

## Commission on Justice in Wales

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*Saturn is fallen, am I too to fall?  
Am I to leave this haven of my rest,  
This cradle of my glory, this soft clime,  
This calm luxuriance of blissful light,  
These crystalline pavilions, and pure fanes,  
Of all my lucent empire?<sup>1</sup>*

1. I am grateful for the invitation to submit evidence to the Commission. The justice system in Wales has been a constant in my research over the years.<sup>2</sup> In 2012, I published a monograph in the Welsh language which addressed key themes in the development of the law in contemporary Wales.<sup>3</sup> In the recent past, I have submitted evidence to consultations initiated by the Welsh Government and the National Assembly for Wales on the subject of a separate jurisdiction for Wales. Last year, I published an article in the *Irish Jurist* on the same subject in the light of recent legislative developments.<sup>4</sup> Much of this submission is based on that publication.
2. I must therefore apologise if what follows has a ring of familiarity to some members of the Commission. However, and without unnecessary repetition, I shall succinctly summarise what I regard as being the overarching issue facing the Commission.

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<sup>1</sup> Extract from *Hyperion* by John Keats.

<sup>2</sup> For example: R. Gwynedd Parry, "The Council of Legal Education in Wales: an idea whose time has come?" in Emöd Veress (ed.) *Multilingualism and Law* (Cluj-Napoca: Sapientia University Publishing, 2016), pp. 49-65; R. Gwynedd Parry, "The Three Ages of Legal Scholarship in Wales" in T. G. Watkin (ed.) *The Carno Poisonings and Other Essays*, (WLHS, 2013), pp. 49-71; R. Gwynedd Parry, "Bilingual Legal Scholarship in Wales: Historical and Contemporary Perspectives" in Xabier Arzoz (ed.), *Bilingual Higher Education in the Legal Context: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), pp. 215-257. R. Gwynedd Parry, "Rheithgorau Dwyieithog: Penbleth Geltaidd?" (2011) (9) *Gwerddon* <http://www.gwerddon.org>; R. Gwynedd Parry, "Higher education and Article 8.1.e of the European Charter for Regional or Minority Languages: a Welsh 'opportunity avoided'?" in Parry RG and Dunbar R, eds., *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Strasbourg: Council of Europe Publishing, 2008), pp. 253-75; R. Gwynedd Parry, "An important obligation of citizenship: language, citizenship and jury service", (2007) 27 (2) *Legal Studies* 188-215; R. Gwynedd Parry, "Beth yw Trosedd? Golwg ar yr Elfennau Sylfaenol.", (2004) 3 *Cylchgrawn Cyfraith a Pholisi Cymru* 223-236; R. Gwynedd Parry, "Random Selection, Linguistic Rights and the Jury Trial in Wales" [2002] *Criminal Law Review* 805-816; R. Gwynedd Parry, "Hyrwyddo'r Gymraeg ym Myd y Gyfraith- Beth yw Cyfraniad Adrannau Cyfraith y Brifysgol?", (2002) 1 *Cylchgrawn Cyfraith Cymru* 387-395; R. Gwynedd Parry, "Yr Iaith Gymraeg a'r Tribiwnlys Apêl Cyflogaeth - ystyried y penderfyniad yn Williams v. Cowell", (2001) 1 *Cylchgrawn Cyfraith Cymru* 178-182.

<sup>3</sup> R. Gwynedd Parry, *Cymru'r Gyfraith: Sylwadau ar Hunaniaeth Gyfreithiol* (Caerdydd: Gwasg Prifysgol Cymru, 2012).

<sup>4</sup> R. Gwynedd Parry, "Is breaking up hard to do? The case for a separate Welsh jurisdiction" (2017) 57 *The Irish Jurist*, 61-93.

