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## The Church in Wales and the State: A Juridical Perspective

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**Series on Church and State**

**The Church in Wales and the State: A Juridical Perspective**

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ABSTRACT

In 1536 Wales (*Cymru*) and England were formally united by an Act of Union of the English Parliament. At the English Reformation, the established Church of England possessed four dioceses in Wales, part of the Canterbury Province. In 1920 Parliament disestablished the Church of England in Wales. The Welsh Church Act 1914 terminated the royal supremacy and appointment of bishops, the coercive jurisdiction of the church courts, and pre-1920 ecclesiastical law, applicable to the Church of England, ceased to exist as part of public law in Wales. The statute freed the Church in Wales (*Yr Eglwys yng Nghymru*) to establish its own domestic system of government and law, the latter located in its Constitution, pre-1920 ecclesiastical law (which still applies to the church unless altered by it), elements of the 1603 Canons Ecclesiastical and even pre-Reformation Roman canon law. The Church in Wales is also subject to State law, including that of the National Assembly for Wales. Indeed, civil laws on marriage and burial apply to the church, surviving as vestiges of establishment. Under civil law, the domestic law of the church, a voluntary association, binds its members as a matter of contract enforceable, in prescribed circumstances, in State courts.

*Introduction*

The Church in Wales is an autonomous province of the worldwide Anglican Communion, its civil legal foundation following the disestablishment of the Church of England in Wales by Parliament in 1920. The Church in Wales is regulated by two categories of law: the law of the Church and the law of the State, Wales and England having been united by the English Parliament in the Act of Union 1536. The internal law of the Church, the product of continuous historical development, theolo-

gical reflection and practical action, expresses, in a concrete way, ideas the Church has about its own nature, identity, mission, standards and organization. As applied ecclesiology, the law of the Church is found in instruments created by the Church for itself since disestablishment, and in a host of earlier sources inherited at disestablishment.

Like other major institutions in society, the Church in Wales also lives in the wider legal environment of the external law of the State. While its religious freedom, and that of its members, are protected by the Human Rights Act 1998, the Church functions within a wide range of State laws, including Westminster statute, the common law, the law of the National Assembly for Wales, and, increasingly, the law of the European Union. Whereas the current establishment of the Church of England, with the monarch as legal head, means that, in England, many of its institutions enjoy status in public law, its law is part of the law of the land, and the incidents of establishment include the royal appointment of bishops and membership of bishops in the House of Lords,<sup>1</sup> the Church in Wales is a voluntary association (like other non-established religious organizations in the UK), broadly separate from the State, its internal law generally not having the status of public law but instead existing as the terms of a contract entered into by the members of the church. These two entities, of church law and of civil law, provide a convenient focus for the sometimes ambiguous relationship between the Church in Wales and the State.

### *Historical Outline of Church Law in Wales*

Like the contemporary Church in Wales, its ancient history traceable to the beginnings of Christianity in the British Isles (which pre-date the arrival of Augustine), the law of the Church is the product of almost two thousand years of continuity and change.

#### *The Origin and Development of Church Law in Wales*

The formation and use of standards and norms in the ecclesial communities of New Testament times sought to enable, guide and order the life of the Christian faithful.<sup>2</sup> In the post-apostolic era, the early Councils systematized these in the form of canons, designed in both practical and idealistic ways to serve the purposes of the Church, and, in so doing,

1. See generally N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), ch. 1.

2. Most of what follows forms ch. 1 of N. Doe, *The Law of the Church in Wales* (Cardiff: University of Wales Press, 2002).

elucidating the identity of the church itself. This formative period, along with the subsequent inception in the Western Church of a centralized system of papal government, generated a complex of regulatory instruments, operating in concert with local ecclesiastical customs, to which was soon attached the title *canon law*, partly through the pervasive influence of Roman law, and partly through the development of the notion of the Church as an institution. From the mid twelfth century the canon law was subjected to systematic organization and application throughout the Western Church.<sup>3</sup>

It was from the mediaeval period that the four Welsh dioceses of Bangor, Llandaff, St David's and St Asaph came under the jurisdictional control of Canterbury and, progressively, of Rome.<sup>4</sup> Alongside local law, the Welsh Church was regulated by Roman canon law, sometimes the subject of study by Welsh canonists of international standing, until the Reformation.<sup>5</sup> The Henrician legislation of the 1530s terminated papal jurisdiction and resulted in the establishment of the Church of England, its formal and legal connection with the State effected through the royal supremacy. However, by parliamentary statute, Roman canon law was to continue to apply unless it was contrary to the laws of the realm. The Canons Ecclesiastical 1603/4 were promulgated by the Convocations of York and of Canterbury, the membership of which included bishops and clergy from the Welsh dioceses. It was by these canons, along with those elements of Roman canon law which survived the Reformation, and the decisions of the church courts that the institutional church was regulated. In addition, particularly in the nineteenth century and as a feature of establishment, Acts of Parliament represented a significant source of law applicable to the Church of England in Wales.<sup>6</sup>

3. For historical overviews, see generally J.A. Brundage, *Medieval Canon Law* (London: Longman, 1995); see also C.A.H. Green, *The Constitution of the Church in Wales* (London: Sweet & Maxwell, 1937), ch. 5.

4. See generally D. Walker (ed.), *A History of the Church in Wales* (Penarth: Church in Wales Publications for the Historical Society of the Church in Wales, 1976; re-issued 1990).

5. See E.P. Roberts, 'The Welsh Church, Canon Law and the Welsh Language', in N. Doe (ed.), *Essays in Canon Law* (Cardiff: University of Wales Press, 1992), pp. 151-73; for discussion of Welsh awareness and observance of canon law, and for the contribution of Welsh canonists (such as Johannes Galensis or Walensis, writing 1210-15), see generally H. Pryce, *Native Law and the Church in Medieval Wales* (Oxford: Clarendon Press, 1993); for William Lyndwood, Bishop of St David's, who completed his celebrated *Provinciale* c. 1433, see B.E. Ferme, *Canon Law in Medieval England* (Rome: Libreria Ateneo Salesiano, 1996).

6. For a historical overview, see P. Jones, *The Governance of the Church in Wales* (Cardiff: Greenfach, 2000), pp. 1-8.

*Church and State: Law and Disestablishment*

The readjustment of Church–State relations throughout Europe in the nineteenth century saw in 1870 the disestablishment of the Church of Ireland, the dissolution of its constitutional union with the Church of England, in 1917 promulgation in the Roman Catholic Church of its *Codex Iuris Canonici* (replaced in 1983), in 1919 the foundation in the Church of England of a new legislature, the Church Assembly, and the enactment of the Church of Scotland Act 1921. This period also marked the legal foundation of the modern institutional Church in Wales. Through the Welsh Church Act 1914, Parliament effected the disestablishment of the four dioceses of the Church of England in Wales. Enacted in 1914,<sup>7</sup> implementation of the statute was postponed, due to the First World War, until 31 March 1920, the date of disestablishment.<sup>8</sup> Until that time, ‘the Church of England and the Church of Wales were one body established by law’.<sup>9</sup>

The Welsh Church Act 1914 has two basic purposes. It deals with the constitutional effects of disestablishment on the relations between Church and State, the legal severance of the Welsh dioceses from the Church of England, and the reconstitution of the Welsh Church on a new legal basis. The statute also provides for the disendowment of the four Welsh dioceses, and the distribution of funds arising from disendowment, including the partial re-endowment of the Church in Wales.<sup>10</sup> On the day of disestablishment, the Church of England, so far as it extended to and existed in Wales and Monmouthshire, ceased to be ‘established by law’.<sup>11</sup> Terminating the royal supremacy for the purposes of the Church in Wales,<sup>12</sup> the Welsh Church Act 1914 provided that no person was to be appointed or nominated by the monarch or by any person, by virtue of any existing right of patronage, to any ecclesiastical office in the Church in Wales; every cathedral and ecclesiastical corporation (sole and aggregate) was dissolved; bishops of the Welsh dioceses ceased to be members of the House of Lords; bishops and clergy ceased to be members

7. It was enacted without the consent of the House of Lords by means of the procedure contained in the Parliament Act 1911, and received royal assent on 18 September 1914.

