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Cymdeithas y Cyfreithwyr
The Law Society

Professor Thomas Glyn Watkin

How the law is taught in modern Wales

– THE OPPORTUNITIES AND RISKS

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The Reverend Professor Thomas Glyn Watkin was born in the village of Cwmparc in the Rhondda in 1952. He was educated at the Rhondda County Grammar School for Boys in Porth, before studying Law at Pembroke College, Oxford, where he was Oades and Stafford Scholar (1971-1974). He obtained the degrees of BA (1974), BCL (1975) and MA (1977) from the University of Oxford and was called to the bar by the Middle Temple (1976). From 1975 until 2004, he was successively lecturer, senior lecturer, reader and professor in the Law School at the University of Wales, Cardiff, as well as acting as Legal Assistant to the Governing Body of the Church in Wales from 1981 until 1998. He was appointed foundation Professor of Law at Bangor in 2004.

His principal publications include The Nature of Law (1980), The Italian Legal Tradition (1998) and An Historical Introduction to Modern Civil Law (1999), and, as editor, Legal Record and Historical Reality (1989), The Europeanization of Law (1997), Legal Wales: Its Past; Its Future (2001), The Trial of Dic Penderyn and Other Essays (2003) and Y Cyfraniad Cymreig (2005). His next book, Wales: An Introduction to its Legal History, is due to be published in the autumn of 2005. Known mainly for his work in legal history and civil law, Professor Watkin is a council member of the Selden Society, Secretary and Treasurer of the Welsh Legal History Society and a member of the editorial board of the Journal of Legal History. He was elected to the Academy of Private Lawyers of Milan and Pavia in 2002, and is an ordained priest in the Church in Wales.

LEGAL LEARNING IN CONTEMPORARY WALES
Opportunities and Dangers

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Learning and the law go hand in hand. The law is a learned profession. A lawyer refers to another lawyer in court as his 'learned friend'. In the House of Commons, an honourable member who is also a lawyer is referred to as an 'honourable and learned member', getting the benefit possibly of at least one doubt.

Let me say first of all what a privilege and a pleasure it is for me to have been invited by the Law Society of Wales to deliver its annual lecture here at the Eisteddfod. It is moreover a particular pleasure because the Eisteddfod is being held this year at the Faenol, near Bangor, where over the last year I have had the enjoyment of, as well as responsibility for establishing Wales' newest School of Law. I am happy to report that the first year in the life of Bangor Law School has been both happy and successful. Almost fifty students enrolled for the first year of our new law courses, and it was especially pleasing to discover that over a third of these were Welsh speakers, of whom eleven opted to have their tutorials in Law conducted through the medium of Welsh. As we shall see, such students are the answer to a nation's prayer.

Setting up the new Law School at Bangor provides the background to what I want to say this afternoon. The wonderful opportunity which Bangor University has given me to establish a new Law School necessarily means that I have had the chance to reflect upon what a Welsh Law School should provide by way of legal education at the start of the twenty-first century, and also what sort of legal research and legal scholarship legal academics working in Wales should be cultivating at the present time. By choosing as my title *Legal Learning*, rather than Legal Education, Legal Scholarship, or Legal Research, my intention is to embrace not one but all of those elements which make the study of Law a learned activity.

Not long after I was appointed to the Chair of Law at Bangor, I found myself travelling from Cardiff up to Bangor for a meeting to validate the new Law degrees. I prefer to travel by train rather than by road, which means that usually I take a taxi to and from my home in Cardiff to the station. Cardiff taxi drivers may not drive like their counterparts in New York, but they certainly talk as much. The inevitable conversations ensued on both the outward and return legs of my journey. On the way to the station, the driver eventually asked the question: "What do you do for a living then?" I always

[1] The author is grateful to Dr. Enid Pierce Roberts for her comments on an earlier version of the text. The author alone is responsible for any defects which remain.

answer that I teach at the university. "What do you teach?" I answered Law. "Oh". A pause. "What do you think of this Assembly, then? Do you think it's got enough powers, or do you think it should have more?" An inevitable question perhaps in the spring which saw the publication of the Report of the Richard Commission. However, the question was an interesting one for me because as I thought about it later that day, it struck me that for this man, a taxi driver in Cardiff, the mention of the Law did not bring to mind some law made by the Parliament at Westminster or some important case before the Courts of Justice in London; it made him think of the National Assembly and its powers, or lack of them.