3. The Commission's terms of reference are broad, and rightly so. There are many specific matters relating to the administration of justice in Wales which warrant examination. My own interest lies in the legal infrastructure and in the mechanisms whereby justice issues can be considered and debated, and policy can be devised and implemented. By infrastructure I mean legal institutions and structures, and authority for justice policy. More specifically, I believe that the most important question facing the Commission is whether the legal system in Wales can continue, to all meaningful purposes, as an English circuit, or whether the time has come for Wales to have the legal architecture that befits a self-governing nation within the United Kingdom. Should Wales have the same or similar legal institutions and legal autonomy as Scotland and Northern Ireland? In my opinion, it is when this is answered that all the other myriad issues facing justice in Wales can be addressed.
4. The imprints of the past bear heavily on the current constitutional arrangements in relation to the administration of justice in Wales. The Tudor reforms of the sixteenth century intensified the annexation of Wales by England. By the middle of the nineteenth century, Wales was fully incorporated into the English legal system. That remains the bottom line constitutionally in so far as the legal system is concerned. Of course, there never existed a "union" between England and Wales, but conquest followed by annexation. The present legal jurisdiction of England (and Wales) is the product of this historical legacy and continues, fundamentally, and despite a few recent concessions, to function on this premise.
5. This is not to deny those notable examples of legal devolution in recent years. A good example has been the Administrative Court in Wales, which has ensured that judicial reviews of the actions of the Welsh Government or the National Assembly have been heard in Wales. The creation of the unified Courts and Tribunals Service in 2011, and the establishing of the Office of President of the Welsh Tribunals in 2017, are other examples. But these innovations exist within the centuries-old paradigm of the unified jurisdiction.
6. Therein lies the problem. Wales is no longer, constitutionally or politically, annexed by England. Constitutionally, there has been a change from a state of "annexation" to that of a "union". But rather like the royal standard or the union flag, the unified jurisdiction of England and Wales does not reflect this change and operates on that basis which was infamously stated in the *Encyclopaedia Britannica* and quoted by Professor Thomas Watkin in his submission to this Commission: "for Wales see England".
7. Perhaps the change from "annexation" to "union" requires further explanation. On the 3rd March 2011 the people of Wales declared in a referendum, instigated in accordance with the Government of Wales Act (UK) 2006, that the National Assembly for Wales should serve as a primary law maker, or legislature, for Wales.<sup>5</sup> The 1998 Act (UK) had established a limited form of executive devolution, with powers to make secondary or subordinate legislation and to exercise executive powers.<sup>6</sup> The 2006 Act, however, created the means for legislative devolution and

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<sup>5</sup> Thereby implementing the recommendations in the *All Wales Convention Report* (Crown Copyright, 2009).

<sup>6</sup> See Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999), p. 254.

also ensured the constitutional separation of the Welsh Government and the National Assembly consistent with a parliamentary model of government.<sup>7</sup>

8. But perhaps **the** actual moment when a state of “union” came into existence was with the passing of the Wales Act 2017. The Act places two important principles on a statutory footing, principles which negate any idea that the National Assembly is merely a subsidiary of the Westminster parliament. The first relates to the permanence of the Assembly and the Welsh Government. The Act states that the Assembly and the Welsh Government will not be abolished without the people of Wales voting for that course of action in a referendum.<sup>8</sup> The second principle is that the Westminster parliament will not normally legislate with regard to devolved matters without the consent of the National Assembly for Wales.<sup>9</sup> These principles effectively render the doctrine of parliamentary sovereignty redundant on devolved powers, and create a new constitutional model based on popular sovereignty.<sup>10</sup> In the parlance of another age we would say that Wales now has ‘Home Rule’ within the United Kingdom. This has changed completely the constitutional relationship between Wales and England, and Wales’s place within the Union. It may even be said that it is the first true “act of union” in Welsh history in that it recognises the sovereignty of the Welsh nation within the Union.
9. Despite this, there exists some resistance to recognise this fundamental change to Wales’s constitutional status. Rather like the Titans in Keats’s poem, some struggle to come to terms with it all. The entire notion of self-government for Wales, or even Welsh nationhood itself, can be a source of anxiety. Wales is wonderfully *sui generis*, it is implied, and should be well pleased not to have the sort of legal institutions enjoyed by the other self-governing nations or autonomous regions of the world.
10. The Commission must see all of that for what it is. The issue now is not whether Wales is a nation, is sufficiently different from England, or whether legislative devolution is a good thing or a bad thing: these are all matters resolved by democratic mandate and the law. What matters now is whether the continuation of a single jurisdiction of England and Wales (that is, England with Wales subsumed within it) can be said to be constitutionally acceptable.
11. In the meantime, a body of law which applies only in Wales is increasing. Already, divergence in key areas of policy is creating legal divergence between England and Wales, especially in the fields of planning, housing and education law. The Wales Act 2014 conferred tax-raising powers on the National Assembly, powers that increase with the Wales Act 2017. The divergence between laws in Wales and laws in England is also driven by legislative provisions made for England in Westminster that do not apply in Wales.<sup>11</sup> Westminster statutes may be amended both by the Westminster

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<sup>7</sup> See Dafydd Elis-Thomas, “From Body Corporate to Parliamentary Service” (2005) 4 *Wales Journal of Law and Policy*, 12.

<sup>8</sup> Wales Act 2017, s. 1.

<sup>9</sup> Wales Act 2017, s. 2.

<sup>10</sup> Also reflecting the belief that, “Westminster is in practice no longer sovereign over the domestic affairs of Scotland and Wales”: see Vernon Bogdanor, *The New British Constitution* (Oxford: Hart, 2009), p. 113. See also Anthony Bradley, “The Sovereignty of Parliament: Form or Substance?” in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution* (Oxford: Oxford University Press, 2007), at pp. 25-58.

