DOES SCOTLAND HAVE AN ESTABLISHED CHURCH?

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1. INTRODUCTION

Whatever may be thought about the question of the possible disestablishment of the Church of England, there is one premise which the protagonists do not dispute. Nobody doubts that the Church of England **is** established. Well informed persons also know that, as one aspect of struggling with 'the Irish question' in the nineteenth century, the union of the Churches of England and Ireland was dissolved, and the Church disestablished, so far as the island of Ireland was concerned, by the Irish Church Act 1869. Besides, there was disestablishment for the territory of Wales and Monmouthshire by the Welsh Church Act 1914, an Act which is something of a constitutional curiosity: as there is not a separate Welsh legal system, it is very rare for legislation to distinguish between English and Welsh territory, as that Act does.

But what of the fourth part of the United Kingdom? The Acts of Parliament such as the Submission of the Clergy Act 1533 which first marked out the relations of church and state in England were Acts of the *English* Parliament, and most people are aware that a different form of Protestantism became predominant in Scotland. As a constitutional lawyer, I have sometimes reminded general audiences that there is a different established church in Scotland. I said as much at a conference recently, and was rather surprised when a Church of Scotland minister[1] responded with a firm denial that the Church of Scotland was established. His denial has prompted this inquiry.

2. WHAT IS 'ESTABLISHMENT'?

As readers may already have surmised, the difference of opinion ultimately falls to be resolved according to the technique reputedly favoured by the 1950s *Brains Trust* panellist, Dr C. E. M. Joad: 'It all depends what you mean by . . .'.

The meaning of 'establishment' is surprisingly unclear. A search of the literature quickly reveals that the terms 'establishment' or 'established church' are commonly used, but rarely analysed, so that the elucidation of their meaning is not easy.

'Establishment' is not a legal term of art in this country.[2] Lawyers distinguish between legal terms of art, where words convey a particular meaning when found in legal language (which may be different from their usual meaning), and other words and phrases, which are to be taken in their ordinary sense, unless the contrary intention appears.

There are several statutes which include the term 'establish' or a derivative form. For example, the Claim of Right passed by the Scottish Parliament in 1689 condemned King James VII for 'arraigning the laws establishing the Protestant religion', amongst other faults. The Act of Settlement enacted in England in 1700 refers to the 'Church of England, as by law established', and confirms and ratifies the laws 'securing the established religion'. And the Acts of Union passed by the Scottish Parliament in 1706 and the English in 1707 recite that the Scottish Church is 'by Law established' and incorporate provisions for its protection. However, in none of these instances is the term defined. In each the meaning is assumed, and the reference is to an existing state of affairs.

So recourse must be had to the ordinary usage of the word, and the views of authorities.

[1] Actually the Reverend Andrew Morton, who is also the Associate Director of the Centre for Theology and Public Issues at the University of Edinburgh.

[2] By contrast, in the United States the First Amendment to the Constitution provides that 'Congress shall make no law respecting an establishment of religion . . .'. However, the case law on the clause is not especially helpful in determing the core of meaning, as litigation has typically involved peripheral issues, in the light of the extended interpretation given to the clause.

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Many of the authorities evince a reluctance to attribute meaning, however. The leading encyclopaedia of the laws of England says that the word is used in various senses, and the authors of the section decline to choose between them.[3] The corresponding Scottish work uses the term as being applicable to the Church of Scotland, but nowhere defines it.[4] The Archbishops' Commission on *Church and State* (1970) noted that the term had various connotations, but finally settled for 'the laws which apply to the Church of England and not to others'.[5] Of course, that approach cannot provide a generic definition and even for England, as one author observed, it is perhaps over-inclusive in some respects (for some of the laws would not seem to relate to establishment as such) and under-inclusive in others (for establishment may not be entirely signified through laws).[6] The same author compares the process of defining 'establishment' to the perhaps equally problematical task of trying to define a pretty girl (but suggests that we all know one when we see one). However—even aside from its political incorrectness—this test will surely not do, if only because it obviously affords no guidance when there is disagreement.

Rather more helpfully, a High Court judge hazarded a definition incidentally in a case concerning parental duties in connection with compulsory school attendance: 'Establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.'[7] There is a trace of ethnocentricity about the judge's definition, which needs to be stripped out if it is to serve more generally, since naturally there are church and state relations in non-Christian countries as well. That reservation aside, a similar approach to the judge's is taken by David Walker in his legal compendium.[8] His definition of an established church is along the same lines, but more succinct: 'A church legally recognised as the official Church of the state or nation and having a special position in law'. The two elements which are common to these suggestions are *official recognition or approval, above other religions*, and *a different status in the consitution of laws of the land.* These elements seem to be central to most conceptions of 'establishment', as the term is used. While it must be conceded that the term can be used in a variety of ways, perhaps we would be justified in employing a working definition along these lines.

