

Codification of Welsh Law

Speech delivered to the Association of London Welsh Lawyers by Jeremy Miles AC/AM, Counsel General for Wales, on 8 March 2018

Diolch yn fawr iawn i chi am y croeso yma heno. Mae'n bleser mawr i fod yn ôl yn Llundain ymysg hen ffrindiau, yn enwedig yn ystod Wythnos Cymru yn Llundain. Mae'n ffrind hefyd i fod yn siarad ar y cyd gyda Nicholas Paines, Cwnlser i'r Frenhines, ac wrth gwrs gyda'r Arglwydd Lloyd Jones y barnwr ar y Goruchaf Lys sy'n cynrychioli Cymru.

Thank you very much for the welcome here this evening. It's a great pleasure to be back in London amongst old friends, especially during Wales in London week. I was a solicitor in London for around 17 years until I moved back to Wales and have a great fondness for the city, its energy, diversity and its openness to the world.

I'm delighted to be sharing the stage with such eminent speakers as Nicholas Paines QC and of course Wales' Supreme Court judge, Lord Lloyd Jones.

I was absolutely delighted when David was appointed recently to the Supreme Court. David's wisdom and knowledge of Wales and the Welsh political and legal system will enrich the Supreme Court, and I believe it to be essential that Wales is always represented in this way on our highest court.

Both have painted a vivid picture of the benefits of codification. My first contact with the law as an undergraduate was with Justinian Codes of Roman law so you could say that the virtues of codification have been clear to me since I cut my teeth as a lawyer. But codification and accessibility is a huge legal, social and economic asset in the modern world which is why it's so important that we are discussing this today.

Before I turn to what we in the Welsh Government intend to do about a problem we have long been conscious of - I'd like to say a little about the legal and constitutional context and say a few words of warning about the immense task we have set ourselves.

As David has said we have a significant problem of complexity and inaccessibility of the law applicable in Wales. This has many causes. Some- such as the size of the statute book and the frequency in which it is amended - are fairly obvious, but others are less so.

Nearly 500 hundred years ago when the so called Laws in Wales Acts formally annexed Wales to England, they attempted to bring about political, administrative, legal and linguistic uniformity.

Although this uniformity has now gone, the legacy of the Acts is still seen in the single legal jurisdiction of England and Wales. The single jurisdiction affects the accessibility of the law in Wales.

The fact that there is only one formal body of law for England and Wales leads to very practical problems.

Legislation in the UK has generally been divided by reference to its "extent", or the legal jurisdiction within which the legislation has effect.

A law that "extends" to Scotland becomes part of Scots law, and a law that extends to Northern Ireland part of the law of Northern Ireland.

But an Act passed by the National Assembly, cannot extend to Wales only - but to England *and* Wales by virtue of the single jurisdiction. Similarly an Act of the UK Parliament intended, say, to affect only local authorities in England must again extend to England and Wales. And this despite the fact that this concept of "England and Wales" does not reflect political and constitutional reality in any other context. Whilst we can, and should, speak of "Welsh law" and the Wales Act 2017 refers to "Welsh law" - it does not exist in the sense of being the law of a defined jurisdiction - which is not a good start.

This is compounded by the fact that the legislative competence of the Welsh legislature is still largely based on the subject matter of the limited powers transferred to the Secretary of State for Wales from the 1960s onwards. The means there are lengthy and detailed reservations and restrictions which make the line between what is devolved and not more intricate, and considerably more complicated, than is the case for Scotland and for Northern Ireland.

This makes it more difficult to understand who is responsible for what and when the law in Wales could be different. It also makes it more difficult to sensibly divide the law by subject area, as often the line between what is devolved and what is not will cut through a subject.

So while I am ambitious for what we can achieve, i know that the journey we are embarking on is a difficult one, and one which will take many years. I'm conscious

also that others have failed to reach the destination. Lord Scarman on the creation of the law commission said that "*the law is on its way to modernity*". He was talking in part of his ambition as its first chairman to codify English law. While the achievements of the law commission in consolidating the law over the last 50 years outlined earlier by David are significant, nobody would argue that they come close to a wholesale codification of the law. Sadly the statute book has continued to proliferate and the law commission has necessarily concentrated on relatively confined areas of law most in need of rationalisation.

The scale and complexity of the task is therefore daunting. We are talking here not only about the laws the National Assembly and Welsh Ministers have made to date, but also those many thousands of laws that are within our competence which we have inherited from the UK parliament and Government.

I'm not sure how many of you will have the physical volumes of Halsbury's statutes in your offices nowadays, but I'm sure you can picture those books on shelves. Think then of taking around a third of those books and disentangling the laws inside for Wales before reconstructing them so that they are better organised, clear, and drafted in modern language.

Think also of having to make sure that all of the laws re-made are human rights compliant, and fall within the legislative competence of the National Assembly for Wales. Think also of the fact that you have to do this not only in English but also in Welsh. And by way, that picture I hope you have in your minds of the books – that's just the primary legislation...

I agree with David, therefore, that this is a task that will take a generation and perhaps longer. And like the forth bridge, once it's finished we will have to start again, because in the meantime the codified law will continue to be amended. So much for the caveats. What have we in the Welsh Government been doing and what are we going to do?

Well we embarked on this journey some time ago. Even before the National Assembly's legislative competence was expanded in 2011 there was discussion within the Welsh Government about the merits of consolidating devolved law. One of my predecessors as Counsel General, Theodore Huckle QC, made a commitment in 2012 wherever possible, to restate whole parts of law for Wales rather than making piecemeal changes to laws that applied to England also or to the rest of the UK.

