# CHAPTER TWO

# The Legal Implications of Welsh Devolution

**The Honourable Mr Justice Thomas**

The nature of Welsh devolution with its unique features is a complex constitutional development. This chapter which seeks to highlight only in outline six of the most significant aspects of Welsh devolution, was originally delivered as a paper at the first conference of UK judges on 9th April 1999. I am grateful to David Lambert for his assistance.

## 1 The Unitary Nature of the Legal system in England and Wales

England and Wales share a unitary legal system. By the 1536 Act of Union, England and Wales were united and Welshmen were made subject to the same laws and privileges as Englishmen; Welsh law and custom ceased to have effect. However until 1830, Wales with Chester continued to have its own system of Courts - the Courts of Great Sessions which had original common law, equity and criminal jurisdiction;[41] appeals in equity lay to the House of Lords and in common law to the Court of King's Bench.

In 1830, at the outset of the industrial revolution in Wales,[42] the courts of Great Session were abolished, as one of the first stages of the reforms to justice initiated by Lord Brougham. Wales was made part of the circuit system that had operated in England. From then onwards, Welsh cases, apart from equity cases, were heard in Wales in the same way as cases from the English counties were heard in those counties. With the establishment of the Commercial Court in London in 1895, commercial matters virtually ceased to be tried on circuit in Wales and this trend for specialist work to be done in London has continued until very recently. In 1989, a Chancery Court for Wales was set up in Cardiff and in October 1998 the Lord Chancellor announced the establishment of a Mercantile Court for Wales at Cardiff. Devolution will not change the unitary nature of the legal system.

## 2 The Devolved Functions: the Legislature and the Executive

The essential reform effected by the Government of Wales Act is the transfer of most of the existing functions of the Secretary of State for Wales to the National Assembly for Wales. No primary law making powers are transferred and the transfer of all the functions is made to the Assembly as a single entity; it has therefore been characterised as a form of "executive devolution".[43] Although this is a convenient way of distinguishing Welsh devolution from

41 The courts were established by the 1543 Act of Union; they were organised into four circuits - Chester (with Flint, Denbigh and Montgomery), North Wales, Carmarthen and Brecon, each with its own Chief Justice; their practice and procedure was modelled on that which had been used in the counties of North Wales since the conquest of Wales and in part derived from the procedure used at the courts in Westminster.

42 Cardiff was the assize town for Glamorgan, but was not an important town; Swansea and Merthyr Tydfil were much bigger and the Commissioners who reported in 1829 recommended Neath as the assize town in place of Cardiff.

43 See the Kilbrandon Commission's Report at paras. 827- 855, Cmd 5460 (1973) and the paper by Sir David Williams Q.C., "Devolution: The Welsh Perspective" in *Devolution and the British Constitution* (1998, ed. A. Tomkins). The Kilbrandon Commission described the essence of this form of devolution

the devolution to Scotland and Northern Ireland, it is necessary to examine the three separate functions that have been devolved to the Assembly to explain its real characteristics.

## 2.1 The function of making subordinate legislation

The Assembly will have the power to make subordinate legislation. Apart from the specific power contained in the Act to make subordinate legislation on a limited number of matters, its power to make subordinate legislation will be derived from the powers in existing primary and future legislation of the Westminster Parliament.[44] Among the more important powers being transferred are powers in respect of agriculture, economic development, education, health, highways, housing, local government and planning and the environment. The Assembly will also have power to implement Community directives and other Community obligations under s. 2(2) of the European Communities Act 1972.[45]

At present, although the Secretary of State for Wales initiates some statutory instruments that are particular to Wales, the overwhelming majority are made by him and the relevant Departmental Minister and laid before Parliament jointly. Although it is envisaged that the subordinate legislation made by the Assembly on matters common to England and Wales will still be largely identical to that made by the Departmental Minister, the Assembly will, in principle, be free to make its own subordinate legislation and amend existing subordinate legislation in respect of the devolved matters in a manner different to the provisions of the subordinate legislation applicable to England.[46] The Assembly's subordinate legislation will not, in general, be subject to the scrutiny of the Westminster parliament.[47] The Assembly therefore has the functions of a legislature for Wales on devolved matters quite distinct from the executive model of a local authority.

