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**Robin ap Cynan Memorial Lecture at the National Eisteddfod
Abergavenny 2016**

**FAMILY LAW WALES
TIME TO CREATE AN INDEPENDENT JURISDICTION?**

HH Judge Gareth Jones

It is a great honour for me to be invited to present the Robin ap Cynan Memorial Lecture this year on a subject that would be of considerable interest to him.

Background

This week, the role of Wales' Premier Cultural Festival is to promote and celebrate the civilisation and culture of the nation - its literary and musical traditions through the medium of the language that created them. With the exception of rare occasions such as this annual lecture, one of Wales' important traditions is overlooked - its legal tradition that was lost, but was recently restored through the will of its people.

In 1932 the first volume of "Braslun o Hanes Llenyddiaeth Gymraeg Hyd at 1535" ("An Overview of the History of Welsh Literature up to 1535") by Saunders Lewis was published. In it can be found a discussion of the works of the poets of the princes, the poets of the nobility and also Taliesin and Dafydd ap Gwilym. But it also included a chapter on Welsh prose, where we see the following:

"It is a truly significant fact that the first major work of Welsh prose preserved for us is the Laws." (page 31)

It continued:

"The Welsh Laws are one of the pinnacles of mediaeval civilisation in Europe." (page 32)

And then:

"What is almost incredible about the Laws is that they are in Welsh. This means that the language had already attained incomparable philosophical maturity in that period." (page 32)

Therefore it is entirely fitting and appropriate that this important legal tradition is accorded its rightful place in Wales' Premier Cultural Festival.



What were the elements of this tradition and is it relevant to contemporary Wales?

I turn to the second part of the question first.

I have already mentioned the loss of the tradition. I'll let the law historians argue over when that occurred. The milestones along the way are well known: The Statute of Rhuddlan, the Acts of Union, the abolition of the Courts of Great Sessions. There is a difference also between legislative and legal competence and public use of customary law - because the law has both statutory sources and also Common Law roots. But certainly, long before the advent of the twentieth century Wales lost its inherent legal traditions.

Recently, they have been restored. Since 2007, the National Assembly has secured the ability to introduce Legal Measures and post-2011 the ability to pass Acts. The legal tradition has been rekindled in a timely and important manner.

I turn briefly therefore to the first part of the question, regarding the elements of the legal tradition.

In his volume entitled "Cyfraith Hywel Dda" (1986), Professor Dafydd Jenkins deals with the three books of Welsh Laws - the Laws of the Court, the Laws of the Country and the Lawyers' Text Book (namely a practical handbook for the judges and advocates of the time).

In the section that deals with the Law of the Country, I would argue that the most important and possibly the most extensive are those sections that deal with the Family Law and the Law of Women.

This may be no surprise. It could be argued that the family is a core element within any society and so a legal system that ignored the subject would be defective and inadequate.

But it is not the *tradition* that is in question in this lecture because the law is a practical subject that belongs to the modern world. The law must be relevant and the legal system should be tailor-made to meet the needs of the society it serves. This is a fundamental requirement.



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There is possibly no aspect of human life that has changed as much as family life over the past century. The capacity to reform, develop and change in this area of law is obvious.

It would be impossible in a concise lecture like this one to present a discussion of the wide-reaching developments seen in the Family Law of England and Wales over the past century.

My intention is to concentrate on Family Law in Wales.

The Current Position

There is a recognised division between Private Family Law and Public Family Law. The first involves the legal relationship between individuals. The second involves the legal relationship between public agencies and the individual (in general, state agencies) mainly in order to protect the interests of the child and most of the legal powers relating to this function have been included in sections IV and V Children Act 1989 but also in the Adoption and Children Act 2002 which allows adoption orders following a placement order.

A division is also seen in the legislative competences of the National Assembly. In general, the Assembly does not have legislative competence over the content of Private Family Law in Wales. It is the Westminster Parliament that legislates in this area for England and Wales. A recent example was seen in Westminster's decision to extend the right to marry to single sex couples, a decision made in Westminster covering the joint jurisdiction of England and Wales.

In general, the Assembly does not have legislative competence over the content of Public Family Law but it does have legal power and administrative responsibility over a number of state agencies involved in Public Family Law in Wales or which deal with the welfare of children in Wales, for example Welsh local authorities, CAF/CASS Cymru, the Office of the Children's Commissioner for Wales, the Care Council for Wales and the Office of the Public Services Ombudsman for Wales.

The result of this division within the legislative competencies of the Assembly is that the responsibility for the *content* of Public Family Law has been reserved to Westminster whilst the administrative responsibility for a number of the agencies administering that law has been devolved

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to the Assembly in Cardiff. This follows Schedule 7, Part 1, Government of Wales Act 2006, in which the Assembly is permitted to legislate in the area of social welfare, with the exception of family law and procedure.