<sup>11</sup> The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469–I, 29 June 2016), pp. 7-8.

parliament and the National Assembly, and legislation that relates to a devolved area may be a combination of legislation passed by the National Assembly and the Westminster parliament and/or subordinate legislation made by Ministers in both. The Wales Act 2017 creates the possibility for even greater divergence, with greater legislative powers for the National Assembly in new areas, including energy, transport and elements of private and criminal law.<sup>12</sup> Welsh Ministers, who also have law-making functions, are already exercising those functions in some areas of the criminal justice system. This includes the police, young offenders, drugs-related crime, and health and education services for prisoners.

12. The Wales Act 2017 also implemented the recommendation in the Commission on Devolution in Wales's report that there should be a shift from a conferred powers model to that of a reserved powers model, which brings Wales into greater constitutional alignment with Scotland and Northern Ireland.<sup>13</sup> In terms of its legislative powers, Wales is catching up with the other devolved nations. Of course, the long list of reserved matters in the revised Schedule 7A to the 2006 Act has generated controversy.<sup>14</sup> But the process of devolving further legislative powers from Westminster to Cardiff will surely continue.
13. The Wales Act 2017 maintains the position whereby the laws made for Wales are part and parcel of "the laws of England and Wales", as there remains a single legal jurisdiction. A notion of "Welsh Law" is to be found in the first section of the Wales Act 2017: "The law that applies in Wales includes a body of Welsh law made by the Assembly and the Welsh Ministers". "Welsh Law" is thus a shorthand term for laws made by the Assembly and Welsh Ministers which form part of the law of England and Wales.<sup>15</sup> This position, as has often been stated, is a recipe for confusion.
14. Although having two legislatures making laws for the same territory is not of itself unusual, it does pose challenges in terms of clarity and accessibility. The fundamental requirement is that people need to know the law that applies to them. A unified body of Welsh law, the law that applies in Wales, regardless of where it is made, must be clear and accessible to the public. The Law Commission recognised the current threats to accessibility and clarity and made proposals based on the fundamental tenet, in the context of legislation, that accessibility is central to the rule of law.<sup>16</sup>
15. The growth in legislative divergence also means that the Welsh judiciary and legal profession are required to specialise in Welsh law, that is, law that applies in Wales. For this to occur, manuals, guides and other legal literature are required (such literature is gradually appearing under the imprint of University of Wales Press). If there is a separate body of Welsh law, there must be a legal profession and a judiciary that can fulfil their constitutional responsibility within a specifically Welsh context.
16. This should be an opportunity for Wales, and for Welsh lawyers especially. The establishment of distinctively Welsh legal institutions, within a Welsh jurisdiction,

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<sup>12</sup> See Wales Act 2017, s. 3 and schedule 2.

<sup>13</sup> Wales Act 2017, s. 3 and schedules 1 and 2.

<sup>14</sup> See Wales Act 2017, schedule 1.

<sup>15</sup> Wales Act 2017, s. 1.

<sup>16</sup> See *Form and Accessibility of the Law applicable in Wales* (Law Commission Consultation Paper No. 223, 2015).

could allow the legal profession in Wales to develop a distinctive professional identity and develop expertise in new areas based on Welsh legislation. In addition, the university law schools of Wales could seize the opportunities offered by the emergence of a distinct body of law. In his submission, Professor Richard Owen mentioned my proposal for the creation of a Council for Legal Education in Wales to provide a national strategy for legal education and training in Wales and to promote research and scholarship on Welsh law and the legal implications of devolution.<sup>17</sup> This is but one example of the kind of indigenous legal institutions now required in Wales.

17. I now turn to the issue of constitutional parity. Devolution in the United Kingdom is asymmetrical. This is in part a reflection of the different circumstances existing within the three nations when the devolution project began.<sup>18</sup> It hardly represents a coherent model of constitutional governance, and its piecemeal pragmatism has created “a constitutional process of considerable complexity”.<sup>19</sup> However, a uniform settlement is unlikely as some of the differences in detail, such as the power-sharing executive in Northern Ireland, for example, exist to deal with specific circumstances and should not be replicated in the others. Tolerance towards a degree of constitutional diversity is likely to remain and, indeed, should remain.
18. However, Wales does not enjoy anything remotely akin to the legal arrangements and institutions in Scotland and Northern Ireland. It remains incorporated, in terms of justice, into England, a constitutional anomaly in the light of recent constitutional changes. As I have stated in the past, Northern Ireland offers a good precedent for Wales in terms of its internal legal structures. A common law jurisdiction, it has many of the institutions and arrangements that could be replicated in Wales.
19. Much ink has been spilled over the meaning of ‘separate jurisdiction’. Here, I shall take a descriptive approach by referring to the sort of legal institutions which exist in Northern Ireland, but do not exist in Wales. The Court of Judicature of Northern Ireland consists of the Court of Appeal, which comprises the Lord Chief Justice, who is the President of the Court of Appeal, and three Lord Justices of Appeal. High Court Judges are also entitled to hear appeals relating to criminal matters. The Court of Appeal hears criminal appeals from the Crown Court and civil matters from the High Court (including Judicial Reviews). The Court of Appeal may also hear appeals on points of law from county courts, magistrates’ courts and some tribunals. The High Court is composed of the Lord Chief Justice (the President of the High Court), three Lord Justices of Appeal together with ten High Court Judges and two part-time High Court Judges. The High Court has three divisions, the Chancery Division, the Queen’s Bench Division and the Family Division, to deal with the wide range of matters that come before it.
20. Northern Ireland, although quite unique in many respects of course, does offer a valuable precedent. Its history demonstrates that a jurisdiction can evolve and change,

