DISESTABLISHMENT: A HUNDRED YEARS ON

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To understand what disestablishment meant for Anglicans in Wales a century ago, one should perhaps describe 31 March 1920 as "Exit Day". Comparison with the United Kingdom's withdrawal from the European Union has some resonance. Anglicans did not want disestablishment; the Non-Conformist majority did. For decades, the issue had been divisive. Passions on both sides ran high. The Welsh Church Bill, which aimed to both disestablish and disendow the Church of England within Wales, was passed twice by the House of Commons in successive sessions of Parliament, only to be twice defeated in the House of Lords. On its third successful passage through the lower House, it proceeded forthwith for Royal Assent under the terms of the Parliament Act 1911. It was the first piece of legislation to do so, enacted in effect by the Commons alone, by-passing the House of Lords.[1]

By the time that the Welsh Church Act received Royal Assent and became law on 18 September 1914, the United Kingdom was at war with Germany. As a consequence, implementation was delayed, and disestablishment did not take effect until the last day of March 1920. By that time, feelings on both sides had been tempered, mainly as a consequence of the appalling loss of life across all denominations. Further legislation was enacted, to soften the effects of disendowment, in the shape of the Welsh Church (Temporalities) Act 1919. At Prime Minister David Lloyd George's behest, the bill for that Act is said to have been concocted by Welsh churchmen over a single week-end, and it is clear from Hansard that the Government minister introducing it in the House of Commons had no clue as to the purpose of some of its provisions.[2]

Many Anglicans had hoped that the delay might mean that disestablishment itself could be reversed. That did not occur. The then four Welsh dioceses of Llandaff, St Davids, Bangor and St Asaph ceased to be part of the Church of England on Wednesday, 31 March 1920. That Wednesday was the Wednesday of Holy Week, the week leading up to Easter. Disestablishment dawned in Wales as Anglicans prepared to observe Maundy Thursday, Good Friday and Easter.[3]

Disestablishment wrought a momentous change in the history of the Christian Church within Wales. The four Welsh dioceses had been part of the Province of Canterbury since the twelfth century – four hundred years prior to the English Reformation which saw the creation of the Church of England; four centuries before the incorporation of Wales into the realm of England by Henry VIII. Wales had been united with England ecclesiastically long before it was incorporated politically. That bond was severed by disestablishment.

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[1] Famously, during the Parliamentary debates, F.E. Smith, the future Lord Birkenhead, described it as "a bill which has shocked the conscience of every Christian community in Europe", a piece of hyperbole which provoked a famous poetic response from G.K. Chesterton in his *Antichrist: or the Reunion of Christendom: An Ode*. Hyperbole aside, there was no denying the issue's divisiveness. Another controversial bill received Royal Assent in accordance with the Parliament Act on the same day – the Government of Ireland Act 1914.

[2] See particularly Hansard, HC, Wednesday 6 August 1919, col. 460, when Mr Shortt for the Home Department said of the bill: "It makes absolutely no change in any of the principles or any of the fundamentals contained in the Act of 1914", which was certainly not the case regarding the *volte face* regarding marriages (clause 6).

[3] In my home parish of Cwmparc in the Rhondda, the event cruelly coincided with the death of the Vicar, the Reverend Thomas Tissington, within twenty-four hours of the date of disestablishment: see Mary and John Cynan Jones, "Our Parish: Part Two – Consolidation and Expansion", in the Parish of Cwmparc: St George's Church, *Newsletter*, January and February 2004.

What did this mean for the Anglican Church within Wales? All royal and other patronage regarding ecclesiastical appointments was terminated. All ecclesiastical corporations, whether aggregate such as cathedral chapters or sole such as bishoprics, were dissolved. Welsh bishops were no longer eligible to be among the four-and-twenty bishops with seats in the House of Lords, and Welsh clergymen – and men they would be for another sixty years – were no longer disqualified from membership of the House of Commons.[4]

Of more significance to the legal history of Wales was the termination of the jurisdiction of the ecclesiastical courts of the Church of England, and the concomitant cessation of ecclesiastical law as part of the law of the land within Wales. The words of the statute in this regard are very interesting. Section 3(1) reads:

> As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales [*by which is meant the Church of England within Wales*] shall cease to exist as law.

