

# LAW MAKING AND THE CHURCH IN WALES

Norman Doe

Like other religious organisations, the Church in Wales is regulated by two broad categories of law: the (external) law of the State and the (internal) law of the church. This short paper sets out the fundamentals of the position of the Church in Wales under State law and its consequences for law-making for the church by the State and its institutions (e.g. Parliament, Courts, National Assembly for Wales and Welsh Government) and for law-making within the church (by e.g. its Governing Body).

## 1. The Welsh Church Act 1914: Disestablishment and Ecclesiastical Law

*The foundation of the Church in Wales resulted from the disestablishment of the Church of England in Wales under the Welsh Church Act 1914. The ecclesiastical law of England and Wales ceased to apply to the Church in Wales as the law of the land, but some elements of it continue to apply as such (e.g. marriage and burial).*

The foundation of the institutional Church in Wales under State law followed the disestablishment of the Church of England in Wales by Parliament in 1920 through the Welsh Church Act 1914. Until 1920 ‘the Church of England and the Church in Wales were one body established by law’.<sup>1</sup> On the day of disestablishment (31 March 1920), the Church of England, in Wales and Monmouthshire, ceased to be ‘established by law’ (s. 1): no person was to be appointed by the monarch to any ecclesiastical office in the Church in Wales; every ecclesiastical corporation was dissolved; Welsh bishops ceased to sit in the House of Lords; and bishops and clergy were no longer disqualified from election to the House of Commons (ss.1, 2, 3).<sup>2</sup>

The 1914 Act also 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 (s. 3(1)). Before 1920, the ecclesiastical law, applicable to the established Church of England in Wales, formed part of the law of the land: ‘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>3</sup> However, this ecclesiastical law (found in both State-made and church-made law) did not lose all its authority for the Welsh Church. The 1914 Act provides that pre-1920 ecclesiastical law continues to apply to the Church in Wales as if its members had assented to it (s. 3(2)); this is what might be styled the statutory contract of the Church in Wales. This was to fill the juridical vacuum left by disestablishment, and to ensure a degree of continuity. The 1914 Act does not define ‘ecclesiastical law’, but various definitions exist in case-law: e.g. ‘the term “ecclesiastical law” means the law relating to any matter concerning the Church of England administered and enforced in any court’ (temporal or ecclesiastical).<sup>4</sup> Moreover, some ecclesiastical laws continue to apply to the Church in Wales as part of the law of the land - the so-called ‘vestiges of establishment’ (e.g. on marriage and burial: see below).

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<sup>1</sup> *Re Clergy Corporation Trusts* [1933] 1 Ch 267.

<sup>2</sup> See N. Doe, *The Law of the Church in Wales* (University of Wales Press, Cardiff, 2002), Ch. 1.

<sup>3</sup> *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446.

<sup>4</sup> *AG v Dean and Chapter of Ripon Cathedral* [1945] Ch 239.

## 2. The Self-Governance of the Church in Wales

*The Welsh Church Act 1914 provides for the freedom of the Church in Wales to govern itself by means of its own system of law. This includes the power to alter the pre-1920 'received ecclesiastical law' and create new 'enacted ecclesiastical law'.*

The 1914 Act provides for the self-government of the Church in Wales: its freedom to set up its own system of government and law. 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 them, nor the framing in such manner as they think fit 'constitutions and regulations for the general management and good government of the Church in Wales', its property and affairs (s. 13(1)). The power (by means of a constitution and regulations) to alter ecclesiastical law includes the power of alter such law so far as it is contained in any Act of Parliament forming part of the pre-1920 ecclesiastical law (s. 3(4)). The Constitution of the Church in Wales lists pre-1920 statutes which have been dis-applied by the church since 1920 and it classifies the pre-1920 terms of its statutory contract as the 'received ecclesiastical law', and those created by the church and its institutions since disestablishment (its post-1920 instruments) as the 'enacted ecclesiastical law'. However, again, several 'vestiges of establishment' remain today for the Welsh Church: the duty of its clergy to solemnize the marriages of parishioners, the right of parishioners to burial in the churchyard, and the duty of the church to provide for prison chaplains (see below).

## 3. The Legal Nature and Position of the Church in Wales

*The Church in Wales has been classified by State courts as 'disestablished', as 're-established', and as a 'voluntary association' (without legal personality). It may also be classified legally as a 'religious organisation' and, for the purposes of the vestiges of establishment (marriage, burial, prisons) as 'established' or 'quasi-established'.*

The legal nature and position of the Church in Wales may be approached from two perspectives. From the ecclesiastical perspective, 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>5</sup> In the wider ecclesiastical context, the Church in Wales is also an autonomous member of the global Anglican Communion, a fellowship of churches in communion with the See of Canterbury, with its own system of canon law.<sup>6</sup>

From the secular perspective, State law contains several 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>7</sup> Secondly, the Church in Wales is sometimes classified as a 'disestablished church',<sup>8</sup> but, technically, it was the Church of England that was disestablished in 1920, not the new institutional

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<sup>5</sup> Book of Common Prayer 1984, 692.

