

## Speech by the Counsel General for Wales, Jeremy Miles AM, to the Legal Wales Conference 12 October 2018: Law in Wales: Access & Accountability

*Note: paragraphs 1 to 7 of the speech were delivered in Welsh; an English translation is provided as an endnote to this transcript.*

1. Bore da gyfeillion. Mae'n bleser mawr i fod yma yn y coleg ger y lli y bore 'ma, a hoffwn ddiolch yn fawr iawn i'r Canghellor, yr Arglwydd Thomas, ac i gymdeithas Cymru'r Gyfraith, am y croeso<sup>i</sup>.
2. Mae prifysgol cyntaf Cymru wedi chwarae rhan amlwg iawn yn hanes a diwylliant ein gwlad ac wedi addysgu cymaint o'n cyfreithwyr. Ac Aberystwyth, wrth gwrs, yw cartref ysgol y gyfraith hynaf Cymru. A doedd dim disgwyl i'r adran gyfyngu ei hun i ddysgu cyfraith ymarferol. Dyma oedd barn yr Arglwydd Ustus Vaughan Williams wrth draddodi'r ddarlith agoriadol ar gyfer sesiwn cyntaf yr adran ym 1901. Ei obaith oedd bod modd i'r adran newydd ddilyn trywydd gwyddonol wrth astudio'r pwnc; yn ei eirau ef:

*I hope and believe that in a Welsh School of Law you will find jurisprudence studied, discussed, and taught as a theory in its most scientific aspect with the same thoroughness and the same enthusiasm that you will find it studied, discussed, and taught in a German university.*

3. Efallai am y rheswm hwn roedd Vaughan Williams yn ddilornus braidd o bwysigrwydd hanes wrth astudio'r gyfraith. Aeth ymlaen i ddweud:

*The study of Roman law, the study of the laws of Great Britain, past and present, the study of the codes of Justinian, and the Code Napoleon, the study of the laws of Howell [sic] Dda, all have a value to students of law and history, but the law of the past and the history of the past are hardly scientific ends.*

4. Bydd y rhai ohonom fu'n gwranddo ar ddarlithoedd Sara Elin Roberts ac Iwan Bryn James ar gyfreithiau Hywel yn y Llyfrgell Genedlaethol neithiwr yn amau hynny. A nid dyma chwaith farn un o feibion mwyaf blaengar yr adran, y cyfreithiwr a'r ysgolhaig uchel iawn ei barch, yr Athro Dafydd Jenkins – a dydy hynny ddim yn syndod. Fel un a fu'n arbenigo yn hanes y gyfraith, yn enwedig yma yng Nghymru, rwy'n siŵr y byddai'r Athro Jenkins wedi cymryd pleser mawr mewn bod gyda ni neithiwr wrth ddathlu trysorau cyfreithiol Cymru.