The taxi drive home was equally predictable ... and interesting. "What do you for a living , then?" "I teach at the university". "Yeah. What do you teach?" "Law". "Really. Well, what do you make of this war in Iraq, then? Do you think it's legal?" This time, I had no chance to answer, for the driver immediately gave me his opinion, but I was struck that once again, mention of the law did not bring to mind the doings of the Westminster Parliament or the Royal Courts of Justice in The Strand, but the position of the law on the international scene – the legality or otherwise of the doings of nation states.

What would these taxi drivers in Cardiff have made of me if I had replied to their questions by saying "Sorry. I deal with the general law of England and Wales, not the secondary legislation passed by a local Assembly". Or "Sorry, my interests are in the law of England and Wales, not international law". Would they regard me as a learned person, part of a learned profession if my idea of law turned out to be narrower, more confined, than theirs? There was a lesson here, a lesson that as it turned out, confirmed the strategy I was developing for the Law degrees at Bangor. For a Welsh lawyer to be learned at the start of the twenty-first century, he or she needs to have learned not only the law of England and Wales, but also the law that now relates solely to Wales, as well as the law that operates within the international context, both in terms of the European Union and within the jurisdiction of the United Nations. The learning of a truly learned lawyer must not only be deep, it must be broad, and the public are starting to expect this. Three-quarters of a century ago, my father went to University College, Southampton, as it then was, as a student. There, he was taught English literature by Professor V. da Sola Pinto, whom my father admired for his teaching, scholarship and personality. As a consequence, when I was a student in the 1970s, I bought – and read – a book by Professor Pinto entitled *Crisis in English Poetry: 1880–1940*.[2] Professor Pinto's argument in that book was that the standard of English poetry during that period had suffered a crisis because poets either took the 'voyage out' to explore the world in which they lived or the 'voyage in' to explore themselves. Few managed to combine the two voyages as earlier generations had done. Law faces a similar challenge today. There is a need for lawyers who will make the 'voyage in' to discover what riches the new legal

[2] V. da Sola Pinto, *Crisis in English Poetry: 1880–1940* (5th ed., London, 1967). The image of the 'voyage out' and 'the voyage in' is first used in C.F.G. Masterman's *Condition of England* (1909; 1960 ed.).

order of Wales can afford to their learning, while also 'voyaging out' to discover what role the law plays in both Europe and around the world. The law is local, national and universal – and a lawyer's learning has to reflect this. Not surprisingly perhaps, the jurists of Ancient Rome knew this and reflected it in their teaching, concluding that some laws were peculiar to a particular people and some were common to all mankind, the distinction between the *ius civile* and the *ius gentium.*[3]

Lawyers in England and Wales are sometimes ready to accept this challenge and sometimes not. I am always astounded that here in the United Kingdom we do not know more about one another's legal systems. I do not know of a single law school in England or Wales in which the law of Scotland is taught. Equally, I do not know of a single law school in Scotland in which the law of England and Wales is not taught. This narrow approach has also affected the way in which some authors of textbooks on public law have responded to the challenge of Devolution. A few years ago I was sent complimentary copies of two textbooks on constitutional law by the publishers. In one, a book running to 600 pages, only six were devoted to Devolution in both Wales and Scotland. Scotland got the lion's share of the attention. In the other, an equally substantial work, Devolution was only mentioned in a footnote explaining why the author was not going to deal with its effects.

This failure to engage with the diversity of legal systems on our own doorsteps in the United Kingdom also extends in large measure to our attitude to law in the international context. Neither Public International Law, which deals with the legal regulation of nation states, nor Private International Law, which deals with cross-border legal relations between private individuals, is deemed to be of sufficient importance to be a foundation subject in the law curriculum of England and Wales, even though, very substantial numbers of people now routinely enter into contracts with firms trading from abroad and increasing numbers own properties in other countries. On the European mainland, on the other hand, both Public and Private International Law are generally essential subjects of study in order to obtain a law degree.

The same has not, however, been true of the response of lawyers to the law of the European Union. Academic lawyers in particular leapt at the opportunities that British entry into the Common Market offered with regard to developing new courses and writing the legal materials – textbooks, learned articles and scholarly monographs – needed to make teaching those courses possible. Ever since 1972 a virtual flood of literature on European Union law has been flowing from the pens, or more recently the word processors, of British legal academics. However, even though academic lawyers would appear to have got the message very early on that European Union law was important to legal learning in England and Wales, it took the professional bodies a quarter of a century to recognize this fact officially by making European Law a

[3] Gaius, *Institutiones* I.1; Justinian, *Institutiones*, I.2.1: "Jus autem civile vel gentium ita dividitur: omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur".

foundation subject of legal study for the purpose of obtaining a Qualifying Law Degree. It is almost as if the first generation of lawyers who qualified after British entry to the European Community had to have reached positions of seniority in the profession before European Union law could assume its rightful status in the eyes of the legal community.

