THE REBIRTH OF WELSH LAW

David Lloyd Jones

Abstract

The advent of devolution has meant that for the first time since the age of the Tudors it is meaningful once again to speak of Welsh law. The legislative powers conferred by successive devolution settlements have brought both opportunities and challenges. Foremost among the challenges is the need for the law to be accessible to its subjects. This article discusses the importance of the Welsh Government's programme for consolidation and codification of the statute law of Wales, issues surrounding the drafting and interpretation of bilingual legislation and the role of the Supreme Court under the Government of Wales Act 2006. It ends with an account of the inaugural sitting of the Supreme Court in Wales in July 2019.

Wales has a particularly rich legal history, as is demonstrated by Professor Thomas Glyn Watkin in his Legal History of Wales,[1] a work of great scholarship which covers the story of law in Wales from pre-Roman times, through the medieval customary Welsh laws, to the impact of the Acts of Union which abolished Welsh law and established the shared legal system of England and Wales, and on to modern times and the effect of devolution. Indeed, there was a time in the early Middle Ages when its laws were a distinctive, identifying characteristic of Wales as a nation. Professor Sir Rees Davies has described how the laws of Hywel Dda played an important part in the emergence of the idea of the Welsh as a united people.[2] The first extant treaty between an English King and a Welsh Prince, that between King John and Llywelyn ap Iorwerth in 1201, formally recognised the unitary and distinct character of Welsh law.[3] As Professor Davies observes, the existence of this body of law was, by the time of the surviving law texts and probably earlier, a cardinal affirmation of the distinctiveness of Wales as a country and of the Welsh as a people.[4]

1 Thomas Glyn Watkin, *The Legal History of Wales*, 2nd Ed., (Cardiff: UWP, 2012). See also Professor Sir David Williams QC, 'The Law of England and Wales: The Welsh Contribution', *Transactions of the Honourable Society of Cymmrodorion* (2005); David Lloyd Jones, 'Wales: Law in a Small Nation', *The UK Supreme Court Yearbook* 10 (2018-19), p. 100.

2 R. R. Davies, *Conquest, Coexistence and Change, Wales 1063-1415* (Oxford: Clarendon Press, 1987), pp. 18–19; Geraint H. Jenkins, *A Concise History of Wales* (Cambridge: CUP, 2007), pp. 41, 45 et seq.

3 Davies, *Conquest, Coexistence and Change*, p. 18.

4 Davies, *Conquest, Coexistence and Change*, p. 19.

This was a sophisticated body of law.[5] It began as customary law and became established through usage. It was codified in the tenth century in Dyfed. The codification is usually attributed to Hywel Dda and, as a result, it is usually referred to as 'Cyfraith Hywel' ('the laws of Hywel'). The work attributed to Hywel in codifying and systematising the customary laws of the different Welsh kingdoms was a significant legal and cultural achievement. It provided a workable legal code addressing matters such as the criminal law, the law of contract, the law governing civil wrongs, ownership and inheritance and family law. To modern eyes it was in certain respects enlightened and humane; for example it made particular provision for the rights of women.

During the later middle ages, English law gradually encroached on Wales until, in the reign of King Henry VIII, the Acts of Union of 1536 and 1542 incorporated Wales into England. A new entity – 'England and Wales' – was born which, nearly five centuries later, still survives. Welsh law was abolished and English law applied throughout Wales. Wales was, however, given its own courts system. The Courts of Great Session administered royal justice in Wales – with the exception of Monmouthshire – from 1543 until 1830. Over time, the Courts of Great Session became subservient to the English courts.[6] Following the abolition of the Great Sessions in 1830, the machinery of justice in Wales was largely indistinguishable from that in England with little if any recognition being given to the distinct needs of Wales within the shared legal system of England and Wales.

My subject in this paper is the rebirth of Welsh law. The coming of devolution has meant that, for the first time since the age of the Tudors, it is meaningful to speak once again of Welsh law as a living system of law. Wales remains part of the shared legal system of England and Wales. The common law in force in Wales – that is the law made and applied by courts through judicial decisions – remains the common law of England and Wales, save to the extent that it is varied by legislation. However, the legislative powers conferred upon the Senedd (formerly the National Assembly) and the Welsh Government under successive devolution settlements have meant that there is now a distinct and important body of legislation made in Wales for Wales.[7]

This body of Welsh legislation is emerging in a constitutional and political climate in which further proposals for change abound. In particular, the Commission on Justice in Wales, chaired by Lord Thomas of Cwmgiedd, has reported and has made wide-reaching recommendations as to the directions in which the

5 See generally, Watkin, *The Legal History of Wales*, Chapter 4; Sara Elin Roberts, *The Legal Triads of Medieval Wales*, 2nd Ed. (Cardiff: UWP, 2011); Sara Elin Roberts, *The Welsh Legal Triads* (London: Selden Society, 2015); Davies, *Conquest, Coexistence and Change*, pp. 18–19, 65, 133–4, 368–70.

6 See, for example, *R v Athos* (1723) 8 Mod 136; *Lampley v Thomas* (1747) 1 Wils 193; *Lloyd v Jones* (1769) 1 Dougl 213.