I refer briefly to a practical example of this division in operation. The Children and Young Persons (Wales) Measure 2011 was passed:

“.....to make provision regarding for and in connection with giving further effect in Wales to the rights and obligations set out in the United Nations Convention on the Rights of the Child.”

This was the intention of the legislation and many would agree with that intention. In the schedule to the Measure we see appropriate articles of the Convention being incorporated as part of domestic law in Wales but it is not fully incorporated. The duty to pay due regard to Part I of the Convention and appropriate articles of the Optional protocols of the Convention has been placed upon Welsh Ministers (and thus the Welsh Government) but not upon the courts in Wales.

This interpretation was confirmed in the decision of Mr Justice Moor, the Family Division Liaison Judge for Wales in *Re FB and others [2015] EWCHC 297(Fam)* determined in the Family Court in Swansea – a case that involved adoption following Care and Placement Orders. Referring to the argument of the advocate for the parents, he stated:

“His first submission is that the United Nations Convention on the Rights of the Child has been incorporated into Welsh Family Law and must be applied by all judges hearing a case in the Family Court in Wales. I do not agree.” (para 67)

Then:

“Family Law is not devolved to the Welsh Assembly. The law that I have to apply as to adoption comes from Westminster, which has not enshrined the Convention on the Rights of the Child into English and Welsh Law. It is right that social welfare law is devolved to the Welsh Assembly. It therefore follows that the Assembly can for example, make regulations as to the procedure local authorities have to follow in relation to social welfare. The Assembly cannot, however, amend the Adoption and Children Act 2002 and that is the Act I am considering.” (para 70)



The legal and statutory interpretation of the decision is clear and correct and binds designated family judges in Wales, circuit and district judges and Family Court Magistrates in Wales.

But there are signs also that this division between the *content* of Family Law and social welfare law in Wales appears less clear with the advent of the Social Services and Wellbeing (Wales) Act 2014. I turn therefore to this important act.

Social Services and Wellbeing (Wales) Act 2014

The statute came into force in April this year and Sections VI and VII in particular are relevant to Children's Law in Wales. A general duty is imposed upon those implementing functions under the Act to promote the wellbeing of individuals needing care and support including children in Wales.

"*Wellbeing*" is therefore a key term within the Act with its interpretation to be found in Section 2(1)(a) - (h) of the Act. See also Section 2(3):

"In relation to a child, 'wellbeing' also includes –

(a) physical, intellectual, emotional, social and behavioural development;

(b) 'welfare' as that word is interpreted for the purposes of the Children Act 1989."

The term "*welfare*" is central to the Children Act 1989 and in particular Section 1(1) of that Act:

"When a court decides any question regarding -

(a) the upbringing of a child or

(b) the administration of a child's property or the use of any income arising from it,

the child's welfare will be the court's paramount consideration."

The definition in Section 2(3) of the 2014 Act suggests that the words "*welfare*" and "*wellbeing*" are not equivalent as "*wellbeing*" includes "*welfare*" and thus "*wellbeing*" is wider in nature than "*welfare*" which is but an element of it.

If so, the courts are required under the Children Act 1989 to give the paramount consideration to the welfare of the child but the responsibilities of local authorities in Wales in relation to children to



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provide services and support (for example within the statutory care plan under Section 83 of the 2014 Act) are wider.

It could be argued, of course, that this distinction in legal terminology will make no difference in practical terms.

As the courts use the “*welfare*” yardstick in reaching decisions when making orders for children, then it is inevitable that the provision made by Welsh local authorities (which use an extended and more generous yardstick) logically should satisfy the court’s test.

However, it is possible to foresee cases in which it could be argued that providing more extensive services for the “*wellbeing*” of a child renders it more likely that the child could be reunited successfully with his/her parents or natural family instead of taking that child into the care of the local authority. Therefore, the courts should pause before taking such action.

And if the duty of the local authority as the corporate parent is measured according to the “*wellbeing*” of children, why in principle should the duties of natural parents be measured according to “*welfare*” only? Is there any rational justification for this difference?

And if the courts and local authorities are to work in partnership for the benefit of children in care, why then differentiate between the duties of the court and the applicant, namely the local authorities? Would it not be more rational to harmonize the yardstick of both functions? I am asking the question rather than expressing an opinion.

The above is an example only of the existing division in the National Assembly’s competence when dealing with children public law in Wales. However, as the substance of Welsh law diverges from English law in the devolved areas then it is likely that the incongruity of the present situation will be amplified.

Indeed, even within the 2014 Act, there is a clear example where it could be argued that the boundary between Family Law on the one hand and social welfare law on the other has not been adhered to. Under Section 124(5) of the 2014 Act, the Family Court in Wales has the right to



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disregard parental objection, where the local authority wants to make an arrangement for a child in care to live outside England and Wales contrary to that parent's wishes.