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<sup>17</sup> See, further, R. Gwynedd Parry, “The Three Ages of Legal Scholarship in Wales” in T. G. Watkin (ed.) *The Carno Poisonings and Other Essays*, (Welsh Legal History Society, 2013), pp. 49-71.

<sup>18</sup> The implications of asymmetrical devolution are considered by Rosanne Palmer, *Devolution, Asymmetry and Europe: Multi-level Governance in the United Kingdom* (Brussels: P. I. E. Peter Lang, 2008).

<sup>19</sup> Peter Leyland, “The Multifaceted Constitutional Dynamics of U.K. Devolution” *Int. J. Constitutional Law* (2011) 9 (1): pp. 251-273 at p. 271.

and that not all the essential elements must be in place from the outset. It took several years following the establishment of the jurisdiction in 1920 before, for example, an Inn of Court was established, or a law journal was founded at a university law school. The creation of the jurisdiction stimulated responses and initiatives over subsequent years as momentum gathered pace and as the entity took root. Developing a new jurisdiction need not be an overnight affair, and all elements do not necessarily need to be in place from the start. But once established, such a development has the potential to be a catalyst for enriching and nurturing the legal culture and providing the necessary legal infrastructure for Welsh democracy.

21. The Northern Ireland model also shows that creating a new jurisdiction does not lead to a complete divorce from the former jurisdiction or splendid isolation in terms of the administration of justice. Free movement is a key feature in the relationship between the lawyers of Northern Ireland and those of England and Wales, and any member of the profession in Northern Ireland can, for example, apply to practise in England and Wales, with only a few hurdles to cross. The creation of a Welsh jurisdiction should, therefore, not deprive members of the legal profession in Wales of opportunities to work in England, or vice-versa, provided there is professional competence on both sides. There could also be arrangements for judges to be authorised to sit in either jurisdiction. I believe, however, that there should be a corps of Welsh judges, led by a Lord Chief Justice for Wales, permanently based in the Welsh courts, to provide focus and leadership. But, as has been argued in other submissions, the separateness/distinctiveness of a separate/distinctive Welsh jurisdiction is capable of flexible interpretation and application.
22. It hardly needs to be said that the Supreme Court of the United Kingdom is the highest tribunal of appeal for all the state's jurisdictions, and it is here, normally, that complex legal questions which give rise to new and important legal precedents are determined. Even if decisions of the English court of appeal were to become merely persuasive in Wales, that should not cause significant difficulties. Welsh judges could give due and proper consideration to English judgments and follow them where they served the interests of justice. That is the current practice within the jurisdictions of the UK, namely, giving due and proper consideration to cross-jurisdictional judgements that offer a suitable precedent. Many such technical matters, including cross-jurisdictional enforcement of judgments, could be resolved in the same way as between the present jurisdictions of England (and Wales), Scotland and Northern Ireland.
23. Is this merely an argument for separate but parallel arrangements in the proposed jurisdiction of Wales, by replicating those existing in England? What **substantively** would distinguish the role of a judge in Wales to that of a judge in England, and why, in terms of real substance, should there be a Welsh legal system with Welsh judiciary presiding in Welsh courts, applying and interpreting the law in Wales? I shall now offer a few comments in relation to one specific feature of justice in Wales about which I am best informed.