<sup>6</sup> See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1996) Ch. 1.

<sup>7</sup> *Re Barnes, Simpson v Barnes* [1930] 2 Ch 80.

<sup>8</sup> *Representative Body of the Church in Wales v Tithe Redemption Commission and Others* [1944] 1 All ER 710 at 711.

church coming into being as a result of the WCA 1914.<sup>9</sup> The WCA 1914 itself provides that this was ‘An Act to terminate the establishment of the Church of England in Wales and Monmouthshire’. Thirdly, it has also been said judicially that the object of the 1914 Act was ‘to re-establish the Church in Wales on a contractual basis’.<sup>10</sup> The institutional Church in Wales was indeed founded as a direct result of the legislative activity of civil power. Given the vestiges of establishment (e.g. marriage, burial) the Church in Wales may be classified as ‘established’ (or ‘quasi-established’) for these purposes. Fourthly, the State courts treat the Church in Wales as a consensual society classified in law, like non-established religious organisations, as ‘a voluntary organisation of individuals, held together by no more than the contract implied by their mutuality’.<sup>11</sup> Consequently, ‘the Church in Wales is a body whose legal authority arises from consensual submission to its jurisdiction’; it 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>12</sup> namely, organised ‘as a matter of agreement between the persons who are members of that body’.<sup>13</sup> Thus, being an unincorporated voluntary association, the Church in Wales has no separate legal personality, though institutions within it do (e.g. Representative Body: see below).<sup>14</sup> Finally, the church is also a ‘religious organisation’ enjoying religious freedom under the European Convention on Human Rights.<sup>15</sup>

#### 4. The Bodies of Law Applicable to the Church in Wales

*The Church in Wales is regulated by two bodies of law: external and internal. State law is found in e.g. Acts of Parliament, secondary legislation, the common law, European law, and legislation of the National Assembly for Wales. Church law is found in the Constitution and other regulatory instruments of the Church in Wales.*

**State Law:** External State law applying directly or indirectly to the Church in Wales is found in: UK primary legislation enacted by the Parliament;<sup>16</sup> secondary legislation;<sup>17</sup> the common law (judicial decisions); and European Union law.<sup>18</sup> The National Assembly for Wales and Welsh Government have competence over, e.g. religious education (to be mainly Christian); agreed religious education syllabuses; daily acts of collective worship (to be broadly Christian); rights of parents and teachers to opt out of religious education and worship; the functions of a SACRE on religious education and worship; the religious rights of children in care; health care (including spiritual

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<sup>9</sup> *Re MacManaway* [1951] AC 161 at 165 (*arguendo*).

<sup>10</sup> *Powell v Representative Body of the Church in Wales* [1957] 1 All ER 400 at 403.

<sup>11</sup> *R v Dean and Chapter of St Paul’s Cathedral and Church in Wales, ex parte Williamson* (1998) 5 EccLJ 129.

<sup>12</sup> *R v Provincial Court of the Church in Wales, ex parte Revd. Clifford Williams* (1999) 5 EccLJ 217.

<sup>13</sup> *Re Clergy Orphan Corporation Trusts* [1933] 1 Ch 267.

<sup>14</sup> The Representative Body is incorporated by royal charter under the WCA 1914; the Governing Body is recognised as an ‘appropriate authority’ under the Sharing of Church Buildings Act 1969.

<sup>15</sup> The Human Rights Act 1998 itself employs the category ‘religious organisation’ (s. 13).

<sup>16</sup> E.g. Welsh Church (Burial Grounds Act) 1945 and Ecclesiastical Courts Jurisdiction Act 1860. By constitutional convention Parliament does not legislate for the Church of England without its consent: Lord Sainsbury, 19 July 2005, GC 192-193; *quaere*: does this apply to the Church in Wales?

<sup>17</sup> E.g. Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994 (now the responsibility of the National Assembly for Wales).

<sup>18</sup> E.g. as one of those ‘churches’ with which ‘the Union shall maintain an open, transparent and regular dialogue’: EURT Art. 17.3; see N. Doe, *Law and Religion in Europe* (Oxford, 2011) Ch. 10.

care in hospitals); ecclesiastical exemption; burial grounds and fees.<sup>19</sup> In the exercise of such functions the Assembly and Government cannot violate religious freedom.<sup>20</sup>