7 See generally Thomas Glyn Watkin with Daniel Greenberg, *Legislating for Wales* (Cardiff: UWP, 2018); Law Commission Consultation Paper No 223, Form and Accessibility of the Law Applicable in Wales, (2015) [henceforth 'Law Commission, Form and Accessibility CP']; Law Commission, Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366 [henceforth 'Law Commission, Form and Accessibility Report'].

administration of justice in Wales should now develop. In particular, it has recommended legislative and executive devolution of the administration of justice. This would mean that existing restrictions on the power of the Senedd to legislate on justice issues would be removed and that executive responsibility for justice in Wales would be transferred to the Welsh Government.[8] It has recommended that the law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England.[9] It has also recommended the creation of a separate courts system: the creation of a High Court of Wales and a Court of Appeal of Wales.[10] I hope I will be forgiven if I do not directly address these issues in this paper. Others are far better qualified than I am to comment on these recommendations and, to the extent that they raise political questions, it would not be appropriate for them to be addressed by a serving judge. In any event, the principal focus of my this paper is much narrower. I want to say something about the emerging body of Welsh legislation and, in particular, its form and its content.

As we shall see, however, it is not possible entirely to divorce this topic from the way in which devolution in Wales has evolved. It is, therefore, appropriate to recall at this point that the path of devolution in respect of Wales has not run particularly smoothly. In the space of twenty years or so, since, as Professor Sir David Williams famously observed, Wales was whisked into devolution on the hem of a kilt, Wales has seen four successive constitutional settlements – four different phases of devolution in each of which the powers conferred on Welsh institutions have varied very considerably.[11]

(1) In the first phase, the Government of Wales Act 1998 created a National Assembly for Wales which was inaugurated in 1999 as part of a process of devolution within the United Kingdom. There was an important difference, however, between the powers devolved to Wales and to Scotland. Whereas the Scottish Parliament was given the power to make primary legislation, this was denied to the National Assembly for Wales. Instead there were transferred to the Welsh Assembly specific powers to make subordinate legislation in eighteen listed areas, which had previously been exercisable by Government Ministers in Whitehall, primarily the Secretary of State for Wales.

(2) The second phase came with the Government of Wales Act 2006 which formally recognised the distinction between the executive and legislative functions of the Assembly which had already emerged in practice. It was the role of Ministers to make subordinate legislation and that of the Assembly to scrutinise it. However, the 2006 Act also made provision for

8 Cyfiawnder yng Nghymru dros Bobl Cymru (Cardiff: Comiswn ar Gyfiawnder yng Nghymru (Commission on Justice in Wales), Justice in Wales for the People of Wales, 2019), para 12.63.

9 Ibid., para 12.123.

10 Ibid., para 12.159.

11 The first three phases are considered in detail by Watkin, *The Legal History of Wales*, Chapter 10.

the first time for the Assembly to acquire primary legislative powers in a piecemeal manner within twenty fields. This could be achieved either by an Act of the Westminster Parliament or, following an application by the Assembly to the Westminster Parliament, by an Order in Council. It is unnecessary to dwell on the details of this extremely cumbersome and immensely complex system because it was rapidly superseded. Although it was intended to last for a generation it lasted for barely four years, for only one session of the Assembly.

(3) The third phase is based on Part 4 of the 2006 Act which set out an alternative model for Welsh devolution. It provided that following a positive result in a referendum, the Assembly would be given the power to legislate under Part 4 in relation to twenty specified subjects without requiring the approval of the Westminster Parliament or the UK government. A referendum was held in March 2011 and as a result of the positive vote the new system was brought into force. This was a critical development as the Assembly acquired for the first time direct primary legislative powers in a number of devolved areas.

(4) The fourth phase of Welsh devolution rapidly followed in the Wales Act 2017 and the changes it brought were equally fundamental. Whereas powers had been devolved previously to the Assembly and the Welsh Ministers on a devolved powers basis i.e. a system under which the powers in specified fields were expressly conferred on the Assembly and Welsh Ministers, the Wales Act 2017 introduced a retained powers model, similar to that in Scotland. The National Assembly was now given the power to legislate on matters which are not reserved to the UK Parliament.[12] Corresponding provision was made for executive powers.[13]

The result is somewhat unusual, if not unique. Wales remains a part of the legal system of England and Wales. However, Wales now has its own legislature and its own government, both operating within the devolved fields, although the competence of both is limited and subject to the overriding sovereignty of the United Kingdom Parliament. The new Welsh statute law extends to England and Wales – it is a part of the law of England and Wales – but it applies only in relation to Wales.[14] So within a single legal system, that of England and Wales, we have two legislative bodies, one of which is sovereign and the other of which is not, the first with power to make law for the whole of England and Wales and the second with power to make law only for Wales. It is an inevitable and intended consequence of devolution that we are already seeing a considerable divergence between the statute law of England and that of Wales within the non-retained areas – for example in the fields of health, social services, education, planning, residential tenancies – and with time that divergence is bound to increase.

12 Wales Act, 2017, section 3, substituting section 108A for section 108, Government of Wales Act 2006; New Schedules 7A and 7B to the Government of Wales Act 2006.