8. The date was fixed by the Welsh Church (Temporalities) Act 1919, s. 2.

9. *Re Clergy Orphan Corporation Trusts* [1933] 1 Ch 267 per Farwell J.

10. See R. Brown, ‘The Disestablishment of the Church in Wales’, *Ecclesiastical Law Journal* (ELJ) 5 (1999), p. 252.

11. Welsh Church Act 1914, s. 1.

12. See, however, P. Jones, *Governance*, p. 68, for the argument that ‘all churches in Britain, not just the Church of England, are subject to the royal supremacy’.

of and represented in the Convocation of Canterbury; but bishops and clergy were no longer disqualified from election to the House of Commons.<sup>13</sup> The University of Wales, the National Library of Wales, and Welsh local authorities were notable beneficiaries of the disendowment provisions of the statute, a process administered by the Welsh Church Commission.<sup>14</sup>

The Welsh Church Act 1914 provides that, as from the date of disestablishment, 'the ecclesiastical law of the Church in Wales shall cease to exist as law' for the Welsh Church.<sup>15</sup> Previously, the ecclesiastical law,<sup>16</sup> applicable to the Church of England in Wales, had formed part of the law of the State, being the law of the established church.<sup>17</sup> However, this ecclesiastical law (found in both State and Church-made law) did not lose all its authority for the Welsh Church. The Welsh Church Act 1914 prescribes that pre-1920 ecclesiastical law is to continue to apply to the Church in Wales as the terms of a contract to which the members of the Church are party. In so doing the statute ensures the continuity of the canonical tradition, as well as of the fundamentals of faith and order. The statute provides that, as from the date of disestablishment, pre-1920 ecclesiastical law, previously applicable to the Church of England, and the pre-1920 articles, doctrines, rites, rules, discipline and ordinances of the Church of England, are to continue to apply to the Church in Wales. These pre-1920 sources continue to bind the church as if its members had agreed to be bound by them. However, under the statute, they continue to apply unless and until modified or altered by the Church in Wales.<sup>18</sup>

At the same time, the Welsh Church Act 1914 provides for the Church's power of self-governance. Nothing in any Act of Parliament, law or custom is to prevent the bishops, clergy and laity of the church from holding synods or electing representatives to these, nor from framing in such manner as they think fit 'constitutions and regulations for the general management and good government of the Church in

13. Welsh Church Act 1914, ss. 1, 2 and 3(5).

14. Welsh Church Act 1914, Part II; see Brown, 'The Disestablishment', pp. 252-54.

15. Welsh Church Act 1914, s. 3(1).

16. See below for definitions of ecclesiastical law.

17. *Mackonochie v. Lord Penzance* (1881) 6 App Cas 424 at 446 *per* Lord Blackburn.

18. Welsh Church Act 1914, s. 3(2): As from the date of disestablishment, 'the then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, and ordinances of the Church of England shall, with and subject to such modification or alteration, if any, as after the passing of this Act may be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound'.

Wales' and for its property and affairs.<sup>19</sup> The power to make (by means of a constitution and regulations) alterations and modifications in the inherited ecclesiastical law, includes the power to alter and modify such law so far as it is embodied in any Act of Parliament forming part of pre-1920 ecclesiastical law.<sup>20</sup> While the church was empowered to establish church courts, such courts cannot exercise coercive jurisdiction.<sup>21</sup> The current Constitution, an organic document which has been amended and added to from time to time since, originated in the work of a lay and clerical Convention held in Cardiff in 1917,<sup>22</sup> and is the product of influences from other Anglican legal systems, notably of the church in England and Ireland.<sup>23</sup>

### *The Legal Nature and Position of the Church*

The legal nature and position of the Church in Wales may be approached from two perspectives: the ecclesiastical and the secular.

#### *The Ecclesiastical Perspective*

According to the teaching of the Church in Wales, the church universal is 'the family of God and the Body of Christ', it is 'One, Holy, Catholic and Apostolic', and its members enter it by baptism. The mission of the Church is 'to be the instrument of God in restoring all people to unity with God and each other in Christ'. The Church carries out this mission, through the ministry of all its members, in prayer and worship, in proclaiming the Gospel and 'in promoting justice, peace and love in all the

19. Welsh Church Act 1914, s. 13(1).

20. Welsh Church Act 1914, s. 3(4): this provides for a power to alter or modify the pre-1920 ecclesiastical law as embodied in the Church Discipline Act 1840, the Public Worship Regulation Act 1874, the Clergy Discipline Act 1892, the Ecclesiastical Dilapidations Acts 1871 and 1872, 'or any other Act of Parliament'; see now Const. XI.47 (discussed below) for the current list of statutes which the church has disappplied since disestablishment.

21. Welsh Church Act 1914, s. 3(3).

22. See *Official Report of the Proceedings of the Convention of the Church in Wales* (Cardiff: Western Mail, 1917); the basic structures were approved by the Governing Body at its first meeting on 8 January 1918; see generally R. Brown, 'What of the Church in Wales?', *Ecclesiastical Law Journal* 3 (1993), p. 20.

23. For contrary views about the respective influences of C.A.H. Green and Viscount Sankey, see: A.J. Edwards, 'Building a Canon Law: The Contribution of Archbishop Green', in Doe (ed.), *Essays in Canon Law*, pp. 49-67; and J.T. Gainer, 'John Sankey and the Constitution of the Church in Wales', LLM Dissertation, University of Wales, Cardiff, 1994.

world'.<sup>24</sup> The visible church of Christ is 'a congregation of faithful men, in which the pure Word of God is preached, and the sacraments duly administered according to Christ's ordinance in all those things that of necessity are requisite to the same'.<sup>25</sup> The Church in Wales defines itself as 'the ancient Church of this land, catholic and reformed', proclaiming and maintaining 'the doctrine and ministry of the One, Holy, Catholic and Apostolic Church'.<sup>26</sup> In turn, the law of the Church in Wales acknowledges that the church belongs 'to the One, Holy, Catholic and Apostolic Church of Jesus Christ and truly participating in the apostolic mission of the whole people of God'.<sup>27</sup> In the church 'the Word of God is authentically preached', 'the sacraments of baptism and the eucharist are duly administered', and the apostolic faith is genuinely confessed.<sup>28</sup> The calling of the Church in Wales is 'to nurture men and women in the faith of Jesus Christ and to aid them to grow in the fellowship of the Holy Spirit'.<sup>29</sup> It is usually the case in other Anglican churches that such definitions are contained in the constitutional law of the church.<sup>30</sup>

In a wider ecclesiastical context, the Church in Wales is also a member of the Anglican Communion, 'a fellowship, within the One Holy Catholic and Apostolic Church, of those duly constituted dioceses, provinces and regional Churches in communion with the See of Canterbury'.<sup>31</sup> Unlike some Anglican churches which are national (their territory coincident with that of a State), united or extra-provincial, but in common with

24. *Book of Common Prayer* (1984) (hereafter *BCP*), pp. 690-91 (Catechism).

25. Thirty-Nine Articles of Religion, Art. 19; the Articles of Religion enjoy authority as an official source of doctrine in the Church in Wales.

26. *BCP*, p. 692.

27. Can. 28-9-1995: the Church in Wales, in this canon (designed to implement the Porvoo Declaration), indirectly claims these features for itself – the statements appear in the First Schedule to the Porvoo Declaration; see also Can. 27-4-2000 (a canon to implement the Reuilly Agreement).

28. Can. 28-9-1995.

29. Constitution, Prefatory Note.

30. See, e.g., New Zealand, *Constitution and Canons* (1995), Preamble: 'the Church is the body of which Christ is the head'; 'the Church (a) is One because it is one body, under one head, Jesus Christ; (b) is Holy because the Holy Spirit dwells in its members and guides it in mission; (c) is Catholic because it seeks to proclaim the whole faith to all people to the end of time and (d) is Apostolic because it professes the faith of the apostles and is sent to carry Christ's mission to all the world'.