**Church Law:** The principal legislator for the Church in Wales is the church itself and its institutions (principally, its Governing Body composed of bishops, clergy and laity). The regulatory instruments of the Church in Wales (created by the church for itself under the freedom provided for it in the WCA 1914, s. 13) fall into four broad categories: (1) the Constitution of the Church in Wales (composed e.g. of chapters, canons, rules and regulations made by or under the authority or with the consent of the Governing Body of the Church in Wales); (2) pre-1920 ecclesiastical law, which continues as part of the statutory contract under the WCA 1914 unless modified or dis-applied by the church (WCA s. 3),<sup>21</sup> as post- 1920 ‘enacted ecclesiastical law’ prevails over pre-1920 ‘received ecclesiastical law’;<sup>22</sup> consequently, sources of pre-1920 ecclesiastical law which continue to bind the church, to the extent that they do not conflict with the Constitution or have not been dis-applied or abrogated since 1920, include: Acts of Parliament;<sup>23</sup> judicial decisions of the ecclesiastical and secular court;<sup>24</sup> the Canons Ecclesiastical 1603/4; and pre-Reformation Roman canon law;<sup>25</sup> (3) extra-constitutional legislation;<sup>26</sup> and (4) ecclesiastical quasi-legislation (such as codes of practice). Some instruments made by the church (once approved by the State) have the status of secondary legislation under civil law.<sup>27</sup> The purpose of these internal laws is to facilitate and order the life of the Church: ‘The Constitution [of] the Church in Wales exists to serve the sacramental integrity and good order of the Church and to assist it in its mission and its witness to the Lord Jesus Christ’.<sup>28</sup>

## 5. The Status and Enforceability of Church Law in Civil Law:

*The internal law of the Church in Wales has the status in civil law of the terms of a contract binding on its members. Its internal law is enforceable in (a) the State courts in relation to property and rights under civil law (with the effect that State courts make law for the Church in Wales); and (b) the courts and tribunals of the Church in Wales but these exercise a voluntary jurisdiction not a coercive jurisdiction.*

One effect of the nature in civil law of the Church in Wales is that its internal law (both pre- and post-1920) has the status of a contract entered by the members of the church: ‘It is binding upon all members of the Church in Wales, both clerical and lay,

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<sup>19</sup> Hill, Sandberg, and Doe, *Religion and Law in the United Kingdom* (Kluwer, 2011) par. 167-172.

<sup>20</sup> Government of Wales Act 1998, s. 107; Government of Wales Act 2006, ss. 81 and 94(6).

<sup>21</sup> The Church in Wales Constitution, I.5, lists UK statutes which no longer apply to the church (e.g. the Clergy Discipline Act 1892); also: ‘the Courts of the Church shall not be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial’; so, pre-1920 ecclesiastical law ‘shall be binding on the Members’ of the church ‘in so far as it does not conflict with anything contained in [its] Constitution’.

<sup>22</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 17.

<sup>23</sup> E.g. Sacrament Act 1547.

<sup>24</sup> E.g. *R v Dibdin* [1910] P 57: on admission to Holy Communion.

<sup>25</sup> If not repugnant to the royal prerogative, laws, statutes and customs of the realm (Submission of the Clergy Act 1533, s. 3); *Bishop of Exeter v Marshall* [1868] LR 3 HL 17: it is incorporated as custom.

<sup>26</sup> I.e. that which is not contained in the Constitution of the Church in Wales, such as Standing Orders of Governing Body, and cathedral constitutions, statutes, ordinance and customs, diocesan decrees.

<sup>27</sup> E.g. the Governing Body may authorise rules made by e.g. the Representative Body (e.g. Rules made under the Welsh Church (Burial Grounds) Act 1945, s. 4(2) and approved by the National Assembly).

<sup>28</sup> Constitution of the Church in Wales, Prefatory Note.

but not upon the people of Wales generally, and, in common with the rules of other voluntary associations, it is enforceable in certain circumstances in the civil courts'.<sup>29</sup> Pre-1920 ecclesiastical law, whilst 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, '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>30</sup> Its post-1920 law (not being modifications to the pre-1920 ecclesiastical law), has the same status: a church 'in places where there is no Church established by law, is in the same situation with any religious body...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>31</sup>

Consequently, generally, the domestic law of the Church in Wales is enforceable in the civil courts as a matter of private law and sometimes as a species of public law (e.g. when approved by the Assembly).<sup>32</sup> Under the WCA 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>33</sup> The same applies to new post-1920 law (not being modifications or alterations to the pre-1920 ecclesiastical law) dealing with property; '[t]he law imposes upon [a] church a duty to administer its property in accordance with the provisions of [its] book of rules'.<sup>34</sup> Moreover, in non-property cases, domestic church law may be enforced in civil courts when breaches of it within the church result in the violation of a right or interest under civil law.<sup>35</sup> So, its internal law is inferior to the law of the State: 'the Church in Wales remains bound by the secular law of England and Wales'.<sup>36</sup> However, if a State court entertained a challenge to the domestic law of the church,<sup>37</sup> the court must have particular regard to the importance of the right of freedom of religion.<sup>38</sup> Indeed, it would be unlawful for

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<sup>29</sup> Constitution of the Church in Wales, Prefatory Note and I.2: 'The Constitution shall be binding on all Members of the Church in Wales, as defined in Part II of this Chapter'.