13 Wales Act 2017, section 19 inserting section 58A into the Government of Wales Act 2006.

14 Watkin, *The Legal History of Wales*, p. 211.

The role of the Supreme Court in the constitutional settlements

The Supreme Court of the United Kingdom is charged with the responsibility of adjudicating upon compliance by the delegated legislatures with the various devolution settlements enacted in respect of Scotland, Northern Ireland and Wales. It does so by a system of references. In the case of Wales, the Attorney General for England and Wales or the Counsel General for Wales may refer to the Supreme Court for its decision the question of whether a Senedd Bill or any provision of a Senedd Bill is within the legislative competence of the Senedd.[15] Similar provisions exist in respect of Scotland and Northern Ireland.[16] If a Bill is referred to the Supreme Court in this way, it cannot be presented for royal assent until the Supreme Court has ruled on it.[17]

On such a reference, the Supreme Court has to consider whether the Bill is within legislative competence, for example whether it relates to reserved matters.[18] This can often be a very technical matter requiring a close analysis of the applicable Westminster legislation and the Welsh Bill. In particular, the Government of Wales Act 2006 provides that the question whether a provision of an Act of the Senedd relates to a reserved matter is determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.[19] In addition, a provision will be outside legislative competence if it is incompatible with the rights conferred by the European Convention on Human Rights and the Human Rights Act 1998.[20] A further provision which has proved influential requires that any provision which could be read in such a way as to be outside legislative competence is to be read as narrowly as is required for it to be within competence or within powers, if such a reading is possible, and is to have effect accordingly.[21]

It is important to note, however, that Bills are not subject to review on common law grounds which would apply in a normal case of judicial review of a public body, such as irrationality, unreasonableness or arbitrariness. On the contrary, the delegated legislatures are accorded special treatment which reflects their particular status and the nature of devolution. This is apparent from a Scottish case before the Supreme Court, *Axa General Insurance Limited v The Lord Advocate*,[22] but the principle stated applies with equal force to Wales. In his judgment Lord Reed explained that as a result of the Scotland Act there are two institutions with power to make laws for Scotland: the Scottish Parliament and the Parliament of the United Kingdom.

15 Section 112, Government of Wales Act 2006.
16 Section 33, Scotland Act 1998; section 11, Northern Ireland Act 1998.
17 Section 115, Government of Wales Act 2006.
18 Section 108A, Schedules 7A, 7B, Government of Wales Act 2006.
19 Section 108A(6), Government of Wales Act 2006.
20 Section 108A(2)(e), Government of Wales Act 2006.
21 Section 154, Government of Wales Act 2006. See *Local Government Byelaws (Wales) Bill 2012: Reference by the Attorney General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792 per Lord Neuberger at para 64; per Lord Hope at para 84.
22 [2011] UKSC 46; [2012] AC 868.

> The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited, it is also subject to the jurisdiction of the courts. Within the limits set by section 29(2) [of the Scotland Act], however, its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard. Even if it might be said, at the highest level of generality, that the Scottish Parliament's powers had been conferred upon it for the purpose of the good government of Scotland, that would not limit its powers. The Act leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers.
>
> In these circumstances, it appears to me that it must have been Parliament's intention, when it established the Scottish Parliament, that that institution should have plenary powers within the limits upon its legislative competence which were created by section 29(2). Since its powers are plenary, they do not require to be exercised for any specific purpose or with regard to any specific considerations. It follows that grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes, and which are designed to prevent such bodies from exceeding their powers or using them for an improper purpose or being influenced by irrelevant considerations, generally have no purchase in such circumstances, and cannot be applied. As a general rule, and subject to the qualification which I shall mention shortly, its decisions as to how to exercise its law-making powers require no justification in law other than the will of the Parliament. It is in principle accountable for the exercise of its powers, within the limits set by section 29(2), to the electorate rather than the courts.[23]

To my mind, this is a powerful statement of the fundamental constitutional change which has been brought about by devolution in the United Kingdom.

Devolution references are frequently made to the Supreme Court. The Supreme Court has recently heard a reference from Northern Ireland on whether legislation establishing safe access zones around clinics providing abortion services is

[23] Per Lord Reed at paras 146, 147, referring *to R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, paras 50–51 per Lord Hoffmann; paras 107–109 per Lord Rodger of Earlsferry, paras 128–130; per Lord Carswell. See also Lord Hope at para 52. The qualification to which Lord Reed referred is that Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law. (See Lord Reed at para 153.)

compliant with the European Convention on Human Rights so as to be within the legislative competence of the Northern Ireland Assembly[24] and one from Scotland on whether legislation providing for an independence referendum is within the legislative competence of the Scottish Parliament.[25] There have been three Welsh references to the Supreme Court to date, relating respectively to the Local Government Byelaws (Wales) Bill,[26] the Agricultural Sector (Wales) Bill,[27] and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill.[28] In the first two references the Supreme Court held that the Bill was within legislative competence; in the third it held that it was outside legislative competence both because it did not relate to a devolved subject and because it was incompatible with the European Convention on Human Rights.[29]

The role of the Supreme Court as the final arbiter of devolution issues is distinct from its role as the final court of appeal for the legal systems within the United Kingdom. As the final court of appeal for England and Wales the Supreme Court has ruled on the interpretation and application of the new statute law of Wales.[30]

The need for codification

It is a fundamental requirement of the rule of law that the law should be accessible to its subjects. Those who are subject to the law should be able to know and understand what the law is. In particular, it must be possible to locate and read it and it must be clear and intelligible. While there have long been concerns about the lack of accessibility of statute law within the United Kingdom generally,[31] there can be no doubt that this is a particular problem in the case of legislation applicable in Wales. In its project on the Form and Accessibility of the Law applicable in Wales,

24 *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32.

