Law reform in Wales

Prynhawn da gyfeillion.

Mae'n braf iawn i fod yma ym Mhontypridd eleni a gai ddiolch yn fawr i Huw Williams a Keith Bush a gweddill tîm Cymru'r Gyfraith am dynnu rhaglen mor gyflawn ac amrywiol at ei gilydd eto eleni. Mae'n draddodiad bellach y bod rhai o arweinwyr cyfreithiol mwyaf blaengar y Deyrnas Unedig yn bresennol yn ein Cynhadledd. A diolch hefyd iddynt hwy am fod more barod i ddod.

Roedd dau o'r arweinwyr hynny yn siarad y bore 'ma yn ystod rhan gyntaf y sesiwn hon. Rwy'n falch iawn fod perthynas gryf rhwng Comisiwn y Gyfraith a Llywodraeth Cymru, a rhwng y Comisiwn a Chymru yn fwy cyffredinol – ac mae diolch i'r Arglwydd Lloyd Jones ac i'r Arglwydd Ustus Green am hynny.

Yn ogystal â bod yn Gadeirydd Comisiwn y Gyfraith mae'r Arglwydd Ustus Green hefyd yn farnwr; yr Arglwydd Lloyd Jones wrth gwrs sy'n cynrychioli Cymru ar y Goruchaf Lys; ac mae sawl un arall o aelodau blaenllaw y farnwriaeth yn siarad heddiw neu yn y gynulleidfa, gan gynnwys yr Arglwydd Brif Ustus fydd yn cloi'r gynhadledd ar fy ôl.

Yn ystod argyfwng gwleidyddol mae rheolaeth y gyfraith hyd yn oed yn fwy pwysig nag erioed. Ac mae annibyniaeth y farnwriaeth yn un o'n hanfodion cyfansoddiadol mwyaf sylfaenol. Mae sylwadau gan wleidyddion pwerus sy'n cwestiynu rôl y farnwriaeth, neu benderfyniadau'r farnwriaeth, yn erydu rheolaeth y gyfraith ac yn erydu'r cyfansoddiad. Ac mae'n hollol amhriodol i awgrymu fod y Goruchaf Lys yn anghywir wrth ddehongli'r gyfraith. Yn hynny o beth does dim *modd* i'r Goruchaf Lys fod yn anghywir.

Diolch yn fawr felly i chi – ein barnwyr annibynnol – am gyflawni eich rôl yn ddiduedd ac heb unrhyw ragfarn wleidyddol.

Another feature of a political crisis is that people's focus and energies – even more so than is usually the case – are on the here and now. But good governance isn't just about producing fixes to the immediate problems of the day. It is also about taking a strategic, long term approach to often deep-rooted and long-standing issues. One of those is the state of the statute book, and therefore, of the law.

This is an issue that also concerns the dynamic between politics and law. Traditionally within the common law system, the majority of the law to which we were subject was judge made. It was, therefore, largely the preserve of lawyers. The prevalence of legislation in recent decades, both domestically and at the European level, has meant that the law is now made in the main by politicians – either by the legislature or by Ministers making Statutory Instruments. That is not a bad thing, not least because it means that the act of changing law is more directly linked to the democratic process. But speaking as both a lawyer and a politician, I hope my colleagues will forgive me when I say that law-making cannot be left to politicians alone. Lawyers have a crucial part to play.

That happens routinely in many different ways. Lawyers, obviously, *advise* on whether legislation is compliant with EU law and with the European Convention on Human Rights, and here in Wales they also advise on whether proposed Bills fall within the legislative competence of the National Assembly. Lawyers *draft* legislation, the complex combination of a technical process of ensuring that text has the effect it is intended to have, without opening loopholes, and a more creative process of trying to write laws that are as clear and understandable as the context allows.

What is perhaps more surprising is the role lawyers also have in developing the content of legislation, or in other words the *policy* that underpins a proposal to change the law. Generally, lawyers only have a supporting role in the process of developing policy for legislation – and more often than not the content is not influenced significantly by their advice. However, there are situations where lawyers play a more central role. This may be because decisions of policy are heavily influenced by legal advice – reducing, in effect, the options to what would be lawful – or because the nature of the law that is being changed is so technical and closely connected to legal concepts such as contracts or trusts that often understanding existing legislation requires the skills that lawyers have.

