The Church in Wales and the devolved Constitution
Matthew Chinery
Head of Legal Services, Church in Wales

Paper delivered to Public Law Wales webinar 28/01/2021

Thank you for your welcome, and for the invitation to speak this evening, which is daunting on a number of levels. My undergraduate public law tutors would find it equally amusing and alarming that I am lecturing anybody on matters of public law and I am a newcomer to issues surrounding devolution – the latest in that line of meddling Englishmen that made the call for disestablishment so irresistible. In following Professor Watkin I stand on the shoulders of the tallest of giants in both public and ecclesiastical legal realms. Finally, it is rather unusual to be speaking in the presence of ones regulator, although I cannot pretend that my workload as a Notary Public for Ecclesiastical Purposes only is a heavy one – I hope the Master of the Faculties will never have cause to be troubled by my conduct in the occasional certification of the election or consecration of a Bishop, which appear to be the extent of my duties in that role.

Before life in the Church in Wales I had spent just over 10 years in private practice – nine of those working almost exclusively with various constituent bodies of the Church of England and before that six months working for a team of Parliamentary Agents dealing with private and hybrid bills. This left me with a rather Diceyan view of the law – that the answer to all difficult questions is an Act of Parliament, or at the least, a Church of England Measure.

My favourites were always the series of legislation known as the Church of England (Miscellaneous Provisions) Measures – although I'm reliably informed that the abbreviation MPM better stands for "more previous mistakes". Several times each decade, legislation quietly makes its way onto the books with a series of seemingly disparate and unrelated provisions which can make significant changes (albeit limited in scope) to the law, to the general benefit of the Church of England. To take but one recent example of particular interest to Landlord & Tenant lawyers, by section 12 of the 2020 Miscellaneous Provisions Measure the Church of England has granted the power for certain church bodies validly to grant leases to themselves, creating an exception to the rule set down by the House of Lords in *Rye v Rye* which applies to everybody else. Even better, the section applies retrospectively, to regularise leases previously purportedly granted.

I feel that I arrive in Wales with similar expectations of the Church from the Welsh population as the English have for the Church of England, but without many of the levers – particularly legal and governmental levers - to pull.

When I say similar expectations, the first point I would make is that I no longer think Wales is substantially less "Anglican by default" than England, in stark contrast to the position in the early 20th Century. Admittedly this is entirely due to the collapse in those identifying as Anglican in England rather than any sort of revival in Wales! Secondly (and I'm sure that this will be the most controversial thing I say), but if anything one can attempt to make a *better* argument now for the Church in Wales's positioning as a national church than the antidisestablishmentarians could in 1920 – whilst our numbers of ministers may be much lower than then, and services every week in every village may be forever gone, we still seek and mostly succeed to maintain a Christian presence in every community in Wales, in a way that other denominations largely no longer can.

The mutual hostility between denominations of years gone by appears much reduced. One hundred years ago it was unthinkable that, upon closure of the village chapel, the remaining congregation would be content to start worshipping at the village church. But that is a story we are now hearing more and more often. I do not make these sweeping and perhaps provocative statements as some sort of pitch for re-establishment, but rather to note my observation that, at the grass roots, the day-to-day life of the established church and the disestablished church is rather more similar that I perhaps had been anticipating on my arrival.

Clearly, the main areas where we act as an established or, perhaps, quasi-established church are marriage and burial. With regards to marriage, disestablishment did not abolish the historic common law right of residents to be married in their local Anglican parish church. There are good arguments that perhaps it should have. The 1912 draft of the Welsh Church Bill included provision for its abolition, but the Act as passed did not and here we are.

Therefore, unless restricted by statute (as is the case, currently, for same-sex marriages, of which more later), this common law right continues. On the face of the Marriage Act 1949 we are treated identically to the established Church of England and very differently from all other faith groups. There are only two references to the Church in Wales in the text of the act, a specific provision in relation to the marriage of transgender persons in section 5B, and a general provision in section 78(2) which reads *"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"*. A lot of procedural complexity hides behind that deceptively simple statement.

Thomas has already touched upon the difficulties faced by the Church in Wales in seeking changes to Marriage Law. In 2008 the Church of England, by Measure, relaxed some of the restrictions regarding which churches couples could get married in (extending the right, for example to a church where your parents got married, or a parish where you used to live). But the Church of England, as we have heard, cannot legislate for Wales, and the Church in Wales cannot legislate for itself. When the Church in Wales wished to introduce the same provisions it had to rely upon members of the Westminster legislature to introduce a Private Member's Bill. Fortunately, both parliamentary time and suitable volunteers were found (it helped that the Chairman of the Representative Body was a member of the House of Lords!). Without such goodwill in Westminster, the law of marriage in the Church in Wales would be frozen as at 1949.