<sup>30</sup> 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 6: as to a property matter, Greene MR speaks of the 'quasi-contractual obligation enforceable in the temporal courts'.

<sup>31</sup> *Long v Bishop of Cape Town* (1863) 1 Moo NS 411; *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323: 'The church is...an unincorporated body of persons who agree...to practise the same doctrinal principles by means of the organisation and in the manner set forth in the constitutional deed'.

<sup>32</sup> 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 secondary legislation, have status in the public law of the State and are enforceable as such.

<sup>33</sup> WCA 1914, s. 3(2): pre-1920 ecclesiastical law with modifications and alterations effected after the passing of the Act, duly made under the rules 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'.

<sup>34</sup> *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323 at 329.

<sup>35</sup> See e.g. *Buckley v Cahal Daly* [1990] NIJB 8; *Forbes v Eden* (1867) LR 1 Sc & Div 568.

<sup>36</sup> CW Constitution, Prefatory Note: especially 'regarding such matters as the ownership and management of property, the solemnisation of marriage and rights of burial in its churchyards'.

<sup>37</sup> *R v Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 EccLJ 129: a challenge, to the Church in Wales' decision to ordain women priests, was dismissed - the applicant, a vexatious litigant under the Supreme Court Act 1981, s. 42, lacked *locus standi*.

<sup>38</sup> Human Rights Act 1998, s. 13.

a civil court (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>39</sup>

The Church in Wales may establish its own ecclesiastical courts, but these are forbidden to exercise coercive jurisdiction.<sup>40</sup> Submission to them is voluntary, and compliance with their decisions is effected by means of declarations made by prescribed classes.<sup>41</sup> In exercising their jurisdiction ‘the Courts of the Church in Wales shall not be bound by any decision of the English Courts in relation to matters of faith, discipline or ceremonial’.<sup>42</sup> It has been held that in disciplinary cases the High Court lacks jurisdiction over the consensual jurisdiction of the church courts.<sup>43</sup>

## **6. The Direct Applicability of Public Law to Church in Wales Prison Chaplains**

*Several bodies of State law apply directly to the Church in Wales which have survived disestablishment (and continue as vestiges of establishment). For the purposes of these bodies of law, the church continues to be established. One such is that by statute prison chaplains in Wales are clerics of the Church in Wales with public functions.*

Every prison in Wales must have a chaplain and, if large enough, may also have an assistant chaplain. The chaplain (and assistant) must be a cleric of the Church in Wales. Appointment belongs to the Secretary of State. Prior to appointment, notice of the nomination must be given to the diocesan bishop. They may officiate only under the authority of a licence from the bishop.<sup>44</sup> The chaplain must, for example: interview every prisoner belonging to the Church in Wales soon after the prisoner’s reception in the prison and shortly before his release; regularly visit prisoners belonging to the Church in Wales; and visit daily all such members who are sick, under restraint or undergoing cellular confinement. Special rights to the ministry of the chaplain are enjoyed by prisoners who are not members of the Church in Wales; for example, they must be allowed to attend chapel or be visited by the chaplain. The chaplain must conduct divine service for prisoners belonging to the Church in Wales at least once every Sunday and other listed occasions, and, if other arrangements have not been made, read the burial service at the funeral of these who die in the prison.<sup>45</sup>

## **7. The Direct Applicability of Marriage Law: Common Law and Statute**

*A second vestige of establishment is that clergy of the Church in Wales have a duty at common law to solemnise the marriages of parishioners and those with a qualifying connection to the parish. Parliament has by statute lifted this duty with regard to the marriages of divorced persons and the government proposes to do so with regard to marriages for same sex couples. The Church in Wales may also solemnise marriages in accordance with common licences and special licences recognised in public law.*

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<sup>39</sup> Human Rights Act 1998, s. 6.

<sup>40</sup> WCA 1914, s.3(3).

<sup>41</sup> See e.g., for clergy, Const. VI.10: clergy undertake ‘to accept, submit to, and carry out any sentence of...any Court or the Tribunal of the Church in Wales’.

<sup>42</sup> Const. I.5: no definition of ‘the English Courts’ is given.

<sup>43</sup> *R v Provincial Court of the Church in Wales, ex p Reverend Clifford Williams* (1998) CO/2880/98.

<sup>44</sup> Prison Act 1952, ss. 7 and 9; s. 53(4): references to the Church of England must be construed as including references to the Church in Wales.

<sup>45</sup> Prison Rules 1999, rr. 10, 14-16.