This is where the Law Commission has such an important role to play. The Law Commission of itself is a manifestation of lawyers engaged in the legislative process, and of lawyers overseeing the law as a whole. Its function is to keep the law under review and to propose reform to the law, and while it isn't constrained in the issues it tackles, we know that it tends to focus on complex, technical, areas of law – using a combination of legal expertise and subject specific knowledge and experience.

The Law Commission model of working provided inspiration for part of our policy for the recently enacted Legislation (Wales) Act 2019. This Act has been described by one of my Ministerial colleagues as the "law law" and while that is of course intended as a humorous oversimplification, it isn't inaccurate. The purpose of the Act is, essentially, to make sure that the law works. And making sure the law works requires, firstly, requires lawyers to play an important role in keeping the law under review and make it more accessible, and secondly, it requires there to be rules prescribed about how legislation works. Or law about the law as my colleague would call it.

So the purpose of the Legislation Act is to make Welsh law more accessible, clear and straightforward to use. It makes provision about the interpretation and operation of Welsh legislation, and requires the Counsel General and the Welsh Ministers to take steps to improve the accessibility of Welsh law. Some of the provisions in the Act draw upon the Law Commissions Act of 1965 for inspiration and its underlying purpose is also similar to that of the Law Commission – reforming the law for the sake of the law itself. Making the law less complex and easier to understand both at the level of individual enactments and, crucially, as a collective. We want to develop an accessible Welsh statute book that users of legislation can navigate and comprehend.

The Act has three Parts. Taking them in reverse order, Part 3 contains simplifications to the process of making subordinate legislation. Meanwhile, Part 2 is very significant as for the first time it puts in place what is commonly known as an "Interpretation Act" for Wales. For

the first time, Wales will have its own rules on the operation of legislation. This means all Acts and Statutory Instruments made in Wales after 1 January 2020 will be subject to the Legislation (Wales) Act and not to the UK's 1978 Interpretation Act.

I will be focussing today, however, on Part 1 which imposes an obligation on the Counsel General and the Welsh Ministers to keep the accessibility of Welsh law under review, and to develop programmes of activity to make it more accessible.

I have spoken before about the complexity of our laws – about the problems people experience in understanding the rights conveyed upon them and the obligations to which they are subject. The disorganised state of our vast and sprawling statute book is a problem caused not only by the sheer volume of legislation; but also by the way in which that legislation is amended, re-amended and re-made – often inconsistently – over time. Layers of legislation have emerged which may be related or interconnected in a number of different ways, making the legislative terrain very difficult for lawyers to navigate let alone the affected citizen. This does not help our complex system of devolution, compounded as it is by existing within the framework of what I believe is an increasingly complex and artificial England and Wales jurisdiction.

This all brings an economic cost – as we have heard from Sir Nicholas Green – and a social cost. Cuts in legal aid and other advice service exacerbate this problem, making this an issue of social injustice.

The UK's withdrawal from the European Union – when, perhaps if, it happens – is likely to add to this problem. The exercise of incorporating law that was designed as international law, and based primarily on the creation of the single market, into domestic law will further exacerbate the problem of inaccessible law. The European Union (Withdrawal) Act 2018 will convert a large body of EU law into domestic law at the point of withdrawal, and we have been making subordinate legislation to amend that law that so that it can operate correctly outside the EU. Other legislation will also be required in connection with withdrawal from the EU, and the final position remains unclear, not least because much depends on the nature of the UK's future relationship with the EU. I should stress that this process has, by necessity, often been a "stopgap" and further action will certainly need to be taken to rationalise the law. How that could be done would, however, depend on the extent to which European standards are retained.

I have also spoken before about my long term goal for bringing order to the Welsh statute book, a subject upon which we have formerly received the assistance of the Law Commission. We as a Government have long been clear that a process of consolidation of legislation was essential and we asked the Law Commission to look at this and related issues. Since the Commission's report on the *Form and Accessibility of the law applicable in Wales* we have of course now passed the Legislation (Wales) Act and have been looking in more detail at how to go about achieving the core recommendations of consolidating and codifying the law.