24. The Welsh language is used daily by a significant minority of the population of Wales.<sup>20</sup> The Welsh language has acted as the main catalyst for the development of distinct practices within the legal system in Wales during the twentieth century.<sup>21</sup> It is even possible to argue that the struggle to save the language has been at the heart of the struggle to save the very idea of Wales as a nation.<sup>22</sup> The Welsh Government has declared its goal of ensuring that there will be a million Welsh-speakers by the middle of this century, and investment in education and community initiatives is expected. The Welsh language, despite everything, is here to stay.
25. The statutory right to use the language in court and tribunal proceedings dates back to 1967.<sup>23</sup> The subsequent Welsh Language Act of 1993 confirmed the principle that the Welsh language should be equal with English in the conduct of legal proceedings in Wales, but added nothing new.<sup>24</sup> In any legal proceedings in Wales any party, defendant or witness, or other person who desires to use it, may speak the Welsh language. In short, the courts operate on a principle of equality rather than a principle of necessity. A person may use the Welsh language regardless of their competence in the English language, regardless of their ethnicity, their nationality, their gender, or any other characteristic.<sup>25</sup>
26. The National Assembly enacted the Welsh Language (Wales) Measure 2011 (which is in fact an ‘Act’, but which suffers from a defect in nomenclature arising from the interim constitution of 2006-2011), which confirmed the Welsh language as an

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<sup>20</sup> The Census 2011 figures show that 562,000 or 19% of those over 3 years old can speak Welsh and 14.6% over three years old can speak, read and write in Welsh. See <https://statswales.gov.wales/Catalogue/Welsh-Language>. Welsh as a minority language in Wales is a phenomenon of the twentieth and present centuries. The Census of 1891 showed that 54.5% of the population spoke Welsh, with 30% speaking Welsh only; see Gwenfair Parry a Mari A. Williams, *Miliwn o Gymry Cymraeg! Yr Iaith Gymraeg a Chyfrifiad 1891* (Cardiff: University of Wales Press, 1991) at p. 443.

<sup>21</sup> For an account of the development of the legal status of the language during the last century, see Gwilym Prys Davies, “The Legal Status of the Welsh Language in the Twentieth Century”, in Geraint Jenkins, (ed.), *The Welsh Language in the Twentieth Century*, (Cardiff: University of Wales Press, 2000), pp. 217-248.

<sup>22</sup> A view expounded most eloquently by Saunders Lewis who delivered the BBC Annual Lecture Broadcast on 13 February 1962 entitled *Tynged yr Iaith*, (The Fate of the Language). It can be found in the collection of his political speeches and writings, Marged Dafydd, (ed.), *Ati Wŷr Ifanc*, (Cardiff: University of Wales Press, 1986), 88- 98. See also Saunders Lewis, *Canlyn Arthur, Ysgrifau Gwleidyddol*, (Llandysul: Gomer, 1985), at pp. 61-65

<sup>23</sup> Welsh Language Act 1967, s. 1. This provided that, “In any legal proceeding in Wales or Monmouthshire the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly”.

<sup>24</sup> Welsh Language Act 1993, s.22. The phrasing is virtually identical to that in the 1967 Act: “In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates’ court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly”.

<sup>25</sup> This principle of equality is a relatively recent innovation in Wales. See *R. v Merthyr Tydfil Justices, ex p Jenkins*, [1967] 2 Q.B. 21. For an excellent account of the development of the legal status of the language during the last century, see Gwilym Prys Davies, “The Legal Status of the Welsh Language in the Twentieth Century”, in Geraint Jenkins, (ed.), *The Welsh Language in the Twentieth Century*, (University of Wales Press, Cardiff, 2000), at pp. 217-248. The right to use the Welsh language does not extend to any right to demand that the tribunal itself be fluent in that language, and there is currently no provision enabling the courts to summon Welsh-speaking or bilingual juries in cases when the Welsh language may be used. For a consideration of this particular issue, see R. Gwynedd Parry, “Random Selection, Linguistic Rights and the Jury Trial in Wales” [2002] Crim. L.R. 805.

official language in Wales.<sup>26</sup> It also replaced the former language scheme mechanism with language standards, and extended rights to use the language with a broader range of public and private organisations than in the past. The office of Welsh Language Commissioner<sup>27</sup> was established to implement and supervise language standards within a new regulatory regime in which the Commissioner is empowered with legal sanctions in the event of non-compliance.<sup>28</sup> Although the role of the language commissioner is currently under review, with the possibility of it being replaced by a commission, most of the key principles of the legislation will remain in place.