The Standing Orders of the Assembly have to provide for subordinate legislation procedures that include making, unless inappropriate or not reasonably practicable, a "regulatory appraisal" of the likely costs and benefits of complying with proposed provisions of

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at para. 827 in these terms: " Parliament and the central government would be responsible for the framework of legislation and major policy on all matters but would wherever possible transfer to directly elected regional assembles the responsibility within that framework for the devising of specific policies for the regions, for the execution of those policies and for general administration." At paras. 851-4 there is a useful discussion in this context of the relationship between the German Länder and the Federal Government and the role played by German administrative law.

44 Section 22 and Sch. 2 and 3. About 350 existing statutes are listed in The National Assembly of Wales (Transfer of Functions) Order which transfered the functions on 1 July 1999; it is a lengthy instrument comprising 30 pages. The technical guide listing the sections of the statutes under which powers are transferred is some 535 pages.

45 Section 29. It is intended by a further Order to designate the Assembly as having this power in respect of the areas where the function to make subordinate legislation is devolved.

46 Section 42.

47 Section 44. There are certain exceptions, such as where the power has to be exercised jointly with a Departmental Minister or where this is required under the terms of the Transfer Order. Section 29(3) also generally exempts subordinate legislation made by the Assembly to implement Community directives from scrutiny by the Westminster Parliament.

subordinate legislation before it is laid before the Assembly.[48] In addition, the subordinate legislation passed will usually be subject to scrutiny and amendment in a manner similar to that given to primary legislation enacted by the Westminster Parliament; the Assembly cannot delegate its functions of considering any regulatory appraisal and approval of the legislation.[49]

The question that has therefore been raised in Wales is whether the Courts may be more ready to review legislation passed at Cardiff than at Edinburgh or will they be more flexible in their approach to subordinate legislation made by the Assembly than they are to those made by a Secretary of State.[50] In response, there are, I think, three key points:

(a) As regards the power of the Assembly to make subordinate legislation under an existing statute of the Westminster Parliament, it is difficult to see why a different approach should be followed to that currently followed; when the overwhelming majority of those statutes were enacted, Parliament contemplated passing the power to a Departmental Minister, subject to any specified Parliamentary approval.

(b) That position may not remain the same for future legislation. It will have to be seen whether future Westminster primary legislation is drafted to grant very broad powers to the Assembly and permit a more flexible judicial approach, though it is unlikely that such legislation would ever have the style that would permit that degree of flexible interpretation applicable to a constitutional instrument. A flexible approach may, however, be difficult, if in future legislation the power is conferred in the same terms on both the Departmental Minister and the Assembly; at present, it seems unlikely that powers will be conferred in a different manner.

(c) However, if any issue of reasonableness arises in relation to subordinate legislation, then would not the courts have to attach greater weight to the fact that the subordinate legislation is subject to a number of procedural checks and the Assembly is democratically accountable to the national electorate of Wales?[51]

## 2.2 The executive and administrative function

The executive and administrative functions exercised by the Secretary of State for Wales in Wales for devolved functions will be transferred to the Assembly in the same way as the legislative functions. The Assembly is a single body corporate,[52] and the Act does not create

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48 Section 65. This procedure appears to have its origin in the Deregulation and Contracting Out Act 1994 and the developments from that legislation. Standing Order 23 sets out the detailed procedure; the carrying out of the appraisal is to be done by an Assembly Secretary to whom the decision as to whether it is inappropriate or not reasonably practicable to carry out the appraisal will be delegated.

49 Sections. 66(2) and 66(7).

50 For example: Paul Silk: *The Assembly as a Legislature* (paper published by the Institute of Welsh Affairs in *The National Assembly Agenda* (1999)); Richard Rawlings: "The New Model Wales." (1998) 25 *Journal of Law and Society* 461 at 490 (below, chapter 7, ed.).

