

Introduction to law in Wales



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Introduction

This course explores the law-making powers of the Welsh Assembly, the administration of justice in Wales and the history and evolution of law in Wales.

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Learning Outcomes

After studying this course, you should be able to:

- understand the process of devolution in Wales
- explain the ongoing development of the law-making powers of the Welsh Assembly
- understand the relationship between the Welsh Assembly and UK Parliament
- show an awareness of the ongoing developments in relation to a Welsh jurisdiction.

1 Overview of legal regulation in Wales

Like Scotland and England, Wales has a rich and varied legal history. This section briefly considers that history.

The system followed in Wales until the sixteenth century was based on a legal system codified by Hywel Dda, King of Deheubarth (a kingdom that covered most of modern-day Wales) in the mid-tenth century.

The laws he codified are often referred to as Cyfraith Hywel Dda. The word 'Dda' translates into English as 'good', and is thought to refer to the wisdom, and the just and compassionate nature of his laws. No copies of the original codified laws exist; the earliest copies of Welsh laws date from the twelfth century (the manuscripts are in Latin and Welsh). Because no records exist prior to this it is not clear how the laws were originally codified. It is thought that a convention was held by Hywel Dda in Whitland. His cantrefws were invited to the convention; they studied the existing law and then codified it, keeping laws that were seen as being of value and setting aside old, inappropriate laws, writing new laws to replace them.

About 40 law books exist from before 1536 (many dating from the thirteenth and fourteenth centuries), and historians believe that they have the Cyfraith Hywel Dda at their core. Many of the books that have survived are well used, it is thought by lawyers, rather than having been kept in a library. One of the books, Peniarth 28, is an illustrated manuscript depicting the king and his court, everyday life and animals and is a rare example of an illustrated medieval Welsh manuscript.

1.1 Early Welsh law

The laws covered the responsibilities of the king and officers of court and dealt with matters such as king and court, society, kindred and status, animals, crimes and tort, property, contract, and the laws of women. They divided the people of Wales into three categories: the king, free landowners and the peasantry. They also refer to the 'alltud', people from outside Wales who had settled in Wales.

In many aspects the laws were ahead of their time, for example, in women's rights. In a claim of rape, precedence was given to the woman's claim; marriage was an agreement and divorce permitted by common consent; if a wife found her husband committing adultery she was entitled to a payment as compensation; if a divorce occurred after seven years of marriage the wife was entitled to half the husband's property and any sons would be divided equitably between the parents.

Other laws considered illegitimate children and legitimate children as equal, which meant that, on the death of a landowner, the land would be shared equally between all the sons. This meant a conflict with the Church – in canon law illegitimate children could not inherit.

In criminal matters there was no capital punishment for murder; the murderer's family had to pay a murder price to the family of the deceased (this payment could last as far as the seventh generation). However, a thief could be hanged, but clemency would be given to somebody who had stolen food if they could prove they had been begging for three days to feed a starving family. The laws placed a value on all kinds of property – a newborn kitten was worth a penny, but its value rose to fourpence once it caught a mouse.

The importance and influence of Hywel Dda are still recognised; the original home of the Welsh Assembly was Tŷ Hywel and the original Assembly chamber was known as Siambur Hywel. [A heritage centre](#) with a garden and interpretative centre, the first of its type in Europe, has also been established at Whitland.

1.2 Further developments

The system established by Hywel Dda continued (with additions and alterations) until the thirteenth century. It became a symbol in the struggles with England during the twelfth and thirteenth centuries.

Following the conquest by Edward I in 1282, Wales began to be governed by the laws of England. At this stage in the development of the legal system the 1284 Statute of Rhuddlan/Statute of Wales passed by Edward I replaced Welsh criminal law with English law. Welsh law continued in use for civil cases (such as contracts and sureties), although there were changes in civil law, so that illegitimate sons were no longer able to claim inheritance.

The position was not clearly formalised until the Acts of Union 1536 and 1543, which were passed by the Henry VIII, made Wales subject to English laws in both criminal and civil matters. Parliamentary seats for MPs from Wales were however provided by the Acts of Union.

