NATIONAL EISTEDDFOD OF WALES
DENBIGH 2001

LAW LECTURE

The Challenge of Legal Wales

The Law Society
Cymdeithas y Cyfreithwyr

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It is a privilege for me to be invited to deliver this year's Law Lecture. It is a particular pleasure to do so at Denbigh, the "Renaissance Shire". As a boy, I enjoyed family holidays in Llangernyw and Llanrwst and I have fond recollections of the "green, expansive countryside with its fertile meadows and noble trees". The pleasure of delivering the Lecture here is enhanced by the fact that Humphrey Llwyd was a native of Denbigh. It was Llwyd who presented a Parliamentary measure in 1563 to enable the translation of the Bible and the Book of Common Prayer into Welsh. Were it not for this measure, it is doubtful whether the work of William Salesbury and William Morgan could have been completed. It is in the context of the historical achievement of Humphrey Llwyd that I venture to discuss the challenge of Legal Wales in our times following Devolution and the coming of the National Assembly to Cardiff.

Devolution has acted as a catalyst for change and development in the administration of law and also the law in Wales. This is not surprising as the White Paper on the National Assembly for Wales[1] predicted that "the Assembly will help to create the body of law which governs Wales". The Courts will have the opportunity to contribute to the process of devolution through scrutiny of the exercise by the Assembly of its functions, that is, by providing appropriate checks and balances against abuses or excesses of power by the Assembly. Everything the Assembly does is potentially susceptible to legal challenge by way of a range of legal proceedings, including criminal proceedings as well as, of course, judicial review. Through these developments, the Counsel-General, Mr Winston Roddick QC has referred to the existence of a distinct body of Welsh law: "This repatriation to Wales of law-making powers and the administration of justice has created what I call 'Legal Wales' and it is developing at a rapid pace".[2]

In October 2000, Sir John Thomas delivered at the University of Wales Swansea the Lord Morris of Borth-y-gest Lecture where he took as his theme: "Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, the Welsh Language and Parochialism". Here, the phenomenon of "Legal Wales" was

considered within the historical context of Wales' modern past and as such, the lecture represents an outstanding and defining contribution in this field. In the lecture, Sir John posed this question: "But how has the law and its institutions within Wales recognised national identity and what contribution can be made today by 'Legal Wales' to the nation?" My purpose today is to seek to chart some approaches to this question by identifying the constraints on "Legal Wales", the distinctive characteristic of "Legal Wales" and lastly the nurturing of "Legal Wales".

CONSTRAINTS ON LEGAL WALES: THE SHAPING OF POWERS AND PRINCIPLES

The powers of the Assembly are circumscribed because as the National Assembly Advisory Group observed: "[T]he Assembly will not be a Parliament in the recognised sense of the term[3]." Whereas the Scotland Act 1998 and the Northern Ireland Act 1998 provide powers to enact primary legislation, the Government of Wales Act 1998 does not. Since primary legislation continues to be made in Westminster, it has been necessary to bring the Assembly into the legislative process in Westminster and its role and treatment within the Westminster process is still being worked out.

The devolution settlement in Wales has created a "vastly complex legal chess game".[4] To a large extent this reflects the absence of a set of principles underpinning the scope and allocation of powers in the Government of Wales Act. There was no constitutional convention - this in itself reflects the political background to the Act, that is, devolution in Wales was achieved with the slenderest of majorities. Thus, the basis of the transfer of powers was simply administrative convenience in that the initial Transfer Order[5] reflects the delegated powers that the erstwhile Welsh Office had wielded. Perhaps this is also a reflection of the very short timescale that was available. Unfortunately, such an approach ignored the fact that there had been no principled basis underlying the exercise of these powers and also that these powers had grown incrementally. It is little surprise therefore that the basic Transfer Order is such an unwieldy document listing as it does around 350 Acts of Parliament containing functions transferred to the Assembly. Indeed, it is an extraordinarily complex document where references are made to excepted sections, powers devolved, powers exercised concurrently and powers exercised jointly with central government.