31. Lambeth Conference 1930, Resolution 49; for the Church in Wales, 'The Anglican Communion is a family of Churches within the Catholic Church of Christ, maintaining apostolic doctrine and order and in full communion with one another and with the See of Canterbury' (*BCP*, p. 692).



many,<sup>32</sup> the Church in Wales is a particular church,<sup>33</sup> organized on the basis of a province,<sup>34</sup> today consisting of six dioceses.<sup>35</sup> In short, the Church in Wales is an autonomous, self-governing church, 'a fellowship of dioceses within the Holy Catholic Church, constituted as a Province of the Anglican Communion'.<sup>36</sup>

### *The Secular Perspective*

The law of the State contains five different ideas about the nature and position of the Church in Wales. First, in civil law, a 'church' is the aggregate of the individual members of a religious body or a quasi-corporate institution carrying on the religious work of the denomination whose name it bears.<sup>37</sup> Secondly, the Church in Wales is sometimes classified as a disestablished church.<sup>38</sup> This is not technically the case, however. The legal foundation of the contemporary institutional Church in Wales was the result of the Welsh Church Act 1914.<sup>39</sup> The effect of this

32. N. Doe, *Canon Law in the Anglican Communion* (Oxford: Oxford University Press, 1998), p. 9.

33. For discussion of the national role of the Church in Wales, see H. Jones, 'The Church in Wales: A Church for the Welsh Nation', *Law and Justice* 149 (2002), pp. 134-44.

34. ACC-4, 1979: a province is 'a self-governing Church composed of several dioceses operating under a common Constitution and having one supreme legislative body'. See Jones, *Governance*, p. 31: the province of the Church in Wales was neither created by the Welsh Church Act 1914, nor by the Constitution, but by a declaration of the Archbishop of Canterbury, Randall Davidson, on 10 February 1920, 'the last act of English ecclesiastical law to bind the Church in Wales'.

35. The dioceses existing at disestablishment were St David's, Llandaff, St Asaph, and Bangor; the creation of two new dioceses followed: Monmouth (1921) and Swansea and Brecon (1923).

36. Const., Prefatory Note.

37. See *Re Barnes, Simpson v. Barnes* (1922) [1930] 2 Ch 80 and *Re Schoales, Schoales v. Schoales* [1930] 2 Ch 75. See also *Free Church of Scotland (General Assembly) v. Lord Overtoun* [1904] AC 515, in which the House of Lords defines a church as an associated body of Christian believers, having a common interpretation of its source of belief, and acknowledging its collective belief thereby establishing their membership of it; for a discussion of this case, see Jones, *Governance*, pp. 44-49.

38. *Representative Body of the Church in Wales v. Tithe Redemption Commission and Others* [1944] 1 All ER 710 at p. 711: Viscount Simon speaks of 'the disestablishment and partial disendowment of the Church in Wales' and of 'the Representative Body which represented the disestablished Church'; see also p. 718, *per* Lord Porter, who speaks of the 'disestablished Church of Wales'; see also *Wallbank and Wallbank v. PCC of Aston Cantlow and Wilmote with Billesley* (2001) CA Case No: A3/20000/0644.

39. See generally T.G. Watkin, 'Disestablishment, Self-determination and the Constitutional Development of the Church in Wales', in Doe (ed.), *Essays in Canon Law*, pp. 25-48.

statute was the partial disestablishment of the Church of England on 31 March 1920. It was the Church of England, not the Church in Wales, that was disestablished.<sup>40</sup> As the Welsh Church Act itself provides, this was 'An Act to terminate the establishment of the Church of England in Wales and Monmouthshire'.<sup>41</sup> Moreover, insofar as the contemporary institutional Church in Wales was founded in direct consequence of a legislative act of the civil power, and given the notorious difficulties which exist in defining establishment,<sup>42</sup> there is modest judicial support for the view that the Church in Wales is a re-established church.<sup>43</sup> Indeed, three notable vestiges of establishment remain today: the duty of clergy of the Church in Wales to solemnize the marriages of parishioners; the right of parishioners to burial in the churchyard;<sup>44</sup> and the appointment of clergy of the Church in Wales as prison chaplains.<sup>45</sup> The same arrangements operate in England with respect to the established Church of England.<sup>46</sup> These and other incidents of establishment may suggest the view that the Church in Wales is a quasi-established church, being treated for these purposes as if it were established.<sup>47</sup>

Thirdly, the law of the State treats the Church in Wales as a consensual society classified in law, like other non-established religious organiza-

40. *Re MacManaway* [1951] AC 161 at p. 165, *arguendo*: 'the Welsh Church Act, 1914, did not disestablish the Welsh Church, but only disestablished the Church of England in so far as it then existed in Wales'.

41. Welsh Church Act 1914, long title; see, however, s. 1: 'the Church of England, so far as it extends to and exists in Wales and Monmouthshire (in this Act referred to as the Church in Wales), shall cease to be established by law'.

42. See, e.g., *AG (Victoria) ex rel Black v. Commonwealth* (1981) 146 CLR 559; and Doe, *The Legal Framework*, pp. 8-9.

43. *Powell v. Representative Body of the Church in Wales* [1957] 1 All ER 400 at p. 403 *per* Wynn-Parry J: the object of the 1914 statute was 'to re-establish the Church in Wales on a contractual basis'. Through the Welsh Church Act 1914 (being the formal legal parent of the Church in Wales), the State provides the church with a statutory contract (consisting initially of pre-1920 ecclesiastical law), and with the statutory power to make its own constitution and regulations; the statute also provides for the power to alter and modify Acts of Parliament which formed part of the statutory contract provided for the Church by the State (ss. 3(4), 13).

44. See T.G. Watkin, 'The Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales', *Ecclesiastical Law Journal* 2 (1990), pp. 110-15.

45. Prison Act 1952, ss. 7 and 54. See generally, Doe, *The Law of the Church in Wales*, chs. 7 and 11.

46. See generally M. Hill, *Ecclesiastical Law* (Oxford: Oxford University Press, 2nd edn, 2001).

47. For the concept of quasi-establishment, see M.H. Ogilvie, 'What Is a Church by Law Established?', *Osgoode Hall Law Journal* 28 (1990), pp. 179-215.

tions,<sup>48</sup> as an unincorporated voluntary association whose members are organized and bound together as a matter of private contract.<sup>49</sup> Since disestablishment in 1920, the Church in Wales has been recognized by the courts of the State as having existed as 'a voluntary organisation of individuals, held together by no more than the contract implied by such mutuality'.<sup>50</sup> Consequently, 'the Church in Wales is a body whose legal authority arises from consensual submission to its jurisdiction'; the church has 'no statutory (*de facto* or *de iure*) governmental function', but is, rather, 'analogous to other religious bodies which are not established as part of the State'.<sup>51</sup> Like other religious voluntary associations, the Church in Wales is a consensual religious community,<sup>52</sup> operating its own largely self-regulatory system of governance, distinct from the State and its institutions.<sup>53</sup> Similarly, being an unincorporated association, the Church has no separate legal identity; it is not treated as a juridic person and cannot sue or be sued,<sup>54</sup> though institutions within it may enjoy legal personality or identity in secular law.<sup>55</sup>

Fourthly, being in civil law a consensual body, the Church in Wales may enjoy the status of a voluntary organization for the purposes of dealings with the National Assembly for Wales. The Government of Wales Act 1998 provides a mechanism to enable relevant voluntary

48. *Forbes v. Eden* (1867) LR 1 Sc & Div 568.

49. *Powell v. Representative Body of the Church in Wales* [1957] 1 All ER 400 at p. 403; for criticism of the applicability of the contract idea, see Jones, *Governance*, pp. 51-52: this suggests that 'the notion of the Church in Wales as based on a contract...is flawed...because a church exists on the basis of shared religious belief', not contract; 'It would be better to speak of the governance of the Church in Wales as based on consensus rather than contract'.

50. *R v. The Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 ELJ 129 per Sedley J.

51. *R v. The Provincial Court of the Church in Wales, ex parte Reverend Clifford Williams* (1999) 5 ELJ 217 per Latham J.

52. *Re Clergy Orphan Corporation Trusts* [1933] 1 Ch 267 per Farwell J: the Church in Wales is organized 'as a matter of agreement between those persons who are members of that body'.

53. *R v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] WLR 1036: for State court intervention, the test is that of 'government interest': 'to attract the court's supervisory jurisdiction there must not be merely a public but potentially governmental interest in the decision making power in question'.