In Wales, the Court (note) has the right to disregard that objection on the basis of the child's "wellbeing". In England under Schedule 2 para 19 Children Act 1989 the Family Court has the right to disregard parental objection in a similar situation, if the Court is satisfied that the person in question is withholding his/her consent unreasonably - an entirely different test. Therefore, it could be argued that Section 124 of the 2014 Act has amended the content of Family Law within Wales and the relevant Court test (and this is not confined to the local authority).

It appears that what we are seeing are porous boundaries rather than fixed ones.

Jurisdiction

Ten years have elapsed since the Presiding Judge of the Wales Circuit, Sir Roderick Evans, gave the Law Society lecture at the Swansea National Eisteddfod entitled "Legal Wales – The way ahead". He noted five elements included in the term "Legal Wales" and although he did not mention a legal jurisdiction for Wales specifically - implicitly that topic is inherent in principles two and three which he noted in his lecture.

In modern Wales, there is a Senedd with legislative competence devolved within specific areas. It is likely that we will see an extension of those areas soon. Therefore, we see two parliamentary bodies operating within a specific territory (namely Wales only) that are part of a unified legal jurisdiction (England and Wales). The situation is unique in the context of the United Kingdom where devolved legislative parliaments are seen with individual legal jurisdictions. It is unusual at an international level also.

The advent of the Government of Wales Act 2006 caused considerable controversy over the limitations of the legislative competence of the National Assembly. I do not intend to go down that road today. A summary of appropriate Supreme Court decisions can be seen in paragraphs 2.43 to 2.93 of consultation paper 223 by the Law Commission.



The 2014 Wales Act was passed in response to part one of the Silk Commission's Report and the powers of the National Assembly were enhanced. The Westminster government's response to the second part of the Silk Commission's Report was announced in the Queen's Speech recently. The response of the Welsh government was submitted in the form of a draft bill shortly before the last Assembly election, which included the creation of a legal jurisdiction for Wales.

It is not, of course, appropriate for a judge to express a political opinion and he/she must be impartial. However, there is a legitimate judicial role in the provision of objective analysis and the sharing of judicial experience (hopefully) to promote an informed public debate.

To summarise, therefore, at present the National Assembly has legal jurisdiction for Social Welfare and Local Government Law. In the Social Services and Wellbeing (Wales) Act 2014 this jurisdiction is connected with Public Family Law. The jurisdiction mentioned is limited to a specific territory, that is, within Wales. But Wales does not have an individual and unique legal jurisdiction. Is this situation sustainable?

At the outset, it is necessary to distinguish between a number of considerations when considering legal jurisdiction. For example, the formation of an independent legal profession in Wales, an independent court administration in Wales (and associated services) and the provision of court arrangements and a judicial system for Wales would be associated with the creation of a legal jurisdiction for Wales but these are also distinct subjects.

Of course there would be practical implications as a result of the creation of an independent legal jurisdiction but much depends on how any such jurisdiction is established.

The legal jurisdiction topic should be investigated as a result of principled and practical considerations.

Since the age of Enlightenment, the elements of the political constitution have been noted – the legislative, the judicial and the administrative. In Wales, two of these elements exist or are beginning to appear within the devolved system but not the third, i.e. the judicial (with the possible exception of the special administrative tribunals within the individual jurisdiction of the National Assembly).



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Inevitably, the argument regarding an independent legal jurisdiction involves democratic principles and principles of accountability and transparency.

In considering the topic of an independent legal jurisdiction, consideration must be given also to the difference between first instance courts and appeal courts. As part of a civilised judicial system, which respects the rule of law and human rights a clear difference is seen between courts of first instance and those courts that deal with appeals from the courts of first instance, that is the Appeal Courts. A citizen who is a litigant must be entitled to an independent appeal. This is a fundamental requirement.

Commonly seen are legal jurisdictions that possess a final Court or Courts of Appeal that are arranged at inter-jurisdictional level. This is seen within the United Kingdom. The existence of the Supreme Court in London does not undermine the existence of an independent legal jurisdiction for Scotland or Northern Ireland. Furthermore, Lord Neuberger (President of the Supreme Court) gave an undertaking in 2013 that the Supreme Court judges' panel would include a judge with knowledge and experience of Wales in appeals involving the powers of the National Assembly. Possibly, we can see in this decision the commencement of a federal Supreme Court with judicial representation from the countries of the United Kingdom.

Within the United Kingdom, a number of individual family law jurisdictions co-exist without any difficulty. The Family Law Act 1986 introduced a clear framework to implement/enforce and recognise the orders of the family jurisdictions of Scotland, Northern Ireland, England and Wales and the British Isles within the United Kingdom.