However, although study of the law of the European Community was rapidly embraced by British legal academics, somewhat surprisingly the same was not true of the study of the internal laws and legal systems of the member states. This is surprising because it was virtually inevitable that the opportunities afforded by British entry into the Common Market would result in many more British people trading with people in the other member states, living and working in those other countries, buying and owning property there and needing to use the legal systems of those countries from time to time to recover compensation for injuries suffered. Some, of course, would find themselves facing charges of a criminal nature in those countries as well. There can be little doubt that one of the problems facing legal academics and law students who wanted to study the internal laws of the other member states has been that, unlike the law of the European Community, once Britain had joined, the primary legal sources needed to engage in that area of study were not available in English. To study the law of countries such as France, Germany and Italy one had to be able to read French, German or Italian. Here we come up against a very serious obstacle to the development of a European dimension to legal education in England and Wales – insufficient commitment to the study of languages. English-speaking lawyers have little difficulty in turning to the laws and legal systems of the United States or the Commonwealth for the purposes of comparison. This is partly to do with the British system of Common Law that these countries inherited, and partly to do with the fact that that law was set down in English, thus the law and the language in which it was delivered both followed the same flag. Equally, it is not the fact that the countries of mainland Europe derive their law from a different legal tradition, the civil law of Rome, that puts English lawyers off studying their laws. Ironically, until a generation ago virtually all English lawyers would have acquired some knowledge of Roman law as an essential part of their legal education. Rather, in my view, it has more to do with the fact that they cannot read the languages of those countries. Within the last five years, I remember reading in the law supplement of a quality national newspaper the remarks of a senior partner in a leading London firm of solicitors to the effect that languages were important for a lawyer – but not that important. Why not important? Because, in his view – and that of many others – English is the language of international legal discourse. The others speak English, so why should we bother to learn French, German or Spanish? For us in Wales, the answer should be obvious. What will happen when these monoglot English lawyers are engaged in negotiations with their counterparts from Marseilles, Munich or Madrid? At some point, the other parties will choose to discuss the issues amongst themselves, and, as we hear so often said in Wales, accusations will fly that they spoke in their own language in order that the monoglot English-speakers should not be able to understand. It is simply incredible that in the context of something as important as legal negotiations, or worse,

in a case before the courts, English lawyers should choose to operate in a context in which the other party can understand them but they cannot understand the other party. That is hardly a situation of equality, and one cannot but wonder whether as clients come to realize this, our lawyers will lose work in the international field to those lawyers from other countries who are linguistically better qualified to work in an international context.

In rising to the challenge of practicing the law in a multi-lingual, international context, lawyers who come from a multi-lingual or bilingual society have a distinct advantage. They already have not just the skills but also the intellectual attitude that enables them to thrive in the international community. It is perhaps therefore not surprising that the law schools of Wales should have been in the vanguard of developing degree courses which allowed law to be studied in conjunction with a second language, often in combination with the law and legal system of the country in which that language was spoken. I am personally very proud to have been part of such developments in, to date, two of Wales' law schools. But one cannot be complacent with regards the future of such programmes of study, even in Wales, where the numbers enrolling on such degree courses are in decline and where in some places the courses themselves are under threat, some having already been discontinued. The study of law in combination with languages is in my view vital if the legal professions of England and Wales are going to keep pace with their counterparts in mainland Europe. The solution to the current problems though, lies with those who shape and fund the curriculum in our schools rather than in the universities, where the consequences of neglecting language studies amongst the young raises the fear of a terminal decline in the production of modern language graduates.

So much for the 'voyage out' as it relates to legal studies and the importance of languages. What of the voyage in? I have already said that a lawyer who is at home in a bilingual legal environment is likely to enjoy professional advantages in the international context within which law is developing today. In Wales, therefore, we can at least be happy that the increasing numbers of children being educated bilingually in our primary and secondary schools will inevitably lead to there being more and more bilingual lawyers as the century progresses. However, being able to read, write and speak both languages is not in itself enough. Wales needs lawyers who are as fully capable of exercising their legal skills in Welsh as in English, and that requires more than just the ability to speak both languages. It requires a confidence on the part of the individuals concerned that they are fully effective in their legal work, regardless of whether they are working in Welsh or in English. It would be bold – no, it would be false – to claim that the Welsh law schools have already succeeded in achieving the goal of producing such graduates.

So, why not? What are the obstacles? There are a number.