54. See *Baker v. Jones and Others* [1954] 2 All ER 553; *R v. Jockey Club, ex parte RAM Racecourses Ltd* (1991) 3 Admin LR 265.

55. The Representative Body, for example, is incorporated by royal charter; and the Governing Body is recognized as an 'appropriate authority' for the purposes of the Sharing of Church Buildings Act 1969 (Sched. 2).

organizations to be consulted by the Assembly in the exercise of its functions. Relevant voluntary organizations are defined as those bodies whose activities are carried out otherwise than for profit and directly or indirectly benefit the whole or part of Wales.<sup>56</sup> Finally, while the matter has as yet not received judicial consideration, the Church in Wales may be classified as a religious organization, its members enjoying freedom of religion under the European Convention on Human Rights,<sup>57</sup> for the purposes of the Human Rights Act 1998.<sup>58</sup> As a general principle, it is unlawful for any public authority, including the National Assembly for Wales,<sup>59</sup> in carrying out its functions, to act in a way which is incompatible with Convention rights, such as the right of freedom of religion.<sup>60</sup>

### *State Law Applicable to the Church*

The law of the State applicable to the Church in Wales is found in primary legislation – statutes enacted by the Sovereign in Parliament, which may be addressed to the Church indirectly or directly,<sup>61</sup> secondary legislation – such as that made or deemed to be made by the National

56. Government of Wales Act 1998, s. 114. The assembly is under a duty to make a scheme setting out how it proposes ‘to promote the interests of relevant voluntary organisations’. Whether the Church in Wales is a voluntary organization, and therefore eligible for membership of a scheme, would be for the Assembly to decide. The scheme must specify how the Assembly proposes to consult relevant voluntary organizations about the exercise of its functions affecting, or of concern to, those organizations. Provision exists to keep the scheme under review, to remake and revise it, and to publish it. The Assembly must consult such organizations as it considers appropriate before making, remaking or revising the scheme.

57. ECHR, Art. 9: (1) ‘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’; (2) ‘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’.

58. Human Rights Act 1998, s. 13: ‘If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of conscience, thought and religion, it must have particular regard to the importance of that right’; in this section ‘court’ includes a tribunal.

59. Government of Wales Act 1998, ss. 107, 153(2).

60. Human Rights Act 1998, s. 6: acts include omissions.

61. For direct applicability see, e.g., the Welsh Church (Burial Grounds) Act 1945; for indirect applicability see, e.g., Ecclesiastical Courts Jurisdiction Act 1860.

Assembly for Wales (for instance in relation to the ecclesiastical exemption enjoyed by the Church in Wales with respect to its places of worship under secular planning law);<sup>62</sup> European law;<sup>63</sup> and the decisions of the courts of the State, that is, decisions on the meaning of legislation and in the common law.

### *Secular Legal Standards and the Church*

The following may be offered to illustrate the diversity of matters in the life and activities of the Church in Wales which are or may be subject to State law. First, there are secular standards with which the Church must comply; for example, computerized or paper-based files containing information on the members of the Church in Wales, or others, are subject to State law on data protection—any church person or organization which processes or handles personal data must do so in accordance with a set of statutory principles, though keeping records solely for staff administration or to maintain membership or support for the organization may be exempt.<sup>64</sup> Secondly, the State may impose obligatory standards which the Church implements by its own domestic regime: for instance, it is unlawful for the Church, as a service provider, to discriminate against disabled people in the facilities it offers,<sup>65</sup> and the Church in Wales has instituted a policy and guidance to meet the prohibition.<sup>66</sup> Thirdly, the State has permissive arrangements which the Church may adopt voluntarily, such as the provincial scheme to implement the principles

62. Under the Government of Wales Act 1998, the Assembly is competent to exercise all those ministerial functions, which touch the Church in Wales, including the making of secondary legislation, contained in Acts of Parliament listed in Transfer of Functions Orders, and under Acts passed since devolution. Secondary legislation directly or indirectly affecting the Church in Wales which has already been made under statutory powers will continue to apply to the Church as the law of the Assembly, unless and until altered by it: see, e.g., the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771, made under the Planning (Listed Buildings and Conservation Areas) Act 1990. The Church in Wales is party to the Laws Committee of CYTUN (Churches Together in Wales) a function of which is 'to review the effect of legislation on faith communities in Wales' enacted by the National Assembly.

63. See below for the Data Protection Act 1998.

64. Data Protection Act 1998 which gives effect to the requirements of Directive 95/46/EC of the European Parliament.

65. Disability Discrimination Act 1995, s. 19.

66. A Disability Strategy for the Church in Wales, Report of the Standing Committee of Governing Body (April 2002), esp. Appendix III.

of the Children Act 1989 concerning child protection.<sup>67</sup> Fourthly, the State may provide facilities, consisting of both rights and duties, which the church may choose to utilize to further its mission, such as State provision on spiritual care and chaplaincies in hospitals,<sup>68</sup> freedom to administer church schools in accordance with the tenets of the Church in Wales,<sup>69</sup> the use of church sharing agreements to enable ecumenical partnership,<sup>70</sup> protection of public order at the time of divine service,<sup>71</sup> or the opportunity for its clergy to enjoy the protection of civil employment law.<sup>72</sup>

Finally, the courts of the Church. The Welsh Church Act 1914 confers on the Church in Wales the right to establish its own ecclesiastical courts, but these are forbidden to exercise coercive jurisdiction.<sup>73</sup> Submission to their jurisdiction is voluntary, and compliance with their decisions is effected by means of declarations made by prescribed classes of ecclesiastical person.<sup>74</sup> Several principles of pre-1920 ecclesiastical law continue to apply to the courts and tribunal of the Church in Wales.<sup>75</sup> However, whether the State courts may enforce these standards depends on the subject in issue: in disciplinary cases, the High Court has declined to exercise jurisdiction over the Provincial Court of the Church on the basis that the latter was a domestic (or private) body (whereas the courts

67. The Care and Protection of Children: Statement of Policy and Guidance for Implementation, produced by the Panel of Bishops' Representatives on behalf of the Bench of Bishops of the Church in Wales (1997).

68. The State has made provision with respect to the appointment of chaplains, staff pay and conditions of service, worship facilities at hospitals, and record-keeping: see Doe, *The Law of the Church in Wales*, pp. 189-91.

69. Schools Standards and Framework Act 1998, s. 69; see Doe, *The Law of the Church in Wales*, pp. 219-21.

70. Sharing of Church Buildings Act 1969.

71. Ecclesiastical Courts Jurisdiction Act 1860: this makes it a crime to disturb acts of public worship.

72. Currently, clergy are not classified as employees, and so have no recourse to the civil industrial tribunals in cases of unfair or unlawful dismissal. For recent government proposals, however, see S. Calvert and C. Hart, 'EU Employment Law and Religious Organisations', *Law and Justice* 148 (2002), pp. 4-20.

73. Welsh Church Act 1914, s. 3(3).

74. See, e.g., for clergy, Const. VII.66: clergy undertake 'to accept, submit to, and carry out any sentence...of any Court or the Tribunal of the Church in Wales'.

75. For example, they must be satisfied about their competence under church law to determine a matter; they must not exceed their jurisdiction; they must not determine a matter in accordance with rules which are contrary to the common law. See, respectively, *R v. Twiss* (1869) LR 4 407; *Blunt v. Harwood* (1838) 8 Ad & El 610; *Tey v. Cox* (1613) 2 Brownl 35.

of the Church of England are subject to judicial review);<sup>76</sup> and yet, failure by a Church court to comply with the domestic church law in a property matter, is subject to the supervision of the State courts, as would be a Church court decision in breach of rights under civil law.<sup>77</sup>

### *The Vestiges of Establishment*

There are several key areas of ecclesiastical law which have survived disestablishment and still apply to the Church in Wales as part of the public law of the State,<sup>78</sup> as they do currently to the established Church of England. First, the right to marriage in the parish church. The law of the State provides that nothing in the Welsh Church Act 1914 or the Welsh Church (Temporalities) Act 1919 affects 'the law with respect to marriages in Wales and Monmouthshire', or 'the right of bishops of the Church in Wales to license churches for the solemnisation of marriages'.<sup>79</sup> As a result, pre-1920 ecclesiastical law on marriage continues to apply to the Church in Wales as the law of the land, as does the current general marriage law of the State,<sup>80</sup> under which marriage is treated as a human right.<sup>81</sup> In State law, in Wales 'every resident of a parish is entitled to marry in his/her parish church',<sup>82</sup> whether they are members of the church or not. Consequently, '[t]he incumbent or priest-in-charge has a duty to solemnize the marriage of parishioners on request (or to provide an assistant curate to do so), and is guilty of neglect of duty if he/she refuses (for which disciplinary proceedings may be taken in the ecclesiastical courts)'.<sup>83</sup> The right to marry in the parish church has been recognized by Parliament,<sup>84</sup> by the secular courts,<sup>85</sup> and by pre-1920

76. *R v. Provincial Court of the Church in Wales, ex parte Reverend Clifford Williams* (1998) CO/2880/98. Disciplinary matters are now dealt with by a new Disciplinary Tribunal (with appeal to the Provincial Court).