It is noteworthy that the Act does not state that the ecclesiastical law shall cease to apply in Wales but that it 'shall cease to exist as law' – an interesting phrase. To this day, the ecclesiastical measures of the Church of England, passed by its General Synod and subsequently approved by Parliament, are stated to *extend* to the provinces of Canterbury and York, that is they are only law within those English provinces; they are not law in Wales. It is not that as laws they do not *apply* in Wales, they are not law here at all. The distinction between application and extent will be familiar to all who have been involved in or followed the development of legislative devolution. The orthodox dogma is that as Wales is part of the single jurisdiction of England and Wales, it is not possible for laws to extend only to Wales – or for that matter only to England. It is possible for laws to *apply* only in one or other country, but as laws they are and must be law in both. Yet, because of disestablishment, when the Westminster Parliament has legislated on issues which affect the Church of England even when their effect is not limited to Church matters alone, it has sometimes expressed its legislative intention by saying that certain provisions "do not extend to Wales".[5] Even more striking perhaps is that the Church Assembly created by statute for the Church in England in 1919, and of which the General Synod is now the successor, was given legislative competence to make laws in the form of measures. The competence given was very broad, section 3(6) of the Church of England Assembly (Powers) Act 1919 stating:

> A measure may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including this Act:
> Provided that a measure shall not make any alteration in the composition or powers or duties of the Ecclesiastical Committee or in the procedure in Parliament prescribed by section 4 of this Act.

[4] Again, it is perhaps worth mentioning that the bishops' ineligibility to sit in the House of Lords did not lose them the courtesy title of Lord Bishop, such titles being meant to mirror in the spiritual domain modes of addressing peers and others in temporal affairs. Thus, archbishops, like dukes, were addressed as 'Your Grace', bishops like barons as 'My Lord', and – in Shakespeare's time and for some time later – parish priests were equated with knights, and accorded the courtesy title of 'Sir', well-known examples being Sir Hugh Evans in *The Merry Wives of Windsor* and the comic imposter Sir Topaz sent to guile Malvolio in *Twelfth Night*.

[5] For example in section 80(3) and the Sixth Schedule to the Marriage Act 1949, as originally enacted.

Granted, the approval of Parliament following scrutiny by the Ecclesiastical Committee is required before measures become law; nevertheless the competence given is very wide when compared with that given to the devolved legislatures currently, and there is no suggestion that it is limited to ecclesiastical law alone. Rather the established Church can legislate in relation to "any matter" concerning it. Yet, given that such measures only extend to the provinces of Canterbury and York, any such legal changes do not merely not apply to Wales, they do not extend to – that is they are not law in – Wales. The powers have been used to make alterations to provisions in Parliamentary statutes, such as the Marriage Acts, which provisions previously extended to England and Wales, leaving Wales subject to the unamended law with no mechanism for amendment short of an Act of the Westminster Parliament.[6]

The disestablishment legislation itself did not create any new ecclesiastical structures for the Church within Wales. Rather it was left to the Welsh Church itself to decide upon how it wished to organize itself following disestablishment. The delay to disestablishment occasioned by the Great War provided time for Anglicans in Wales to ponder how they wished to proceed following disestablishment. The dioceses jointly created a Convention, which resolved that the Welsh Church should form itself into a new province within the Anglican Communion, and should have its own Archbishop. The new entity took as its name the Church in Wales, which legally was an unincorporated association composed of the clergy and lay members of the Church. Lacking legal personality, the property of the Church in Wales fell to be held by trustees on trust for the charitable purposes of the members, who availed themselves of the opportunity afforded by section 13(2) to seek the incorporation by royal charter of the trustee body, which achieved legal personality as the Representative Body of the Church in Wales.

The 1914 Act also confirmed the freedom of the bishops, clergy and laity of the Church in Wales to elect representatives to, and hold, synods, whether as a whole or as separate dioceses, which could make "constitutions and regulations for the general management and good government of the Church".[7] Given that until the date of disestablishment, the Welsh dioceses had been subject to the ecclesiastical law of the Church of England but that law was no longer law in Wales, the Welsh dioceses ran the risk of finding themselves in a legal vacuum following disestablishment. The Act however prevented that by a mechanism which has again proved its worth in more recent times. Immediately after abolishing ecclesiastical courts and ecclesiastical law in Wales in section 3(1), it provided in the following subsection that the ecclesiastical law of the Church of England, as it stood on the date of disestablishment, should be binding on the members of the Church in Wales "in the same manner as if they had mutually agreed to be so bound".[8] In effect, therefore, a body of rules which could properly be described as 'retained ecclesiastical law' continued in force, in much the same manner as European law has been retained in the UK following withdrawal from the EU.[9] The difference was that in the case of disestablishment, retention was not as part of the law of the land, but as the rules of an unincorporated association, contractually binding on its members. Thereafter, it would be the members of the Welsh Church who would decide what changes to make to that body of retained rules; changes made by the Church of England to its ecclesiastical law would have no effect in Wales. This again anticipated by a century the position regarding retained EU law following Brexit.

[6] For example, the effects of the Church of England Marriage Measure 2008, discussed by Matthew Chinery in his paper following.
[7] Welsh Church Act 1914, s. 13(1).
[8] Ibid., s. 3(2).
[9] See European Union (Withdrawal) Act 2018, ss. 2–7.