The lack of governing principles has and will result in intergovernmental tension.[6] This arises from the fact that much of the UK legislation is driven by different Whitehall Departments. There is evidence that such Departments have different approaches to Assembly Functions insofar, for example, as they relate to ministerial order-making powers.[7] Indeed, in the Lord Morris of Borth-y-gest Seminar which considered the law making powers of the Assembly,[8] the current arrangements in terms of the dividing line between primary and secondary legislation for the purposes of the Assembly was described as "zig zag".[9] It was concluded that there was no consistency to the amount of power devolved to the Assembly which necessarily has led to a lack of transparency in the horizontal and vertical division of powers.[10] Undoubtedly, the complexity of the current arrangements has significantly undermined the accessibility of the law. As Jane Jones has pointed out:

> "...accessibility is a long-standing fundamental of the legitimacy of statute-law; as long ago as 1539 the Statute of Proclamations recognised this by requiring that laws made under delegated powers must be proclaimed 'openly and on places public and convenient'. It seems reasonable to assume the purpose of the requirement is to enable a reasonably well-educated person to discover the law without incurring very much expense. It is becoming questionable whether post devolution Welsh statute law passes that test."[11]

Powers transferred to the Assembly are to be found in very many separate Acts of Parliament - the impression is of a patchwork quilt of powers conferred in different ways in different Acts. This position has arisen not so much as a result of drafting policy but rather represents the outcome of negotiations between the Assembly, the Secretary of State for Wales and other government departments as to what the Assembly is to be permitted to do. An illustration of this phenomenon is the Children's Commissioner for Wales Act 2001 which is the first piece of Wales-only primary legislation since devolution. This had to be fitted within the pre-existing statutory framework[12] and there are inevitable drafting constraints with such a procedure, that is, only drafting in an "economical manner" was available from the point of view of those charged with drafting it.[13]

The "Bill by Bill" approach to defining the powers of the Assembly causes difficulties for practitioners and indeed some have expressed concern that the present arrangements make it more difficult for lawyers to ascertain what the

law is in Wales in contrast to that seen in force in England and Scotland. There are two aspects to this: first, the issue of accessibility of the law is guaranteed by Article 6 of the European Convention on Human Rights as implemented by the Human Rights Act 1998 and putting it at its lowest, the complexity of the current arrangements brings this into focus; second, there is the matter of efficiency in obtaining information about what legislation applies and/or what is in contemplation in Wales. With regard to the latter point, I have no doubt that Welsh Law Schools have something to offer and I will refer to this later. However, the substantive issue relates to the uncertainty arising out of the patchwork of the current arrangements which are difficult to untangle in terms of mapping the scope of the Assembly's law-making powers. This offends against the "principle of intelligibility"[14] and as Rawlings points out:

> "This feature is the more striking because of the great stress placed in the devolutionary design on transparency and bringing government closer to the people. Intelligibility of functions or powers is a *sine qua non* of the practice of inclusiveness."[15]

The present difficulties arise out of the very structure and position of the Assembly itself: it is the executive branch of government in Wales; the Cabinet is a committee of the Assembly; Assembly Secretaries are AMs with delegated powers. The "soft law" in the form of memoranda of understanding, concordats or protocols[16] essentially expose a legal fiction, namely, that the Assembly Cabinet is the Executive branch of government in Wales in much the same way as its Scottish and Northern Irish counterparts. What we have in Wales is a unique compromise within the UK devolutionary settlement between a local government model and a system of Cabinet government seen elsewhere in the United Kingdom. It is little wonder that at the Lord Morris of Borth-y-gest Seminar held in January 2001,[17] scepticism was expressed amongst the distinguished delegates as to the effectiveness of such "soft law" which was not considered as important as the relationship between those who had to work together.[18]

In Wales, the distinction between the legislation and executive functions of the Assembly are of little if no relevance given that at least, formally, Wales does not have the powers to adopt primary legislation. There is deep irony at the heart of the present arrangements which Burrows elegantly summarises as follows:

> "In Wales there is the anomaly that an Assembly deriving its legitimacy from the will of the people demonstrated in elections lacks the power to carry out the functions associated elsewhere within the United Kingdom with such a body. The National Assembly for Wales therefore has legitimacy but lacks a functional capacity proper to its status whereas prior to devolution the Welsh Office had an extensive functional capacity yet lacked legitimacy. The whole point of devolution was to rectify this position. It has recently turned it upside down."[19]

As a matter of constitutional logic, the Assembly, which derives its legitimacy from the electorate, cannot ultimately be confined to merely a consultative role[20] in the process of government in Wales. It may be that what is called for is a new way of analysing the present arrangements so that, for example, Rawlings refers to a quasi-legislative model for devolution.[21] The argument is that it is legally consistent with the Government for Wales Act for the Assembly to be granted greater power by the Westminster Parliament in the form of Henry VIII clauses which would effectively give the Assembly the power to modify primary legislation. The point is that the devolution settlement encapsulated in the 1998 Act is not a static one and it is designed to permit new functions to be conferred on the Assembly and to permit the transfer to the Assembly of further existing functions within the fields specified in Schedule 2 of that Act. The current position is that various post-devolution Acts have conferred new functions on the Assembly, notably the Health Act 1999, the Local Government Act 2000, the Learning and Skills Act 2000 and the Care Standards Act 2000. In the last session of the Westminster Parliament five Acts conferred functions on the Assembly, namely the Capital Allowances Act 2001, the Children's Commissioner for Wales Act 2001, the Health and Social Care Act 2001, the Special Educational Needs and Disability Act 2001, the Regulatory Reform Act 2001. Significantly, three of these Acts provide a framework within specific fields for separate policy development, law making and administration in Wales: the role of the Children's Commissioner, the improving health NHS agenda in Wales and special educational needs in Wales.