77. *Forbes v. Eden* (1867) LR 1 Sc & Div 568; indeed, the Welsh Church Act 1914, s. 3(2) domestic church law 'shall be capable of being enforced in the temporal courts in relation to any property' held on behalf of the church.

78. These are the so-called vestiges of establishment: see Watkin, 'The Vestiges of Establishment', p. 110.

79. Welsh Church (Temporalities) Act 1919, s. 6.

80. Marriage Act 1949, s. 78(2): 'Any reference in this Act to the Church of England shall, unless the context otherwise requires, be construed as including a reference to the Church in Wales'.

81. Human Rights Act 1998 and European Convention on Human Rights, Art. 12.

82. *Anglican Marriage in England and Wales: A Guide to the Law for Clergy*, issued by the Faculty Office of the Archbishop of Canterbury (1999), 6.1.

83. *Anglican Marriage in England and Wales*, 6.1.

84. See, e.g. Matrimonial Causes Act 1965, s. 8.

85. *Davis v. Black* (1841) 1 QB 900.

decisions of the ecclesiastical courts.<sup>86</sup> However, clergy have no duty to solemnize the marriages where one of the parties is divorced or has a surviving former spouse.<sup>87</sup> No special protection is given by State law to clergy with regard to marriage of the unbaptized.<sup>88</sup>

Secondly, the right to burial in the parish burial ground. The law of burial applicable to the Church in Wales is to be found in both State-made and Church-made law. According to pre-1920 ecclesiastical law: 'No Minister shall refuse or delay...to bury any corpse that is brought to the Church or Churchyard, convenient warning being given thereof before, in such manner and form as is prescribed' by the rites of the church.<sup>89</sup> Only parishioners are entitled, as of right, to be buried in the parish's burial ground.<sup>90</sup> Except so far as rights are preserved by the Welsh Church (Burial Grounds) Act 1945, no discrimination may be made by the church between the burial of a member of the Church in Wales and that of other persons.<sup>91</sup> The right of parishioners to burial in the parish burial ground is one recognized and protected at common law.<sup>92</sup> The Welsh Church (Burial Grounds) Act 1945 provided for the transfer and maintenance of burial grounds to the Representative Body of the Church in Wales, which may make rules relating to burial provided they have been approved by the National Assembly for Wales.<sup>93</sup>

Thirdly, prisons. Every prison in Wales must have a chaplain, and if large enough, may also have an assistant chaplain. Both the chaplain and, if there is one, assistant chaplain must by civil law be a cleric of the Church in Wales.<sup>94</sup> Appointment belongs to the secretary of state, and prior to appointment, notice of the nomination of a chaplain or assistant chaplain must be given to the diocesan bishop within a month of nomin-

86. *Argar v. Holdsworth* (1758) 2 Lee 515.

87. Matrimonial Causes Act 1965, s. 8. The church now has in place guidance as to the marriage of divorced persons: the decision is a matter of conscience for the cleric concerned.

88. See generally Doe, *The Law of the Church in Wales*, pp. 257-58.

89. Canons Ecclesiastical 1603/4, Can. 68.

90. 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 (the church's) electoral roll of the parish at the date of death: Burial Grounds Rules, Second Schedule.

91. Burial Grounds Rules, Second Schedule, Notes, and Welsh Church (Burial Grounds) Act 1945, s. 4.

92. See, e.g., *Kerr* [1894] P 284.

93. Welsh Church (Burial Grounds) Act 1945, s. 4: as to notice, fees and services.

94. Prison Act 1952, s. 7(1), (3) and (4); s. 53(4): references in the statute to the Church of England must be construed as including references to the Church in Wales.



ation. The chaplain or assistant may officiate only under the authority of a licence from the bishop of the diocese in which the prison is situated.<sup>95</sup> The functions of the Church in Wales chaplain are governed by State secondary legislation, and include duties to visit prisoners and to provide divine service for prisoners.<sup>96</sup>

### *The Forms of Domestic Church Regulation*

The internal or domestic law of the Church in Wales is found in a host of regulatory instruments which fall into two broad categories: the constitution of the Church in Wales; and pre-1920 ecclesiastical law.<sup>97</sup> Each source is, in turn, composed of several forms of ecclesiastical regulation. In most Anglican churches, the law is to be found, simply, in a constitution and a code of canons.<sup>98</sup> In addition to the formal law, the Church has extra-constitutional legislation, and quasi-legislation; these are not considered here.<sup>99</sup>

#### *The Constitution*

The *constitution* of the Church in Wales, made in pursuance of a power recognized expressly by State law,<sup>100</sup> is a legal text in both Welsh and English which applies throughout the province. The constitution is composed of chapters (and further chapters), 'all canons of the Church in Wales', and 'all rules and regulations made from time to time by or under the authority or with the consent of the Governing Body'.<sup>101</sup> The

95. Prison Act 1952, s.9.

96. Prison Rules 1999, SI 1999/728.

97. The domestic law of the church sometimes distinguishes between the 'received' ecclesiastical law, and the 'enacted' ecclesiastical law, the received being that which was inherited at disestablishment, and the enacted that which has since been made by the church; see, e.g., the Scheme of the Cathedral Church of Llandaff, II.1; see also below.

98. The Constitution most commonly consists of fundamental declarations and principles: see, e.g., the Church of the Province of Southern Africa, *Constitution and Canons* (1994). Others simply have a code of canons: see, e.g., Scottish Episcopal Church, *Code of Canons* (1996). The canons of the Church of Ireland are incorporated in the Constitution (*The Constitution of the Church of Ireland*, Ch. IX). The law of the Church of England includes Measures (enacted by General Synod and approved by Parliament), and canons (made by General Synod and assented to by the Monarch).

99. See Doe, *The Law of the Church in Wales*, pp. 18-20.

100. See above for the Welsh Church Act 1914, s. 13.

101. Const., I.1(1)(a)-(d); the English and Welsh versions of the Constitution have 'equal validity' (I.1(2)), though, for 'the purpose of interpretation and for the resolution of any ambiguity, the English version shall be the definitive text' (I.1(3)).

Governing Body is the provincial legislature, and is treated by the civil courts as an institution of private law.<sup>102</sup> The Governing Body is empowered 'to add to, alter, amend, or abrogate any of the provisions of the Constitution'.<sup>103</sup> The power to create *chapters* (or *further chapters*) is vested in the Governing Body,<sup>104</sup> their enactment, and alterations and additions to them, being effected in practice by means of the making of a canon. The *canons* of the Church in Wales are made, repealed and amended by the Governing Body, acting in accordance with bill procedure.<sup>105</sup> On promulgation by the President of the Governing Body, a canon becomes 'a law of the Church in Wales'.<sup>106</sup> *Rules* and *regulations* may be made by the Governing Body,<sup>107</sup> which may also authorize or consent to their creation by others, such as the Representative Body (the provincial trustee).<sup>108</sup> Regulations may operate under the authority of a canon,<sup>109</sup> but it is assumed that they cannot repeal or amend those elements of the constitution which may be repealed or amended only by bill procedure.<sup>110</sup> It has been argued that the Welsh Church Act 1914 imposes a duty in civil law on the Governing Body to legislate in accordance with the substantive and procedural requirements prescribed by the constitution, and that civil judicial review would lie in the event of failure to do so.<sup>111</sup>

102. See *R v. Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 *Ecclesiastical Law Journal* (1998) 129.

103. Const., II.43; see also II.33(1): the Governing Body may make constitutions and regulations for 'the general management and good government of the Church'; this is declaratory of the Welsh Church Act 1914, s.13(1).