There is another important consideration in the context of an individual legal jurisdiction for Wales. It should be borne in mind that the legislative and political system of Wales has a unique feature within the United Kingdom. It is a bilingual system that was chosen by the people of Wales through their political representatives in the Welsh Language Measure 2011:

“The Welsh Language has official status in Wales” [Section 1(1)]



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There is conferred an: “.....equal status to Welsh and English texts of National Assembly for Wales Measures and secondary legislation” [Section 1(3)(c) of the 2011 Measure] and this is confirmed by the National Assembly for Wales (Official Languages) Act 2012.

Of course, a bilingual legal system is not unique at international level. Indeed, Lord Neuberger drew attention in his Legal Wales lecture at Bangor recently to the experience of the Court of Appeal in Hong Kong in the multi-lingual context that arises there. But a judicial interpretation by any appeal court in England and Wales in Welsh would be a notable precedent.

Although there is a respectable number of Welsh speakers within the judiciary in Wales, the provision in the appeal courts of England and Wales is not so obvious. Appropriate figures regarding the use of Welsh in the courts can be found in paragraph 10.16 of Law Commission Report 223 and an example of a judgment delivered in Welsh was seen in *Welsh Language Commissioner v National Savings and Investments [2014] EWHC 488 (Admin)*.

If one of the functions of any court is to interpret legal meaning and statutory intention from the statutory provisions, whether at first instance or appellate level, there will be a need to consider how this can be provided in Welsh and in English in Wales. And as the number and content of the Assembly's laws and secondary legislation increases - this is a question that cannot be avoided. Will that task be rendered more difficult or eased by an independent jurisdiction or by a joint-jurisdiction with England?

As a result of the inevitable increase over time, in the amount and content of Welsh legislation, the knowledge of the legal profession in Wales and the judiciary will have to develop in order to include the new information. The law is a subject that is constantly changing. Is that process rendered more difficult or eased within an independent jurisdiction or within a joint jurisdiction and are the present arrangements of the Judicial College equal to the task?

Already, it is a requirement for judicial applicants to demonstrate an understanding of the devolved governance system in Wales and inevitably knowledge of the content of unique legislation within Wales will also be required where necessary. Knowledge of and linguistic ability in Welsh is an additional qualification for some judicial appointments in Wales. Is the Judicial Appointments

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Commission's present system adequate or does it need to be reformed? Does the arrangement of a joint jurisdiction ensure that the particular requirements of Wales receive due consideration?

I mentioned at the beginning of this lecture the decision of the Family Division Liaison Judge for Wales in 2015 in the Family Court in Swansea. Currently, the situation has developed and changed once more. Part 1 of the United Nations Convention on the Rights of the Child has been extended to include local authorities in Wales under Section 7 of the 2014 Act.

If the Welsh Government (and thus CAFCASS Cymru as a government agency) and local authorities in Wales are to consider the appropriate content of the United Nations International Convention, for how long can the family courts in Wales carry out their function in a rational and sustainable way without doing so? The Assembly's legislative competence and the existence of an independent legal jurisdiction are topics that have practical implications for the people of Wales; they are not boring topics for political or constitutional "anoraks".

The Future

Recently, at an England and Wales level, a Unified Family Court was created. The new court will have to grapple with a number of changes in the future. The public is aware that financial constraints have led to a substantial loss in the number of court buildings operating in Wales - how therefore can a modern judicial system and a worthy service for the public be provided? Without Legal Aid in private family law cases, the courts must consider operating in an inquisitorial rather than an adversarial way. Should the family courts be more open to the public or not? Social changes should also be considered. For example, the new scientific technologies of conception, innumerable changes in the constitution of the family, international movements of citizens meeting, forming relationships and having children all create new demands.

These are the developments which the Family Law system will have to face and solve at an England and Wales level or a Wales level only in the twenty first century. We can learn a great deal from other family law jurisdictions.

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Despite these complex demands, I have faith in the people of Wales and their desire to create better opportunities for their children – their most important asset.

Of course, ultimately it will be the responsibility of the people of Wales to create (or not to create) an independent legal jurisdiction for Wales or, as a step in that direction, perhaps a Unified Family Court for Wales with an individual jurisdiction. This last suggestion could be considered as a step towards a full jurisdiction, or as a rational and important step in a specific area that is suitable for such treatment. The first would be a move towards a “separate jurisdiction” and the second would create a “specific jurisdiction”.

There is a historical precedent - the jurisdiction of the Courts of Great Sessions was partial only, until they were abolished. In principle - the legal jurisdiction of Wales could be extended in tandem with an increase in the legislative powers of the Assembly. And perhaps it is in the area of Public Family Law in Wales that the most significant development has been seen hitherto.

But these are simply comments not a prescription. The choice is in the hands of the people of Wales and there is an opportunity for them to demonstrate once again (if they wish to do so) the legal capacity and ingenuity that has been so prominent in their history.