The court system is also an important part of any legal system or jurisdiction. This was not mentioned in the 1536 Act, but the 1543 Act established a separate court system for Wales. The need to take account of local Welsh circumstances was recognised and The Court of Great Sessions in Wales were established. While this meant that Welsh courts applied the same laws as the English courts, there were significant differences in the way in which they chose to do so.

The Court of Great Sessions continued until 1831, when it was abolished by The Administration of Justice Act 1830 and a single court system for England and Wales was created.

Activity 1: Law as an element of national identity

Timing: 10 minutes

Is it important to have a separate legal system in order to maintain a sense of national identity?

Discussion

Different people will have different opinions on this, and may use different sources of evidence to support their view. For example, Scotland has maintained a separate legal system from England and Wales, and this may have played an important role in preserving Scottish national identity. On the other hand, many people may not know that these differences exist. Their ideas about national identity may be related more to culture, geography or language, rather than legal differences. Wales has maintained a sense of distinctiveness during the period when it did not have its own legal system.

Another aspect of this issue is the increasing importance of European law. If many aspects of law are 'harmonised' throughout the European Union, for example, then the legal differences between different nations within Europe will decrease. You may have strong views about whether or not this is a good thing. Reducing the differences between legal systems may make trade easier, and allow disputes to be resolved more

easily; however, many people may feel that there is a loss of democratic accountability if laws are made a long way away, and by people with whom they may feel little connection.

2 Devolution in Wales: the beginning

Since Tudor times there had been no law-making powers in Wales. Changes in Victorian times meant that the operation of the administration of justice through a separate Welsh court system had also been eroded.

Matters began to change in later Victorian times with campaigns to establish Welsh home rule. Acts relating specifically to Wales began to be passed by the UK Parliament, the first being the Sunday Closing Act 1881, and in 1907 a Welsh Board of Education was established. This was followed in 1919 by the Welsh Board for Health. In 1948 an unelected advisory body on Welsh was established.

2.1 The Welsh Office

From 1951, Home Secretaries were also designated Minister of State for Welsh affairs. In 1957 this post moved to the Minister of Housing and Local Government, and in 1964 the position of Secretary of State for Wales was created and the Welsh Office was established. The Welsh Office had its own annual budget.

The Secretary of State for Wales has responsibility for a number of areas, which has grown to include trade and industry, agriculture, environment, health, housing, local government and roads, and education and training.

2.2 Votes on devolution

The Royal Commission on the Constitution in 1973 recommended the creation of elected bodies for both Wales and Scotland. The Wales Act was passed in 1978 but would only become law if voted for by a majority of voters in Wales. A referendum was held in Wales in 1979, but devolution was rejected by a substantial majority (79.7 per cent of those who voted).

Despite the resounding no vote in the 1979 referendum, changes again began to be called for in the 1980s and 1990s as the pattern of political support in Wales differed greatly from England. These calls were recognised in the Labour Party manifesto for the 1997 elections, which contained a commitment to hold a referendum on devolution in Scotland, Wales and Northern Ireland. The Labour government published a White Paper *A Voice for Wales* in July of the same year. The White Paper outlined proposals for a devolved Assembly in Wales, and a referendum was held on 18 September.

Turnout for the referendum was 50.1 per cent. A small majority (50.3 per cent of those who voted) supported devolution. Because no thresholds had been stipulated, a simple majority vote was all that was required to give a mandate for devolution. The process of devolution began with the Government of Wales Act 1998.

Activity 2: Opposition to devolution

Timing: 10 minutes

Can you think of any reasons why so many people in Wales opposed devolution?

Discussion

There may have been many reasons why devolution was regarded with little enthusiasm by many Welsh voters. For example, many people believe that there are already too many layers of government, and too many politicians. Creating additional layers may be seen as an unnecessary expense, or as a distraction from more fundamental economic or social problems.

In addition, there may be some people who were concerned that taking the path to devolution might be the first step towards eventual independence, or that it might lead to a reduction in attention for Welsh issues in the Westminster Parliament. Other voters may have voted against devolution because it did not go far enough in granting real power to the Welsh Assembly. The extent of the powers granted will be considered in the next section.