***The Duty to Solemnise Marriages:*** State law 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>46</sup> As a result, pre-1920 ecclesiastical law on marriage continues to apply to the Church in Wales as the law of the land (‘a vestige of establishment’),<sup>47</sup> as does the current general marriage law of the State.<sup>48</sup> The right to marry in the parish church has been recognised by Parliament,<sup>49</sup> the secular courts,<sup>50</sup> and pre-1920 decisions of the ecclesiastical courts.<sup>51</sup> The origin of the right is difficult to ascertain but the right may be conceived as a powerful legal fiction.<sup>52</sup> The Marriage (Wales) Act 2010 extends the right to marry in church to those with a ‘qualifying connection’ to the parish.<sup>53</sup> The duty to solemnise also extends to the marriages of un-baptised persons.<sup>54</sup>

***Common Licences:*** Marriage according to Church in Wales’ rites, without banns, may follow the grant of a licence by a diocesan bishop, a diocesan chancellor or surrogate,<sup>55</sup> provided all civil and ecclesiastical conditions are satisfied.<sup>56</sup> There is no right to a licence: the grant is discretionary.<sup>57</sup> Licences may also be available, as a matter of discretion, in the case of marriage of the un-baptised and divorced persons.

***Special Licences:*** In exceptional circumstances, the Archbishop of Canterbury may grant a special licence for the solemnisation without banns, at any convenient time or place, of a marriage according to Church in Wales’ rites. If satisfied that all civil and ecclesiastical conditions have been observed, the minister of the parish is bound to solemnise the marriage on production of the special licence.<sup>58</sup> The archbishop’s power is regulated by civil law,<sup>59</sup> and by English ecclesiastical and canon law.

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<sup>46</sup> Welsh Church (Temporalities) Act 1919, s. 6 (which repealed WCA 1914, s.23: ‘[t]he law relating to marriages in churches of the Church of England (including any law conferring any right to be married in such a church) shall cease to be in force in Wales and Monmouthshire’).

<sup>47</sup> T.G. Watkin, ‘Disestablishment, self-determination and the constitutional development of the Church in Wales’, in N. Doe (ed), *Essays in Canon Law* (Cardiff, 1992) 25 at 33ff.

<sup>48</sup> 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’.

<sup>49</sup> See e.g. Matrimonial Causes Act 1965, s.8: that ‘No clergyman of...the Church in Wales shall be compelled’ to solemnise the marriages of divorced persons (see below) is an exception to the duty.

<sup>50</sup> *Davis v Black* (1841) 1 QB 900; *R v James* (1850) 3 Car & Kir 167; *R v Dibdin* [1910] P 57 (CA) at 129: ‘One of the duties of the clergyman within this realm is to perform the ceremony of marriage, and parishioners have the right to have that ceremony performed in their parish church’.

<sup>51</sup> *Argar v Holdsworth* (1758) 2 Lee 515.

<sup>52</sup> See N. Doe, *The Legal Framework of the Church of England* (1996) 357-362.

<sup>53</sup> N. Roberts, ‘The historical background to the Marriage (Wales) Act 2010’ (2011) 13 *EccLJ* 39: other examples include the Marriage (Wales) Act 1986 (to deal with the effects of grouping benefices); see also Gender Recognition Act 2004 which inserts a new s. 5B in the Marriage Act 1949 lifting the duty on Church in Wales clergy to solemnise the marriages of those with an acquired gender.

<sup>54</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 257.

<sup>55</sup> Welsh Church (Temporalities) Act 1919, s. 6(b): nothing in the WCA 1914 or the 1919 Act affects ‘the right of bishops of the Church in Wales to grant licences to marry’; Marriage Act 1949, s.5: the power is one of dispensation (to dispense with the requirement for banns).

<sup>56</sup> BCP (1984) 737, 2; see also Marriage Act 1949, s. 16(4). For fees, see RODC, Sched. of Fees.

<sup>57</sup> *Prince Capua v Count de Ludolf* (1836) 30 LJPM & A 71n.

<sup>58</sup> BCP (1984) 737, 2.

<sup>59</sup> Marriage Act 1949, s. 79(6).

**Re-Marriage after Divorce, Clerical Discretion and Conscientious Objection:** State law provides: ‘No clergyman...of the Church in Wales shall be compelled (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister’.<sup>60</sup> The church understands this to allow clerics ‘to refuse to solemnise such remarriages and to refuse to allow the churches of which they are the ministers to be used for such a purpose’; the decision is that of the individual cleric concerned (being based on a personal statutory right or discretion).<sup>61</sup> In short, the right to marry in the parish church does not apply to divorced persons (and a cleric is not required to solemnise such a marriage), provided the cleric has a conscientious objection to it.<sup>62</sup>

**Same Sex Marriage:** The Marriage (Same Sex Couples) Bill permits a non-established religious organization to opt-in and perform same sex marriages if its governing body so decides; it is not a matter for individual ministers of religion to determine.<sup>63</sup> Also, no minister or organization will be compelled to solemnize, consent to, be present at, or otherwise participate in a same-sex marriage.<sup>64</sup> The Equality Act 2010 will be amended so that no discrimination claims can be brought against religious organizations or individuals for refusing to marry a same sex couple or allowing premises to be used for this. The Bill makes special provision for the Church of England,<sup>65</sup> and the Church in Wales,<sup>66</sup> in view of their common law duty to solemnize marriages.<sup>67</sup> The effect of this is to lift ‘the common law duty’ with respect to marriage.<sup>68</sup> However, both churches may opt in and, if they so choose, to celebrate same sex marriages: this would be achieved by the enactment of a Measure by the Church of England,<sup>69</sup> and by ministerial order (of the Lord Chancellor) for the Church

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<sup>60</sup> Matrimonial Causes Act 1965, s. 8(2).