3. THE SCOTTISH REFORMATION AND AFTER

With that background in mind, let us examine the position of church and state in Scotland as it has developed since the sixteenth century.[9]

Protestant doctrines were preached in the kingdom soon after Luther began his work on the Continent, and the burning of reformers as heretics merely added to the zeal of their followers. The martyrdom of George Wishart in 1546 led to the assassination of Cardinal Beaton, who had condemned him. The transportation of John Knox and other Protestants to French prisons and galleys during the regency of Mary of Guise delayed, but did not prevent, the spread of the reform movement. Following a riot at Perth in 1559, Crown forces (mainly French) were opposed by English troops as well as rebels, until a treaty was agreed which provided for the withdrawal of foreign forces, and the appointment of parliamentary commissioners to negotiate with the Crown on questions of religion.

The Scottish Parliament or Estates which met in 1560 acted rather more decisively

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[3] *Halsbury's Laws of England* (4th ed.), vol. 14, 'Ecclesiastical Law', para. 334.

[4] *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 5, Constitutional Law, section 6, 'Church and State'.

[5] Church of England, Archbishops' Commission, *Church and State* (1970), p. 2.

[6] Richard Davies, 'Church and State', (1976) 7 *Cambrian Law Review 11*.

[7] *Marshall v. Graham* [1907] 1 KB 112, *per* Phillimore, J. at p. 126.

[8] *The Oxford Companion to Law* (1980).

[9] For a more detailed account, to which I am indebted in the sections which follow, see Francis Lyall, *Of Presbyters and Kings* (1980). See also J. H. S. Burleigh, *A Church History of Scotland* (1960).

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than had been allowed for. The Papal Jurisdiction Act 1560 (1560, c.2) abolished the jurisdiction of the Pope in Scotland. The Abolition of Idolatry Act (1560, c.3) and the Abolition of Mass Act (1560, c.4) are self-explanatory. And a statement of the new belief, drafted by a committee under John Knox, was ratified and approved by the civil authority in the Confession of Faith Ratification Act (1560, c.1).

The Reformation in Scotland is commonly dated at 1560, on account of these measures. But, as their enactment was to some degree irregular,[10] and as besides they did not refer as such to any institutional church, *establishment* is usually dated a few years later, at 1567.

It was in that year that Mary Queen of Scots was forced to abdicate and the Earl of Moray, a Protestant, became regent. The Acts of the 1567 Parliament ratified the abolition of the Pope's jurisdiction (c.3) and the Mass (c.5) and repealed Acts in support of the Papacy (c.4).

Besides, the Church Act 1567 (c.6) acknowledged the reformed church or Kirk as 'the only trew and haly kirk of Jesus Christ within this realme', the Coronation Oath Act 1567 (c.8) required all future monarchs to swear to protect the true church as established, and the Church Jurisdiction Act (c.12) recognised the Kirk's jurisdiction, while 'thair be na uther iurisdictioun ecclesiasticall acknowledgeit within this Realme'.

These Acts may fairly be regarded as betokening establishment, for they dealt with relations between church and state in a way that recognised the special status of the reformed Kirk. Indeed, the word is used in the Church Jurisdiction Act, which affirms that 'their is no uther face of Kirk nor uther face of Religioun than is presentlie be the favour of God establischeit within this Realme'. One matter not dealt with in 1567 was the form of church government, but the General Assembly Act 1592 (c.8) provided for a presbyterian form.

It would be wrong to regard these matters as clearly settled, however. For the next century, there was a history of struggles between the Church and the State, and between episcopacy (which was enforced at times) and presbyterianism. Some developments, including the victory of Cromwell's forces and the restoration of the monarchy in 1660, mirrored events in English history. Others, such as the persecution of the presbyterian Covenanters, were more local.

As in England, the revolution of 1688 allowed for a new constitutional settlement, in which the issue of religion was prominent. In the Scottish Parliament, the Claim of Right (1689) justified the revolution and set out the terms on which the throne was being offered to William and Mary, in a way which largely corresponded to the Bill of Rights in England. Other Acts reasserted the historic relations of church and state, along the lines of the 1567 Acts. Thus an Act abolished the prelacy (1689, c.4), another repealed the Act of Supremacy which Charles II had imposed in 1669 (1690, c.1), and another reinstated displaced Covenanting ministers (1690, c.2). Most importantly, the Confession of Faith Ratification Act 1690 (1690, c.7) secured the religion described as true, as Protestant, and as according to the truth of God's word, 'as it hath of a long time been professed within this land'. It also ratified the Westminster Confession of Faith, and gave approval to the presbyterian form of church government. This series of Acts may be regarded as the second foundation of the Church of Scotland and the *re-establishment* of the Church.