We as a Government propose to approach the process of making the law more accessible through four main initiatives

The first is to set a framework for bringing order to legislation. This is to be done by developing a scheme of *classification* of its subject matter. Last year we published a draft taxonomy of how legislation could be organised on a subject by subject basis. This is now to be done by working with The National Archives and adopting an additional step to the normal process of publishing legislation on legislation.gov.uk. This will enable additional information to be captured when legislation is published. Most importantly this would include a subject 'category' for each piece of legislation. This process will start with new legislation made before moving backwards year by year to retrospectively add metadata to all legislation within devolved areas. So that in due course legislation can be searched conveniently by subject matter not solely by the year it was made.

This development should be useful in its own right, but its benefit will not be fully realised without our second initiative. This is to remake Welsh law in accordance with the classification put in place, primarily by a process of *consolidation* of existing legislation. So as an example, our process of classification may establish that there are, say, 10 Acts of the UK Parliament or of the Senedd on schools. Consolidating those Acts means re-enacting one bilingual Senedd Act on that subject. This is the most important, but also the most difficult, element of the process because of the complexity of the process and the sheer scale of the statute book. Wholesale reform of the statute book in this way will take a generation and more to achieve. Our work to date with the Law Commission on consolidating the law of planning, referred to this morning by Lord Justice Green, has shown us how important this work is – and the benefits it will bring – but it has also confirmed our view of how long this will all take.

Once order has been achieved, subject by subject, through a process of classification and consolidation, we must of course maintain that order. Our third initiative, therefore, is to put in place a process of *codification* of consolidated law so that it remains within the scheme of classification without proliferation. Perhaps the issue that has caused us most conceptual difficulty is what exactly we mean when we refer to 'codification' or to a 'code' of law. While on the one hand, there has been a general consensus that organising the law by codes is a good thing, it has not been totally clear what that would involve. We questioned whether the complexity of legislation would be improved by introducing a new form of legal instrument, and partly in consequence we have taken the view that codification should mean two things. First, it would mean a better way of publishing legislation by collating all newly consolidated legislation on a particular topic under the label of a "code". And second, it should involve a procedural means – using the Senedd's Standing Orders – of keeping the structure and classification of consolidated law intact. This to be done by requiring proposer of new legislation to justify any departure from that structure. The *content* would, of course, be subject to change in the normal way but its *form* should be protected.

And finally, no matter how clear and well organised the statute book will become, our fourth initiative will continue to play an important part. Improving our *communication* about the law and providing more non-legislative clarification of its meaning will supplement our other initiatives. Here our Cyfraith Cymru / Law Wales website will have an important part to play.

We have set out more detail about these initiatives in a document I am publishing today on the "Future of Welsh law". Although this is a document setting out my vision for the Welsh Statute Book, the views expressed are not final not least because they require further discussion with, and in some respects the agreement of, the Senedd. I would very much welcome the view of others on its content, especially those in this room.

We are also today publishing the Office of the Legislative Counsel's Guidance on drafting legislation: "Writing Laws for Wales", and guidance designed to help officials develop policy: "Common Legislative Solutions to Common Legislative Problems". These are designed, primarily, as internal guidance but I am keen that we contribute as much to the resource available to the public around Welsh law and law making. Guidance on Parts 2 and 3 of the Legislation (Wales) Act is also being finalised and will be published before the end of the year.

Before I conclude, I should stress that the reform to Wales's system of law making I have set out today will still have some limitations. This is not a subject for today but our complex and illogical devolution settlement, including the quirk of history that is the single England and Wales legal jurisdiction, makes this task more difficult. We look forward with considerable anticipation to seeing the conclusions of the Justice Commission, and may I take this opportunity to sincerely thank Lord Thomas and the other members of the Commission for their enormous commitment to the task of reviewing the justice system in Wales, and its part in our system of government. I would like to mention also that as part of our focus on justice and the legal system in Wales I recently commissioned a rapid review of the legal sector which I was pleased to publish earlier this week. We are now engaging with our legal professionals about how we address its conclusions.

But to return to the question of law reform as opposed to constitutional reform, there is no doubt that we have a problem of inaccessible law, and that problem affects lawyers, yes, but it also profoundly affects the citizen. It brings with it an economic and social cost. Remedying the situation will not be straightforward and it will certainly not happen overnight. But our desire to create an accessible system of law for Wales is sincere and we have, I hope, set a clear direction for getting to that destination and are now embarking on a journey which I know all of you here today are enthusiastic to travel with us.

Diolch yn fawr.