards and burial grounds came to be retained by the disestablished church. However, in this there remained a problem. While the church was established, its law was part of the law of the land and, as such, non-members had control over its provisions through the secular government. With regard to such matters as burial, this was important, as that part of the ecclesiastical law dealing with burial fees, fees for the erection of monuments and indeed the right of burial itself could clearly affect non-members. Once such burial grounds were in the hands of the disestablished church, such control was lost, for, as has been shown, from disestablishment ecclesiastical law ceased to be law in Wales and became merely the terms of a contract binding the members of the church, and only those members. The members alone could alter or modify the content of the contract and thus could severely prejudice the position of non-members whose interests could still be affected in matters such as burial rights.[16] In this regard, therefore, the Church in Wales is still subject to the control of the law of the land. With regard to such matters as rights of burial and burial fees, the Church in Wales is not free to do as it wishes. Under the provisions of the Welsh Church (Burial Grounds) Act, 1945, the church, through the Representative Body, may make rules relating to these matters, but to be valid the rules have to be approved by the Secretary of State. This system recognizes that persons other than members of the church have an interest here, and the church therefore is not free to do as it wishes. The Secretary of State in effect approves the rules on behalf of the population as a whole, including the non-members whose legitimate interests are affected. The church retains, therefore, certain public duties in this area, for non-members continue to enjoy rights of burial, and it is likely that the courts would enforce the public duties involved with prerogative orders of mandamus.

To the extent, therefore, that the Church in Wales remains bound to the law of the land with regard to marriage and burial, there are still some aspects of its life over which it does not have full control. To this extent, there is an area of

14. Welsh Church (Burial Grounds) Act, 1945, section 1.
15. *Ibid.*, section 2.
16. Under the existing Rules, all parishioners have a right to be buried in the parish burial ground, and parishioners are defined as: "persons normally residing in the parish; persons dying in the parish; ex-parishioners and non-parishioners for whom family graves or vaults are desired to be opened and whose close relatives have been buried in the churchyard; and persons on the electoral roll at the date of death". The Rules also specifically provided that: "Except so far as rights are preserved by the aforesaid Act [Welsh Church (Burial Grounds) Act, 1945], no discrimination shall be made between the burial of a member of the Church in Wales and of other persons".

public law which continues to apply within Wales solely to the Welsh church. Despite the terms of the statute, it is submitted that this is in effect ecclesiastical law, the provision of the statute ending the reign of ecclesiastical law in Wales having been enacted in the belief that no privileges with regard to marriages and burials were to continue. Outside of these areas, however, the Church in Wales is now free to devise its own laws and regulations, and these, it is submitted, being laws made by the church for the church, constitute canon law.

It is further submitted that the distinction between these two sorts of ecclesiastical regulation in Wales points to the nature of the distinction between ecclesiastical law and canon law generally, the former being law relating only to the church but made for the church by the State, while the latter is made for the church by the church itself. The distinction suggested is one which would be readily understood by the civil lawyers of continental Europe, but not so easily comprehended by an English lawyer. Like so many other difficulties pertaining to the English legal system, the historical background contains the key to a better understanding. In England, at the Reformation, the fact that the church was the church of almost all the people meant that in a sense there was no distinction between church and State, so that ecclesiastical law and canon law became fused in that they were made for the same subjects by their rulers in matters ecclesiastical and temporal. However, as this situation ceased to obtain, the State was left with the power to make ecclesiastical law for the church, while the church did not reacquire the right to self-government and to make law, canon law, for itself. Hence, the difficulty of distinguishing the two concepts in English legal theory.

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