Holding synods, electing representatives to them, and the general management and good government of the Church required a framework of additional rules within which this could be facilitated. Mechanisms to amend the inherited body of retained ecclesiastical law were also needed if that corpus was not to be set in stone. To this end, the Convention which preceded disestablishment saw the need for and commissioned a Constitution for the new province. The work of producing the Constitution was entrusted to three leading lawyers – a high court judge, Sir John Sankey, later to be Lord Chancellor, and two Lords Justices of Appeal, Sir John Eldon Bankes and Sir James Richard Atkin, the future Lord Atkin of Aberdyfi. They would become affectionately known in Welsh Church circles as 'the Three Wise men'. The Constitution which they produced provided for a Governing Body, with powers to make and amend canon law for the province, as well as for institutions of government at diocesan, ruridecanal and parish level. The Constitution also made provision for the election of diocesan bishops and, from among their number, an Archbishop, such elections being entrusted to an electoral college composed of the bishops and of clerical and lay members themselves elected by the dioceses. Within a few years of disestablishment, the number of Welsh dioceses was increased to six through the creation of the new diocese of Monmouth in 1921 and the new diocese of Swansea and Brecon in 1923. The Church in Wales' first archbishop was elected in 1920 – Bishop A.G. Edwards of St Asaph, great-uncle of a future Secretary of State for Wales, Nicholas Edwards, Lord Crickhowell – and the enthronement was conducted at St Asaph Cathedral by the Archbishop of Canterbury, Randall Davidson, providing an element of comity and continuity.

Law-making procedures within the Governing Body bore a distinctly parliamentary stamp. Whereas amendments to the Constitution generally could be achieved by simple motion, changes to faith, order, discipline, liturgy, doctrine and the inherited canon law required bill procedure, resulting in the making of a new canon. Bills were required to progress through three readings. As at Westminster, the first reading was title only without debate, although the full text of the bill had to be circulated to members in advance. The second reading was on the principles of the bill, at the end of which the question would be put as to whether the bill be read a second time. If the bill elicited the support of a simple majority of members at that stage, it would proceed to its Committee stage, when amendments of detail would be debated and voted on, prior to its third reading when the bill as amended would be debated without opportunity for further amendment. The question would then be put that the bill be passed, whereupon a two-thirds majority of those present and voting was required in each of the three orders into which Governing Body members were divided – bishops, clergy and laity. If a two-thirds majority was obtained in each of the three orders, the bill would be promulgated as a Canon of the Church in Wales. The whole process normally took about two years to complete, although in the last half-century more streamlined procedures have been devised to deal with uncomplicated or uncontroversial legislative proposals.

The Welsh Church Act also provided that the disestablished Church should be able to create ecclesiastical courts for itself, but if it did so the courts were not to 'exercise any coercive jurisdiction'.[10] A whole courts system was eventually established: archdeacons' courts to deal with parochial matters such as disputes over inclusion on electoral rolls; diocesan courts to deal mainly with applications for faculties to make alterations to church buildings or their contents, and a provincial court charged with dealing with very serious matters, such as complaints concerning conduct giving just cause for scandal or offence, or preaching or teaching doctrine contrary to that of the Church in Wales. The Welsh Church courts, as originally devised, paid full regard to the need for trial by one's peers. Charges of

[10] Welsh Church Act 1914, s. 3(3).

misconduct against bishops were therefore to go to a Special Provincial Court, and archbishops were to be tried by the Supreme Court, consisting of other Anglican archbishops from the British Isles or their nominees, nominees having to be persons holding or who had held high judicial office. Extreme as this structure may nowadays appear, it's worth remembering that at the time it was devised, peers of the realm charged with felony were entitled to be tried in the House of Lords.[11] The Supreme Court and the Special Provincial Court have since been abolished, and a Disciplinary Tribunal added to the Church's judicial armoury.

For a generation or more after 1920, disestablishment was regarded by many Anglicans as a disaster which had befallen the Welsh Church. As time went by, however, others began to view it as an opportunity, a grant of freedom, allowing the Church to become more Welsh than was feasible when it was a part of the Church of England. Some even saw disestablishment as a chance to re-engage with the Celtic roots of the nation's faith, and the creation of a Welsh province with its own archbishop as the fulfilment of the twelfth- and thirteenth-century campaigns of churchmen such as Giraldus Cambrensis, not to mention the dreams of Owain Glyn Dŵr.

I do not intend this evening, to explore the question of how Welsh the Church in Wales became or has become since disestablishment, partly because there is not enough time and partly because I hope to address the issue in a lecture to *Cymdeithas Carnhuanawc*'s annual *Ysgol Fore* early in March, courtesy of an invitation from the organizer, Keith Bush QC, for which I am grateful.