To begin with, Welsh law schools are not bursting at the seams with academic lawyers who are Welsh-speaking, let alone those who feel confident enough to deliver instruction in Welsh as well as English. It is not only among the students and graduates of our legal academies that the confidence to work in both languages needs to be nurtured. However, while the number of Welsh-speaking academic lawyers prepared to teach through the medium of Welsh is small in any one of the Welsh law schools, with the possible current exception of Bangor – although that is a new department with a relatively small number of staff at the present moment – the numbers within the sector as a whole, that is to say the sum-total of all the academic lawyers in Wales who are both able to speak Welsh and who are willing to teach in the language, is not that small. Indeed, the number, though not large, is big enough to allow for the whole of the core curriculum, in other words the seven foundation subjects demanded by the professional bodies for direct entry to the Bar Vocational Course or the Legal Practice Course, to be taught in Welsh. Moreover, by one of those fortunate occurrences, the interests of the staff in question range across the foundation subjects in such a way that were they all to be based in one teaching centre there would be no difficulty in having the whole of the core curriculum taught through the medium of Welsh.

However, they are not all in one place. Some are in Cardiff; some are in Swansea. Others are in Aberystwyth and others in Bangor. All of the law schools seem therefore condemned to offer but a fraction of the core curriculum in Welsh. Or are they? It is undoubtedly the case that communications by road and rail across Wales are not as easy as they are across countries with fewer mountains – but our communications are not that difficult and they are certainly not impossible. During the course of the last academic year, for instance, two members of the academic staff from Bangor have also been involved in teaching Welsh-medium law courses at Cardiff, for much of the time on a weekly basis. This has enabled Welsh-medium provision to continue at Cardiff despite the fact that two teachers had left the delights of Cardiff Bay to experience the joys of the Menai Straits. It can be done. Where there's a will, there's a way – even if the way is as tortuous as the A470 or as circuitous as the rail route through the Marches. A third teacher from Bangor was able to help a tertiary college earlier this year when sudden illness threatened the continuity of a Welsh-medium A-level course. A lot can be achieved if there is the will to achieve it. Modern methods of communication, using e-mail, the internet and video links, all have a part to play in overcoming what for too long may have been seen as insuperable obstacles. I am still astonished to note how many people are shocked at the notion of commuting between north and south Wales on a weekly basis yet who would not bat an eyelid at the idea of commuting daily between south Wales and London or on a weekly basis between Wales and Brussels. Until a generation of confident, bilingual law graduates has been produced from whose ranks the next generation of academic lawyers can be recruited, the way ahead has to involve the willingness of individual teachers and the law schools in which they work to share these vital human resources. There needs to be a willingness to teach in more than one place, and equally a willingness on the part of the authorities in those places to agree

to use the services of accredited teachers from other institutions within Wales. Nor must those responsible for financing Higher Education in Wales lose sight of the fact that for such a strategy to succeed, the means must be found to meet the travel and possibly the accommodation expenses of those prepared to accept the challenge of becoming peripatetic scholars.

If there is no solution to the challenging problem of recruiting a sufficient number of suitable teachers in the short term, neither is there any easy, or indeed ready, solution to the next problem - the question of what materials should these teachers use when instructing their students, and where can the students themselves access legal materials in the Welsh language? At the present time, those students who are opting to have all or part of their legal education delivered through the medium of Welsh face a double challenge. One – learning the law – they have in common with their English-speaking brethren. But these students also face an additional challenge. As well as learning the law alongside their English-speaking counterparts, they have to adapt their knowledge to meet the challenge of displaying their skills bilingually. Having attended lectures in English alongside their fellow, English-speaking students, having read their textbooks, their statutes and their law reports in the library, they then have to prepare themselves to discuss, apply and write about their subject in a language other than the one in which they have learned it, and moreover in a language other than the one in which the law was originally framed. Not surprisingly, many Welsh-speaking students see this as a considerable additional burden, and they are not wrong to esteem it as such. For some, the fear that this additional burden will adversely affect the standard they will achieve in their studies leads to their opting to study entirely in English. There can be no doubt that the absence of an established legal literature in Welsh is a strong disincentive for Welsh-speaking students to choose a Welsh-medium programme of study in the law. Ironically, those who do follow such a programme appear to excel, probably not in spite of the extra work they have to do, but because of the extra work they have to do. It is still unfair, however, that they have to do it at all. If Wales and its government wants a generation of law graduates to emerge from the law schools of Wales who are capable of exercising their legal skills in both languages, then it needs to take seriously the fact that these young men and women should not face avoidable additional burdens in the course of their studies merely because they choose to receive their education in their native tongue. [4]