5. Fy mhrofiad cyntaf i o'r Athro Jenkins oedd derbyn rhodd caredig gan fy rieni wedi i fi ddweud wrthynt fy mod i'n bwriadu astudio'r gyfraith. Y rhodd oedd ei destun dylanwadol ac awdurdodol ar gyfraith Hywel. Ymateb y darpar gyfreithiwr ifanc oedd i amau pa mor berthnasol fyddai hun i realiti'r gyfraith – a'r gymdeithas – fodern. Ond efallai y bod gan fy rieni ddealltwriaeth fwy cadarn o natur yr astudiaethau cyfreithiol oedd ar y gweill. Oherwydd misoedd yn unig wedi hynny dyna lle yr oedden i, yn fy nhymor Michaelmas cyntaf yn Rhydychen, yn darllen am 'delict' a 'dominium', a hawliau eraill dinasyddion Rhufain.
6. Rwy'n siwr y bod yr Athro Jenkins wedi bod wrth ei fodd wrth weld ailymddangosiad cyfreithiau Cymreig yn hwyr yn ei fywyd, yn enwedig gan eu bod yn y Gymraeg yn ogystal a'r Saesneg.
7. Rwy'n amau hefyd y byddai diddordeb mawr gan yr Athro Jenkins yn y modd yr rydym yn ymwybodol iawn o'n hanes wrth geisio datrys problemau heddiw, ac wrth lywio y materion y byddaf yn eu trafod heddiw: hygyrchedd y gyfraith ac atebolrwydd ein sefydliadau gwleidyddol. Fe fyddai'n ystyried sut y gallwn ddysgu gwersi o'r gorffennol i ddod â trefn i'r llyfr statud.
8. As we all know, 20 years ago saw the passing of the Government of Wales Act 1998, and the start of a historic journey. 20 years ago also saw the emergence of new Welsh legal institutions. During this period Lord Thomas, then Presiding Judge for the Wales and Chester Circuit, was heavily involved in the creation both of Legal Wales and of the Wales Public Law and Human Rights Association, now called Public Law Wales. 20 years on he's still here making yet another significant contribution to our nation's development as Chair of the Justice Commission. His proposal mentioned in his opening remarks to establish a Law Council for Wales is an important one which I welcome. I urge all of us to engage constructively in the consultation which he referred to this morning.
9. We should not, of course, underestimate the significance of the 1998 Act. It, after all, created our National Assembly. But looking back this was only one step on a long journey, and in comparing our constitutional arrangements today with those put in place by that Act, we can see that we have come a long way. We now have a fully fledged legislature, a formal executive, tax-raising powers and an emerging body of Welsh law.
10. And yet, we still live with the legacy of the past, a legacy which holds us back and has a real and practical detrimental effect on our system of government. This historic legacy impacts upon the accountability of our institutions and the accessibility of our laws.

11. Government in Wales is complex and confusing. It is at odds with the rest of the UK and beyond. It is an anomaly in comparison with other decentralised political systems across the world. This has long been the case and after 20 years it still has not been resolved. In this respect the Wales Act 2017 was a great opportunity missed. The change from a conferred to a reserved powers model of devolution, implemented by that Act, exposed deep fault lines in the devolution settlement that have been as yet unfilled. This was largely caused by what had to be done in the Act to reflect the UK government's wish to somehow "protect" the single legal jurisdiction of England and Wales. A protection that was in effect to be attempted by restricting the powers of the National Assembly, and in that way seeking to limit the divergence in the law of England and Wales.
12. But it is no longer sensible to talk of the law of England and Wales. It is a relic of the past. The law of England on the one hand and of Wales on the other has already diverged and will continue to do so. This is an inevitable consequence of the creation of a legislature for Wales with primary law making powers. A legislature, naturally, legislates. So a fundamental characteristic of a legal jurisdiction – one uniform body of law – no longer exists. The UK Government is attempting to protect something that was created in a different age – an age of political, administrative, linguistic and legal uniformity, and that no longer exists. It is trying to protect something that no longer serves its purpose and it is surely destined to fail in the long term.
13. Another fundamental flaw is the arbitrary nature of what has been devolved to Wales, which has been done by looking more to the past than the future. Decisions about what should, or should not, be devolved should be based on a coherent and well thought out vision of how government can improve the lives of the people of Wales. They should not be based on a simple accumulation of powers in the abstract, and equally they should not, as has been the case too often, be based on incremental development from what has gone before.
14. Just as the absence of a legal jurisdiction for Wales is a quirk of events of nearly five hundred years ago, the question of which powers should be devolved is too heavily influenced by the subject matter of the limited functions that were initially transferred to the old Welsh Office some fifty years ago.
15. Trying to maintain the single legal jurisdiction, and the reservation of policing and most justice related matters, is by far the single biggest remaining cause of complexity of the Welsh devolution settlement.
16. And it is also the reason why the system is incoherent and in some sense unstable. This isn't just a matter of constitutional theory (though Lord Justice Vaughan Williams would

have regarded that as justification enough) – it has very real practical implications. The line between what is devolved and what is not runs right through the middle of subjects we would call ‘domestic’ subjects, most notably public services – of which policing and the justice system form part. An arbitrary line has been drawn between what *can* be legislated for and what *can't*. This causes genuine confusion and complexity and hinders joined up working and good governance.