On the 11th of December 2012 the UK Culture Secretary announced that the Church of England and the Church in Wales would be "banned" from conducting same-sex marriages. This was in contrast to all other faith groups, who would be permitted to opt in to offering such ceremonies. Judging by the comments of the Archbishop of Wales reported by the BBC the following day, this announcement came as something of a surprise to the Church in Wales. It also came as a surprise to those who understood disestablishment as freeing the Welsh Church from this sort of Erastian interference in a doctrinal matter. Such a ban would not be an insurmountable problem for the Church of England, which has the legislative competence to remove this legislative ban by passing primary legislation overturning it. The Church in Wales, of course, does not.

From a purely legal standpoint I quite understood the draftsman's quandary – the common

law right to be married in one's local church would have, on the face of it, extended to same-sex couples if the legislation had been silent on the point. That being so, enabling the Church in Wales to conduct such marriages would also have been forcing it to, and therefore also trespassing on doctrinal affairs.

The solution eventually reached was rather an elegant one. The prohibition remains on the face of the legal text, but if the Governing Body of the Church in Wales resolves to request it, section 8 of the Marriage (Same Sex Couples) Act 2013 empowers and requires the Lord Chancellor to make provision by Order for the legalisation of same-sex marriage in the Church in Wales.

The Governing Body is yet to make such a request, although I should note that a Bill to make provision for the liturgical *blessing* of civil same-sex marriages and civil partnerships is before the Governing Body for consideration at its meeting in September 2021.

A general power for the Lord Chancellor (or, perhaps in future, the Welsh Ministers) to make similar provision by Order for other areas of Church in Wales marriage law might be equally elegant way to avoid the necessity for Private Members' Bills in future.

We await the Law Commission's final proposals for the reform of marriage law later this year, and the Westminster Government's reaction to the proposals. It seems that significant deregulation is likely, but the Commission has given no indication that they propose reform to the common law duty of the Church in Wales to marry its parishioners. Our response to the consultation makes clear that certain forms of deregulation *without* reform of the common law duty may present some hidden difficulties. Any revised laws would, we say, need to make explicit provision (for example) for the Church to be permitted to regulate the form of service or content of the ceremony. This is because the law of the Church in Wales (whether consisting of the pre-disestablishment ecclesiastical law or the small L law passed since by the Governing Body) binds only the members of the Church in Wales, as made clear in the Welsh Church Act. Such law does not, therefore, bind non-members who wish to exercise their legal right to get married in the Church in Wales. We would need some 'hook' in civil law on which to hang our reasonable requirements about the conduct of weddings in our churches, even if non-members have a right to be married within them.

Marriage law, of course, is currently not devolved. Burial law brings us much more squarely into devolved matters. It is an area where the Church in Wales serves – or perhaps more accurately wishes it could serve – the entire community. Again, a pre-disestablishment common law right is in play here – residents of all faiths and none have a legal right to burial in the parish churchyard (if it is open for burials). In England, there is a financial *quid pro quo* for this legal right. The church, at its own expense, maintains the burial ground until it is full. The taxpayer takes responsibility for the maintenance of it once full and closed for future burials, under *s215 Local Government Act 1972*.

Not so in Wales. At the point of disestablishment (and I recklessly simplify the following for brevity, with apologies to the historians amongst us) the intention was for the Welsh Church Commissioners to transfer Church in Wales burial grounds to the local authorities. In the vast majority of cases, the local authorities refused to accept these transfers. This crisis – and reading some of the Hansard records, it clearly was seen as a crisis – was not resolved for over a quarter of a century, until the Representative Body agreed to take responsibility for the upkeep of these churchyards. Reading the contemporary papers it

seems that this was done on the back of a surge of naïve optimism, largely unsustained by subsequent events, that the civil authorities would provide financial assistance on a voluntary basis. And so the Welsh Church (Burial Grounds) Act 1945 came into being, in which the hitherto common law right for all residents of all faiths to burial in the churchyard was placed on a statutory footing.

Primarily, I think, to ensure compliance with this duty, the act also required the Representative Body's regulations for management of the Welsh Churchyards to be approved by the Home Secretary (a responsibility which passed to the Welsh Ministers at devolution). Ever since then, the respective parties have assumed that civil approval is needed, not only for the Regulations, but also for the *fees* charged for an interment in the Churchyard. I happen to be of the view that this interpretation of the 1945 Act is quite possibly wrong, but until today I have not been brave enough to say that publicly and it may be a while longer before I am brave enough to do anything about it. That aside, the position today is that the Church in Wales has its burial fees regulated by Government, whilst nobody else does – even the local authorities can change whatever they like. It will not surprise any of you that the regulated Church fees are much lower than the unregulated local authority fees. It costs £482 to bury a body in a Church in Wales churchyard. This compares with (and I promise I looked up two local authorities entirely at random) £1935 for a burial in a local authority cemetery in Swansea and £1500 in Monmouthshire.

To state the obvious, once a churchyard is full, burial fees dry up, but the costs of maintenance do not. The Representative Body simply cannot afford to continue with this way of doing things. Therefore it currently is not opening any new burial ground unless the local church community can commit an endowment fund sufficient to fund the maintenance of it in perpetuity (factoring in burial fees). With investment returns currently being what they are, these endowments cannot be raised and we are therefore not opening any new burial grounds. Because we are not opening any new ones, those we do have are fast running out of space. The lack of burial space is becoming critical in Wales and I cannot imagine that the excess deaths of 2020 have helped the position. The Church in Wales can and would love to be a major part of the solution, but it will need help in doing so.