Whilst the Legal Wales phenomenon is entrenched, nevertheless, the uncertainty over the powers of the Assembly are such that there are limits to what can be achieved. Ultimately, for Legal Wales to move on a set of devolution principles need to emerge setting out devolutionary minima[22] doubtless echoing subsidiarity and comity between jurisdictions. The development of such

principles could form the basis of a Wales Constitutional Convention. However, this will take time but this should not prevent, in the interim, clarification of which powers should be devolved in Statutes of the Westminster Parliament as this would facilitate understanding and accessibility in the presentation of legislation as well as providing guidance to legislative draftsmen. At the Lord Morris Seminar which considered the law making powers of the Assembly, the following proposals were made:[23]

- Separate provisions for Wales should be more clearly indicated on the face of the primary legislation;
- Separate sections in each Act dealing with the powers conferred on the Assembly;
- Adoption of the phrase "appropriate national authority" in future legislation;
- The Assembly should be given the power to amend an Act before it came into force;
- In respect of pre-1999 statutes and their amendment a provision should be included in the Interpretation Act dealing with the position of the Assembly. This section could provide that "National Assembly" should be read for Secretary of State, unless there was a separate provision.

THE DISTINCTIVE CHARACTERISTIC OF LEGAL WALES: BILINGUALISM AND THE LEGAL PROCESS IN WALES

The distinctive feature of "Legal Wales" is the phenomenon of the Welsh language. The Assembly operates upon the basis of the equality of the Welsh language and English language in its own administration and this duty is enshrined in s47(1) of the Government of Wales Act 1998. Further, the Assembly is normally required to draw up statutory instruments in Welsh and English[24] and where so published, the two languages have equal legal standing.[25] Of course, historically, this was not the position.[26] Clause 17 of the Act of Union (1536) directed that the English language was to be the only language of the courts and public life in Wales so that Welsh was excluded, at least formally[27], from the key spheres of law administration and the public sector until the Act of 1942 which permitted Welsh to be used in court in Wales by a party or witness "who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh". It did not place Welsh on an equal footing with English but it did repeal Clause 17 and further provided for subordinate legislation prescribing forms of oaths in Welsh.[28] Thirty-five years later, the Welsh Language Act 1967 enshrined the principle of

equal validity of Welsh and English by providing an unconditional right for any person to use Welsh in giving evidence in court proceedings in Wales. In 1993, a second Welsh Language Act was passed which established a Welsh Language Statutory Board with promotional functions, and it was perceived that this was an acknowledgement that the State has a duty both to protect and promote the Welsh language in Welsh public life. The legislation further provides that Welsh should be treated on the basis of equality with English. To this end, public bodies named and defined in the Act are required to prepare "Welsh Language Schemes". There is a power to specify further bodies or persons for this purpose.[29] The Welsh Language Schemes (Public Bodies) Order 2001, the first exercise of this power by the Assembly[30], has specified a further 25 bodies on the basis that:

> "[It] will enable the application of the principle that English and Welsh should be treated on a basis of equality to be further extended. The Order is consistent with the National Assembly's policy of supporting bilingualism. It will contribute to one of the priorities of the Assembly's strategic plan, BetterWales.com, which is to extend access to and awareness of the Welsh language."

There are two aspects to the use of the Welsh language in "Legal Wales" which are particularly pertinent in this context. The first relates to the drafting of laws in Welsh; the second is concerned with the use of the Welsh language in court proceedings. I shall deal with each of these in turn.