104. Const., I.1(a) and (b).

105. See *Wallbank and Wallbank v. PCC of Aston Cantlow* (2001) unreported, per Sedley LJ: 'The term canon law is properly applied to the law made by the churches for the regulation of legal matters within their competence'.

106. Const. II.42(2).

107. Const. I.1(1)(d); the terms are not defined, and the constitution seems to provide no procedure for their creation, alteration or repeal. See, e.g., the Hardship Regulations, made by the Governing Body to alleviate hardship arising from the promulgation of the canon enabling women to be ordained as priests.

108. See, e.g., Rules made under the Welsh Church (Burial Grounds) Act 1945, s. 4(2).

109. See, e.g., Regulations (relating to payments to incapacitated incumbents) made under Can. 21-4-82 as amended by the Incapacitated Incumbents (Amendment) Canon 1985 (they are found in the First Schedule to the canon).

110. See Chancel Repair Regulations: these regulations also describe the provisions in them as 'rules'; r. 11: 'Nothing in these rules shall affect the provisions of Chapter III of the Constitution'.

111. Jones, *Governance*, p. 54: the argument is based on s. 3(2), Welsh Church Act 1914: see above n. 18.

While the constitution does not include them in its formal list of sources,<sup>112</sup> the following are considered to be included in the constitutional law of the church. *Schemes* made by the Governing Body,<sup>113</sup> and by the Representative Body,<sup>114</sup> are treated as a matter of ecclesiastical convention as part of the constitution. *Motions* and *resolutions* may be passed by the Governing Body, in accordance with prescribed procedures, and the latter may effect temporary amendments to the constitution.<sup>115</sup> Liturgical *rules*, *rubrics* and *general directions* are forms of ecclesiastical regulation: 'The law of worship of the Church in Wales is contained in the Book of Common Prayer' (1984),<sup>116</sup> itself authorized by the Governing Body by means of canon and, therefore, having constitutional authority. Finally, *ecclesiastical custom*, or long-standing and continuous usage, though a minor source of regulation, has been recognized by the constitution as having binding authority.<sup>117</sup>

#### *Pre-1920 Ecclesiastical Law*

Although the ecclesiastical law, applicable to the Church of England prior to its disestablishment, has ceased to exist for the Welsh Church as the law of the land,<sup>118</sup> it continues to apply to the Church in Wales as part of the Church's statutory contract; and sometimes the domestic law of the Church distinguishes between the received and the enacted ecclesiastical law.<sup>119</sup> Its application is by virtue of the Welsh Church Act 1914, and it is operative unless and until altered or modified by the Church in Wales.<sup>120</sup> With the exception of those parliamentary statutes, and other elements of pre-1920 ecclesiastical law, which the Church in

112. The following instruments are not explicitly listed in Const. I.1(1) (for which see above).

113. The six Cathedral Schemes are included in Volume II of the Constitution.

114. The Maintenance of Ministry Scheme, consisting of 'Regulations prescribed by the Representative Body', is included in Volume II of the Constitution.

115. Const. II.34 and 35.

116. *BCP*, p. v.

117. See, e.g., Const. VI.17(1),(2); cathedral schemes too preserve the customs of cathedrals if they are not inconsistent with the terms of those schemes and, sometimes, under cathedral schemes, cathedral clergy are obliged 'faithfully to observe all the Customs of the cathedral'. See also *Ridsdale v. Clifton* (1876) 1 PD 316 at p. 331: 'Usage, for a long series of years, in ecclesiastical custom especially, is entitled to the greatest respect; it has every presumption in its favour; but it cannot prevail against positive law, though, where doubt exists, it might turn the balance'.

118. With the exception of rights to prison chaplains, marriage, burial: see above.

119. See, e.g., Scheme for the Cathedral Church of St Davids, II.1: the governance of the cathedral is 'subject always to the ecclesiastical law received or enacted by the Governing Body of the Church in Wales'.

120. Welsh Church Act 1914, s. 3(2); see also above.

Wales has disappplied since disestablishment,<sup>121</sup> the constitution provides that the 'ecclesiastical law as existing in England', at the date of disestablishment, 'shall be binding on the members (including any body of members) of the Church in Wales'. This pre-1920 ecclesiastical law must be 'applied to the determination of any question or dispute' between the members of the church, 'in so far as it does not conflict with anything contained in the Constitution'; the church's post-1920 constitutional law prevails over pre-1920 ecclesiastical law.<sup>122</sup> However, while pre-1920 ecclesiastical law continues to bind the members of the church (unless altered by the church), the courts of the Church in Wales are 'not to be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial'.<sup>123</sup> The post-1920 law of the Church of England forms no part of the law of the Church in Wales.<sup>124</sup>

The Welsh Church Act 1914 does not define the expression 'ecclesiastical law'.<sup>125</sup> However, a variety of definitions appear in judicial decisions – some are wide, others narrow: '[t]he term "ecclesiastical law" ... means the law relating to any matter concerning the Church of England administered and enforced in any court', temporal or ecclesiastical; alternatively, it is 'the law administered by ecclesiastical courts and persons', in the Church of England, 'and not by the temporal courts'.<sup>126</sup>

121. Const. XI.47 lists the following disappplied statutes: the Clergy Ordination Act 1804; the Church Discipline Act 1840; the Ecclesiastical Commissioners Act 1840; the Clerical Subscription Act 1865; the Clerical Disabilities Act 1870; the Colonial Clergy Act 1874; the Public Worship Regulation Act 1874; the Sales of Glebe Lands Act 1888; the Clergy Discipline Act 1892; the Benefices Act 1898; the Pluralities Acts and the Incumbents Resignation Acts.

122. Const. XI.47. Moreover, it does not apply if in conflict with anything contained 'in any special contract as to glebe [land] between the Representative Body and an Incumbent' (Const. XI.47).

123. Const. XI.47.

124. The point is well made in Jones, *Governance*, pp. 29-30.

125. While canon law is commonly understood as the law which churches create for themselves (see n. 126 below), ecclesiastical law is understood as the law of the State applicable to churches. As will be apparent from the discussions in this article, however, these definitions may not readily be applied to the Church in Wales. See also A.T. Denning, 'The Meaning of "Ecclesiastical Law"', *LQR* 60 (1944), p. 235; in the House of Lords in *Representative Body of the Church in Wales v. Tithe Redemption Commission* [1944] 1 All ER 710 at p. 720, Lord Simonds considered, for the purpose of that case, that it was not 'necessary to determine the exact scope of that "ecclesiastical law of the Church in Wales" which by sect. 3 of the Act is to cease to exist as law'.

126. *AG v. Dean and Chapter of Ripon Cathedral* [1945] Ch 239; this was cited in *Wallbank and Wallbank v. PCC of Aston Cantlow* (2001) unreported Court of Appeal case per Sedley LJ: 'Ecclesiastical law is a portmanteau term which embraces not only the canon law but both secular legislation and common law relating to the church'.

Some definitions appear to be contradictory. On the one hand, 'The ecclesiastical law of England...is part of the general law of England – of the common law – in that wider sense which embraces all the ancient and approved customs of England which form law'.<sup>127</sup> On the other hand, 'ecclesiastical law' has been distinguished from the common law.<sup>128</sup> For practical purposes, therefore, the ecclesiastical law enjoying continuing authority in the Church in Wales, encompasses all law, consistent with the constitution of the church, which was before disestablishment applicable to the Church of England in Wales, whether it was created by the State or by the English Church, and whether it was enforceable in the courts of the State or in those of the Church.