25 *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31.

26 *Local Government Byelaws (Wales) Bill 2012: Reference by the Attorney General for England and Wales* [2012] UKSC 53; [2013] 1 AC 792.

27 *Re Agricultural Sector (Wales) Bill: Attorney General for England and Wales v Counsel General for Wales (Attorney General for Northern Ireland intervening)* [2014] UKSC 43; [2014] 1 WLR 2622.

28 *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3; [2015] AC 1016.

29 It is open to the Counsel General for Wales to intervene in Scottish or Northern Ireland references. He intervened, for example, in *Reference by the Attorney General and the Advocate General for Scotland: UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; *Reference by the Attorney General and the Advocate General for Scotland: European Charter of Local Self-Government (Incorporation) (Scotland) Bill*; *Reference by the Attorney General and Advocate General for Scotland: United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

30 See, for example, *R (Forge Care Homes Ltd and others) v Cardiff and Vale University Health Board and others* [2017] UKSC 56; *In the matter of T (A Child)* [2021] UKSC 35.

31 See, for example, *R v Chambers* [2008] EWCA Crim 2476 per Toulson LJ at para 64; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) per Laws LJ; [2003] QB 151, cited in Law Commission, Form and Accessibility CP 1.35 – 1.40.

undertaken at the request of the Welsh Government, the Law Commission identified a number of reasons why this problem is particularly acute in the case of Wales.[32] First, the statute law of Wales is not to be found in one place but comprises primary legislation made in Westminster and in Cardiff Bay, as well as secondary legislation. It is a huge body of law. To use an example provided by the Law Commission, which has been much cited, depending on how widely 'the law of education' is defined, the law which applies to education in Wales was in 2016 to be found in between 17 and 40 Acts of Parliament, 7 Assembly Measures and 6 Assembly Acts, as well as hundreds of statutory instruments.[33] A second source of complexity is linked to the succession of different arrangements for devolution in Wales over the last two decades. The fact that powers to make subordinate legislation have been transferred under successive devolution settlements – from the Secretary of State for Wales to the National Assembly and then to the Welsh Ministers – often makes it unclear which body has the power to make law or to exercise legal powers. This is not always apparent on the face of the legislation and can require considerable research or inquiry. Thirdly, in order to understand the law in a devolved area, it is often necessary to read legislation made in Cardiff Bay in conjunction with Westminster legislation in areas which have not been devolved. Furthermore, Westminster statutes may now be amended both by the UK Parliament and by the Senedd. It can sometimes be difficult to establish precisely which statutory provisions apply to Wales.

The Law Commission's report on the Form and Accessibility of the Law applicable in Wales was published in 2016.[34] It made detailed recommendations for the consolidation and codification of Welsh law. By consolidation is meant the revision and bringing together of legislation that has become outdated, heavily amended and disorganised. By codification is meant the adoption of a structure to improve the accessibility of Welsh law and then organising and publishing consolidated Welsh law according to that structure. Its recommendations included the following:

- It recommended that the Welsh Government should pursue a policy of codification which involves both (a) bringing together in a single codified enactment legislation whose subject matter is within the legislative competence of the National Assembly (now the Senedd) and (b) the reform of that legislation as appropriate.
- It recommended the adoption of a flexible streamlined legislative procedure for codification or consolidation Bills.
- It recommended that codes should not be distinct from other Acts of the Senedd but should be preserved by a rule that, where there is a code in place, further legislation within the subject area of the code should only take effect by amending the code.

32 Law Commission, Form and Accessibility CP, 1.41–1.71.
33 Law Commission, Form and Accessibility Report, para 7.2.
34 Law Commission, Form and Accessibility Report.

- It recommended that the Welsh Government should institute regular programmes of codification and that the Counsel General should be obliged to present a codification programme and report to the Senedd on the progress of the programme at regular intervals.
- It also recommended that a Code Office, distinct from the Office of Legislative Counsel, be set up to manage the process of codification and consolidation and maintaining codes.
- It recommended that the Counsel General be responsible for publishing a set of legislative standards and that the Senedd establish regular structures for pre-legislative scrutiny and post-legislative scrutiny of Bills.
- It recommended that the Welsh and English language versions of legislation should be capable of being viewed side by side on the UK Government's website legislation.gov.uk.
- It recommended that the Welsh Government and the Senedd should develop online access to ensure that citizens can find all of the law relating to a particular code in one place, including primary and secondary legislation, statutory and non-statutory guidance and other sources as appropriate.[35]

The response of the Welsh Government was to accept or to accept in principle all of the Law Commission's recommendations, with only one exception. It agreed that a sustained, long-term programme of consolidation and codification of Welsh law would deliver societal and economic benefits and was desirable in order to ensure that the laws of Wales were accessible. It added that this would make the work of the Welsh Government and that of the Senedd in developing and scrutinising new laws considerably more straightforward and therefore more efficient. The one recommendation which was rejected was that the Welsh Government should be responsible for standardisation of legal terminology in the Welsh language. While accepting that more could be done to facilitate Welsh as a language of the law, it did not accept that terms in Welsh should be rigidly standardised, and it expressed the wish that they should retain the same flexibility as exists in relation to the English language.