27. “A Wales of vibrant culture and thriving Welsh language” is one of the seven well-being goals in the Well-being of Future Generations (Wales) Act 2015, whose primary objective is to promote sustainable development in Wales. It imposes a duty on a number of public bodies listed in the Act<sup>29</sup> to make a “thriving Welsh language” a policy objective, and to further the goal of creating “a society that promotes and protects culture, heritage and the Welsh language”.<sup>30</sup> The Planning (Wales) Act 2015 requires that the Welsh language be taken into consideration in the planning process in Wales and when a planning application is determined. It declares that impact on Welsh language is a material planning consideration when preparing and determining a planning application.<sup>31</sup> It also requires that the Welsh language should be a factor in sustainability appraisals for development plans.<sup>32</sup>
28. These highlight the significance of the Welsh language in the administration of justice and in the public life of Wales in general.<sup>33</sup> The Welsh language is used extensively in courts in Wales, with over six hundred cases heard wholly or partly in Welsh in courts and tribunals every year.<sup>34</sup> This is despite few resources to support such use, such as manuals, guides or a standardised legal terminology. The right to use the Welsh language in legal proceedings is subject to a territoriality principle established by the Welsh Language Act 1993, which declares that the right to use the Welsh language in courts of justice is confined to Wales only. The legal system in Wales thus operates according to a language policy which does not apply throughout the jurisdiction. As the right to use Welsh in legal proceedings is confined to Wales, as upheld in judicial rulings,<sup>35</sup> this linguistic dimension adds to the case for a Welsh jurisdiction. For a right to use the Welsh language in the high court or the court of appeal to be recognised, those tribunals must be physically located in Wales.
29. After devolution, Welsh also became a language of law-making and government. The Government of Wales Act 1998 required that the National Assembly should function

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<sup>26</sup> Welsh Language (Wales) Measure 2011, s. 1(1).

<sup>27</sup> The role of the Welsh Language Commissioner is given careful and critical scrutiny by Diarmait Mac Giolla Christ, *The Welsh Language Commissioner in Context: Roles, Methods and Relationships* (Cardiff: University of Wales Press, 2016).

<sup>28</sup> Welsh Language (Wales) Measure 2011, ss. 71-94.

<sup>29</sup> Wellbeing of Future Generations (Wales) Act 2015, s. 6.

<sup>30</sup> *Ibid.* s. 4.

<sup>31</sup> Planning (Wales) Act 2015, s. 31.

<sup>32</sup> *Ibid.*, s. 11.

<sup>33</sup> See Lord Judge, *The Safest Shield: Lectures, Speeches and Essays* (Oxford: Hart, 2015), pp.166-80.

<sup>34</sup> Most are heard in magistrates’ courts and County Courts: see The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469–I, 29 June 2016), p. 113.

<sup>35</sup> See *Williams v Cowell* [2000]1 W.L.R. 187.



on the basis of the equal status of Welsh and English.<sup>36</sup> Other provisions guaranteed the equal validity of English and Welsh versions of statutory instruments.<sup>37</sup> These principles were further affirmed in the provisions of s. 35 of the Government of Wales Act 2006, which stated that the Assembly must give effect, “so far as is both appropriate in the circumstances and reasonably practicable, to the principle that the English and Welsh languages should be treated on a basis of equality”.<sup>38</sup> These provisions were subsequently amended by the National Assembly for Wales (Official Languages) Act 2012, which confirmed that Welsh and English are official languages of the National Assembly and must be treated on a basis of equality.<sup>39</sup> Section 78(1) of the Government of Wales Act 2006 requires Welsh Ministers to adopt a strategy on how they propose to promote and facilitate the use of the Welsh language. Section 78(4) requires Welsh Ministers to keep the strategy under review and enables them from time to time to adopt a new strategy.

30. The 2006 Act also states that English and Welsh language versions of legislation have equal standing.<sup>40</sup> It is in the creation of Welsh versions of legislation that the National Assembly is pioneering a new legal culture that is bilingual and one that is different from that in England. The drafting of laws in the Welsh language took the legislators into uncharted territory.<sup>41</sup> A language which for centuries had been deprived of legal status and which had not developed as a language of law would need to rise to the challenge.<sup>42</sup> Ensuring the quality of the Welsh version and thus guaranteeing its equal standing with the English version was not going to be an easy task.<sup>43</sup> Indeed, the use and standardisation of Welsh legal terminology in the drafting of legislation remains work in progress.<sup>44</sup>
31. There is no doubt that bilingual legislative drafting in Wales is a craft that is still in infancy, but there are lessons that can be learnt, where appropriate, from practices in other bilingual jurisdictions.<sup>45</sup> Conversely, Wales may itself become a paragon of good practice in the art of bilingual legislative drafting in years to come.<sup>46</sup> Making bilingual laws clear and accessible adds another dimension to the case for a separate

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<sup>36</sup> Government of Wales Act 1998, s. 47 (1). This was subsequently repealed and superseded by provisions in the Government of Wales Act 2006.

<sup>37</sup> Government of Wales Act 1998, s. 122 (1).

<sup>38</sup> Government of Wales Act 2006, s. 35(1).

<sup>39</sup> See National Assembly for Wales (Official Languages) Act 2012.

<sup>40</sup> Government of Wales Act 2006, s. 156.

<sup>41</sup> See Gwyn Griffiths, “Her Deddfu’n Ddwyieithog” (2007) 38 *Cambrian Law Review*, pp. 103-116.

<sup>42</sup> See Keith Bush, “Deddfu yn y Gymraeg: Ail-gydio mewn Hen Ymgom” (2007) 38 *Cambrian Law Review*, pp. 83-102.