There are two issues here, and different people will place a different emphasis upon them. For some, it is axiomatic that Welsh-speaking students in Wales' universities should be able to study the subjects of their choice, including Law, in the Welsh language. That is a matter of their rights as speakers of a minority language in the country of their birth or upbringing.[5] For others, the need is primarily national rather than personal. In the wake of both the Welsh Language Act and the Government of Wales Act the legal profession in Wales needs to be able to meet the needs of a bilingual

[4] A Report on this issue is in hand at the present time under the leadership of Mr. R. Gwynedd Parry of the Law Department, University of Wales, Swansea.

society. Wales needs bilingual public lawyers to serve its needs within the National Assembly and in local government. Wales also needs private lawyers who can respond to legitimate demands from the population for legal services in Welsh or English at the client's choice. It is worse than useless to provide for bilingual legislation and the rights of individuals to have legal services delivered in the language of their choice if nothing is then done to recruit lawyers who can deliver those services, or to facilitate the achievement of those goals by young people who are ready and willing to rise to the challenge but who are frustrated by the lack of resources to do so. It is clearly for the academics to produce the materials that will create those resources, and there is no lack of willingness in the academic legal community to do so. However, there are obstacles to achieving even this. The market for Welsh legal textbooks is not likely to be such as to allow publishers to recoup the costs of, let alone make a profit from, the production of such materials. Likewise the market for Welsh-language legal journals is not likely to be great. While legislation from the Assembly is already bilingual, and perhaps one day, who knows, some law reports relating to Welsh matters may also be available in both languages, the commercial costs of producing Welsh versions of the existing corpus of statute law, let alone case law, is likely to be prohibitive. Creating the materials needed to produce and service a bilingual legal profession requires an initial substantial investment on the part of those who have the political will and the financial powers to make it possible. The academic and professional communities are currently actively developing proposals with regard to what materials are needed.

Alongside the problem of providing materials for teaching and learning the law, there is another problem, one that affects all branches of the legal profession. This is what might be termed the deficit of legal terminology, which has resulted from the lack of official status suffered by the Welsh language over the last four and a half centuries. Dr. Robyn Lewis' *New Legal Dictionary* has gone a long way to remedying this shortfall,[8] but the law does not stand still and new legal terms are continually being coined. If Welsh is to maintain its place as an official language for legal purposes within Wales, it will be necessary for the stock of Welsh legal terms to be subject to constant review. While the Assembly's duty to produce all of its legislation bilingually will ensure that the legal terms coined therein will always be bilingual, the same is not going to be true of the laws produced at either Westminster or in Brussels. Somehow, the mass of new legislation will have to be reviewed to ensure that the bank of legal terms in Welsh keeps pace with those being built up in English and other languages. This is work for a team of researchers, who will mercifully be assisted by the efficient search engines available in these days of computer technology, which can even identify terms and phrases that have been previously translated. This is exciting work for researchers with the appropriate backgrounds and qualifications, and the skills they could develop would be of immense use, not only in Wales but also in other societies facing the same challenges. Wales in

[8] On developments in relation to minority languages in Europe, see Emyr Lewis, *Minority Languages in the New Europe – a bit of a headache for those who believe in order?* (The Law Society Annual Lecture, National Eisteddfod of Wales, Newport and District, 2004).

turn will be able to learn a great deal from those other countries and communities that have already embraced the challenge of bilingualism or even multi-lingualism in their legislation.[7]

I turned to the question of producing a living, developing legal terminology because it was connected with that of providing a body of legal literature in Welsh to meet the needs of students and, of course, practitioners as well. There is however at the present time one major obstacle in the path of academic lawyers at our university law schools rising to that challenge. Unlike the other obstacles I have described, its removal is not likely to be costly, but it does require a firm exercise of political will by the Welsh government. A body of legal literature to serve the needs of post-Devolution Wales, whether in Welsh or in English, is most likely to be produced by the academic community. I have already mentioned how academic lawyers rose to the challenge of providing a fund of scholarly literature on European law once Britain had entered the Common Market. But I also mentioned how in the area of British public law today, the challenge of dealing with Devolution does not appear to be producing anything like the same response. With the exception of Richard Rawlings' major study, *Delineating Wales*,[8] Devolution has not spawned a great outpouring of scholarly writing, and Professor Rawlings, it should be noted, writes from the perspective of a London-based lawyer. Why has there been so little written about the post-Devolution laws of Wales by academic lawyers working in Wales? The linguistic problems encountered earlier with regard to other countries' laws can offer no explanation on this occasion since the laws of Wales produced by the Assembly are available for study and comment in English as well as in Welsh.