Consequently,<sup>129</sup> sources of pre-1920 ecclesiastical law which continue to bind the members of the church, to the extent that they do not conflict with the constitution or have not been disapplied or abrogated since disestablishment, include: Acts of Parliament;<sup>130</sup> judicial decisions of the ecclesiastical and secular courts;<sup>131</sup> the Canons Ecclesiastical of 1603/4;<sup>132</sup> and the pre-Reformation Roman canon law, provided it is consistent

127. *Mackonochie v. Lord Penzance* (1881) 6 AC 424 at p. 446 *per* Lord Blackburn; see also *R v. Millis* (1844) 10 Cl & Fin 534 at p. 678: 'the general canon law', which is 'no doubt the basis' of ecclesiastical law, has been 'modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and...has been known from early times by the distinguished title of the King's Ecclesiastical Law'.

128. *Representative Body of the Church in Wales v. Tithe Commission* [1944] 1 All ER 710 at p. 713: Viscount Simon distinguishes ecclesiastical law from 'the common custom of England' (i.e. the common law); compare *Evers v. Owen's Case* (1627) Godb 431: 'There is a common law ecclesiastical, as well as our common law, *jus commune ecclesiasticum*, as well as *jus commune laicum*'.

129. *Kemp v. Wickes* (1809) 3 Phillim 264 at p. 276 *per* Sir John Nicholl: 'The law of the Church of England and its history are to be deduced from the ancient general canon law, from the particular constitutions made in this country to regulate the English church, from our own canons, from the rubric, and from any acts of parliament that may have been passed on the subject; and the whole may be illustrated also by the writings of eminent persons'.

130. See, e.g., the Sacrament Act 1547.

131. See, e.g., *Argar v. Holdsworth* (1758) 2 Lee 515 (concerning the right to marry in the parish church). However, the *courts* of the Church in Wales 'are not bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial' (Const. XI.47).

132. For the difficulties in determining which of these canons continue to apply, and the effect of non-usage or desuetude, see G.K. Cameron, 'The Church in Wales, the Canons of 1604 and the Doctrine of Custom', LLM Dissertation, University of Wales, Cardiff, 1997. For historical antecedents to the Canons Ecclesiastical 1603, see G. Bray, *The Historic Anglican Canons: 1529–1947* (London: Boydell Press, 1998).

with the royal prerogative, the laws, statutes and customs of the realm and has been incorporated as custom (through recognition and continuous usage) into the ecclesiastical law.<sup>133</sup> Moreover, the principles and maxims of canon law, rooted in the canonical tradition, also contribute to the law of the Church in Wales. These may be understood as overarching all individual canonical systems, expressing the church's underlying values and traditions, distinctive by virtue of their theological content, and giving meaning and coherence to hosts of individual rules.<sup>134</sup> Finally, in accordance with canonical tradition, the learned works of pre-disestablishment jurists are of continuing persuasive authority.<sup>135</sup>

### *The Authority and Enforceability of Church Law*

Regulation in the church is seen by many as restrictive and coercive: ecclesiastical life ought to be governed by the Holy Spirit, the faithful living under grace rather than under a series of humanly made commands and prohibitions.<sup>136</sup> Yet, the purpose of law in the church is the same today as it was in the early church: to facilitate and to order the life of the people of God. Thus, for the Church in Wales: '[t]he Constitution

133. Submission of the Clergy Act 1533, s. 3; *R v. Millis* (1844) 10 Cl & Fin 534; *Bishop of Exeter v. Marshall* (1868) LR 3 HL 17 at pp. 53-56: according to a 'rule of practice', to be operative as custom, it must have been 'continued and uniformly recognised and acted upon by the bishops of the Anglican Church since the Reformation'; *Bryant v. Foot* (1867) LR 2 QB 161: custom must have operated from time immemorial.

134. See N. Doe, 'The Principles of Canon Law: A Focus of Legal Unity in Anglican-Roman Catholic Relations', *Ecclesiastical Law Journal* 5 (1999), pp. 221-40; some Anglican churches refer to these in their constitutions and canons: see, e.g., the Province of Southern Africa, *Constitution and Canons* (1994), Can. 50: 'if any question should arise as to the interpretation of the Canons or Laws of this Church, or of any part thereof, the interpretation shall be governed by the general principles of Canon Law thereto applicable'; see also the *Code of Canon Law* (1983) of the Roman Catholic Church (c. 19).

135. See *Kemp v. Wickes* (1809) 3 Phillim 264 at p. 276 per Sir John Nicholl: ecclesiastical law may be 'illustrated also by the writings of eminent persons'; see, e.g., R. Phillimore, *The Ecclesiastical Law of the Church of England* (2 vols.; London: Sweet & Maxwell, 2nd edn, 1895).

136. Rudolf Sohm (1841-1917), for example, saw a fundamental antithesis between law and the church as a community bound together by love: for Sohm's *Kirchenrecht* (1892) see A.V. Dulles, *Models of the Church* (Dublin: Gill and Macmillan, 1976); compare Adolf Harnack's response in *The Constitution and Law of the Church in the First Two Centuries* (trans. F.L. Pogson; London: Williams and Norgate, 1910). For a critical appraisal of modern Welsh Church law, see A.T. Lewis, 'The Case for Constitutional Renewal in the Church in Wales', in Doe (ed.), *Essays in Canon Law*, pp. 175-89.

which regulates the Church in Wales exists to serve the sacramental integrity and good order of the Church and to assist its mission and its witness to the Lord Jesus Christ';<sup>137</sup> however, church law is also used to effect order, as '[e]very society, ecclesial or secular, requires its own rules for the regulation of its affairs'.<sup>138</sup> Both the Church in Wales and the State provide mechanisms for, and limitations upon, the enforcement of the domestic church law.

#### *Compliance with Law within the Church*

The provincial law of the Church in Wales employs three devices to ensure compliance with its domestic law. First, the constitution specifies the binding effect of particular instruments. The overriding principle is that: 'The Constitution shall be binding on all office-holders in the Church in Wales, all clerics and deaconesses in receipt of a pension from the Representative Body and all persons whose names are entered on the electoral roll of any parish in Wales'.<sup>139</sup> Accordingly, chapters, further chapters, canons and all rules and regulations made under the authority or with the consent of the Governing Body are binding on these ecclesiastical classes.<sup>140</sup> The constitution also provides specifically for the binding effect of the canons of the Church in Wales,<sup>141</sup> and the pre-1920 ecclesiastical law.<sup>142</sup> The same applies to other forms of law in the church, made under powers conferred by the constitution, such as resolutions of the Diocesan Conference, which are binding in the diocese.<sup>143</sup> Moreover, prescribed church bodies are obliged to comply with directions of superior ecclesiastical authorities.<sup>144</sup> The binding effect of ecclesiastical quasi-legislation is more problematic, however.<sup>145</sup> Sometimes church law provides for the binding effect of directions from ecclesiastical persons.<sup>146</sup>

137. Const., Prefatory Note.

138. Const., Prefatory Note.

139. Const. I.2.

140. Const. I.1(1).

141. Const. II.42(2): promulgation canons are 'binding on all the members' of the church.

142. Const. XI.47: pre-1920 ecclesiastical law 'shall be binding on the members (including any body of members) of the Church in Wales'.

143. Const. IV.33.

144. See, e.g. Const. VI.22(3)(c): a parochial church council must implement any provision made by the Diocesan Conference.

145. See N. Doe, 'Ecclesiastical Quasi-legislation', in N. Doe, M. Hill and R. Ombres (eds.), *English Canon Law* (Cardiff: University of Wales Press, 1998), pp. 93-103.

146. See, e.g. Const. VI.21: 'Any dispute arising out of this section, or otherwise connected with the inventory, shall be referred to the Archdeacon, whose decision shall be final'.