Before the powers of the Welsh Assembly are considered it is worth noting here that devolution in Wales has been referred to as 'a process and not an event' (Ron Davies, Secretary of State for Wales, 1997). There have been two Acts relating to devolution in Wales since the referendum in 1997: the first, the Government of Wales Act 1998, established the National Assembly for Wales with secondary legislative powers; the second, the Government of Wales Act 2006, expanded these powers, giving the Assembly potential for future legislative powers and formal separation of the executive and Assembly. Section 3 looks at these developments and the growing expansion of the powers of the Welsh Assembly.

3 Devolution in Wales: the modern era

The White Paper *A Voice for Wales* set out the detailed proposals for creating the Welsh Assembly. The Assembly of 60 members would assume most of the former powers of the Secretary of State for Wales. (These include executive powers, and powers to make law in the form of 'secondary legislation', where these powers had been granted under an Act of Parliament passed by the Westminster Parliament.)

Following the referendum vote the Government of Wales Act 1998 (the 1998 Act) received Royal Assent on 31 July 1998. It provided for the establishment of an Assembly of 60 members, divided into 40 constituency representatives and 20 members for regional seats.

The 1998 Act gave the Welsh Assembly authority to pass secondary legislation affecting Wales (in specified areas) and executive powers as to how UK laws were implemented in Wales. (This could have the important consequence that legislation might be brought into force in Wales but not in England, or vice versa.) It could not pass primary legislation or raise taxes, although it could debate issues that extended to Wales.

The transfer of powers to the National Assembly took place when the National Assembly for Wales (Transfer of Functions) Order 1999 came into force.

The 1998 Act in effect granted a form of Executive Devolution, where the powers of the Secretary of State for Wales were transferred to the ministers of the National Assembly for Wales. The model of government established was derived partly from the precedent of local government, with ministerial functions and powers over secondary legislation belonging to the Assembly.

The first elections to the National Assembly for Wales were held on 6 May 1999 and the second elections took place on 1 May 2003.

3.1 Further change

The Welsh Assembly was welcomed by many and there were a number of positive outcomes. Public access was greater and an inclusive and consensual rather than divisive style of politics was developed.

However, there were a number of challenges that led to calls for further change. There had been a minority Labour administration in the Assembly, and gaining agreement from the other parties proved difficult. In February 2000 the First Secretary had been replaced following a vote of no confidence. These highlighted problems with the model of a single corporate structure adopted following the 1998 Act.

In 2002, discussions and debates took place that led to a resolution by the Assembly to separate the roles of the executive and legislative as far as was as possible within the framework of the 1998 Act. The term 'Welsh Assembly Government' was introduced to highlight the difference between the work of the Executive, the Cabinet and the Assembly. An independent commission, the Richards Commission, was established in 2002 to look at the powers and electoral arrangements of the Assembly. Its recommendations had major implications for the future of devolution in Wales.

3.2 The Richards Commission

The Richards Commission reported in 2004. The report contained a number of findings and recommendations, including the following:

- It recommended the separation of the legislature and the executive, and their establishment as separate legal entities
- It noted that there had been practical difficulties in achieving legislative requirements since 1999 and suggested enhancing the powers of the Assembly so that it operated in a similar way to the Scottish Parliament to enable those difficulties to be overcome.

3.3 *Better Governance for Wales*

Following the report of the Richards Commission, the UK Labour government published a White Paper *Better Governance for Wales* in June 2005. The main changes it proposed were:

- legal separation between the Welsh Assembly Government and National Assembly
- greater legislative powers
- electoral reform.

This consultation was followed by the Government of Wales Act 2006 (the 2006 Act), which received Royal Assent on 25 July 2006.

3.4 The Government of Wales Act 2006

The 2006 Act in effect amended the devolved powers of the Welsh Assembly and illustrated that devolution in Wales was a 'process and not an event'.

The 2006 Act made a number of significant changes, such as:

- creating powers for the Assembly to seek permission to create legislation on devolved issues (these take the form of Assembly Measures), which enabled enhanced legislative powers to be gained
- separating the executive and legislature
- establishing the Welsh government as an executive body – at the time of writing there are eleven Cabinet Ministers whose work affects areas such as health, education, transport and local government
- making provision for further referendums on extending the powers of the Welsh Assembly.

The Welsh government comprises the First Minister, Welsh Ministers, Deputy Ministers and Counsel General. They have responsibility for making and implementing policy, and subordinate executive. The 2006 Act in effect created a separate legislature whose decisions can now be kept in check by the National Assembly. The role of the Assembly is to make laws and represent the people of Wales.