51 Cf. *R v Secretary of State for the Environment ex p Nottinghamshire CC* [1986] AC 240 at 247 and *R v Secretary of State for the Environment ex p Hammersmith & Fulham LBC* [1991] 1 AC 521 at 597. Although the analogy of a bye-law is not a happy one to apply to the Assembly, a possible approach could be one based on the judgment of Lord Russell of Killowen in *Kruse v Johnson* [1898] 2 QB 91 at 98 - 9.

52 Section 1(2).

a separately empowered or separate legal entity to which these functions are transferred. There is thus no formal separation of powers easily discernable in the scheme of devolution for Wales.

However the Assembly has power to delegate functions under express provisions of the Act,[53] and it seems clear that it will do so. Originally it was envisaged that executive and administrative decisions would be made through a committee style of executive more akin to that of a local authority. During the course of the passage of the Bill through Parliament, there was a change of policy and it was decided to put in place a cabinet style executive to be headed by the Assembly First Secretary. It is now intended that, in general, the executive and administrative functions will be delegated to the Assembly First Secretary to exercise on the Assembly's behalf and the draft Standing Orders make express provision for this.[54] He will head an executive committee comprising the Assembly Secretaries,[55] chosen by him from among the members of the Assembly; this executive committee will be known as the Assembly Cabinet. Most of the Assembly Secretaries will be given a field of responsibility.

"Subject committees" for the same fields of responsibility as those to which Assembly Secretaries are nominated will be appointed from members of the Assembly; an Assembly Secretary will be a member of the subject committee for his field of responsibility. Although the Act enables delegation of functions to these committees, these committees will probably operate more in the way in which Parliamentary committees operate;[56] executive and administrative decision making will lie substantially in the hands of the Assembly Secretaries.

It cannot be certain that the system will in fact operate in this way,[57] but if, as seems likely, executive and administrative decisions are in fact made by the Assembly Cabinet or one of the Assembly Secretaries, then the decision making may be little different to executive and administrative decision making by Departmental Ministers, though the Assembly Cabinet and Secretaries will be acting under delegated powers of the Assembly. It is therefore probable that in practice a separation of powers between legislature and executive will in general emerge. However, there may be some exceptions; in any such case, if an administrative decision is made by a committee of the Assembly, then that decision making will be more akin to that of a local authority where the separation is more difficult to discern.

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53 Sections 53- 56, 62-3.

54 Commissioners have prepared draft Standing Order which the Secretary of State has to consider and approve with such modifications as he considers appropriate; after he has made them, they take effect as the Standing Orders of the Assembly until remade by the Assembly (section 50); draft Standing Order 2.4 provides in effect for the delegation of the Assembly's executive and administrative functions to the First Secretary.

55 The powers delegated to the First Secretary can be delegated to the Assembly secretaries: section 62.

56 Draft Standing Order 9 proposes that the functions will include advice on legislation and the allocation of the budget.

57 The position of civil service is to be left to evolution; although they will transfer to the Assembly, it is anticipated that most will in practice be responsible to the Assembly Secretaries, whilst others will support the Assembly in its legislative and other non-administrative functions; this will reflect the *de facto* separation of powers.

Although the model by which the Assembly chooses to operate will have a bearing on the nature of any judicial review, there would appear to be no reason to differentiate review of any actions in executive and administrative matters from present practice applicable to the model that emerges. There is one qualification; the draft standing Orders provide a special regime for the quasi judicial role that the Secretary of State has hitherto exercised in planning appeals and call in cases; the function of determining appeals and call in cases will be discharged by a panel of three members of the Assembly chosen from the subject committee for land use.[58]

### 2.3 The function of reviewing and scrutinising all matters affecting Wales

The Assembly will have the power to consider and make appropriate representations about any matter affecting Wales,[59] even though it is not a devolved matter. The impact of this on the legal system will only be indirect. For example, although the administration of justice is not a devolved function, it is already envisaged that this power may be used to seek to debate in the Assembly matters such as policies relating to the location of courts in Wales and any future closures and the provisions for the treatment of the English and Welsh languages on a basis of equality.