Drafting Laws in Welsh

In promoting the use of Welsh in the law making process as well as in official and public administration the standardisation of terms is of the utmost importance. It is self-evident that the Welsh and English versions of official documents must be accurately mirrored and reconciled. Errors and omissions, lack of consistency can be seen in some *translations* of statutory instruments especially those produced between 1967 and 1987 and all such instruments (where they remain in force) need to be reviewed in terms of the accuracy of the Welsh translation.[31]

Bilingualism in the context of the drafting of laws in Wales does not mean simply translation. The Welsh language must be considered at the point of construction of any enabling power which is to be exercised bilingually. It is obvious that the fragmentation in the law making process which, as we have

discussed, is very much the outcome of negotiation between the Assembly, the Secretary of State and other government departments as to what the Assembly is permitted to do, fails to take into account or at all the drafting implications. However, there is nothing in the Government of Wales Act 1998 to preclude devolution of functions by reference to fields rather than perceived equivalents to the former powers of the Secretary of State for Wales nor that, where appropriate, the Assembly might in its own legislation "apply with modifications" the provisions of an English statute, or disapply those provisions and make separate provision for Wales. One strong argument for this approach is that this takes into account the necessary requirements of bilingualism. Indeed, this phenomenon far from being a burden upon the legislative processes in Wales can make the law more accessible by clarifying the source(s) of law powers in Wales and also promote clarity of meaning of the words used in both the English and Welsh versions, that is, it has the effect of improving the text in both languages.[32]

The logic of the principle enshrined in the Government of Wales Act 1998 of equality between the Welsh language and English language requires the practice of co-drafting. What is involved here is contemporaneous drafting in both languages throughout the legislative process. Instructions are taken in both languages and the texts are drafted side by side, one text influencing the other as the drafting process progresses. This approach is manifested in Canada which has rejected simple translation as a mechanism of drafting. Indeed, the co-drafting mechanism can be seen in other jurisdictions.[33] The implementation of such an approach in Wales would have the following advantages.[34]

- It pays due respect to the law as the Westminster Parliament and the Assembly are bound by the wording used in legislation in terms of grammar and syntax;
- It ensures that no language is categorised as second class;
- It sharply brings into focus the need for an appropriate legal structure.
- It is efficient since each version is developed from instructions so that any problems relating to one or the other in terms of meaning can be explored at the earliest possible opportunity;
- It improves the quality of both versions and the quality of law in general;
- It necessitates the active involvement of all those involved in the legislative process;

As such, it appears to be an appropriate approach to principled government in a bilingual Wales. Indeed, Sir John Thomas would go further:[35]

> "There is no reason why Legal Wales cannot be ... innovative in the development of our own linguistic heritage. I am confident that can also be done, particularly in the field of legislative drafting where we are no longer bound by the history of Whitehall and are free to develop our own ideas and policy. In our analysis of and debate on the new constitutional arrangements for Wales, we can only gain by adopting the same outward looking approach."

The Use of the Welsh Language in Court Proceedings

There are adequate translation facilities and support staff in Civil Justice Centres in Wales to support the use of Welsh in civil proceedings.[36] Whilst there are gaps in the Welsh language provision seen in magistrates' courts throughout Wales, this can fairly easily be remedied by the Lord Chancellor appointing more Welsh-speaking magistrates. In contrast, the right of jury trial to be conducted entirely through the medium of Welsh is at first sight more problematical. At present, it is not possible under the Juries Act 1974 (as amended) to select a jury whose members are entirely bilingual in Welsh and English. The main thrust underlying this approach is the principle of random selection for jury service and Blackstone referred to this as "a palladium of our liberties". This was the argument adopted in Lord Edmund-Davies's Report on the *Use of Welsh in Courts* (1973).[37] Here the point was made that to depart from random selection on, for example, linguistic grounds, amounts to a fundamental attack on the principle of random selection. The mischief it has been argued[38] is particularly accentuated in respect of South-East Wales where over 90% of the people (according to the latest available census) are English speaking thereby debarring a significant percentage from the jury trial process.

Whilst it is the case that in what was Glamorganshire when the 1991 census was taken only a minority of the population could speak Welsh,[39] nevertheless, because of the density of the population in South Wales, in numerical terms, there are more Welsh speakers in what was Glamorganshire than there are in North-East Wales where Welsh is spoken by the majority of the population and is the language of social intercourse. In any event, the principle of "random selection" as a tenet of the common law in England and Wales is questionable given the long list of people excluded from jury service so that, for example, historically, there have been important bars to jury membership including

gender, sex and property. Furthermore, whilst Blackstone was strongly in favour of the selection of jury panels and he expressed these views in trenchant term in his *Commentaries*, his reference to "palladium of our liberties" had nothing to do with the random selection of jury panels. It was his colourful description of the system of choosing juries from the panel by lot.[40] This principle could therefore be maintained by establishing a Welsh-speaking panel from which a jury could be chosen at random from among a panel of members, thereby satisfying Blackstone's views.