<sup>43</sup> Keith Bush, “Deddfu yn y Gymraeg” (2006) 4 *Wales Journal of Law and Policy*, pp. 374-381.

<sup>44</sup> The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469-I, 29 June 2016), at pp. 113-126.

<sup>45</sup> For Canadian experiences and perspectives, see Robert Bergeron, “Co-Drafting: Canadian Experience of the Creation of bilingual Legislation in a Bijural System”, *The Law Making Powers of the National Assembly for Wales*, (Cardiff: Elfennau'r Gyfraith, 2001), pp. 54-58; also Paul Godin, “The New Brunswick Experience: the Practice of the English Common Law in the French Language”, (2001) 1 *Wales Law Journal*, pp. 41-52. For a critical discussion of the relative merits of co-drafting and translation in the Canadian context, see André Labelle, “What Ever Happened to Legislative Translation in Canada” (2016) 37(2) *Statute Law Review*, pp. 133-43.

<sup>46</sup> See Thomas Glyn Watkin, “Bilingual Legislation: Awareness, Ambiguity, and Attitudes” (2016) 37(2) *Statute Law Review*, pp. 116-132.

jurisdiction.<sup>47</sup> The position is that the majority of laws that apply in Wales are not bilingual. The laws created by the UK parliament which apply in Wales are not published in the Welsh language, and so bilingual law and justice is only partial in Wales. This will not change overnight, but a separate jurisdiction within a reserved powers model of legislative devolution is the surest vehicle for remedying this deficiency in the future. If a formal mechanism for adopting Westminster legislation into “Welsh Law” within a separate jurisdiction becomes necessary, there will be a need for that adoption process to also ensure that bilingual versions of laws are created.

32. Creating bilingual laws is one thing, the application and interpretation of those laws is another. With regard to the judiciary in Wales, a significant number speak Welsh and possess sound understanding of the social and legal distinctiveness of Wales.<sup>48</sup> Historically this was certainly not the case, and of those 217 men appointed as judges of the Great Sessions between 1542 and 1830, only thirty were born in Wales, and probably only about ten were able to speak Welsh.<sup>49</sup> In a nutshell, 95% of the judiciary could not speak the language of 90% of the people. This was no doubt a deliberate and conscious policy to enforce clause 20 of the Act of Union of 1535-36, which made English the sole language of justice in Wales.<sup>50</sup> It was part and parcel of that assimilationist agenda already mentioned. Have we moved away from that position completely?
33. Today, the position should be different. There are a fair number of judges in criminal and civil courts with the necessary language skills to conduct legal proceedings in the Welsh language. About a third of the circuit bench have these skills. A cause for concern is the low number of recorders capable of conducting proceedings in Welsh. Diversity and representativeness are also issues, and too few female judges can conduct proceedings in the Welsh language. As far as the senior judiciary is concerned, the position is even less promising. At present there is not a single high court judge who can conduct trials in Welsh. In the day to day business of the courts in Wales, it is essential that there are competent and independent judges, of diverse backgrounds, who can conduct proceedings and interpret legislation bilingually. As the Law Commission acknowledged: “Given the equality of legal standing between the English and Welsh versions of legislation, the long-term aspiration must be to ensure that there are sufficient numbers of judges, able to work in the Welsh

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<sup>47</sup> See D. Hughes and H. G. Davies, “Accessible Bilingual Legislation for Wales / Deddfwriaeth Hygyrch a Dwyieithog i Gymru” (2012) 33(2) *Statute Law Review*, pp. 103-121.

<sup>48</sup> See Sir David Lloyd Jones, “The Machinery of Justice in a Changing Wales” (2010) 14 *Transactions of the Honourable Society of the Cymmrodorion*, p. 123.

<sup>49</sup> See W. R. Williams, *The History of the Great Sessions, 1542-1830* (Brecknock: privately published, 1899), at p. 19.

<sup>50</sup> *The Act for Law and Justice to be Ministered in Wales in Like Form as it is in this Realm 1535-36*, cl. 20: “Also be it enacted of the Authority aforesaid, that all Justices, Commissioners, Sherrifs, Coroners, Escheators, Stewards and their Lieutenants, and all other Officers and Ministers of the Law, shall proclaim and keep the sessions Courts, Hundreds, Leets, Sherrifs Courts, and all other Courts in the English Tongue; and all Oaths of Officers, Juries and Inquests, and all other Affidavits, Verdicts and Wagers of Law, to be given and done in the English Tongue: and also that from henceforth no Person or Persons that use the Welsh Speech or Language shall have or enjoy any manner, office or Fees within this Realm of England, Wales or other the King’s Dominion, upon Pain of forfeiting the same offices or Fees, unless he or they use and exercise the English Speech or Language.” For interesting observations on this see Sir Goronwy Edwards, “The Language of the Law Courts in Wales: some Historical Queries” (1975) 6 *Cambrian Law Review*, pp. 5-9.

language, to sit on any case involving comparison of language versions.”<sup>51</sup> I only take issue with the phrase “long-term”. With respect, this requires immediate attention.