One would not have to enquire for very long in any Welsh university law school before the answer would present itself – the Research Assessment Exercise, or the RAE as it generally known. This is a periodic exercise, conducted once every five, six or seven years, purporting to measure the quality of the research being produced by university departments across all disciplines. Departments, or more accurately, according to the jargon of the RAE, cost centres, receive a grading, which in the past has ranged from 1, the lowest, to 5, the highest, with the possibility of a grade 5* for the very highest levels of achievement. The assessments are made by a subject panel composed of academics drawn from the discipline in question, who are charged with reading – or in very specialized areas having assessors read for them – the four best publications produced by each member of staff and submitted for assessment by every department in the country. The standard of assessment and the grade awarded to each department is meant to reflect the proportion of the collected body of work produced that is of 'international' or 'national' standard. If over half of the published work submitted is of 'international' standard, the department gets a 5*; if a significant percentage of the work, but less than half of it, is deemed to be of international standard, it gets a 5; while for a

[7] See also Iwan R. Davies, The Challenge of Legal Wales (The Law Society Annual Lecture, National Eisteddfod of Wales, Denbigh, 2001).
[8] Richard Rawlings, Delineating Wales (Cardiff, 2003).

department in which there was some work of international quality, but where the predominant quality was 'national', a grade 4 would be awarded. As the proportion of 'national' quality work decreases, so the grade awarded slides down the scale. The consequences of getting a higher or lower grade are financial. The university receives research funding for departments with high grades, but not for those currently ranked below grade 4.

A lot therefore depends on research work being assigned as having 'international' standing – but what does this mean in a subject like Law. While it is fairly clear what it means in most science subjects – one assumes that the effects of splitting the atom or discovering penicillin were not confined to Britain alone – the meaning of the term is bound to be more subjective in the Humanities. In what sense can an essay on the law of contract or criminal law in England and Wales truly be said to be of 'international' standing? The end result is what one of Wales' most distinguished judges ever, Lord Atkin of Aberdovey, might have described as a Humpty-Dumpty definition of the term – 'international' means what the panel determines that it means.[9] In other words, it is not the significance, which the research findings actually have internationally that matters, but what the panel deems to be the standing of the work within the British academic community. An odd result of this is a curt denial that work that is actually concerned with an international context, or which addresses international issues, even to the extent of being published in other countries, is not per se deemed to be 'international'; indeed, there is almost a presumption against treating such work as being of 'international' quality, which is very bad news for academic lawyers working in truly international areas such as Public International Law, environmental law or even the legislation governing maritime trade, where research can often *objectively* be classified as being of international significance. The absurdity of this approach can perhaps best be appreciated if we transpose it to another context. In RAE parlance, the question of whether a rugby or soccer team was of international standing would not depend on how many of its players were actually selected to play in international matches, but rather on the opinions as to their merits of a select group of players from other clubs. Were it not for its financial implications, the RAE would long ago have properly been consigned to the realms of the *Fantasy Football League.*

However, there are financial implications and so it is taken seriously. The unfortunate, damaging consequence has been that instead of being a periodic assessment of research, the RAE has become the target at which research is aimed. Academics now research and publish in order that their departments do well in the RAE. Promotion and security of tenure depend upon producing RAE returnable publications. Those who fail to do so are treated as failing in their responsibilities, whatever their qualities as teachers. Teaching-only contracts are devised for those who are described, disingenuously, as not being "research active", the truth being that their research is deemed by others not to be returnable at the level required by the institution. Long-term research projects become less attractive than the short-term efforts needed to produce four publications for the

[9] Lord Atkin in *Liversidge* v *Anderson* [1942] AC 206.

next round of assessments. Researchers who do not produce work of 'international' calibre are as unwelcome as those who do none at all are. The manner in which academics have seen their careers sacrificed on the altar of the RAE by those who had been their colleagues has been one of the most repulsive features of university life in the last decade and a half. [10]

Please note that the exercise is concerned with research. Increasingly, even in the humanities, this is interpreted to mean something other than scholarship. Writing a scholarly textbook for the use of one's students does not qualify as research and may not be returnable as part of the RAE. Again, the influence of notions derived from the sciences can be discerned, but how in the humanities, how in law, can scholarship be so clearly distinguished from research. The academic lawyer who reflects upon the decisions of the courts and seeks to explain them, in a European tradition stretching back at least a millennium and arguably to the Ancient World, runs the risk of being branded ignominiously as merely a scholar, and his or her work as not qualifying for the terminological accolade of 'research'.