The role of interpreters does go some way to treating Welsh on the basis of equality with the English language, nevertheless, this is not finally achieved and indeed has the potential to work an injustice. For example, nuances of language are lost, the dynamic of cross-examination can be compromised and an interpreter is no substitute for speaking directly to the jury as arbiters of fact. As a matter of principle, there cannot be an objection to jury trial in the Welsh language in view of the Welsh Language Act 1993 where Welsh is treated on the basis of equality with English.[41] The Report prepared by Lord Edmund-Davies is now over 25 years old and the circumstances in Wales are different from those described there. Indeed, the right of the judge under the Juries Act 1974[42] to remove jurors who display an inadequate knowledge of English establishes that there is no fundamental principle of random selection of juries. Further, it may be persuasively argued[43] that it is unnecessary for there to be primary legislation enabling jury trials through the medium of Welsh. The reasoning here is that since the selection of a jury is an administrative function, it should be possible to work towards an administrative protocol in respect of the selection call process where there is an issue of using Welsh in a criminal trial.[44]

There are at least four aspects to this.

Development of Expertise in Constitutional and Administrative Law in Wales

Historically, there has been a lack of a public law tradition amongst the legal profession in Wales.[45] Schedule 8 to the Government of Wales 1998 and the Practice Direction on Devolution Issues 1999 enables public law cases involving the Assembly and other public bodies to be lodged in Cardiff. Already the Administrative Court has been established in Cardiff[46] and this has sat in Swansea and other locations in Wales. I have no doubt that a contribution can be made by Welsh Law Schools to raise the awareness of public law issues at undergraduate and postgraduate levels as well as providing continuing legal education for practitioners in Wales. Already there exists a close collaboration between many of the Welsh Law Schools and the Wales Public Law Association.[47] Even so, it should be noted that the litigation explosion which some predicted would occur in the wake of the Assembly's exercise of its functions being the subject of judicial scrutiny and the establishment of the Administrative Court in Wales has not occurred. It is simplistic to maintain that the reason for this is the lack of public law expertise in Wales. Rather, this reluctance to challenge arises out of the very nature of the powers devolved in that many of the Assembly's core activities relate to its relationship with other public bodies and various voluntary agencies in Wales. In determining whether to challenge the Assembly, these bodies and their legal advisers have to bear in mind the fact that the Assembly is the elected body representing the people of Wales and also would have to justify using scarce public resources to fund an expensive legal challenge which could and would doubtless lead to significant criticism. Only time will tell whether this position will change.[48]

An important element in the development of expertise in public law in Wales relates to the need to develop high quality research in this field within Welsh Law Schools. It may be that the development of a Constitution Unit within the University of Wales could facilitate and co-ordinate this research. However, I will point out that a difficulty for Welsh Law Schools with national and international research missions is to attract funding for such work. The reasoning here is that the research councils are UK driven and that in law for the purpose of the Research Assessment Exercise what is "national" research

will be perceived from a purely UK perspective as distinct from recognising the particular Wales legal perspective which is now emerging especially where research work on "Legal Wales" is carried out through the medium of Welsh. Significantly, there exists a Scottish Panel evaluating legal research in Scots Law: there is no such Panel for Wales.

Raising Legal Awareness in Conjunction with Independent Policy Development in Wales

Unquestionably, devolution has provided an opportunity for the development of distinct law and policy reflecting the needs and aspirations of the people of Wales. To facilitate this process further, it is necessary to develop legal literature disseminating the outcomes of critical reflection on the development of law and policy in Wales by setting this within a UK, European and international perspective. I am delighted to announce today the launching of a major new development, the Wales Law Journal, which seeks to contribute to achieving this objective. The Journal has a distinguished editorial board comprising of senior judges and practitioners as well as senior academicians both within and outside Wales. There is representation on the editorial board from all Law Departments within the University of Wales. Jane Jones, the former Assistant Counsel General and now of the Law Department, University of Wales Swansea is uniquely qualified to be the foundation General Editor of this Journal. The aims of the Journal can be set out as follows:

- To provide a forum for descriptive and reflective papers on issues of interest to legal practitioners, policy makers and academicians in Wales and beyond;
- To explain new Welsh law and the way in which it may be or is implemented by the Assembly and public authorities in Wales;
- To make connections and comparisons with developments elsewhere;
- To provide case notes and legal information to legal practitioners in respect of developing law in Wales.

Appropriately, the Journal is modelled upon the Australian Law Journal. Further and in the spirit of "made in Wales", a conscious effort has been made to ensure that the Journal is published in Wales and to this end, I am grateful and wish to formally acknowledge the commitment, the shared vision and the considerable design-flair exhibited by Elfen, the Welsh publishers of the Journal.