<sup>61</sup> *Marriage and Divorce* (1998) pars. 5.1,5.2; see also *Marriage and Divorce: Guidelines* (issued by the Bench of Bishops: undated), par. 3.13: ‘clergy who themselves have conscientious objections may allow the church(es) of which they are the minister to be used for...such a marriage by another cleric’.

<sup>62</sup> S. 8(2) lifts what would otherwise be a duty to marry; similar provisions in other marriage statutes have been seen by State courts to confer a right of conscientious objection: see e.g. *R v Dibdin* [1910] P 57; it is submitted that if the cleric has no objection in conscience, the ordinary duty to marry operates.

<sup>63</sup> Marriage (Same Sex Couples) Bill cl. 4 and 5.

<sup>64</sup> Marriage (Same Sex Couples) Bill cl. 2; the so-called ‘quadruple lock’: EMTGR, par. 4.19.

<sup>65</sup> Marriage (Same Sex Couples) Bill, cl. 1(3): ‘No Canon of the Church of England is contrary to section 3 of the Submission of the Clergy Act 1533 (which provides that no Canons shall be contrary to the Royal Prerogative or the customs, laws or statutes of this realm) by virtue of its making provision about marriage being the union of one man with one woman’. If the Church in Wales were to decide to solemnize such marriages, a similar provision would have to be created for the Church in Wales.

<sup>66</sup> Explanatory Notes, 50: ‘Since the Statement to Parliament by the Minister for Women and Equalities on 11 December 2012, the Government has worked to understand and accommodate the position of the Church in Wales in its equal marriage Bill. As a disestablished church with a legal duty to marry the Church in Wales is uniquely placed. The Bill provides protection for the Church whilst still enabling it to make its own decision on same-sex marriage. Under the Bill, the duty of Church in Wales ministers to marry will not be extended to same-sex couples. However, should the Church’s Governing Body decide in the future that the Church wishes to conduct such marriages, there is provision in the Bill for the law to be altered without the need for further primary legislation by Parliament. Instead, a resolution from the Church’s Governing Body would trigger an order by the Lord Chancellor for the necessary legal changes to be made’.

<sup>67</sup> Marriage (Same Sex Couples) Bill, cl. 1(4): ‘Any duty of a member of the clergy to solemnize marriages (and any corresponding right of persons to have their marriages solemnized by members of the clergy) is not extended by this Act to marriages of same sex couples’.

<sup>68</sup> Explanatory Notes, 10: ‘the common law duty on the clergy of the Church of England and the Church in Wales to marry parishioners is not extended to same sex couples’.

<sup>69</sup> Church of England, Marriage (Same Sex Couples) Commons Second Reading Briefing, Q&A.



in Wales without the need for a further Act of Parliament.<sup>70</sup> The Lord Chancellor does not have a duty to agree to the request from the Church in Wales.<sup>71</sup> The Bill places the Church of England and the Church in Wales on much the same footing; and the ministerial order would be subject to affirmative resolution in Parliament.<sup>72</sup>

## **8. The Direct Applicability of Burial Law: The Duty to Bury**

*A third vestige of establishment is the law of burial. Every person resident in a parish has a right to burial in the parish churchyard provided this is still open for burials. Responsibility for its administration belongs to the National Assembly for Wales.*

The law of burial applicable to the Church in Wales is found in both church-made and state-made law. As to church 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>73</sup> Moreover, only parishioners are entitled, as of right, to be buried in the parish burial ground, namely: persons normally residing in the parish; persons dying in the parish; ex-parishioners and non-parishioners for whom family graves or vaults are desired to be opened and whose close relatives have been buried in the churchyard; and persons on the electoral roll at the date of death.<sup>74</sup>

According to State law, except so far as rights are preserved by the Welsh Church

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<sup>70</sup> Marriage (Same Sex Couples) Bill cl. 8: ‘Power to allow for marriage of same sex couples in Church in Wales: (1) This section applies if the Lord Chancellor is satisfied that the Governing Body of the Church in Wales has resolved that the law of England and Wales should be changed to allow for the marriage of same sex couples according to the rites of the Church in Wales. (2) The Lord Chancellor may, by order, make such provision as the Lord Chancellor considers appropriate to allow for the marriage of same sex couples according to the rites of the Church in Wales. (3) The provision that may be made by an order under this section includes provision amending England and Wales legislation. (4) In making an order under this section, the Lord Chancellor must have regard to the terms of the resolution of the Governing Body mentioned in subsection (5) If it appears to the Lord Chancellor - (a) that a reference in this section to the Governing Body has ceased to be appropriate by reason of a change in the governance arrangements of the Church in Wales, the reference has effect as a reference to such person or persons as the Lord Chancellor thinks appropriate; or (b) that a reference in this section to a resolution has ceased to be appropriate for that reason, the reference has effect as a reference to such decision or decisions as the Lord Chancellor thinks appropriate. (6) In Schedule 7 to the Constitutional Reform Act 2005 (functions of the Lord Chancellor which may not be transferred under the Ministers of the Crown Act 1975), in paragraph 4, at the end of Part A insert - “Section 8”’.