The National Assembly now had the power to make laws for Wales in defined areas. This was usually done through Legislative Competence Orders approved by the National Assembly and by both Houses of the UK Parliament. It was also done by framework

powers conferred directly on the National Assembly through sections that were included in Acts of the UK Parliament.

3.5 A further referendum

The 2006 Act enabled the Assembly to gain powers in all devolved areas without the need to go through the process of obtaining UK Parliamentary consent if a referendum was held and there was a vote in favour.

In 2007 the 'One Wales' coalition was created by Plaid Cymru and Labour. This agreement was designed to pursue the opportunity presented in the 2006 Act. Turnout for a referendum on 3 March 2011 was low, but a majority voted in favour of further law-making powers.

The Assembly now has power to make laws directly on the twenty areas for which the Welsh government has responsibility as it no longer has to seek consent from the UK Parliament before doing so.

The enhanced legislative competence of the Assembly is set out in part 4 of the 2006 Act and the areas in which the Assembly has powers are set out in schedule 7 of the 2006 Act. This states that the Assembly has devolved powers in the areas of:

- agriculture, horticulture, forestry, fisheries and fishing
- archaeological remains
- culture
- economic regeneration and development
- education, vocational, social and physical training and the careers service
- environmental protection, including pollution, nuisances and hazardous substances
- food and food products
- health and health services
- highways and transport
- housing
- industry
- local government
- the National Assembly for Wales
- public administration
- social welfare
- sport and recreation
- tourism
- town and country planning
- transport
- water and flood defence
- Welsh language.

3.6 Memorandum of understanding

In June 2011 a memorandum of understanding was entered into between the UK government and the devolved administrations. The memorandum sets out principles outlining how they will work together and their relationships. It also created a Joint Ministerial Committee, which is attended by representatives of the three devolved administrations and the UK government. UK government departments and their counterparts in the devolved administrations have also agreed and published outline principles and guidelines for working together.

It is worth noting at this point that the UK Parliament still has power to make laws in each of the devolved administrations, and in certain circumstances can legislate in a devolved area (with consent of the devolved Parliament or Assembly).

When power was transferred to Scotland, a list of matters reserved to the UK Parliament was set out in the Scotland Act 1998, although there was no list of matters devolved to the Scottish Parliament. The Scottish Parliament therefore legislates on all matters that are not reserved. The Welsh Assembly has powers in twenty defined areas. In relation to the Northern Ireland Assembly there is a list of excepted matters that will not be transferred from the UK Parliament, devolved matters on which the Northern Ireland Assembly can legislate and reserved matters that could be transferred at a later date.

Activity 3: Allocation of powers

Timing: 10 minutes

Which powers do you think are reserved to the UK Parliament? Why do you think this is?

Discussion

The UK Parliament retains power to make laws in areas such as foreign policy, constitutional matters, defence, equal opportunities and common markets. This could be seen as beneficial, saving time in each of the devolved legislatures and preventing duplication by allowing it to legislate in areas where there is likely to be common agreement between all the legislatures.

In addition, these issues may be seen as matters of 'sovereignty' that are difficult to divide. For example, having different parts of the UK with their own foreign and defence policies might cause confusion in practice, and would be a step beyond devolution towards effective independence. Where the UK has obligations under European or international law, it would cause difficulties if these obligations were interpreted differently in different parts of the UK. These issues may need to be debated in the UK Parliament, and so it remains important for the devolved parts of the UK to be fully represented in Westminster.

4 How is law made in the Welsh Assembly?

There is a set process through which a Bill must go to become law in the Assembly. The Assembly also has powers to make secondary legislation, which is covered in Section 5. In a similar way to the UK and Scottish Parliaments, the drafts of laws are known as Bills. Once a Bill has been considered through the appropriate procedures and passed by the Assembly it is then given Royal Assent and becomes an Act of the Assembly. Acts are applicable in all areas of Wales unless otherwise stated.

Although most Bills are introduced by Welsh government ministers, they can also be introduced by an Assembly committee, an individual member if their name is drawn from a ballot or the Assembly Commission. Each Bill is accompanied by an explanatory memorandum that sets out policy objectives, details of any consultation undertaken, and estimates of the cost of implementing the Bill. They are available in both English and Welsh.