I will however note this. The Constitution was originally drafted in English, and remained in English only for roughly fifty years. Thereafter, it became a bilingual document, with all motions to amend it and all bills before the Governing Body being presented bilingually. By the time I became Legal Assistant in 1981, meetings of the Governing Body were bilingual with simultaneous translation available for members who were not bilingual. Motions and bills were therefore debated and passed, canons were enacted and made in both languages. Whereas the first Welsh version of the Constitution was a translation of the English text, by the 1980s the production of the text in each language paid due attention to the needs of the text in the other, with the Sub-Committee which scrutinized draft amendments and bills well in advance of their presentation to the Governing Body having skilled linguists as well as lawyers and theologians among its members. In my time, the Committee was blessed with the expertise of Dr Enid Pierce Roberts, following her retirement as Senior Lecturer in Welsh at Bangor. Also among the members in the 1990s was the Head of Legal Services at the Welsh Office, Mr David Lambert, whose recent death is greatly to be regretted.

Not surprisingly therefore, when the Welsh electorate narrowly voted in favour of devolution in 1997 and the need to prepare to make Assembly statutory instruments bilingually became apparent, David Lambert organized a series of discussions to consider how the Church's approach could be a model or could be adapted to the needs of the nation. When I assumed my post as First Welsh Legislative Counsel in 2007, I found in place methods of working to produce bilingual legislation which were very familiar, and among the legislative translators at least one former student of Dr Roberts at Bangor. Not for nothing does Professor Richard Rawlings in his work *Delineating Wales* write that at the time of devolution "the practical experience of legislative drafting in Welsh… had been largely

[11] For example as portrayed in the brilliant comedy, *Kind Hearts and Coronets*. The privilege was abolished by the Criminal Justice Act 1948, s. 30, and had last been exercised in 1935 when a peer was acquitted on a charge of manslaughter consequent upon a road accident.

confined to ecclesiastical law in the guise of the Constitution of the Church in Wales".[12] Tellingly, André Labelle, a former Chief Jurilinguist and Legislative Counsel with the Federal Government of Canada, a country whose co-drafting of laws was much lauded at the time of devolution, wrote of the Church in Wales' approach to producing bilingual legislation: "Had that been the case with the translation of Canadian Federal legislation, there might not have been any need for co-drafting in Canada".[13]

In several ways, therefore, the Church in Wales would appear to have anticipated and to some degree influenced post-devolution law-making in Wales. Regrettably, however, its own law-making has not kept pace with the changes which devolution has occasioned to law-making in Wales. Almost a decade after devolution, in 2009, the Church promulgated a revised version of its Constitution, for which I was subsequently commissioned to produce an Index. What I found was disheartening. The English version continued to be expressed in a legislative style which did not accord with that of Assembly and Welsh Government legislation, and the Welsh version did not accommodate the advances in the legal register of the language which devolution had brought about. Although both versions had been promulgated together, for the purpose of interpretation and the resolution of ambiguities, the English version was still stated to be the definitive text.[14] I was forced to comment that the English version was "more akin to law made for England than law made for Wales" and that the Welsh version had "not kept pace with the development of the language for legal purposes" and was "out of step, both in terms of its style and its terminology, with official legal Welsh". I expressed regret that the Church "having led the way in legislating bilingually and developing the techniques for doing do so, …[was] now lagging behind and failing to keep up" with Welsh legal developments generally.[15]

Ironically, therefore, during the twentieth century, disestablishment gave the Church in Wales opportunities which it took to anticipate the needs of legislative devolution, but in the first decade of devolution, in its own legislative activity, it seemingly regressed, despite having leaders who were in the vanguard of campaigns supporting devolution. It is to be hoped that the next hundred years will see the Church and our national institutions, both sacred and secular, embrace the opportunities afforded by greater self-determination to consolidate their positions to become bodies which are 'of' as well as 'in' Wales.

[12] Richard Rawlings, *Delineating Wales* (Cardiff: University of Wales Press, 2003), p. 257.

[13] André Labelle, "Whatever Happened to Legislative Translation in Canada?", (2016) 37(2) *Statute Law Review*, 133, at 134–135.

[14] The Constitution of the Church in Wales, Volume I, chapter 1, section 1(3). The previous subsection reads: "The English and Welsh versions of the Constitution shall have equal validity", only to be followed by "For the purpose of interpretation and for the resolution of any ambiguity, the English version shall be the definitive text" – a combination of statements which I have described elsewhere as "somewhat Orwellian".

[15] Letter from the author to the Head of Legal Services, Church in Wales, dated 16 January 2012.