Academic lawyers have a significant role to play in research into the effectiveness of policy development and policy implementation in Wales. Many of the "made in Wales" public policy initiatives introduced by the Assembly depend for maximal success either on using current legal powers to their full extent or identifying early the need for new primary legislation to be enacted in Westminster. This can be illustrated in the most recent Queen's Speech which trailed the introduction of legislation to empower the Assembly to abolish health authorities and thus remove a tier of bureaucracy. The abolition of these authorities lies at the heart of the NHS Plan for Wales - *Improving Health in Wales: A Plan for the NHS with its Partners* (2001).

A practical example of the role of the Welsh Law School in the development of policy in Wales is the Swansea Family Court Interdisciplinary Forum. This engages all court users of the Family Court in South West Wales and has provided a useful bridge with the judiciary. The Forum seeks to represent the views of its members on matters of policy affecting the work of the Family Court. Already, the Forum has made links with CAFCASS and is working with the new Children's Commissioner for Wales. The meetings of this Forum[49] are arranged and facilitated by the Law Department of the University of Wales Swansea and assisted by the Law Society in Wales.

Bilingualism and the Legal Process

There are three elements to this:

(a) **Bilingual legal education.** Work on this has already begun. Providers in Wales are now actively co-ordinating the use of Welsh among their respective Law Departments with a view to avoiding duplication of provision.[50] The aim is for certain Law Schools to be responsible for developing identified law modules in Welsh and then delivering this according to demand to other Welsh Law Schools by using video-conferencing and other networking facilities.

(b) **The production of legal materials in Welsh.** The need for bilingual legal texts is self-evident. The problem has been identifying where to start! In Swansea, for example, we have decided to target materials which could benefit the magistracy who dispense with over 95% of all criminal cases. To this end, we will produce a Legal Manual through the medium of Welsh for magistrates.

Of course, the logic of Legal Wales requires that all legal materials pertaining to Wales (including Law Reports) should be available through the medium of Welsh. It is self-evident that this would require a significant financial commitment from the Assembly in conjunction with the Office of the Counsel General and perhaps the Lord Chancellor's Department. In the meantime, there is the challenge of constructing an English-Welsh Bilingual Glossary of Legal Terminology. In terms of its structure, such a Glossary should be constructed and distributed electronically so as to allow editorial flexibility and also to input machine-readable source material automatically. Likely inputs to the compilation process should consist of existing dictionary/glossary material as well as new terms being generated. The point here being the need to ensure standardisation of terms. In this respect, electronic glossary compilation has the advantage of the integration of past documentation with the future translation requirements of the profession and the legal process in Wales.

(c) **Training for court users in Welsh.** Law Schools in Wales have an important role in providing tuition in the use of Welsh within the legal process generally in Wales. To this end, next session, the Department of Law at the University of Wales Swansea will offer such courses at least initially to court users as part of its continuing legal education programme.

Promoting the Welsh Economy

I have no doubt that Law Departments, at least in the Objective 1 region in Wales, can make a significant contribution to wealth creation in Wales. One obvious way is through raising the awareness of intellectual property law rights to SMEs in Wales. At present, there is an abnormally low level of intellectual property activity in Wales and in my view, this has compromised vibrant R & D activity in Wales which ultimately undermines the goal of the Assembly to transform the Welsh economy to focus upon high value, knowledge-driven industrial activity. To this end, I am happy to acknowledge the substantial financial assistance promised by the Welsh Development Agency in supporting the development within the Law Department at the University of Wales Swansea of a Wales Centre for Intellectual Property Rights which with significant European financial assistance is scheduled for launch at the beginning of October this year. Initially, the Wales Centre will provide an "observatory" on intellectual property activity within the Objective 1 region and will pursue research into the application of intellectual property law with specific reference

to Wales within the wider European context. At the same time, the Centre will employ field work officers who will have the task within the whole of the Objective 1 region of providing assistance to SMEs with the protection of their intellectual property and also crucially its exploitation. As part of this exciting development there will be an opportunity for the Centre to collaborate closely with the members of the Wales Commercial Law Association and other professionals working in the intellectual property law field throughout Wales and perhaps beyond. The project value is over £2.1m.

In drawing to my conclusion, I have been informed that the title I have chosen for this lecture is politically incorrect - "The Challenge of Legal Wales". A "challenge" so I am told suggests that there may be obstacles or even difficulties which may require considerable effort to overcome them leading perhaps to the major affliction of the present age, stress. I am advised that instead of referring to "The Challenge of Legal Wales", I should have instead referred to "The opportunity of Legal Wales". Even so, I have no doubt that "Legal Wales" does properly present challenges as well as opportunities for lawyers and policy makers in Wales and elsewhere. Legal Wales is becoming firmly established and the process which is devolution is irreversible.[51] Within this context it may be that the significant challenge to the continuing development of Legal Wales is the pursuit of complete answers: "*Le mieux est l'ennemi du bien.*"[52]

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NOTES

[1] *National Assembly for Wales*, Cm 3718 (1997).