## 3 Special Principles Made Applicable to the Assembly's Powers and Functions

The Assembly is required to observe obligations and rights under international law, Community law and the Human Rights Convention,[60] save for the power of the Courts to declare invalid the subordinate legislation of the Welsh Assembly which is incompatible with these obligations (though with the ability to vary the retrospective effect of its decision as discussed below), and the fact that these obligations will take effect as soon as powers are transferred to the Assembly on 1 July 1999, there would appear to be no special issues relating to Wales.

There are, however, other provisions in the Act that may be significant to the way in which the exercise of the Assembly's functions can be subject to judicial review. Reference has already been made to the requirement for regulatory appraisals, but there are three other duties that should be highlighted:

(a) The Assembly has to make appropriate arrangements with a view to securing that its functions are exercised "with due regard to the principle that there should be equality of opportunity for all people".[61] As this duty governs the whole of the Assembly's functions, it may well be relied on in any review of either the legislative or executive and administrative functions.

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58 See Draft Standing Order 19 and an article by Bosworth and Shellings, "How the Welsh Assembly will affect planning." [1999] *Journal of Planning Law* 219, written before the draft Standing Orders were published.

59 Section 33.

60 Sections 106-8.

61 Section 120. The White Paper, *A Voice for Wales* (Cmnd 3718) foreshadowed this principle and the other special principles (see para .1.24).

(b) The Assembly is under a duty to make schemes as to how it proposes, in the exercise of its functions,

- to promote sustainable development,[62].
- to promote the interests of voluntary organisations - organisations that are non profit making and directly or indirectly benefit the whole or any part of Wales,[63] and
- to sustain and promote local government in Wales.[64].

(c) The Assembly is under a duty to carry out such consultation with the organisations representative of business and other organisations as it considers appropriate having regard to the impact of the exercise of the Assembly's powers on the interests of business.[65]

Although some of these schemes and the duties are novel in concept and may have far reaching effect in relation to policy, it is at present difficult to assess the extent to which they may give rise to legal issues. There is, however, a new potential area.

## 4 The Relationship with Westminster

Although the general scheme for the transfer of functions has been to confer the power in respect of a devolved function exclusively on the Assembly, there are a number of instances where the Assembly and a Departmental Minister have concurrent powers,[66] or where the powers have to be exercised jointly with a Departmental Minister or where a Departmental Minister has to consult or obtain the agreement of the Assembly.[67] If a dispute arises about joint or concurrent powers, there is no legal machinery in the Act for their resolution; it is anticipated they will be resolved through administrative concordats, intergovernmental relationships and the ultimate control of the Westminster Parliament.

Concordats will seek to govern the relationships between the Assembly and the Whitehall departments; given the nature of Welsh devolution, they may be of greater significance than

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62 Section 121. The Welsh Office has been reported as saying that this is the first time such a provision has been written into major legislation and others have said it has far reaching and radical implications.

63 Section 114.

64 Section 113.

65 Section 115. For a discussion of the problems raised in the consultation procedure under the Deregulation and Contracting Out Act 1994, see David Miers: *The Deregulation Procedure: An Evaluation* (1999; Hansard Society for Parliamentary Government).

66 These are set out in the Transfer Order and more readily identifiable in the technical guide; concurrent powers include provisions in employment and industrial development legislation and specific requirements for Treasury consent; joint powers include the making of appointments to various bodies.

67 There are special provisions dealing with cross-border matters: section 44(4) and Sch. 3. Their primary importance relates to water and the regulation of the privatised water companies as the river system and the border do not coincide. A Departmental Minister also has reserve functions to intervene in the case of water resources; these include a power to intervene when there might be an adverse impact on water resources in England (para. 6 of Sch. 3). A Minister may also direct the Assembly to implement obligations under Community law and international law (sections 106(3) and 108(2)).

those for Scotland and Northern Ireland. They are not intended to be legally binding, but it is envisaged that they might give rise to a legitimate expectation of consultation, [68] so that if none is made, a decision taken thereafter will be subject to judicial review.