The Welsh Government clearly understands the massive scale of the Law Commission's recommendations. In accepting them, it referred to the size of the task and the limited resources available to pursue it. However, a start has been made. The Legislation (Wales) Act 2019, which came into force on 11 September 2019, provides that the Counsel General must keep the accessibility of Welsh law under review[36] and that Welsh Ministers and the Counsel General must prepare a programme to improve the accessibility of Welsh law, including an ongoing process of consolidation and codification.[37] In September 2021 the Welsh Government

35 Law Commission, Form and Accessibility Report, Chapters 2–6, 16.
36 Legislation (Wales) Act 2019, section 1.
37 Legislation (Wales) Act 2019, section 2.

published its programme to improve the accessibility of Welsh law in the period 2021 to 2026.[38]

- This includes a project to prepare a taxonomy or classification of subjects of Welsh law. This will provide an organisational structure for future consolidation and codification work.
- Projects are announced for the consolidation of the law in the fields of the historic environment and planning. These will be supplemented by consolidated subordinate legislation in these fields. The Historic Environment (Wales) Bill, the first consolidation Bill brought forward as part of the Welsh Government's first five-year programme to improve the accessibility of Welsh law, was introduced into the Senedd on 4 July 2022 and passed on 28 March 2023.[39] The next areas in line for consolidation are likely to include allotments, building regulations, hazardous substances, housing and public health.
- The programme also includes proposals for improved communication of information about the law using modern technology.

There is an echo here of an earlier age of Welsh law. The Law Commission's report of 2016 begins with a quotation from the Book of Iorwerth (1240), referring to the codification attributed to Hywel Dda:

> And by the common counsel and agreement … they examined the old laws, and some of them they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew.[40]

These latest proposals for consolidation and codification might have brought a smile to the face of Hywel Dda. It does seem to me that if the new law of Wales – the body of legislation applicable to Wales – is to be a viable and accessible system, codification is the only sure way forward.[41] Fortunately, this has been appreciated at an early stage in the development of the system and, as a result, there is every prospect that the difficulties which I have identified can be overcome.

38 The future of Welsh law: A programme for 2021 to 2026. <https://www.gov.wales/the-future-of-welsh-law-accessibility-programme-2021-to-2026-html> 21 September 2021 (last accessed April 2023).

39 Written Statement: Historic Environment (Wales) Bill – introduction to Senedd Cymru (4 July 2022). <https://www.gov.wales/written-statement-historic-environment-wales-bill-introduction-senedd-cymru> (last accessed April 2023).
Historic Environment Wales Bill as passed unchecked.pdf. <https://business.senedd.wales/documents/s135402/Historic%20Environment%20Wales%20Bill%20as%20passed%20unchecked.pdf> (last accessed April 2023). See, generally, Charles Mynors, The First Step towards sorting out Planning Legislation: The Historic Environment (Wales) Bill, [2022] JPL 1375.

40 Law Commission, Form and Accessibility Report, 1.1.

41 Lord Thomas of Cwmgiedd, Foreword to Watkin with Greenberg, *Legislating for Wales*, xii.

Bilingual legislation

The most striking feature of this new body of Welsh law is that it is bilingual. It is made in two languages. Indeed, it is required to be in both the English and the Welsh languages. It has to be said that Welsh as a legal language has made a remarkable comeback. The Tudor statute of 1536 provided that the English language alone was to be the official language of the law in Wales.[42] The use of Welsh in legal proceedings or transactions was strictly prohibited. In fact, in the centuries which followed, the Welsh language continued to be used in courts in Wales, as a matter of necessity when a large proportion of the population spoke no English. The language clause of the statute of 1536 was repealed by the Welsh Courts Act 1942 but this was rather parsimonious in merely providing that:

> … the Welsh language may be used in any court in Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh.[43]

The turning point was the Welsh Language Act 1967 which permitted any party or witness or any other person who desired to use the Welsh language in court to do so.[44] Then the Welsh Language Act 1993 established the much wider principle that:

> In the conduct of public business and the administration of justice in Wales the English and Welsh languages should be treated on the basis of equality.[45]

The Government of Wales Act now makes express provision for legislation enacted by the Senedd to be in both languages.