[2] Winston Roddick QC, Address to the Centre for Welsh Legal Affairs, the University of Wales, Aberystwyth, 14th November 2000.

[3] National Assembly Advisory Group, *Consultation Document: National Assembly for Wales Have Your Say in How it Will Work* para 3.6.

[4] Burrows, *Devolution* (2000) at p 6.

[5] The following transfer of functions orders have been made: SI. 1999/672, 2000/653, 2000/1830, 2000/1829. Under s22 of the Government of Wales Act (1998), the National Assembly derives law-making powers from the transfer of functions orders, from provisions of the 1998 Act itself and also from provisions in Acts conferring powers directly on the Assembly.

[6] See generally Rawlings, "Quasi-Legislative Devolution: Powers and Principles" in Lord Morris of Borth-y-gest Seminars 2001, *The Law Making Powers of the National Assembly for Wales.*

[7] Compare Local Government Act (2000), the Countryside and Rights of Way Act (2000), the Regulatory Reform Act (2001). These are discussed by Jane Jones in "Making Welsh Law: Process, Presentation and Accessibility" *ibid* at pp 49-51.

[8] *Op cit* fn 6. The seminar took place against the background of a general recognition of the need for lawyers to make a greater contribution to the constitutional development of Wales after devolution. Lawyers from all walks of private practice, government and universities examined together, under Chatham House rules, the subordinate law making powers of the Assembly under the Government of Wales Act (1998). This seminar was the first in a series of three following the delivery of the annual Lord Morris of Borth-y-gest lecture. The content of the three seminars which have followed the lecture build on the themes laid out there. The focus of the second seminar was "*The Welsh Language and the Legal Process in Wales.*" This was held in March 2001 and the Report of this Seminar can be found in (2001) 1 *Wales Law Journal* 9. The third seminar will consider longer-term issues relating to the legal institutions, the courts in Wales and the contribution made to the Welsh economy. This is scheduled to take place at the end of September 2001.

[9] See Rawlings *op cit* fn 6 at p 16.

[10] Seminar Report *op cit* fn 6 at p 7, para 1-2.

[11] *Op cit* fn 7 at p 48. See below.

[12] Provision for the establishment of the office of the Children's Commissioner for Wales was made in Part V of and Schedule 2, Care Standards Act (2000).

[13] Parliamentary counsel are unwilling to accept instructions from lawyers of the Office of the Counsel General of the Assembly. In practice, this has meant that skeleton Bill teams of parliamentary counsel have had to be seconded to the Wales Office for the purpose of Wales only legislation. Within the Office of the Counsel General a legislation management unit has been created.

[14] Rawlings *op cit* fn 6 at p 17.

[15] *Ibid* at pp 17-18.

[16] These are rules of conduct without binding or only limited force. See *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales, and the Northern Ireland Executive Committee*, Cm 4806 (2000). For a general discussion see Rawlings, "Concordats and the Constitution" (2000) 116 LQR 257.

[17] See fn 6 above.

[18] *Ibid* at p 8, para 1.3.

[19] *Op cit* fn 4 at p 186.

[20] See the Concordat between the Assembly Cabinet and the Wales Office published in January 2001. The full text is available on the Assembly website.

[21] *Op cit* fn 6 at pp 18-21.

[22] See Rawlings *ibid* at pp 34-38.

[23] See Seminar Report *op cit* fn 6 at pp 10-11 paras 2.9-2.12.

[24] Section 66(4) Government of Wales Act (1998).

[25] Section 122 Government of Wales Act (1998).

[26] This is discussed by Lord Gwilym Prys-Davies, "Y Gymraeg A'r Gyfraith" (2001) 1 *Cylchgrawn Cyfraith Cymru* 29.

[27] See Sir John Thomas, Lord Morris of Borth-y-gest Lecture 2000 "*Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, the Welsh Language and Parochialism*". In his lecture, Sir John shows that with the establishment of the County Court System in Wales in 1846, Welsh speakers were routinely appointed as judges and this was seen as a necessary qualification for doing justice in Wales.

[28] The Welsh Courts Oaths and Interpreters Rules 1943 SI 683.