The Secretary of State for Wales will retain a number of functions, particularly those relating to representing Wales in policy formulation, Parliamentary bills affecting Wales and resource decisions at Westminster; he is under a duty to consult the Assembly about a number of matters including the Government's legislative programme in Parliament and has the right to attend the Assembly and participate in its proceedings.[69] As the scope of this duty is heavily circumscribed by very broad discretions, it seems unlikely to give rise to any legal issues.

## 5 Determination and Review by the Courts

### 5.1 The present position

At present Wales produces very little by way of judicial review work, though it is difficult to be precise on available information as there has been no need to categorise work relating to Wales. It is estimated that about half of the 30 or so judicial review cases in which the Welsh Office are involved each year involve planning matters. There is no way of knowing whether this will change with devolution, but it may well, depending in part upon the legislative activity of the Assembly.[70]

### 5.2 The resolution of devolution issues

A special juridical regime is established for the resolution of Welsh devolution issues; these are defined as:[71]

(a) a question whether a function is exercisable by the Assembly;
(b) a question whether a proposed or purported exercise of a function by the Assembly is within the powers of the Assembly (including issues under Community Law and the Human Rights Convention);
(c) a question whether the Assembly has failed to comply with a duty imposed on it, including complying with obligations under Community law;
(d) a question whether a failure to act by the Assembly is incompatible with any of the rights under the Human Rights Convention.

This very broad definition does not confine Welsh devolution issues to issues on devolved competence, Convention rights and Community law.

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68 By the Solicitor-General, House of Lords Debates, vol. 588, col. 1131 (April 1998).

69 Sections 31 and 76.

70 Active consideration is being given to the best way of ensuring that any emerging body of Welsh subordinate legislation is conveniently available to the public, the legal profession and the courts. It will be particularly important to have an updated compilation and index, especially for amendments made through subordinate legislation of the Assembly to existing Orders and Regulations made at Westminster and for further amendments made by the Assembly to its own subordinate legislation.

71 Section 109 and Sch. 8.

The principal features of the regime as regards proceedings in England and Wales are:[72]

(a) A court or tribunal must give notice to the Attorney General and the Assembly when a devolution issue arises in proceedings before it.[73]

(b) The Attorney General or the Assembly may require the court or tribunal to refer to the Judicial Committee of the Privy Council any devolution issue which arises in proceedings to which the Attorney General or the Assembly is a party. The Assembly or the Attorney General may also refer to the Judicial Committee a devolution issue which is not the subject of proceedings.[74]

(c) If the issue is not referred to the Judicial Committee, then the court or tribunal hearing the matter can make a reference of the issue to a court higher than it; in general outline references from the magistrates courts will go to the High Court, those from the County Court and High Court to the Court of Appeal and from the Court of Appeal to the Judicial Committee.

Issues relating to the exercise by the Assembly of its legislative function would clearly appear to be devolution issues. However, as the executive and administrative functions of the Assembly will probably be exercised by the Assembly Cabinet and the Assembly Secretaries under delegated powers, would it be possible to put forward a pragmatic construction of the Act that these were not devolution issues when they did not raise issues of devolved competence? In view of the wide definition in the Act, this would be very difficult, but the special juridical regime can hardly be apposite for resolution of challenges to many types of administrative decision not involving Convention rights or Community law and where the decision has been made in relation to a function which it is accepted has been devolved and therefore raises no issue of devolved competence.

### 5.3 Judicial Review in Wales

A number of calls have been made for judicial review of the subordinate legislation of the Assembly and decisions of the Welsh executive to be heard in Wales; the arguments range from saying that it is incompatible with the aims of devolution if a decision made in Wales can be reviewed by a court in London (particularly in the case of first instance decisions), to maintaining that the particular problems of Wales (and therefore the rationale of decision making) and the relationship between the Assembly and the courts are better understood by those with a close connection with the Principality.