> The standing orders must include provision for securing that the Senedd may only pass a Bill if the text of the Bill is in both English and Welsh, unless the circumstances are such as are specified by the standing orders as any in which the text need not be in both languages.[46]

Furthermore, the English and Welsh texts of the resulting legislation are to be treated for all purposes as of equal standing.[47] The Welsh language has, therefore, attained

42 An Act for Law and Justice to be Ministered in Wales in like Form as it is in this Realm of 1535/36, 26 & 27 Hen 8 c. 26, section 1.
43 Welsh Courts Act 1942, section 1.
44 Welsh Language Act 1967, section 1(1).
45 Welsh Language Act 1993, long title.
46 Government of Wales Act 2006, section 111(5).
47 Government of Wales Act 2006, section 156(1).

the status of one of the two official languages of legislation in Wales. Within the United Kingdom, this is a truly unique state of affairs. Never before have lawyers in the United Kingdom been faced with creating, advising upon or giving effect to domestic legislation in more than one language.

There can be no doubt that the Welsh language is well up to the task. It is a sophisticated and mature language which has amply proved its utility as a means of communicating the most complex legal concepts and ideas. In addition to its use in legislation, it is used, for example, as a medium for the teaching of law in law schools across Wales. Textbooks on the core legal subjects are being produced in Welsh. Y Coleg Cymraeg Cenedlaethol is engaged in important work co-ordinating the teaching of law in the medium of Welsh. The Law Commission of England and Wales publishes many of its consultation papers and reports – and all of those specifically relating to Welsh law – in the Welsh language in addition to English. Nevertheless, the fact that Welsh legislation is enacted in two languages has inevitably given rise to novel challenges.[48]

First, there is the matter of legal terminology. The Law Commission has pointed to the fact that the English language has developed over many centuries succinct terminology to describe legal concepts and it has suggested that the Welsh language may have some catching up to do.[49] Nevertheless, great progress has been made in this area over the last two decades. There are now legal dictionaries of Welsh terms.[50] A group of practitioners and scholars, sponsored by the Welsh Language Board to achieve a standardised Welsh terminology, achieved agreement on some 1,600 terms.[51] A further consideration here is that formal, legal Welsh can present a challenge even to those who are accomplished Welsh speakers. In this regard, the practice of the Senedd in publishing draft Bills with a glossary of technical terms employed in the Bill is particularly helpful. (This practice has also been adopted by the Law Commission in its reports.)

48 See generally W. Roddick QC, 'Law Making and Devolution: The Welsh Experience, *Legal Information Management* 3 (2003), p. 152; K Bush QC, 'New Approaches to UK Legislative Drafting: The Welsh Perspective', *Statute Law Review* 25(2) (2004), p. 144; D. Hughes and H. G. Davies, 'Accessible Bilingual Legislation for Wales / Deddfwriaeth hygyrch a Dwyieithog i Gymru', *Statute Law Review* 33(2) (2012), p. 97; C. F. Huws, 'The Day the Supreme Court was unable to interpret Statutes', *Statute Law Review* 34 (2013), p. 221; T. G. Watkin, 'Bilingual Legislation and the Law of England and Wales', *The Theory and Practice of Legislation* 2(2) (2014), p. 229; T. G. Watkin, 'Bilingual Legislation: Awareness, Ambiguity and Attitudes', *Statute Law Review* (2014), p. 1; C. F. Huws, 'The Law of England and Wales, Translation in Transition', *International Journal of Speech, Language and the Law* 22(1) (2015), p. 1; Law Commission, Form and Accessibility CP, Chapter 11; Law Commission, Form and Accessibility Report, Chapter 10; Watkin with Greenberg, *Legislating for Wales*, pp. 8–45 to 8–47; Colin D. Robertson, *Multilingual Law, A Framework for Analysis and Understanding* (London: Routledge, 2016).

49 Law Commission, Form and Accessibility CP, 11.4.

50 R. Lewis, *Geiriadur Newydd y Gyfraith (Saesneg – Cymraeg), The New Legal Dictionary (English – Welsh)* (Llandysul: Gomer, 2003); D. Ll. Jones, D. Prys, O. L. Davies (eds.), *Geiriadur Termau'r Gyfraith, Dictionary of Legal Terms* (Bangor: Bangor University, 2008).

51 Termau Gweinyddu Cyfiawnder. Law Commission, Form and Accessibility CP, 196, fn 8.

Secondly, as Professor Richard Rawlings has pointed out, at the start of devolution practical experience of legislative drafting in Welsh was virtually non-existent.[52] The task of producing clear, accurate and accessible legislation in two language texts which are equally authoritative brings considerable challenges. The legislative intention in this regard is admirably expressed by Professor Watkin, himself a former First Legislative Counsel to the Welsh Government, in resounding terms which admit of no contradiction:

> The Welsh text of such bilingual legislation was not to be a quaint addition to the authoritative English text for the convenience of those who wished to access the text in their native tongue, but a fully equivalent expression of the legislative intention.[53]