[29] This power was originally conferred on the Secretary of State for Wales but was transferred to the Assembly under the first Transfer of Functions Order. See Jane Jones, " Wales Legislation" (2001) 1 *Wales Law Journal* 73.

[30] The previous Orders were the Welsh Language Schemes (Public Bodies) Order 1996 (1996 SI 1898); the Welsh Language Schemes (Public Bodies) Order 1999 (1999 SI 1100).

[31] See Lord Gwilym Prys-Davies, "Y Gymraeg A'r Gyfraith" (2001) 1 *Cylchgrawn Cyfraith Cymru* 29.

[32] See Godin, "The Practice of the English Common Law in the French Language: The New Brunswick Experience" (2001) 1 *Wales Law Journal* 40.

[33] See Bergeron, "Co-drafting: The Canadian Experience of the Creation of Bilingual Legislation in a Bijual System" Lord Morris of Borth-y-gest Seminar, *op cit* fn 6 at p 58.

[34] This method had, for example, been adopted by the Swiss government and the drafters of the Canton of Bern, a bilingual canton where French and German are used.

[35] *Op cit* fn 8.

[36] Lord Morris of Borth-y-gest Seminar Report: "The Welsh Language and the Legal Process in Wales" (2001) 1 *Wales LJ* 13 at para 1.9.

[37] This was never published as a report but was presented by way of statement made by the Lord Chancellor, Lord Hailsham in the House of Lords on 12th June 1973.

[38] See *Juries in Wales*, paper sent by Judge Roderick Evans (as he then was) and John Thomas J to Lord Justice Auld's *Review of the Criminal Process.* Compare *Juries in Wales* paper sent by Pill LJ by way of response. These papers were discussed at the Lord Morris Seminar *op cit* fn 36.

[39] According to the 1991 census the percentage of people of 3 years and over able to speak Welsh in the (then) existing counties of South-East Wales was: Gwent - 2.4%; South Glamorgan - 6.5%; Mid-Glamorgan - 8.5%; West Glamorgan - 15%.

[40] See Lord Morris Seminar Report *op cit* fn 36 at para 3.5.

[41] The Welsh Language Act (1993) imposes a duty on the public sector to treat Welsh and English on the basis of equality when providing services to the public in Wales. The same principle applies to the courts.

[42] Section 10 Juries Act (1974) (as amended) provides:

> *"Where it appears to the appropriate authority, in the case of a person attending in pursuance of a summons under this Act that on account of ... insufficient understanding of English there is doubt as to his capacity to act effectively as a juror, the person may be brought before the Judge, who shall determine whether he should act as a juror and, if not, shall discharge the summons ...".*

In order to put Welsh and English on an equal footing, the Act could be amended by adding after the words "*or insufficient understanding of the English language" the following phrase: "or in Wales, where there is a likelihood that a party or witness or other person will use the Welsh language in a case listed for trial, insufficient understanding of the Welsh language*". See Lord Morris Seminar Report *op cit* fn 36.

[43] *Ibid* at para 4.2.

[44] *Ibid* at para 3.7.

[45] In the Lord Morris Lecture 2000 Sir John Thomas referred to "one of the most striking products of the legacy of the past 150 years [referring to the administration of justice] has been the lack of a public law tradition within Wales and within the profession in particular".

[46] In addition, the Commercial Court has been established in Wales. The Court of Appeal Civil and Criminal Division have begun to sit regularly in Cardiff whilst the Employment Appeal Tribunal has also sat in Cardiff.

[47] In the first three years following the Government of Wales Act (1998), three specialist legal associations have come into being namely, the Wales Public Law and Human Rights Association, the Welsh Personal Injuries Lawyers Association, the Wales Commercial Law Association. Senior representatives of the judiciary, the legal profession and academics are involved in these Associations with the aim of providing a forum for discussion and debate on matters of common interest.

[48] See Shellens "Public Law Challenges in 'Legal Wales' " (2001) 1 *Wales Law Journal* 64.

[49] The theme of the first Forum was the impact of the Human Rights Act (1998) on Family Law. The theme of the second Forum was "Children First: Aspirations for the Children and Family Court Advisory and Support Service."

[50] The Welsh Language Law Panel for promoting undergraduate legal education through the medium of Welsh consists of representatives from all Welsh Law Schools. The inaugural meeting took place by way of a video conference on May 24th 2001. Another meeting is planned for September 3rd 2001. These meetings have been co-ordinated by the Welsh Language Liaison Officer of the University of Wales.

[51] See Lord Morris Seminar "*The Law Making Powers of the National Assembly for Wales*" *op cit* fn 6 at para 1.1.

[52] Voltaire *Dictionnaire Philosophique* (1764).