Secondly, compliance is effected by means of declarations. Clergy must make a written 'declaration and undertaking', 'to be bound by the Constitution, and to accept, submit to and carry out any sentence or judgment...[of] the Archbishop, a Diocesan Bishop or any Court or the Tribunal of the Church in Wales'.<sup>147</sup> Clergy must also make 'the declaration of canonical obedience to the Bishop', to obey lawful and honest episcopal directions.<sup>148</sup> Churchwardens must agree to 'faithfully and diligently perform the duties of Churchwarden' and 'to accept and obey any decision of the Bishop or of the Diocesan Chancellor as to any right at any time to hold the office of Churchwarden'.<sup>149</sup> Those whose names are entered on an electoral roll must make a declaration 'to accept and be bound by the Constitution of the Church in Wales'.<sup>150</sup>

Thirdly, compliance is effected by means of arrangements for their enforcement. Mechanisms for enforcement depend on the nature of the non-compliance and the status of the body or person to whom the law or direction is addressed. The normal method to enforce compliance by clergy and lay office-holders is through an executive order of a bishop. Failure by clergy or lay office-holders to comply with the law of the Church in Wales may result, in serious cases, in disciplinary or judicial proceedings in the church; the same applies to clerical breaches of the declaration of canonical obedience.<sup>151</sup>

The constitution prescribes a variety of sanctions in the event of non-compliance with its provisions.<sup>152</sup> Most sanctions are administered as a result of legal process within the church. Some are directed to the individual: for example, every member of the Church in Wales must attend and give evidence, when duly summoned, at any trial or investigation held under the authority of the constitution; if any member wilfully and without sufficient cause neglects or refuses to do so, any office held by that person may be declared vacant.<sup>153</sup> Sanctions may also be directed to a group: for instance, the Diocesan Board of Finance with the approval of the bishop is empowered to place on a defaulter's list a parish which 'culpably neglects to meet its financial obligations'.<sup>154</sup> Other sanctions

147. Const. VII.66; the effect of the declaration has been recognized in civil law: *R v. Provincial Court of the Church in Wales, ex parte Williams* (1999) 5 ELJ 217.

148. Const. VII.66.

149. Const. VI.18.

150. Const. VI.3.

151. That is, the duty on clergy to comply with the lawful directions of their bishop.

152. See N. Doe, 'A Facilitative Canon Law: The Problem of Sanctions and Forgiveness', in Doe (ed.), *Essays in Canon Law*, pp. 69-88.

153. Const. XI.39(3).

154. Const. IV.18.



may involve process in civil law: an incumbent is responsible for the results of any negligence and for wilful damage done to the parsonage and, if repairs are not carried out to the satisfaction of the Parsonage Board, the Representative Body may sue in debt.<sup>155</sup> Similar arrangements are employed in all Anglican churches.<sup>156</sup>

*Enforceability in Civil Law*

The principal effect of secular ideas about the legal nature and position of the Church in Wales, as an unincorporated voluntary association, is that the domestic law of the church has the status in civil law of a contract entered into by the members of the church. Pre-1920 ecclesiastical law, while it ceases to exist as the law of the land, together with post-1920 modifications or alterations to it (duly made according to the constitution and regulations of the church), have the status of a statutory contract. Under the Welsh Church Act 1914, which presents the matter in quasi-contractual terms, these are 'binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound'.<sup>157</sup> Also, new post-1920 law of the church (not being modifications or alterations to the pre-1920 ecclesiastical law), in accordance with well-settled principles of civil law, has the status of the terms of a contract recognized as such at common law. An Anglican church, 'in places where there is no Church established by law, is in the same situation with any religious body – in no better, but in no worse position: and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them'.<sup>158</sup>

Consequently, the domestic law of the Church in Wales, its canonical contract, is enforceable in the civil courts, in certain circumstances, as a matter of private law.<sup>159</sup> However, normally secular courts do not take

155. Const. X.17, 20.

156. See Doe, *Canon Law in the Anglican Communion*, ch. 3.

157. Welsh Church Act 1914, s. 3(2); see also *Welsh Church Commissioners v. Representative Body of the Church in Wales and Tithe Redemption Commission* [1940] 3 All ER 1 at p. 6: with regard to a property matter, Greene MR speaks of the 'quasi-contractual obligation enforceable in the temporal courts'.

158. *Long v. Bishop of Cape Town* (1863) 1 Moo NS 411; see also *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323 (*per* Lord Templeman): 'The church is thus an unincorporated body of persons who agree to bear witness to the same religious faith and to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed'.

159. However, the Welsh Church (Burial Grounds) Act 1945 Rules, made by the Representative Body in pursuance of s. 4(2) of the 1945 Act, as State approved

cognizance of domestic church law, and they are generally reluctant to intervene in ecclesiastical disputes. Under the Welsh Church Act 1914, pre-1920 ecclesiastical law and post-1920 modifications or alterations to it are 'capable of being enforced in the temporal courts in relation to any property...held on behalf of the...Church and its members'.<sup>160</sup> The same applies to new post-1920 domestic law of the church (not being modifications or alterations to the pre-1920 ecclesiastical law) dealing with property; at common law, it has been decided that '[t]he law imposes upon [a] church a duty to administer its property in accordance with the provisions of the book of rules' of that church.<sup>161</sup> Moreover, in non-property cases, the domestic law of a church may be enforced in the civil courts when breaches of it within the church result in the violation of a right or interest under civil law.<sup>162</sup> Similarly, if the application of the domestic law of a church results in breach of the civil law, the secular court may intervene; in a case concerning the Scottish Episcopal Church it was held that: 'A Court of Law will not intervene with the rules of a voluntary association unless to protect some civil right or interest which is said to be infringed by their operation'.<sup>163</sup> As a result, the domestic law of the Church in Wales is inferior to the law of the State: 'the Church in Wales remains bound by the secular law of England and Wales'.<sup>164</sup> However, were a court of the State to entertain a challenge to the domestic law of the church,<sup>165</sup> on the basis that it violates the civil law, the

secondary legislation, have status in the public law of the State and are enforceable as such.

160. Welsh Church Act 1914, s. 3(2): the pre-1920 ecclesiastical law with modifications and alterations effected after the passing of the Act, duly made according to the constitution and regulations of the church, 'shall be capable of being enforced in the temporal courts in relation to any property which by virtue of this Act is held on behalf of the said Church or any members thereof, in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound'.

161. *Davies v. Presbyterian Church of Wales* [1986] 1 WLR 323 at p. 329.

162. See the Scottish case of *Rt Revd Dilworth v. (First) Lovat Highland Estates and (Second) Trustees for St Benedict's Abbey, Fort Augustus* (1999) unreported: in addition, the courts may intervene when non-compliance with domestic church law results in loss of reputation or some other civil wrong; see also generally *Buckley v. Cahal Daly* [1990] NIJB 8.

163. *Forbes v. Eden* (1867) LR 1 Sc & Div 568.

164. Const., Prefatory Note: especially 'regarding such matters as the ownership and management of property, the solemnisation of marriage and rights of burial in its churchyards'.

165. In *R v. Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 ELJ 129: a challenge, to the decision of the Church in Wales to

court must have particular regard to the importance of the right of freedom of religion.<sup>166</sup> In such a case, it would be unlawful for a State court, being a public authority, to fail to have regard to this right, or to act in a way which is otherwise incompatible with this or other European Convention rights.<sup>167</sup>

### *Conclusion*

The relationship between the Church in Wales and the State is ambiguous. On the one hand, the disestablishment of the Church of England in Wales in 1920 led to the institution of the Church in Wales as an organization fundamentally divorced from the State, free to exercise real self-determination in its mission to the Welsh nation.<sup>168</sup> Ecclesiastically, the Church in Wales is an autonomous province of the Anglican Communion, with its own system of law and government, distinct from that of the Church of England. In terms of civil polity, the Church in Wales is like any other religious organization in the UK, separate from the State—a private voluntary association organized on the basis of consensual compact. On the other hand, however, it may loosely be classified as a quasi-established church (but not a disestablished church, though this is often the perception): the foundation of the institutional Church in Wales is the result of direct State legislative activity, effected by means of a statutory contract created by the State, and recognized as having a statutory power of self-governance. Like other religious organizations it is subject to State law in relation to a host of its activities, and increasingly finds the need to work in partnership with the National Assembly for Wales. Above all, it is a quasi-established church in so far as the State continues to assign to it, by law, public functions, rights and duties, notably in marriage, burial, prison chaplaincies, and church schools.

ordain women as priests, was dismissed on the basis that the applicant, a vexatious litigant under the Supreme Court Act 1981, s. 42, lacked *locus standi*.

166. Human Rights Act 1998, s. 13; see also P. Cumper, 'The Protection of Religious Rights under Section 13 of the Human Rights Act 1998', *Public Law* (2000), p. 254.

167. Human Rights Act 1998, s. 6.

168. See Jones, 'The Church in Wales', p. 134.