4. THE UNION AND AFTER

In 1705, encouraged by Queen Anne and prompted by diverse motives, the Parliaments of Scotland and England and Wales agreed to appoint commissioners to negotiate for a possible political union.[11] But, mindful of earlier struggles and previous interference, it was the Scots' intention to keep the religious settlement intact and untouched. Two

[10] The Parliament had not been summoned by the Crown, nor did Queen Mary assent to the laws.

[11] See generally C. R. Munro, 'The Union of 1707 and the British Constitution' in Patrick S. Hodge (ed.), *Scotland and the Union* (1994).

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means were used to that end. First, the Act appointing the Scottish commissioners (1705, c.50) expressly disallowed them from treating of any alterations concerning 'the Church of this kingdom as now by law established'. Secondly, another Act was passed to secure the Church's position. The Protestant Religion and Presbyterian Church Act 1706 (1706, c.6) or Act of Security was designed to be part of any treaty or agreement reached. It incorporated the 1689 and 1690 legislation by reference and also purported to 'Establish and Confirm the said True Protestant Religion and the Worship Discipline and Government of this Church . . .'.

When negotiations were successful, and the two Parliaments agreed to union, Acts were passed by each in turn to bring it about and, as envisaged, the Act of Security was incorporated.[12]

In fact, the Act of Security, by its own terms, was 'to continue without any alteration to the people in this land in all succeeding generations' and was 'a fundamentall and essentiall Condition of any Treaty or Union'. Similar phraseology, suggestive of permanence or a higher or fundamental law status, is found in some other provisions of the Acts of Union too, and also in the union legislation of 1800, when Great Britain was united with Ireland. But, according to orthodox constitutional theory, legislation purporting to bind future Parliaments is ineffective. The greatest of our constitutional writers, A. V. Dicey, considered that the Acts of Union afforded 'the strongest proof of the futility'.[13]

Certainly, there have been repeals and amendments of the union legislation of 1707, as well as of the 1800 provisions. Parts of the Act of Security were expressly repealed when nineteenth century legislation abolished religious tests for schoolteachers and university teachers.[14] But the British Parliament had much earlier and more controversially stamped its authority on the Church. The Scottish Episcopalians Act 1711 was a toleration measure, and the Church Patronage (Scotland) Act 1711 restored lay patronage. These were regarded in Scotland as violating the spirit of the union legislation, and the second—although it is a question of interpretation—probably violated the letter as well.

The ability of the civil authority to legislate for the church was thus exemplified by instances such as these, and could scarcely be questioned as matter of law. However, a different line was propounded in *The Second Book of Discipline*, an important exposition of Presbyterianism which had been formulated by Andrew Melville and approved by the General Assembly of the Church in 1578. There it was stated that the Church was independent of the civil authority, as its powers and authority were derived from God.

The collision of these doctrines was inevitable, if the civil authority continued to intervene in the affairs of the Church. Matters came to a head in the years from 1834 to 1843, and the immediate provocation lay in the chronic dispute over patronage (the right of a landowner or other individual to present a person to be the minister of a congregation). By an Act of the General Assembly in 1834 (the Veto Act), the Church purported to provide that no minister should be intruded upon a congregation contrary to the will of the people. However, its terms were inconsistent with the Act which the Parliament of Great Britain had enacted in 1711, against which it could not stand. The Court of Session decided by a majority of eight to five that the Veto Act was *ultra vires* of the Church, and on appeal the House of Lords agreed.[15] A similar pattern emerged in other litigation, and so it became abundantly clear that the Church's claim to final powers of legislation and of judicial determination of spiritual matters was not accepted by the state. The result was anathema, especially to the evangelical wing, but indeed to many, in the Church. At the

[12] The Scottish Parliament passed the Union with England Act 1707, then the English Parliament passed the Union with Scotland Act 1706. (The apparently inconsistent chronology is explained by the fact that Scotland had adopted the Gregorian calendar, while England did not do so until 1752, so that the year 1707 did not commence there until 25 March.)

[13] *An Introduction to the Study of the Law of the Constitution* (10th ed., 1967), p. 65.