There clearly was a great deal to learn. Obviously, a system which simply involved the drafting of an English text and, once complete, its translation into Welsh would not meet the needs of a fully equivalent expression of the legislative intention or of equality between the two texts. In 2001 a study party, which included Mr Justice Thomas as he then was, visited Canada and studied the different systems of bilingual drafting employed in Ottawa and also in New Brunswick. The ideal form of bilingual drafting would seem to be one similar to that applied by the Canadian Federal Government in Ottawa; it would require the possession of bilingual skills by all drafters, bilingual instructions and an iterative process as the drafting of the two language texts proceeds in parallel. This has proved to be a counsel of perfection so far as Wales is concerned. In the result, the procedures followed by the Office of Legislative Counsel ('OLC') more closely resemble the New Brunswick model. A shortage of Welsh language skills among the Welsh civil service means that instructions normally cannot be obtained in Welsh. An initial draft of the legislation is produced in one language, usually English, and then translated into the other. The OLC is responsible for ensuring the legal equivalence of the different language texts. However, both texts are produced before either is finally settled. An iterative process permits clarification of both texts.[54] The demands made on those charged with drafting bilingual legislation are very considerable. The Law Commission identified the following as the principal objectives of bilingual drafting: fidelity to the intention of the promoters of the Bill, consistency of meaning between the different language texts, clarity of communication to two audiences, efficiency in the maintenance of a bilingual legal order, achieving effective equality between the two languages and achieving a text in each language which readers in each language perceive to be equally natural and familiar use of language.[55] This, undoubtedly, asks a great deal.

52 R. Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (Cardiff: UWP, 2003), p. 257.

53 T. G. Watkin, 'Bilingual Legislation: Awareness, Ambiguity and Attitudes', *Statute Law Review* 1 (2014).

54 Law Commission, Form and Accessibility CP, 11.39–11.51.

55 Law Commission, Form and Accessibility CP, 11.50–11.51, citing K Bush QC, supra at 147.

Turning to the other side of the coin, this bilingual legislation is directed at public and private bodies and individual citizens, and it falls to the judiciary to interpret it. This also brings particular challenges.[56] The intention is that both language texts should convey the same meaning. Professor Watkin has proposed an approach to interpretation of bilingual legislation which recognises that the exact meaning to be given to each language text must depend on the meaning of the other.[57] This approach has a great deal to commend it. In particular, there will be situations in which a comparison of the different language texts will reveal the true intention of the legislature. However, this does have implications for the accessibility of the law because Professor Watkin's approach would require proficiency in both languages in order to arrive at a definitive meaning. Many of the subjects of this new body of Welsh law are not proficient in Welsh. Furthermore, while a substantial proportion of the judges who sit in Wales are proficient in Welsh, many are not.

The complexity of the issues arising are apparent in a case heard by the Court of Appeal sitting in Cardiff in 2020 concerning the provision of sixth form education in Pontypridd.[58] In the English language, the School Standards and Organisation (Wales) Act 2013 provided that certain proposals for school reorganisations require the approval of the Welsh Ministers. Section 50(1) provided that those proposals which 'affect sixth form education' require such approval. Section 50(2) provided that '[p]roposals affect sixth form education if – (a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age'. In the Welsh language, section 50(1) of Deddf Safonau a Threfniadaeth Ysgolion (Cymru) 2013 provided that 'cynigion yn effeithio ar addysg chweched dosbarth' require approval from the Welsh Ministers. Section 50(2) provided that '[m]ae cynigion yn effeithio ar addysg chweched dosbarth – (a) os ydynt yn gynigion i sefydlu neu derfynu ysgol sy'n darparu addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig'. The judge, Fraser J., who is not a Welsh speaker, decided that the words in both language texts encompassed proposals to close a school that provided sixth form education, whether or not that school also provided education to other age groups. On appeal, the Court of Appeal, which included two members with some knowledge of Welsh, came to the opposite conclusion: the words referred to proposals to close schools that provide solely sixth form education.

Of particular interest for present purposes is what the Court of Appeal said about the process of interpreting bilingual legislation. It referred to the Law Commission report on the Form and Accessibility of the Law applicable in Wales and agreed that the best approach to the interpretation of bilingual legislation, where different language texts bear different meanings, and where it is not possible to reach an interpretation consistent with the literal meaning of both language versions, is to

56 Law Commission, Form and Accessibility CP, 12.51 – 12.66.

57 Watkin, 'Bilingual Legislation'.

58 *Driver v Rhondda Cynon Taf County Borough Council* [2020] EWCA Civ 1759 (Sir Geoffrey Vos, Chancellor of the High Court, Nicola Davies and Lewis LJJ).

discern the legislative intention by reference to the purposes or objects of the legislation as they appear from the texts, rather than by searching for a shared meaning.

> The court should, we think, apply normal principles of statutory interpretation to its analysis of the meaning of both texts equally. There should be no special rule about the admissibility of pre-legislative material and legislative history, but the court should always be astute to the possibility that such materials may favour one language version.[59]

As to whether members of a court confronted with a disputed point of interpretation of bilingual legislation should have Welsh language expertise, the Court of Appeal accepted that the use of expert evidence or translations of the Welsh language would be inadequate. Nevertheless, the court in that case had not felt disadvantaged. The questions of interpretation had been accessible to non-Welsh speakers. In its view, there might be other cases where greater levels of Welsh language expertise within the court would be desirable but there would be many cases where it would not be imperative.[60]

I appreciate that there are practical limitations on making available Welsh speaking judges for particular cases. Nevertheless, it would seem desirable that, whenever a disputed point of interpretation of bilingual legislation arises, the court should have some proficiency in the Welsh language.