<sup>71</sup> Explanatory Notes, 49: ‘Clause 8 sets out a procedure by which the Church in Wales can choose to allow marriages of same sex couples to take place according to its rites. Its Governing Body may request that the Lord Chancellor make an order to enable it to do so, which would amend legislation as necessary (in particular the Marriage Act). The Governing Body...must first resolve that the law should be so changed and the Lord Chancellor must have regard to the terms of that resolution’.

<sup>72</sup> Explanatory Notes, 50: ‘The Church in Wales is in the same position as the Church of England as regards marriage law despite the disestablishment of the Church in Wales by virtue of the Welsh Church Act 1914. However, this disestablishment means that the Church in Wales is not itself able to put legislation before Parliament (unlike the Church of England). The power in this clause is therefore required so that the law can be changed to allow the Church in Wales to marry same sex couples (if it were to resolve to allow it), without the need for primary legislation. An order under this clause is subject to the affirmative procedure’.

<sup>73</sup> Canons Ecclesiastical 1603, Can. 68; see also *Cure of Souls* (1996) 9: ‘Failure to observe this canonical requirement within the parish...is a breach of duty’.

<sup>74</sup> Church in Wales’ Burial Grounds Rules (hereafter BGR), Sched. 2, Notes; however, Canons Ecclesiastical 1603, Can. 68 excludes persons who have been excommunicated, ‘for some grievous and notorious crime, and no man able to testify of his repentance’; and perhaps the un-baptised and suicide; *Halsbury Laws of England* (1910 Edn) par. 1412; see also Burial Laws (Amendment) Act 1880, s. 13.

(Burial Grounds) Act 1945, no discrimination may be made between the burial of a member of the Church in Wales and that of other persons.<sup>75</sup> The right to burial in the parish burial ground,<sup>76</sup> if not closed by Order in Council,<sup>77</sup> is understood as a vestige of establishment.<sup>78</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.<sup>79</sup> Any right of burial, in a burial ground vested in the Representative Body, is subject to such conditions as to fees as may be prescribed in the rules of the Church in Wales.<sup>80</sup> Fees for interment are legally prescribed.<sup>81</sup>

## 9. The Public Law Status and Functions of the Representative Body

*A fourth area which might also represent a vestige of establishment concerns the Representative Body of the Church in Wales, a creature of statute and royal charter. Its functions include those of a public law nature and are subject to judicial review.*

The Welsh Church Act 1914 empowers the Church in Wales to frame constitutions and regulations for the property of the church.<sup>82</sup> The Governing Body may legislate on church property.<sup>83</sup> Moreover, the domestic law of the church in relation to any property,<sup>84</sup> held on behalf of the church or its members, is enforceable in the courts of the State.<sup>85</sup> The 1914 Act enables the bishops, clergy and laity of the Church in Wales to appoint persons to represent them and ‘hold property for any of their uses and purposes’, and the Crown by charter to incorporate such persons, as a Representative Body.<sup>86</sup> Incorporated by royal charter at disestablishment, the Representative Body is a charitable trust corporation, and holds the legal title to churches, parsonages, and other forms of property,<sup>87</sup> on behalf of the members of the Church in Wales. The Representative Body is subject to such alterations in its powers and duties, as may from time to time be adopted by the Governing Body. This is the case provided always that such rules, regulations and alterations in them do not conflict with the statutory authority, powers and duties of the Representative Body.<sup>88</sup> The Representative Body is also subject to the jurisdiction of State courts.<sup>89</sup> The

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<sup>75</sup> BGR, Sched. 2, Notes; strictly, in law, the right is that of the personal representatives, as it is they (rather than the deceased) who would seek to enforce it; Welsh Church (Burial Grounds) Act 1945, s. 4: there must be no discrimination except as may be necessary to comply with any trust or condition affecting any part of a burial ground which is a private benefaction under the WCA 1914.

<sup>76</sup> See N. Doe, *The Legal Framework of the Church of England* (Oxford, 1996) 386ff.

<sup>77</sup> *Re Kerr* [1894] P 284.

<sup>78</sup> See T.G. Watkin, ‘Disestablishment, self-determination, and the constitutional development of the Church in Wales’, in N. Doe (ed), *Essays in Canon Law* (Cardiff, 1992) 25 at 36ff: the duty to bury was retained as churchyards were not (as originally planned) transferred to local authorities.