The reason that I have emphasized the potential for damage that exists within the RAE is that it could damage, and arguably is damaging, the development of legal learning in Wales. This is so for a number of connected reasons. From what I have just said about research and scholarship, you will have rightly deduced that an academic lawyer who spends his or her time writing a textbook for students on the law of post-Devolution Wales will run the risk of having their work branded as scholarship rather than research. However, if students in the law schools of Wales are to be properly prepared for the challenges of practicing law in Wales in the coming century, they badly need such texts. The RAE is an obstacle to the provision of what are essential learning tools to the student body. Arguably, such works would also be of immense value to those practicing within the legal profession of Wales, but, in the world of the RAE, the production of practitioners' works is even more heinous a crime than is scholarship. It is the RAE's equivalent to sinning against the Holy Ghost.

It follows, of course, from what I have already said, that if the production of textbooks to service undergraduate student courses is not really an option for academics with regards the fulfillment of their research obligations in the age of the RAE, the writing of a textbook on some area of the law in Welsh but which merely provides in that language what is already available in English, would have no hope of gaining its author any credibility, let alone job security or promotion. Yet there cannot be a single teacher of the law in Wales anxious to see growth in bilingual provision, who is not

[10] On the effect of the RAE on the academic life of Wales generally, see Richard Wyn Jones, *Methiant Prifysgolion Cymru* (Institute of Welsh Affairs Lecture, National Eisteddfod of Wales, Newport, 2004). According to François Simon, cookery correspondent of *Le Figaro*, as quoted in *The Guardian*, (21 May 2005), the effect of the *Guide Michelin* on cooking in France is similar, creating a " 'nervous' *cuisine*... oppressed, destined solely for other chefs and for the guide inspectors, over-technical, unnecessarily showy; demonstration cooking".

aware of how vital the production of such texts is to producing a generation of lawyers fully able to practice their skills in Welsh and English. Yet, at the very time that the need for such a development is at its greatest, the British context within which they are called upon to work, and within which their published works and they themselves as academics will be judged, is heavily weighed against encouraging them to do anything to meet that need. If Welsh-language textbooks for the growing number of young people wanting to study law through the medium of Welsh are to appear, something needs to be done about how the production of such works is viewed, valued and rewarded within the academic community.

The problems described thus far attach to the writing of textbooks on the law, whether in English or Welsh. Welsh academic lawyers, however, obviously have the opportunity of avoiding these difficulties by engaging in research on specifically Welsh aspects of legal developments in the wake of Devolution. There is much opportunity, particularly, but not exclusively, in the field of public law and for original research into the impact of the Assembly's law-making powers on Welsh society. However, even here, the RAE throws up an obstacle. For the product of research to be of any worth as part of the Research Assessment Exercise, it has to attain an international or national standard in accordance with the RAE's interpretation of those terms. Here, oddly enough, the real meaning of the words *international* and *national* suddenly re-surface. The question arises of whether work that is concerned with Wales alone can ever be deemed to be international. Less than eighteen months ago, one of the Welsh law schools commissioned two leading legal academics to examine and consider the strengths and weaknesses of the research produced by its staff thus far during the current RAE period. In their report, which was clearly intended to set the agenda for improving the quality of the research being produced at this particular law school, the outside experts commented on the merits of work which addressed the specific needs of lawyers in Wales in the wake of Devolution. Their conclusion was that Welsh law schools could not plead what they termed the 'Belfast Principle', that is to say there was no argument to be made in Wales along the lines of that made by academic lawyers in Northern Ireland to the effect that they had a special calling to service the needs of law students and lawyers within the context of Northern Ireland's separate legal jurisdiction. In effect, this view denies to Wales and its lawyers any claim to being seen to be a distinct legal entity in the wake of Devolution. It continues the long-standing prejudice that Wales cannot be regarded as a separate legal jurisdiction either because it never had a parliament of its own – even though it now has the Assembly – or because it does not have a distinct set of law courts as both Scotland and Northern Ireland have – even though it once had the Courts of Great Sessions. This argument was, of course, used in the past to try to justify not giving Wales institutions such as a Secretary of State; here it is being set up as an obstacle to the development of a body of distinct Welsh legal scholarship on the grounds that there is no separate Welsh law. In that, of course, as we know, it is erroneous. However, being wrong does not make it any less of a threat. One of the two professors from England who provided that assessment has since been appointed Chair of the RAE panel that