The Supreme Court sitting in Cardiff

Finally, I should like to refer to a matter which is only indirectly relevant to the new body of Welsh law which I have been describing, but which is nevertheless of considerable significance to the broader question of the legal standing of Wales. Over the last twenty years or so – coinciding with the period of political devolution – we have seen important changes in the administration of justice in Wales intended to ensure that it is responsive to the needs of the people of Wales. These have played a major part in establishing the separate identity of Wales within the legal system of England and Wales.

- The coming of devolution meant that legal challenges to the decisions of the newly-created institutions and other public bodies in Wales required to be brought, heard and decided in Wales. Wales took full advantage of the general reform of public law hearings in England and Wales which occurred in 2009 with the result that the Administrative Court now sits throughout Wales as required, deciding issues of public law.

59 At paragraph 11.
60 At paragraphs 14, 15.

The Supreme Court of the United Kingdom sitting in Cardiff, July 2019

- Both the Civil and Criminal Divisions of the Court of Appeal sit frequently in Wales, the only place where they sit regularly outside London.
- Wales is served by a professional judiciary with a strong Welsh identity.
- Every effort has been made to facilitate and promote the use of the Welsh language in courts in Wales.[61]

A particular milestone along this road was the inaugural sitting in Wales of the Supreme Court of the United Kingdom in July 2019. The Supreme Court is the final court of appeal for all three jurisdictions within the United Kingdom: Scotland, Northern Ireland and England and Wales. The Constitutional Reform Act 2005 which established the Supreme Court provides that the Commission appointing members of the Court must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.[62] However, 'part of the United Kingdom' is defined as meaning 'England and Wales, Scotland or Northern Ireland'.[63] As a result, there is, as yet, no statutory requirement that there should be a Welsh Justice on the Supreme Court.

The Supreme Court normally sits in its home in Parliament Square in London. It had previously sat once in Edinburgh and once in Belfast. On this occasion we sat in the Senedd in Cardiff Bay. The Court comprised our then President, Lady Hale, the Deputy President, Lord Reed, Lord Sales, Lord Thomas of Cwmgiedd and myself. The intention was that we should function in Cardiff just as we would if we were sitting in Parliament Square in London. The proceedings were live-streamed as are all our proceedings. We heard four appeals during the week, handed down a number of judgments and made a reference to the Court of Justice of the European Union – the United Kingdom was still a member of the European Union at the time. Extensive use was made of the Welsh language in court, including the only reference ever made to the Court of Justice of the European Union in Luxembourg in both English and Welsh.[64]

As it happened, none of the appeals heard that week concerned a Welsh devolution issue or legislation made by the Senedd. Nevertheless, the decision that the Court should sit in Wales was an appropriate recognition of the changing legal status of Wales. I very much hope that there will emerge a settled pattern of the

61 David Lloyd Jones, 'The Machinery of Justice in a Changing Wales', *Transactions of the Honourable Society of the Cymmrodorion* 16 (2010), pp. 123, 129–131.

62 Constitutional Reform Act 2005, section 27(8).

63 Constitutional Reform Act 2005, section 60(1).

64 *X v Kuoni Travel Ltd* [2019] UKSC 37; [2021] UKSC 34. The response of the Court of Justice of the European Union was not in Welsh: Case C-578/19 *X v Kuoni Travel Ltd* ECLI:EU:C:2021:213.

Supreme Court sitting in the capital cities of the nations of the United Kingdom and that it will soon be able to sit in Cardiff once again.

During one of the many social events which accompanied the sitting in Cardiff, a beautiful document was presented to the Supreme Court by the Legal Wales Foundation. On it is inscribed the following statement, taken from the Laws of Hywel Dda, as to the function of a judge.

> Brawdwr a dyly gwrandaw yn llwyr, cadw yn gofawdyr, dyscu yn graff, datganu yn war, barnu yn trugarawc.
> A judge is to listen fully, keep in memory, learn acutely, pronounce courteously and judge mercifully.[65]

To my mind, they are words of great wisdom and humanity, coming down to us over a thousand years and an inspiring statement of what judges in any age should be trying to achieve.

Conclusion

We stand at the opening of a new chapter in the rich history of law in Wales. Devolution has brought about a renaissance in many areas of Welsh life, but nowhere is this more apparent than in the case of the statute law governing the lives of the people of Wales. This development has brought many new opportunities but they are accompanied by substantial challenges. To my mind, the greatest of these challenges is to ensure that the rapidly developing body of Welsh law is accessible to its subjects. It is a fundamental requirement of fairness that those subject to the law should be able to know and understand their rights and obligations. Moreover, the accessibility of the law is essential to economic development. The real test will be the success of the Welsh Government's programme for consolidation and codification of the law of Wales. This is an enormous undertaking which will require resolve and determination over many years to come. But at least a start has been made. And it is important to remember that Rome was not built in a day.

65 Aneurin Owen, *Ancient Laws and Institutes of Wales* (London: Eyre & Spottiswoode, 1841), Dimetian Code, Book II. During the week the members of the Supreme Court also attended a lecture by Dr Sara Elin Roberts on the laws of Hywel Dda.