<sup>79</sup> Welsh Church (Burial Grounds) Act 1945, s. 4.

<sup>80</sup> Welsh Church (Burial Grounds) Act 1945, s. 4(2): they must be approved by the National Assembly.

<sup>81</sup> BGR, r. 7; see Schedule 2: fees are payable for e.g. services rendered by a cleric.

<sup>82</sup> WCA 1914, s. 13(1).

<sup>83</sup> CW Const. II.

<sup>84</sup> WCA 1914, s. 38(1): “‘property’ includes all property, real and personal’.

<sup>85</sup> WCA 1914, s. 3(2): this includes pre-1920 ecclesiastical law.

<sup>86</sup> WCA 1914, s. 13.

<sup>87</sup> For WCA 1914, ss. 4 and 8.

<sup>88</sup> Const. III.1.

<sup>89</sup> See *Welsh Church Commissioners v Representative Body of the Church in Wales* [1940] 3 All ER 1(CA); *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228 and [1944] 1 All ER 710 (HL); *Powell v Representative Body of the Church in Wales* [1957] 1 All ER

Parochial Church Council is responsible to the Representative Body for the proper care, maintenance and upkeep of all churchyards in the parish.<sup>90</sup>

## 10. Heritage and Church Buildings in the Parish: Ecclesiastical Exemption

*Heritage law and the ecclesiastical exemption (the responsibility of the National Assembly) reflect the entanglement of the Church in Wales in the fabric of the State. Internal church law commonly provides for collaboration with public bodies in this field. This is not technically a vestige of establishment: other religious organisations in Wales are also subject to heritage law and may enjoy the ecclesiastical exemption.*

Under the law of the State, an ecclesiastical building which is used for ecclesiastical purposes is exempt from the need for listed building consent.<sup>91</sup> The ecclesiastical exemption applies to buildings of the Church in Wales vested in the Representative Body,<sup>92</sup> and its continued enjoyment depends on the church having in place a satisfactory internal system of control.<sup>93</sup> This is achieved by the faculty system administered by each Diocesan Court.<sup>94</sup> This is not a vestige of establishment – the exemption is enjoyed by other churches also. However, it is arguable that the faculty jurisdiction of the Diocesan Court of the Church in Wales is subject to the supervision of the secular courts by way of judicial review, insofar as this jurisdiction may be understood as containing a public element, being exercisable, under the ecclesiastical exemption, in place of that enjoyed by the planning authorities of the State.<sup>95</sup>

Within the heritage context, the internal law of the Church in Wales also requires collaboration with CADW (responsible to the Assembly etc). For example, some members of the provincial Cathedrals and Churches Commission, a sub-committee of the Finance and Resources Committee of the Representative Body,<sup>96</sup> are appointed after consultation with CADW;<sup>97</sup> an archaeological consultant is appointed to a cathedral after consulting CADW;<sup>98</sup> notice of a faculty petition is sent to CADW in prescribed cases involving listed buildings; and members of the Diocesan Advisory Committee include an archaeologist appointed after consulting with CADW.<sup>99</sup>

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400. Whether the Representative Body is a public authority for the purposes of the Human Rights Act 1998 is a matter which has not been treated by the courts of the State.

<sup>90</sup> CYR, rr.1-2.

<sup>91</sup> Planning (Listed Buildings and Conservation Areas) Act 1990, s. 60(1). Although ‘ecclesiastical building’ is not defined, clergy residences are expressly excluded (s. 60(3)). Ecclesiastical purposes denote use for corporate worship and this may extend to any purpose which church authorities consider likely to foster Christian fellowship: *AG ex rel Bedfordshire County Council v Howard United Reformed Church Trustees, Bedford* [1975] 2 All ER 337 (HL). Listed building consent is not required for the alteration or extension of a listed ecclesiastical building used for ecclesiastical purposes.

<sup>92</sup> Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771, arts. 4,5: e.g., any church building; any object or structure within a church building; any object or structure fixed to the exterior of a church building. In England, the new 2010 Order enables a freer regime.

<sup>93</sup> The system must be approved by the State which may restrict or exclude particular buildings or categories from the exemption: Planning (Listed Buildings and Conservation Areas) Act 1990, s. 60(5).

<sup>94</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 91-104.

<sup>95</sup> N. Doe, *The Law of the Church in Wales* (Cardiff, 2002) 117, n. 239.

<sup>96</sup> CACCR, r. 2: the Commission is not subject to the direction or control of the RB.

<sup>97</sup> CACCR, r. 5: 7 members with knowledge of e.g. archeology, architecture, archives, art, manuscripts, history, and liturgy: of 7, 1 must be appointed after consulting the Secretary of State for Wales, and 1 after consultation with CADW.

<sup>98</sup> CACCR, r. 40.

<sup>99</sup> RODC.