Stage 1

The Bill is formally introduced into the Assembly, meaning that the Bill is laid with officials in the Table Office. The officials then arrange for the Bill to be published on the National Assembly website the following day.

Stage 1 involves the consideration of the general principles of the Bill by a committee followed by agreement on the general principle by the Assembly. The committee's role is to consider the main purposes of the Bill rather than to scrutinise the fine detail, which is undertaken at later stages. The committee also has the power to invite representations from interested parties and to take evidence to assist its work. Once the committee has made its report, the Assembly is then asked to debate and agree the general principles.

Stage 2

This involves a more detailed consideration scrutiny of the Bill by a committee. The committee will also consider any amendments that have been proposed. While any Assembly member can table amendments to a Bill, only committee members may vote on those amendments. Stage 2 is complete when all amendments have been considered.

Stage 3

This involves detailed consideration of the Bill by the National Assembly and any proposed amendments. Again, members can propose amendments. At this stage it is the presiding officer who decides which amendments should be considered by the Assembly.

Stage 4

This is the final stage. Here there is a vote by the National Assembly to pass the final text.

Royal Assent

Once the Bill has completed Stage 4, it requires Royal Assent becoming law. However, if a Bill is not passed at Stage 4, no further action can be taken on it.

Historically, the monarch formally assents to a Bill in order for it to pass into law. Since the sixteenth century no monarch has actually signed a Bill themselves; instead, the monarch signs Letters Patent, which announce that an assent has been given. Once Royal Assent has been given, the Bill is an Act of the National Assembly.

Following the Royal Assent, the Act will usually come into force at midnight of that date. However, many Acts do not come into force immediately: instead the Act itself either states the date when it will commence, or the Act passes responsibility to the appropriate Minister to fix the date when it will come into force by issuing a commencement order.

Royal Assent is a common feature of all primary legislation in the UK, whether the legislation originates from the UK Parliament, Scottish Parliament, Welsh Assembly or Northern Ireland Assembly.

5 Subordinate legislation in the National Assembly

Acts of the Assembly are now seen as primary legislation. In the same way that the UK Parliament passes laws that permit the making of delegated legislation, many of the acts of the Assembly give powers to others (such as Ministers) to make more detailed legal rules and regulation.

The procedure for subordinate legislation in the Assembly differs from that of the UK Parliament. There are three main categories:

- **No procedure:** This is usually published but requires only the approval of ministers.
- **Negative resolution:** This is published, but within 40 days the Assembly can agree to annul the legislation if a member tables a motion requesting it. A negative resolution comes into force automatically unless there is a request for it to be debated in the Assembly.
- **Affirmative resolution:** This is published in draft and requires the whole Assembly to approve it before it can come in force. An affirmative resolution is always debated and has to be approved by the whole Assembly.

If there is particularly important piece of legislation or contentious legislation, a super-affirmative procedure may be used. This follows the affirmative procedure with the additional requirement for a period of consultation.

The Assembly has an Assembly Committee that is allowed up to twenty days to report to the Assembly on any issues raised by subordinate legislation.

6 The administration of justice

Responsibility for the administration of justice has not been devolved to the Assembly, but there have been some significant developments since devolution. These developments are wide-ranging, and include:

- regular sittings of the Court of Appeal Civil Division and the Court of Appeal Criminal Division in Cardiff
- the establishment of the Administrative Court of Wales
- the establishment of a Chancery Court in Wales
- the creation of a mercantile court for Wales
- the regular sitting of the Employment of Appeals Tribunal in Wales
- most judicial review cases involving decisions of Welsh public authorities, including the Assembly, are heard in Wales
- the appointment of a High Court Judge whose fluency in both English and Welsh enables trials to be conducted bilingually or entirely in Welsh without translation.

These developments illustrate that there has been recognition of the need for a form of administration of justice that meets the needs of the devolved jurisdiction. Some commentators are debating whether this can be seen this as a move towards establishing a separate legal personality for Wales and whether this is feasible or desirable.