[14] By the Universities (Scotland) Act 1853 and the Parochial and Burgh Schoolmasters (Scotland) Act 1861. More generally, see C. R. Munro, *op. cit.*, note 11 above.

[15] *Earl of Kinnoull and Rev. R. Young v. Presbytery of Auchterarder* (1838) 16 S. 661; (1839) McL & Rob. 220.

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1843 General Assembly, a large body of ministers and elders walked out in protest and on principle, and reconstituted themselves as the first Assembly of the Free Church of Scotland. The Disruption, as it was called, was to have profound effects on the relations of church and state.

5. THE SETTLEMENT OF 1921

After the disruption, the 'Moderates' who remained in the established church were those who accepted the jurisdiction of the civil authorities. Yet the general trend in the years which followed was towards a greater recognition of the freedom and principles which the secessionists had demanded, albeit effected through the agency of state legislation. Thus the Scottish Benefices Act 1843 enlarged the powers of a presbytery to entertain objections to a presentee, and the Church Patronage (Scotland) Act 1874 finally abolished patronage. The Church of Scotland Courts Act 1863 clarified the disciplinary functions of the Church courts, and section 5 of the Churches (Scotland) Act 1905 empowered the General Assembly to vary the formula of subscription required of ministers.

These changes went some way towards allowing the Church to govern its own affairs. But a more formal independence from state control and freedom to revise its own constitution in matters of doctrine, worship, government and discipline, would be necessary if a *rapprochement* with the Free Church were ever to be achieved. The Free Church, or rather a majority of it, joined with the United Presbyterians in 1900, to become the United Free Church. But a dissenting minority remained apart, and moreover was successful in litigation concerning the property and endowments of the Church.[16] Legislation was called for in order to resolve the issues more equitably, and the Churches (Scotland) Act 1905 created arrangements to that end.

Ironically, the 'free' church had also, therefore, become entangled with the civil authorities to an extent, just as the Church of Scotland was progressively disentangling itself.

The Church of Scotland was aiming to redefine its relations with the state and revise its constitution in a document which would pave the way for a reunion. After some years of discussion, some Articles were agreed, and a Bill was presented in Parliament, with the Articles (the 'Declaratory Articles') scheduled to it. The Bill became the Church of Scotland Act 1921, and union with the United Free Church was successfully concluded in 1929.

In the 1921 Act, there is recognition of the 'civil magistrate within his own sphere' and 'the jurisdiction of the civil courts in relation to any matter of a civil nature'. But the aim of the Act, as it was described by a judge in a later case, was 'to declare the right of the Church to self-government in all that concerned its own life and activity'.[17] The Act provided that, in so far as statutes and laws were inconsistent with the Declaratory Articles, they were repealed and declared to be of no effect, and that in all questions of construction the Articles were to prevail. The Articles declare that the Church receives from 'the Lord Jesus Christ . . . its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church . . .'.[18]

The term 'established' is not used in the 1921 Act, although the Declaratory Articles state that the Church is in historical continuity with the Church of Scotland which was

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[16] *Bannatyne v Lord Overtoun* (1902) 4 F 1083; [1904] AC 515.

[17] *Ballantyne v Presbytery of Wigtown*, (1936) SC 625, *per* Lord Justice-Clerk Aitchison at p. 654.

[18] Article IV. The efficacy of these provisions has recently been strongly affirmed, by the opinion of Lord Osborne in *Logan v Presbytery of Dumbarton* 1995 SLT 1228. In this case an attempt by a minister of the Church of Scotland to challenge by way of a judicial review petition his suspension, imposed by the Presbytery concerned, failed. The judge held that, as it was a matter of discipline, the civil courts had effectively been deprived of jurisdiction by the terms of the 1921 Act and the Church courts had exclusive jurisdiction.

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reformed in 1560. It is also declared that 'as a national Church representative of the Christian faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry'.

Generally, it is fair to say that the Act may be regarded as a *recognition* by Parliament of the Church's constitution, rather than as a *conferment* of a constitution. The underlying notion of co-ordinate jurisdiction of church and state, each supreme within its own sphere, was reinforced by the unusual feature that the Act (by its terms) could be brought into effect only on condition that the Church's General Assembly adopted the Declaratory Articles.

So it may be inferred that the settlement of 1921 marked a substantial departure from the previous relationship of church and state. It is for that reason that some members of the Church of Scotland, who accept that the Church from 1567 or 1690 to 1921 was 'established', regard the term as inappropriate or misleading when applied to the Church today, and prefer to speak of the 'national Church'.[19]

6. CONCLUSION: A CHURCH ESTABLISHED BUT FREE

It is certainly right to notice the significance of the 1921 settlement, and the change of tone which it represents had, of course, a special resonance in the light of Scotland's religious history.