17. The tendency to tinker without finding the right solutions must come to an end. I want a stable and less complex system of government within which the people of Wales can be clear who is responsible for what. A more straightforward division of powers should be accompanied by the creation of a Welsh legal jurisdiction and a formal body of Welsh law. And in turn this law should be rationalised into an accessible, codified Welsh statute book.
18. We can, of course, look to legal history for part of our solution, to the codes of Justinian, and perhaps more pertinently for us the laws of Hywel Dda. To systems of law that were structured and well ordered and maintained as such.
19. And in that spirit I'm pleased to announce today, therefore, a series of initiatives that are either under way or will begin shortly.
20. The first of these is legislation, part of which will set the framework for the work we are doing, and will continue to do, to make Welsh law more accessible.
21. I am looking forward to introducing a Bill later this year which will set Wales on a new journey to developing clear, accessible codes of law – the first part of the United Kingdom to take this step. The purpose of the Legislation (Wales) Bill is to make Welsh law more accessible, clear and straightforward to use.
22. The Bill will propose that for each Assembly the Welsh Ministers and the Counsel General must develop a programme of activity designed to improve the accessibility of Welsh law. The specific content of each programme will be a matter for Ministers and the Counsel General of the time, but each programme must make provision to consolidate and codify Welsh law, to maintain codified law and to facilitate use of the Welsh language in the law and in public administration more generally.
23. I also want to tell you that accompanying the Bill will be a draft Welsh taxonomy of Codes setting out the subject matter by reference to which Welsh law could be organised. Although we will be significantly constrained in what we do by the devolution settlement, we have been taking inspiration from other jurisdictions which organise

their law in codes and have been engaging on this with, for example, the Irish Law Commission who have been undertaking a similar exercise. I urge you to consider our plans once they are published because we are very interested in your views. The work we are doing is being done with users of law in mind, so we must be sure that users of legislation can see the benefit in what we propose.

24. Also contained in the Bill will be provisions on the interpretation of Welsh law, another initiative that will put Wales on the same legal footing as Scotland and Northern Ireland, who already have such legislation. These provisions, though technical and often detailed, are important because they set out how legislation works. These rules sit in the background ready to be applied whenever there are problems.
25. In addition to the Bill we are working on other projects which will eventually form part of the programme of work required by the Bill. The main focus here is to better publish and promulgate Welsh law. Despite their only comparatively brief existence as a legislature and government, the National Assembly has passed 59 Measures or Acts since 2007 and the Welsh Ministers have made around 6,000 statutory instruments since 1999.
26. You will be interested to know that we are working with The National Archives – in advance of the codification initiative that will take a generation or more to complete – on a system of categorisation of this law. This will enable us to arrange the legislation that has been made in accordance with its content rather than when it was made – which is a very unhelpful way of doing things. We intend, therefore, to publish our legislation differently in future, in ways that make it easier to find and, fundamentally, to help people be aware of its existence. Statutory Instruments are so numerous and made so frequently that it is very difficult to stay current. And the link between the instruments and the Act they are made under is also unclear. Organising this legislation by subject matter, especially where instruments implement European law, will be a significant breakthrough.
27. We are also talking to The National Archives about taking a more prominent role in the way Welsh laws are published. This is the responsibility of the Queen's Printer and fulfilled in practice by the Archive's legislation team in Kew Gardens. They have been making good progress recently incorporating amendments to existing legislation made by subsequent legislation for the purpose of publishing the statute book in up to date form. This progress has, however, been limited mainly to primary legislation and only to the English language text of Welsh primary legislation. We are in the process of agreeing new arrangements under which the task of updating Welsh legislation – in both English and in Welsh – will be taken over by the Welsh Government. Our first priority once we

take over this role will be to deal with the discrepancy that currently exists between the English language and Welsh language texts of the published law. But we don't intend to stop there – my aim is to ensure that all Welsh legislation on the statute book is ultimately published in up to date form.