7 Summary of Welsh devolution

This course has provided an overview of background and information on law in Wales, the process of devolution and the law-making process in the Assembly. The approach taken to this overview has been from a legal rather than political viewpoint. Table 1 provides a summary of devolution.

Table 1 Summary of Welsh devolution

Year	Event
c. 940	Cyfraith Hywel Dda – Welsh laws are brought together under one code
1282	End of government by Welsh princes
1536	Act of Union 1536
1543	Act of Union 1543
1881	The first piece of law passed by the UK Parliament in relation to Wales: the Sunday Closing Act 1881
1907	Welsh Department of the Board of Education created
1920	The church in Wales becomes an independent body separate from the state
1951	Post of Minister of State for Wales created
1964	Welsh Office and post of Secretary of State for Wales (a cabinet post) established
1979	Devolution rejected in referendum
1997	Referendum votes in favour of creating a National Assembly for Wales
1999	First elections held Government of Wales Act 1998 comes into force
2007	Government of Wales Act 2006 comes into force National Assembly and Welsh Government are formally separated National Assembly gains powers to make laws in defined areas
2011	Referendum votes in favour of giving the National Assembly further law-making powers

Source: National Assembly for Wales, undated

8 The debate on a separate Welsh jurisdiction

Carwyn Jones, the First Minister of Wales, made a speech to the Legal Wales Conference in 2011 in which he announced the need for a public debate on the issue of a separate Legal Jurisdiction for Wales. On 7 October he stated:

In March of this year the people of Wales voted for the Assembly to have the power to pass Acts of the Assembly across the whole range of subjects within the twenty devolved fields.

As a government we have previously made it clear that the question about whether Wales should be a separate legal jurisdiction would become more prominent in the event of a 'yes' vote in the referendum.

The Counsel General and I are agreed that this is not simply a matter for politicians and civil servants to discuss. The debate must be much wider than that and we need to obtain the broadest range of views possible, and not just from the legal community.

We must be clear about what we mean by a separate jurisdiction. What are the prerequisites for its existence? What flows from it? What might be the benefits for the people of Wales?

Early next year the Welsh government will initiate a public debate on this issue. We will start by inviting the widest possible views from within and outside Wales. The responses we receive will help to inform the Welsh government's thinking in preparation for the work of the Commission on the Welsh devolution settlement, which the Secretary of State for Wales has indicated she will shortly appoint. Assembly Members' views on the issues will be particularly welcome as the debate goes forward.

On 27 March 2012 a consultation (*An Inquiry into the Establishment of a Separate Welsh Jurisdiction*) began, with a deadline for responses of 19 June 2012. The consultation document states that the purpose of the consultation is to seek views on the specific aspects of a potential Welsh jurisdiction and the underlying issues beneath the broader questions of:

- what is meant by the term 'separate legal jurisdiction'
- whether there are any essential features for the existence of a separate legal jurisdiction and, if so, what they might be
- what the consequences of having a separate Welsh legal jurisdiction might be
- what the potential advantages and disadvantages of a separate Welsh legal jurisdiction would be.

At the time of writing the responses have just been published. If you wish to read the responses they can be accessed on the [Welsh government website](#).

Activity 4: Taking the next step?

Timing: 10 minutes

Having studied this course and considered the legal impact of devolution, do you think that Wales should take the next step and establish a separate legal jurisdiction?

Discussion

This is a question that you may choose to answer in any way you wish. As a result of devolution, there are already some legal differences emerging between England and Wales, and these are likely to increase. However, establishing a separate jurisdiction could increase these differences. This would have implications for the legal profession and legal education, if qualification in one part of the UK would not be regarded as automatically sufficient to practise law in another. Some of these issues are considered in the consultation paper, and the responses to it, and you are likely to have your own views on the advantages and disadvantages of and re-establishing Wales as a separate legal jurisdiction.

9 Conclusion

The debates over whether the Assembly could gain further powers or whether there should be a separate Welsh legal jurisdiction will continue in the future. The significance of events in the past fifteen years should not be overlooked, though – as the Constitutional Committee for the Assembly has stated:

The Third Assembly was the first time for primary legislation to be made in Wales, on purely Welsh matters, for hundreds of years. It was the first time in our history that such laws had been made by a democratically elected body responsible to all the people of Wales.

Constitutional Affairs Committee, 2011, para. 85

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