But, if it is conceded that the pre-1921 Church was established, then we may scarcely regard the post-1921 Church as otherwise unless the Church of Scotland 1921 is regarded as a *disestablishing* measure, and it is difficult to view the 1921 Act in that light.

It must, of course, be acknowledged that the *form* of establishment in Scotland differs somewhat from that in England. If in some respects the Scottish Church's entanglement with the state is less (for instance, because the laws of the Church may be amended without the involvement of Parliament), the corollary is that it lacks some privileges which the Church of England has, such as representation in the House of Lords. Nevertheless, there are many parallels.[20]

The Church of Scotland was a creature of legislation, with the Acts constitutive of it found in the statute book, from 1560 onwards, and its security provided for in the Acts of Union. The Act of 1921 may be regarded not so much as constitutive, but rather as a recognition by the state of a concordat which allowed that the Church had its own sphere of jurisdiction, and the recent case of *Logan v Presbytery of Dumbarton*[21] strongly supports that view. But it is an Act of Parliament which sets out the relations of that church and the state, whereas there is no corresponding legislation found—or necessary—in respect of other churches. Moreover, clergy of the Church of Scotland and the Church of England only are disqualified from membership of the House of Commons under the House of Commons (Clergy Disqualification) Act 1801.

As already noted, the Sovereign's oath of accession includes a promise to preserve the position of the Church of Scotland. The Sovereign is also represented at meetings of the General Assembly, although his or her appointee (the Lord High Commissioner) attends not as a member, but as a guest symbolically seated in a gallery apart from the hall.

The Church's national role is denoted in various formal and ceremonial ways, and is demonstrated by its universal territorial jurisdiction in Scotland, where it has the right and the duty to minister to every parish. The law of the land incidentally recognises the

[19] I am grateful to the Very Reverend James Weatherhead, Principal Clerk of the General Assembly, who helpfully provided me with a full exposition of this view, and should not be taken to agree with my conclusions.

[20] On which, see further R. King Murray, 'The Constitutional Position of the Church of Scotland', 1958 *Public Law* 155, although there have been some changes in the law in some matters referred to. The same author, as Lord Murray, has written the section on 'Church and State' in the *Stair Memorial Encyclopaedia*, *op. cit.*, note 4 above.

[21] See note 18 above.

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Church's special status in some matters. For example, only Church of Scotland ministers are automatically entitled to solemnise a marriage, whereas other priests or clergy require approval under ministerial regulation.[22] Notarial execution of a will for a blind person may be carried out by Church of Scotland clergy, but no others.[23]

The Church's own courts are treated as courts of the realm, as the Court of Session has recognised. For example, in one case Lord President Inglis said:

> 'We are dealing with a presbytery, an established judicature of the country, as much recognised by the law as the Court of Session itself . . . it is just as much the creation of law as any other court in the Kingdom.'[24]

By contrast, other religious organisations fall to be treated as mere voluntary associations, and their rules and tribunals enjoy no special status or recognition in the law of the land.

We may see, therefore, that in a variety of ways the Church of Scotland has official recognition and a different status from other churches, and meets the requirements of our working definition of 'establishment'. Is it, to apply Walker's definition, 'a church legally recognised as the official Church of the state or nation and having a special position in law'? I believe that it is. Yet the acknowledgement by the state in 1921 of the Church's autonomy in its own sphere was undoubtedly significant, and may perhaps be viewed as an interesting model for a 'lighter' form of establishment, perhaps even an example to be emulated.[25] In the meantime, as elegantly summed up by Sir Thomas Taylor some forty years ago, 'The Scottish Kirk is an example of a thing that is rare, if not unique, in Christendom, a Church that is both established and free.'[26]

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[22] Marriage (Scotland) Act 1924, s. 18.

[23] Conveyancing (Scotland) Act 1924, s. 18.

[24] *Presbytery of Lewis v. Fraser* (1874) 1 R 888, *per* Lord President Inglis at p. 892. There are dicta to the same effect in the recent case of *Logan, Petitioner*, note 18 above.

[25] William Temple once wrote that: 'If the Church can win for itself, or the State is willing to bestow upon it, such freedom in spiritual matters as is enjoyed by the Established Presbyterian Church of Scotland, that is probably the best arrangement that can be devised.' (*Christianity and the State* (1928), p. 196.)

[26] T. M. Taylor, 'Church and State in Scotland', 1957 *Juridical Review* 121.

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