includes Law within its remit. Thankfully, the Chair of the Law sub-panel itself will be a professor who has been teaching in a Welsh school for twenty years, so we must hope that her influence will counter balance the stated views of the Chair of the main panel when it comes to recognizing the worth of studies relating to the distinct legal needs of Wales at the present time. Before leaving that issue, one further point should perhaps be noted. Scotland has had its own Parliament, both in the past and still now, and has also maintained its own system of courts. There can be no doubt that Scotland has its own legal system, distinct from that of England and Wales. In the last two Research Assessment Exercises, the distinct nature of Scottish law was recognized by allowing research on Scottish law to be judged by a special sub-panel of the law panel. This, it should be noted, will not be the case during the next Exercise. There will be just one panel, and Scotland will have to make do with having representatives on that panel. One is left wondering what Devolution means to those who organize these Exercises.

The RAE is, in my view, a serious obstacle to the pursuance of serious scholarly work within our law schools, including research into the growing phenomenon of Legal Wales. Academic lawyers who want to be sure that their work is returnable in the next RAE will resist the temptation to pursue research into specifically Welsh matters. That this should be happening – and make no mistake, it is happening – in the very decade following the attainment of Devolution threatens to squander for Wales as a whole an opportunity that may well not come our way again. The academic legal community has the potential to make an important contribution to the critical reception of the growing body of Welsh law. In the wake of Britain's entry into the European Community in 1972, there has been a perceptible change in the manner in which academic writings on the law are valued by not only the legal profession, but also by the judiciary. Whereas it used to be the case that only the works of distinguished but dead legal writers could be cited before the courts, today it is by no means unusual for the works of living writers to be both cited and discussed before the highest courts in the land. One thinks in particular of how the Law Lords regularly discussed the writings of Professor Peter Birks when dealing with cases on restitution, whose death at an early age last year saddened the entire legal community. This is partly the result of having judges today who studied law at the universities and who had their legal consciousness shaped to some extent by the writings of academic lawyers in a way in which their predecessors a generation ago generally did not. But it is also partly to do with that phenomenon called 'Europeanization', whereby the long-standing civilian tradition of respect for the writings of jurists extends to allowing their *doctrine*, that is to say their teachings, to influence the legal interpretation and the application of the law. The academic lawyers of contemporary Wales currently have an opportunity which may never come again to help shape the emerging legal culture of modern Wales through their research, scholarship and writings. It will be a tragedy not only for them, their students and for legal learning, but also for the nation, if that opportunity is lost because of the demands of an assessment exercise devised without any thought having been given to the distinct needs

of Welsh legal education at the present time. There is no need for this to happen. The Assembly Government should seek to acquire or exercise the power to modify the manner in which the RAE operates within Wales so as to ensure due regard is paid to the importance of Welsh studies in Welsh universities, and Welsh legal studies in Welsh law schools. This should include proper recognition for the work of those who devote their energies to making good the deficit of legal materials available for the study of law through the medium of Welsh, the lack of legal materials for the study of Welsh law in either English or Welsh, and the lack of scholarly activity that takes as its object the body of law emanating from the Welsh Assembly. I began by thinking that the study of Wales and Welsh matters should not be penalized within Wales itself for failing to be sufficiently 'international'. However, that is no longer what I believe. Here in Wales, in order to achieve the highest ranking in assessment exercises of any kind, it should be essential to address the Welsh dimension, where there is one, of the discipline in question. Can one really imagine an English law school – with the possible exception of institutions such as SOAS – getting a top-rating in an RAE if none of their staff had written a word on the law of England? I think not. Welsh law schools should not be rewarded with the highest gradings unless at least some work on the legal context of Wales is included.

Wales has a tradition of producing lawyers of distinction, and many of them have contributed to legal learning in their own particular generation. Some, such as John of Wales in the early thirteenth century, contributed to the development of Western canon law; others such as William Aubrey, David Lewis, Thomas Yale and Leoline Jenkins in the sixteenth and seventeenth centuries, were distinguished civil lawyers. There has been no shortage of eminent lawyers from Wales who have contributed to the development of Common Law at home and abroad. At the start of the twenty-first century, the lawyers of Wales face the challenge of writing a new chapter in the history of legal learning in Wales, a new and exciting chapter as our land rediscovers for itself a distinct legal identity. There are great opportunities before us, but also the ongoing challenge of serious obstacles in our path. I have little doubt that Legal Wales will rise to those challenges and overcome those obstacles, in part because of the example set by Welsh lawyers from the past, but also in part because of the enthusiasm and determination of the rising generation of young lawyers and law students across the land. Together, these factors should inspire us all to work, indeed to strive, for a better legal future for Wales and for all of its people.