

Legal Wales

Law of Hywel

The indigenous law of medieval Wales is traditionally associated with Hywel Dda (d. 950), King of Deheubarth, Gwynedd and Powys. Some 40 manuscripts of the law, compiled between c 1250 and 1500 survive. According to the entry in the Welsh Academy Encyclopaedia of Wales (2008): “The law of Hywel is among the most significant and cultural achievements of the Welsh, both in terms of the subtlety and vivid imagination of its legal content and the richness of the literary style in which it is expressed. The law was a primary symbol of the unity and identity of the Welsh as a people; it was the conflict of laws that precipitated the final breach between Edward I and Llewelyn ap Gruffudd, and it was to be the law as the chief marker of Welsh distinctiveness that Llewelyn’s advisers appealed in the dire days of 1282. Some historians have argued that the law of Hywel Dda was essentially primitive law and that it would have become defunct as society became more complex. However, modern scholarship emphasises its ability to evolve, and stresses that it contained elements of mercy, common sense, and respect for women and children that would be absent from the law of England until recent times.”

Welsh Legal System Following Acts of Union

The Acts of ‘Union’ of 1536 and 1543 legislated that Wales should be exclusively subject to English law – and that that law should be administered only by those conversant with the English language. The Courts of Great Session were established to administer royal justice. These were to be held in each county for six days twice a year. Following the abolition of the Council of Wales and the Marches in 1689 the Great Sessions also exercised authority similar to that of the English Court of Chancery. The counties were grouped into four circuits:

North-west Wales – Anglesey, Caernarfonshire and Meirionnydd
North-east Wales – Denbighshire, Flintshire and Montgomeryshire
West Wales – Carmarthenshire, Pembrokeshire and Cardiganshire
South-east Wales - Breconshire, Radnorshire and Glamorgan

The thirteenth county, Monmouthshire, being the nearest to London, was to end its judicial business to the London courts.

From 1830 to 1972

The Courts of Great Session were abolished in 1830 which meant that all civil litigation in Wales had to be commenced in Westminster where the final verdict was also given. The trials themselves continued to take place locally with royal judges visiting the Welsh shires on circuit, also taking on serious criminal cases in assizes. Lesser offences were dealt with by a bench of legally qualified justices of the peace in the magistrates courts at the county quarter sessions.

The Modern Courts System

Quarter sessions and Assizes were replaced in 1972 by crown courts held at Cardiff, Caernarfon, Carmarthen, Merthyr Tydfil, Mold, Newport and Swansea. Since 1972, the Lord Chief Justice has been described as ‘of England and Wales’. A Mercantile Court was established in Cardiff in 2000 to deal with commercial litigation. At its opening Lord Bingham, then Lord Chief Justice of England and Wales, observed, “This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its

citizens here. This court is another step towards recognising Wales as a very proud, distinctive and successful nation.”

Following the establishment of the National Assembly for Wales in 1999 certain applications for judicial review may be made in Cardiff. The language clause of the Acts of Union was modified by the Welsh Courts Act of 1942 and the Welsh Language Acts of 1967 and 1993.

In 2005, with the creation of Her Majesty’s Court Service, the administration of the Magistrates Courts was merged with those of the Crown Courts and the County Courts, while the Wales and Cheshire Circuit was renamed the Wales and Cheshire Region. In 2007, when Cheshire was attached to the North-Western English Region, Wales became a legal unit in its own right.

Moves Towards a Welsh Jurisdiction

The expression ‘Legal Wales’ was coined early in the history of the National Assembly. Two legal establishment figures were largely responsible: Winston Roddick Q.C., the Counsel General to the National Assembly, and Sir John Thomas, then senior presiding judge of the Wales and Chester Circuit. Sir John took it as his theme for the Lord Morris of Borth-Y-Gest lecture for the University of Wales at Swansea in October 2000: *Legal Wales: Its Modern Origins and its Role after Devolution: National Identity, the Welsh Language and Parochialism*. His assertion was that the development of law and legal institutions in Wales is an essential part of a trajectory towards nationhood, in which the 1998 settlement constituted the most significant step in centuries and provided a particular opportunity for the legal profession both to contribute to and benefit from the process. In an article in the Spring edition of the IWA’s journal *Agenda*, Winston Roddick declared, “The law making powers of the Assembly are at the heart of what can be called ‘Legal Wales’”.

Legal Wales also encapsulates the repatriation of aspects of the administration of justice in Wales, notwithstanding that it is not a field in which functions were devolved under the Government of Wales Act of 1998. Sir John’s 2000 lecture focused mainly on administration of justice issues such as the organisation of the courts and judiciary in Wales and the use of the Welsh language in legal proceedings. But other aspects, touched upon in the judge’s analysis, are equally important. Sir Roderick Evans, formerly a Presiding Judge of the Wales and Chester Circuit and now the only fully bilingual High court judge, identified the essential ingredients of Legal Wales in his 2002 Lord Morris lecture at Aberystwyth, as follows:

- (a) The repatriation to Wales of law making functions.
- (b) The development in Wales of a system for the administration of justice in all its forms which is tailored to the social and economic needs of Wales.
- (c) The development of institutions and professional bodies which will provide a proper career structure in Wales for those who want to follow a career in those fields.
- (d) Making the law accessible to, and readily understood, by the people of Wales
- (e) The development of a system which can accommodate the use of either the English or Welsh languages with equal ease so that in the administration of justice within Wales, the English and Welsh languages really are treated on the basis of equality.