The feasibility of establishing a Crown Office list for Wales (with both a filing facility and provision for hearings in Cardiff) is under consideration; an important step has been taken by the Attorney General in creating a separate panel of counsel to advise and represent the Counsel General to the Assembly and the Treasury Solicitor on issues arising in respect of the devolved functions and matters relating to Wales. Providing proper arrangements can be

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72 Similar provisions are made for Welsh devolution issues arising in proceedings in Scotland and Northern Ireland, but these are not likely to be very common. See the Practice Directions set out in the Appendix to this book (ed).

73 Para. 5 of Sch. 8.

74 Paras. 30 and 31 of Sch. 8.

made, there is a strong case for such a Crown Office list; the legal system for England and Wales is sufficiently flexible for this to be done without in anyway undermining its unitary nature.

### 5.4 The power to vary the retrospective effect of a decision with respect to the invalidity of subordinate legislation made by the Assembly

As the Act contemplates that a Court can decide a particular provision of subordinate legislation made by the Assembly is invalid, the Act confers on the Court power to deal with the effect of such a decision. [75] The Court is given a broad discretion to vary or limit the retrospective effect or suspend the effect of a decision to allow the defect to be corrected, but must have regard to any adverse impact on non parties. The application of this power will probably to a considerable extent depend on the Court's assessment on the effect of its decision on what has been done in Wales in reliance on the invalid subordinate legislation.

## 6 The Welsh Language

The 1536 Act of Union made English the language of the Courts and the only official language of Wales.[76] These provisions were repealed by the Welsh Courts Act 1942, which permitted the use of Welsh in the courts if a person considered that he was disadvantaged by reason of his natural language of communication being Welsh.[77] The Welsh Language Act 1967 gave an unrestricted right to use Welsh in the Courts subject to notice,[78] it also enabled a Minister to prescribe a Welsh version of statutory forms or forms of words to be used for official purposes and to provide that if there was a discrepancy between the English and

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75 Section 110.

76 An exception was made for the Church. In 1563, Parliament made provision for the translation of the Bible and Common Prayer book into Welsh

77 In *Rv Merthyr Tydfil Justices ex p Jenkins* [1967] 1 All ER 636, one of the members of the Divisional Court said: "having spent the summer on circuit in Wales where these problems have arisen, I would like to add one word as to my conclusions based on that experience of the Welsh Courts Act, 1942. I think that it is quite clear that the proper language for court proceedings in Wales is the English language. It is to my mind a complete misapprehension to believe that anybody at any time has a right to require that the proceedings be conducted in Welsh. The right which the Act of 1942 gives is the right for the individual to use the Welsh language if he considers that he would be at a disadvantage in expression if he were required to use English. That is the only right which the Act of 1942 gives, and apart from that, the language difficulties which arise in Wales can be dealt with by discretionary arrangements for an interpreter, precisely in the same way as language difficulties at the Central Criminal Court are dealt with when the accused is a Pole". A Report in 1965 had shown how Welsh had occupied an inferior status to English in the administration of justice in Wales: see further Robyn Léwis *Cyfiawnder Dwyeithog (Bilingual Justice)* (1998).

78 Section 1(1), now re-enacted by section 22 (1) of the Welsh Language Act 1993, provides: "In any legal proceedings in Wales the Welsh Language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates court to such prior notice as may be required." This does not extend to an Employment Appeal Tribunal sitting in London hearing an appeal from an employment tribunal sitting in Wales: *Williams v Cowell and Another* (*The Times* 12 August 1999) (ed). Canada is a common law jurisdiction with extensive experience of a bilingual policy; section 23 of the Constitution Act 1867 provides that either language "may be used by any Person in any Pleading or Process in or issuing from any Court in Canada established under this Act", but the Constitution also provides for bilingual legislation. A useful discussion can be found in a Study by the Canadian Commissioner of Official Languages entitled *The Equitable Use of English and French before the Courts of Canada* (November 1995)

Welsh texts, the English was to prevail.[79] The further Welsh Language Act of 1993 established the general principle that the Welsh and English languages are to be treated on a basis of equality in the conduct of public business and the administration of justice.[80] Whether as a result of more general influences or these provisions, the use of Welsh in the courts appears to be growing.[81]

A series of provisions in the Government of Wales Act provide for the equal treatment of the Welsh and English languages by the Assembly;[82] the English and Welsh texts of subordinate legislation are to be treated for all purposes as being of equal standing. The Assembly is also entitled to do anything it considers appropriate to support the Welsh language.[83]. The practical effect on the Courts of these provisions is not easy to assess, but two issues arise.