34. Some may ask, who or what is responsible for developing this bilingual judiciary? The Judicial College has established a Welsh Training Committee to consider the Welsh language training needs of the judiciary. A high court judge, who cannot conduct proceedings in Welsh, is chairing the Lord Chancellor’s Standing Committee on the Welsh Language in order to develop and strengthen the use of Welsh in the courts.<sup>52</sup> The Courts and Tribunals Service has a Welsh language scheme which sets out its commitment to providing bilingual services to the public.<sup>53</sup> It also has a protocol whereby it will inform the Judicial Appointments Commission of any Welsh language requirements when judicial vacancies in Wales arise.<sup>54</sup>
35. The Lord Chancellor has approved a non-statutory eligibility criterion for judicial vacancies in Wales, requiring candidates to have an “understanding or the ability to acquire the understanding of the administration of justice in Wales, including legislation applicable to Wales and Welsh devolution arrangements”. Some circuit judge and recorder posts have been advertised by the JAC where the ability to conduct hearings in Welsh has been an essential criterion.
36. These are encouraging initiatives. But they only serve to reflect the growing schism between the role and expectations of a judge in Wales and a judge in England. The administration of justice in a bilingual country poses challenges which can be successfully met by a comprehensive and holistic jurisdictional structure with complete oversight, from undergraduate legal education to judicial training, of those distinctive needs.<sup>55</sup> Bilingual judges do not magically emerge from the hills, and some degree of concerted planning is required. Resources are needed, books and manuals, to support this new legal culture. Wales is, after all, a different country to England, and its bilingualism is one of the key drivers of national, and, by extension, jurisdictional autonomy.<sup>56</sup>
37. How else would the management of justice institutions in Wales be different if Wales was a separate jurisdiction and if justice policy for Wales was made in Cardiff? One would hope that greater understanding of the geography, the demography and the bilingual dimension of Welsh society would have prevented the recent cull of court centres in Wales, a cull which poses real threats to access to justice in Wales. There is not a Crown Court between Caernarfon and Swansea, which is one hundred and fifty

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<sup>51</sup> The Law Commission, *Form and Accessibility of the law applicable in Wales* (Law Commission Report No 366) (London: Parliamentary Printers, HC 469–I, 29 June 2016), p. 149.

<sup>52</sup> See The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, *The Law of Wales: Looking Forwards*, Speech at the Legal Wales Conference, Cardiff, 9<sup>th</sup>. October 2015.

<sup>53</sup> HM Courts and Tribunals Service, Welsh Language Scheme 2013-16.

<sup>54</sup> See HM Courts and Tribunals Service, Welsh Language Impact Assessment 2015.

<sup>55</sup> Although credit must be given to the judiciary in showing awareness of the official status of Welsh and its implications for law and government in Wales. See *R (Aron Wyn Jones) v Denbighshire County Council* [2016] EWHC 2074 (Admin), when the Administrative Court quashed a decision by a local education authority to close a small Welsh-language primary school, principally on the grounds that it failed to assess the impact on the Welsh language properly.

<sup>56</sup> Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

miles along the predominantly Welsh-speaking, western flank of the country. It is an area of Wales with poor transport infrastructure, with no motorways and disconnected railways, such that it is impossible to travel by train from Swansea to Caernarfon, and vice versa, without first having to travel eastwards to England before making one's way back. Recent court closures in Dolgellau and Carmarthen, where magistrates' courts and the Crown Court had hitherto convened, and where most of the population speak Welsh almost daily, has only exacerbated what was already a challenging context for public access to bilingual justice.

38. To conclude: Wales can no longer be treated as a "circuit" in England's legal system. It must surely have its own legal institutions as a nation within the United Kingdom. That is how I interpret the discussion on a 'separate jurisdiction'. Wales is now in a new and genuine state of union with England, Scotland and Northern Ireland. The extent of the separateness/distinctiveness of its legal institutions in relation to those of England, and what might be usefully shared, must be considered carefully. But is the present system whereby two circuit presiding judges serve short terms of about four years better than a Lord Chief Justice for Wales as a permanent head of the Welsh judiciary with responsibility for the development of justice in Wales? And even if the "law of England and Wales" remains, there must be practical recognition of and public accessibility to "the law in Wales", which must be bilingual, distinct from "the law in England".
39. There may be a need for transitional arrangements and an incremental approach. A timetable for transition needs to be worked through. But the benchmark, going forward, must surely be Northern Ireland, not the Northern Circuit.