The emerging national basis for the administration of the law in Wales was underlined in April 2007 when the Wales and Cheshire region of Her Majesty’s Court Service was replaced by a Wales region. The official reason was to align the courts with the other justice organisations, in particular the Children and Family Court Advisory and Support Service, the national probation service, the prison service, and the Crown prosecution Service. The practical effect was to create a Wales-only judiciary for the first time since the abolition of the Courts of Great Session in 1830. Other administrative developments of ‘Legal Wales’ during the early years of devolution included:

- Establishment of the Mercantile Court in Cardiff in 2000.
- Regular sittings of the Court of Appeal Civil Division in Cardiff.
- Regular sittings in Cardiff of the Court of Appeal Criminal Division.
- Hearings in Wales rather than in London as was the invariable practice of judicial review cases involving the National Assembly and all other public bodies in Wales.
- Establishment of the Administrative Court of Wales.
- Establishment of a Chancery Court in Wales.
- Appointment of a High Court Judge whose fluency in Welsh enables him to conduct trials bilingually or entirely in Welsh, according to the wishes of the parties, without translation.
- The Employment Appeals Tribunal decided it would sit regularly in Wales.

This last resulted in the avoidance of problems around the use of the Welsh language such as had occurred in the case of *Williams v Cowell* in 2000. This concerned an appeal from an employment tribunal in which the appellant was denied what he asserted to be his right to use the Welsh language because the Tribunal did not sit in Wales. Referring to this lack of provision the presiding judge, Lord Justice Igor Judge, noted that the Act of Union of 1536 prescribed that the only language that could be used in courts was English and that those who continued to speak Welsh were to be excluded from any office, including judicial office:

“ In other words, Welsh people appearing in court in Wales, litigating over problems in their own country, were prohibited from using their own language. Mr Williams and those who support him no doubt regard this legislation and the subsequent Act of 1542 as an outrage. Although it does not provide the answer to the question which arises in this case, for what it is worth I agree with them ... For hundreds of years what we now regard as elementary principles were deliberately disappplied in Wales. This prolonged suppression presumably contributed to the continuing inability of many Welsh men and women to converse fluently in the Welsh language ... The infamous Act of 1535 is indeed being rolled back, perhaps it may be said, not yet far enough, but at an ever increasing pace ... Welsh people ... take a loyal pride in their language, both for itself and for what it means to them and their nation”.

Today the National Assembly's approach to legislation is that it is made bilingually rather than made first in English and then translated into Welsh. However, this merely underlines that the prime driver of 'Legal Wales' is the legislation made by the National Assembly, an influence that was substantially reinforced by the Government of Wales Act 2006. Although circumscribed by a relatively complex procedure of the Assembly needing to obtain Legislative Competence Orders from Westminster to enact specifically defined new laws, nonetheless this established the principle that it can enact primary legislation, known as Measures. The Act also contains a provision for the Assembly to be able to pass primary legislation directly, subject to a referendum. As the presiding Officer, Lord Dafydd Elis-Thomas put it in an address to the Law Society at the National Eisteddfod in Mold in 2007:

“ The new Government of Wales Act 2006 shakes the historic relationship between England and Wales to its roots... The new legal situation in Wales means that we can now talk of the Welsh Statute Book, Welsh Law, and redeveloping a body of laws which link us historically with the laws of the princes – the Law of Hywel – one of Welsh culture's most splendid creations, a powerful symbol of our unity and identity, as powerful indeed as the Welsh language itself.”

The development of Legal Wales and law-making powers has highlighted a debate over whether Wales should follow Scotland and Northern Ireland in creating its own jurisdiction separate from England. The case was made by the current First Minister Carwyn Jones in a lecture at Cardiff Law School in May 2009 when he was Counsel General:

“ Once the National Assembly is able to exercise primary legislative powers, following a referendum, I think it is inevitable that we will have to consider creating a distinctive legal jurisdiction for Wales. It is a question which neither the Welsh Government, nor the legal community in Wales can shy away from. It’s worth noting that a separate jurisdiction need not be bound up with future powers. The *One Wales* agreement between the two parties in the Welsh Government includes a commitment to consider devolution of the criminal justice system and moves towards the establishment of a single administration of justice in Wales. However, to my mind it is not necessary to first have the devolution of criminal justice before we consider creating a Welsh jurisdiction. In Scotland, for example, employment law and importantly aspects of criminal law are not devolved, yet the jurisdiction is different. So a jurisdiction does not require that the legislature that it oversees has control over all areas of law.”