### 6.1 The effect on the drafting of subordinate legislation

For the historical reasons explained, there has been little legislative drafting in Welsh; the most extensive experience is probably with the Church in Wales, but this is relatively recent;[84] some local authorities have produced bilingual bye-laws and there are now some bilingual charters, but these are more recent. In the light of this experience, the intention is to work towards parallel drafting of the English and Welsh texts of subordinate legislation, with English as the working draft; this may result, on occasions, in the English version of Assembly subordinate legislation being modified to accommodate the syntax of Welsh, the use of genders in Welsh, the range of Welsh construction and possible ambiguities in the choice of Welsh which has a less extensive vocabulary than English for legal terms. The extent to which this happens remains to be seen, but the view has been expressed that a

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79 Sections 2 and 3 of the Act. This provision has been used to prescribe bilingual forms of certificates, road signs and the like. Section 26 of the Welsh Language Act 1993 re-enacted this provision with some modifications, including the removal of the power to specify that the English text should prevail.

80 The power to make Rules of Court under section 22 has not been devolved, consistently with the scheme that in general none of the functions of the Lord Chancellor or the Attorney General is transferred: see Article 2(f) of the Transfer Order.

81 No figures are presently kept, but this is to change. In Llangefni County Court, there is on average one trial a week in Welsh and about 80% of chambers matters are heard in Welsh. The Gwynedd Magistrates hear a substantial proportion of their cases in Welsh. In 1998, the simultaneous translation facilities in the courts in Wales were used 27 times, twice the number in the preceding year. Following the making by the Lord Chief Justice of a Practice Direction about the use of Welsh in the Crown Court in October 1998, bilingual forms for Plea and Directions hearings are now in general use throughout Wales.

82 Sections 47, 66(4) and 122.

83 Section 32(c) and Sch. 3, para. 2.

84 Although the Constitution of the Church in Wales was drafted between 1917 and 1920 (with the considerable assistance of Viscount Sankey and Bankes and Atkin LJJ), the Welsh version was not finalised until 1972; it was a translation, but it was provided that the English and Welsh versions were to have equal validity. Thereafter, all amendments have been produced bilingually; the drafting has been done jointly with the working text being English. This has resulted in both texts being drafted so that they express as nearly as is possible the same meaning: see an essay by one of the principal members of the Welsh drafting committee, Dr Enid Pierce Roberts, "The Welsh Church, Canon Law and the Welsh Language." In *Essays in Canon Law*, ed. C.N. Doe (1992).

different style of legislative drafting will probably emerge in the longer term for Welsh subordinate legislation.

### 6.2 Interpretation in the courts

It will be necessary, if, for example, a point arises on the difference between the Welsh and English versions of any piece of subordinate legislation or if the Welsh text clarifies ambiguities in the English text, to have in place a proper method of considering the Welsh text with due regard to its co-equal status. There is extensive experience of dealing with the texts of international conventions where the texts in differing languages have equal status and also more recently with Community legislation; the court either relies on its own knowledge of the language or has the assistance of a dictionary or exceptionally an expert translator. Would this be sufficient? Or will the court be better assisted by an assessor?[85]

## 7 Conclusion

It is impossible to predict the extent to which legal issues will arise for determination. However there is the undoubted challenge of developing principles that achieve the right balance and intensity of judicial review of legislative and administrative action taken under this form of devolution with its unique features and complex structure.

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85 Section 70 of the Supreme Court Act 1981 and CPR Part 35.15. The Higher Courts could consider a judicial assessor drawn from among bilingual judges.