28. Next year I intend also to re-launch the Cyfraith Cymru - Law Wales website. This site already serves a useful purpose but it remains a work in progress and its content is limited. It is something that must be developed in collaboration, and I call upon the Welsh legal community to please help us. I recognise that what we have on the site at present falls short of people's expectations, not least my own. But I have also been clear, as have my predecessors in this role, that this is not something government can do on its own. We as a government recognise our responsibility to do more to make Welsh law more accessible, and indeed we are going as far as to impose a statutory duty on ourselves to do that. But there is a responsibility on us all in wider civic society to contribute.
29. But we should be asking ourselves 'what could I do to help?' If everybody here shared a small part of their experience and expertise by producing content for the Cyfraith Cymru site this would have a huge impact. Collectively we can transform this resource from something that is little known and under used into a genuine public asset for the people of Wales.
30. We are together, in a very real way, the co-creators of a revival in Welsh law and in Welsh legal institutions, and we can all help people in Wales to understand more about one of the fundamentals of society – how government, and how democracy, works.
31. A process has begun of creating a distinct legal infrastructure for Wales. This is a process that won't stop. The process of making laws for Wales won't stop, the divergence in law between Wales and England won't stop. The creation of a Welsh legal jurisdiction and ultimately the devolution of the justice system is inevitable.
32. We as lawyers have a vital role to play in that process. A historic role. I hope that the historians of the future will look back at the sort of things that we are doing today, all of us gathered here, and conclude that this is a key stage of our journey. A journey to developing accessible Welsh laws, to developing a stable, coherent and accountable system of government. Constitutional arrangements and laws that will serve the people of Wales well for centuries to come.
33. Diolch yn fawr iawn i chi.

---

<sup>i</sup> Translation of paragraphs 1 to 7 of original speech:

1. Good morning friends. It's a great pleasure to be here at Aber this morning and I'd like to thank the Chancellor, Lord Thomas, and Legal Wales for their welcome.
2. Wales' first University has played a prominent role in the history and culture of our nation, and has educated so many of our lawyers. Aberystwyth, of course, is home to Wales' oldest school of law. And the Department was not expected *"to limit itself to the teaching of practical law"*. These were the words of Lord Justice Vaughan Williams in his Inaugural Lecture delivered for the first session of 1901-2; he hoped and believed:
  - a. *"that in a Welsh School of Law you will find jurisprudence studied, discussed, and taught as a theory in its most scientific aspect with the same thoroughness and the same enthusiasm that you will find it studied, discussed, and taught in a German university"*.
3. Perhaps for this reason Vaughan Williams was dismissive of the role of legal history could play, going on to say that:
  - a. *"The study of Roman law, the study of the laws of Great Britain, past and present, the study of the codes of Justinian, and the Code Napoleon, the study of the laws of Howell [sic] Dda, all have a value to students of law and history, but the law of the past and the history of the past are hardly scientific ends."*
4. Those of us who were present to hear the lectures given last night by Sara Elin Roberts and Iwan Bryn James may doubt that. And this was not the view of the highly esteemed Aber lawyer and scholar Professor Dafydd Jenkins. I'm sure Professor Jenkins would have taken great pleasure in being with us last night celebrating the legal treasures of Wales.
5. My first experience of Professor Jenkins was when a gift given to me by my parents after I told them that I hoped to study law. The gift was a volume of Dafydd Jenkins' seminal text on the laws of Hywel Dda. The young fledgling lawyer wondered quite how relevant this might be to modern legal realities. But perhaps my parents had a firmer grasp of the nature of my future legal studies than I did, as only months later I found myself at my first Michaelmas term at Oxford reading about 'delict' and 'dominium' and other rights of the Roman citizen.
6. I'm sure Professor Jenkins would have been delighted by the re-emergence of Welsh laws late in his life, not least of course because they are bilingual.
7. He would, I suspect, also be intrigued by the fact that we are conscious of how history can inform and help us resolve the issues I am going to address today: the accessibility of the law and the accountability of our political institutions. I will consider how we can learn from the past to bring order to our statute book.

[Return to main speech]