This practice, together with Assembly Acts which have made wholesale changes to the law, such as the Social Services and Well-being and Renting Homes Acts which David mentioned, mean that we have some pretty significant building blocks in place to create Codes of Welsh law.

Around a third of the 35 Acts passed since 2011 could be relatively easily adapted to form part of a Code.

I should explain at this point that when I refer to a “Code” of law, I do not envisage a change in the distinction between the different categories of legislation that exist today – so I am not talking about an American style of code. I want to keep the hierarchical structure of legislation – putting those most important aspects of the law into primary legislation, more detailed provision into subordinate legislation and keeping the flexibility provided by statutory guidance or codes of practice. I think this structure basically works - the problem is the proliferation of primary legislation and the number of statutory instruments made under them, and the fact that the connections between these huge numbers of enactments are not obvious.

My vision of a “Code” therefore is all of the law on a particular subject topic consolidated and published together. This would involve a main or “principal” Act – or more than one principal Act depending mainly on the size of the subject– together with the associated subordinate legislation, as well as any statutory guidance or other ‘soft law’, all being published in one place.

So a “Code” would be a collection of enactments rather than one, and there would be a code each for a series of subject areas. The critical thing then is that the structure of the Code has to be maintained. There are lots of examples of legislation being painstakingly consolidated only to unravel shortly afterwards.

Once an Act is consolidated, although the content of it will inevitably change over time, the sub topics into which it is divided does not need to. And where law is reformed, it should be done through amending the consolidated Act, rather than creating stand-alone Acts as replacements.

Take for example the Education Act 1996 – a 400 page plus consolidation of the law which took around 4 years to complete. The incoming Government in 1997 reformed the law, and within 18 months around two thirds of the Act had been repealed and replaced by new provisions found in several separate new Acts of Parliament on the subject of education.

So I agree with the Law Commission that once the law on a particular subject has been consolidated and codified, the Welsh Government should have a responsibility to keep that law in order no matter the extent of future reforms.

Unless there are good reasons for change, if the law was all in one enactment before reform, then it still should be in one enactment afterwards.

Now I should say that it has not, in my experience, been difficult to persuade my Cabinet colleagues of the merits of consolidating and codifying the law, and the Welsh Government has accepted the overwhelming majority of the Law Commission's recommendations in this respect.

Finding the resource for the task – and ensuring that it can be ring-fenced over the long term, however, is more difficult not least in an age of diminishing resources and increasing demands.

So the existence of a statutory duty to consolidate and codify devolved law is important to the question of resourcing and crucially resourcing over a period.

I am pleased to say that this will actually be discussed by the Cabinet next week, and subject to the agreement of my Cabinet colleagues I hope to consult on a Draft Bill over the summer which would implement this recommendation around the turn of the year.

But consolidation does not have to wait for a statutory duty. We are already undertaking work on consolidating the law on the historic environment and, in conjunction with the Law Commission, on town and country planning. This second project is an illustration of the scale of the task we face -- as the primary legislation alone is likely to be 400 pages long once consolidated and 800 pages in both languages. This work has already demonstrated how worthwhile it is to separate the law that applies to Wales from the law that applies to England in these areas.

Our expert Legislative Counsel and the Law Commission are finding this a difficult challenge in truth, which demonstrates just how difficult it is for users of legislation to understand it.

We have also made progress with our colleagues in the Assembly Commission in Cardiff Bay in developing a new procedure for making consolidation bills. Consolidation bills need to be appropriately scrutinised by the legislature but in a

way which preserves the priority of Assembly time for reform Bills -- hence the need to agree an expedited procedure.

The scrutiny of consolidation Bills should also be primarily a technical, rather than policy-focussed, party political, process. So I believe that it should be the Counsel General rather than the Cabinet Secretary with the relevant policy portfolio responsibility who should bring forward consolidation bills.

But accessibility of the law goes beyond consolidation and codification of the law. Legislation must be published effectively and despite how well it may be drafted and set out, people will also need help to understand it. Improvements to the way Welsh law is published – on legislation.gov.uk – and further development of the Cyfraith Cymru/Law Wales website are both key to accessibility.

[Legislation.gov.uk](http://legislation.gov.uk) does not yet publish all legislation in its current, amended form. It obviously needs to be authoritative and up to date. While the position is improving in so far as primary legislation is concerned, little has been done to make subordinate legislation up to date and nothing has been done to update the Welsh language text – which needs to be put right.

The aim of the Cyfraith Cymru/Law Wales website is to provide explanatory material and commentary on Wales' constitutional arrangements and law, partly because very little of this is done by the private sector. It is being developed alongside Westlaw UK and looks for contributions from practitioners with expertise in particular areas of devolved law. While it is a good start, it is still a work in progress.

All of this is intended to help the users of legislation. A clear, certain and accessible statute book is also an economic asset. It gives those who wish to do business a more stable and settled legal framework. This in turn should help investment and growth.

Public sector bodies and other organisations would more understand more easily the legal context they need to work within.

Policy makers within Government will have a clearer base of current law from which to develop reform proposals.

Legislators will find scrutiny of laws easier. And it would make an enormous difference to those of us who may wish to use the law in Welsh.

But this is first and foremost a question of social justice. Making the law accessible is vital to enable citizens to understand their rights and responsibilities and to protect the rule of law.

I started with the codes of Justinian but Wales has its own tradition of codification. The Laws of Hywel were organised in codes and the lawyers of the day had access to these laws in one book.

So codification is an important part of our legal tradition. Our task now is to make sure it is a part of our legal future. We in Wales have done this before, and I am determined that we will do it again.

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