I don't want to talk much further about money, but I would briefly observe that crunch times will also soon be coming with much of our built heritage. The Church in Wales holds 29% of all the Grade I listed buildings in Wales, and a large proportion of Grade II and II* buildings too. Volunteers at local level do a phenomenal job in maintaining these, but I think we have to be realistic in saying that not every church will reopen when the pandemic has passed. The Representative Body may, with partners, find appropriate alternative uses for some of these, and we are being increasingly creative in looking for these. The charity the Friends of Friendless Churches does incredible work in taking care of some 27 of Wales' most important closed churches on a shoestring budget. But a Welsh version of the Churches Conservation Trust (essentially a joint venture between the Department of Culture Media & Sport and the Church of England) would, with modest funding, make a world of difference to some of our nation's most important historic heritage assets. It may not be the most fashionable of causes and this may not be the best of times to seek funding for unfashionable causes, but we will miss these buildings if they fall into ruin and we do not have long to find a solution.

I may be dreaming with these aspirations, not least because we cannot begin to compete with our English big brother on influence in the corridors of power – we don't have a

parliamentary engagement team and we don't have any Bishops in the Senedd! But we do what we can and the pandemic has, I think, brought us closer to our colleagues in Cathays and Cardiff Bay than at any point in recent memory. Their detailed engagement with us on COVID has been hugely appreciated by us and – I think – our engagement has been much appreciated by them. This can only bode well for what is after all a shared aim between us of serving our communities and building up the common good.

As I gently begin to wrap things up I'd like to expand on and react to a couple of things I have heard from our previous speakers – and in doing so I am most grateful to them for advance sight of their materials.

Morag spoke about the faculty jurisdiction in England and her key role in it. I should note that her appellate jurisdiction extends, just, into Wales, because a small part of Wales remains in the Church of England. By my count there are at least 11 Church of England churches in Wales, including one Grade I and two Grade II* buildings. This is because the parishes that straddled the border of England and Wales were given a referendum in 1915 as to whether they wished to remain in the Church of England or join the Church in Wales. All but one voted for England. These polls are of significant historic interest, not only as an early example of universal suffrage in a UK election, but as a relevant legal precedent for the second EU referendum that never was – two of the nineteen polls were deemed too close to call, with the voting rerun the following March!

If the border parishes arrangements already sound complicated, remember that the subordinate legislation for listed building control is devolved, including the regulations that scope and define the ecclesiastical exemption from local authority oversight. The exemption operates quite differently in Wales than in England – the statutory consultees are different, the exemption does not extend to conservation area consent in Wales, and so on. I do hope the Diocesan Chancellors (the Consistory Court judges) keep a careful list of these eleven churches and remember when to apply the Welsh rules.

To run the risk of being struck off the list of Notaries for insubordination, I cannot justify - logically or ecclesiologically - the Archbishop of Canterbury retaining legal jurisdiction over Welsh church marriages when his jurisdiction over all other Welsh church matters was abolished a century ago. <u>But it works</u>, and the last ten months have proved that beyond any doubt. If it had not been for Morag's team at the Faculty Office and a sixteenth century statute, people would have died, or gone into hospital for risky surgery, or been deployed to active military service, without having fulfilled their wish of being married. That's an jurisdictional anomaly that I can happily tolerate, and moving forward I hope the Law Commission can tolerate it too.

I think Thomas's comments on our Constitution are entirely fair. Luke Chapter 11, verse 52 remains a popular verse – "Woe unto you, ye lawyers" – and I am not sure that the Church has shown enough love and care to its Constitution – and its laws in a wider sense - for some considerable time.

I also do not think it is sustainable for much longer for our key legal textbook to be *Cripps Law relating to the Church & Clergy*, published in 1921, but it remains the book I refer to more than any other. This is because the Constitution is, essentially, only a supplementary document; our primary body of law remains the law of the Church of England as it stood on the 31st March 1920. My own view is that we eventually will need to codify and that would

be an unmissable opportunity to codify truly bilingually. It would be a huge undertaking, and there is no army of draftsmen awaiting my orders. I'm prepared to concede that the events foreseen by the book of Revelation might beat me to the punch. But I'm not entirely without hope that it can happen.

I will end with a quotation from an article written Dr Nicholas Roberts in the Ecclesiastical Law Journal – and it is good to welcome some familiar faces from the Ecclesiastical Law Society tonight. He said:

> *"a disestablished church can rarely, if ever, enjoy the same legal status as church which has never been established, as it will always be bound by the terms of the statute by which it was disestablished, and any reforms involving a change to those terms will require further primary legislation. One speaks of 'established' and 'non-established' churches; but the disestablished church will inevitably occupy a position between the two.*

Such a position is a fascinating, if sometimes slightly awkward, place to be.