

**Public Law Project**  
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**“Constitutional Law and  
the Welsh Government”**

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**Thirty Park Place Chambers**  
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## **Introduction**

“But for Wales?”

“A Man for all Seasons”, the film adapted by Robert Bolt from his stage play, is based on the true story of Sir Thomas More, the 16th-century Chancellor of England, who refused to endorse King Henry VIII's wish to divorce his wife Catherine of Aragon, who did not bear him a son, so that he could marry Anne Boleyn, the sister of his former mistress. The play portrays More as a man of principle, envied by rivals such as Thomas Cromwell and loved by the common people and by his family.

In the film, Thomas Cromwell gives Richard Rich the office of Attorney General for Wales in exchange for Rich's false testimony at More's trial. Though More never opened his mouth, Rich claims he heard More deny the king's authority over the Church. More is sentenced to death but not before he can express his disapproval of the Supremacy Act and his disappointment with a government that would kill a man for keeping quiet. More goes to his death with dignity and composure, and the play ends with his beheading.

Impressive in “A Man for All Seasons” is the depiction of Thomas More's trial, particularly the scene with Richard Rich. The context, is this: Sir Thomas More, former Chancellor of England and a gifted lawyer, is on trial for refusing to sign the Act of Succession, to which he objected on the grounds of the power it gave Parliament in matters of religion over the Papacy. The turning point in More's trial, which leads to his conviction and execution, is the perjured testimony of Rich. As Rich leaves, More stops him, saddened by Rich's betrayal of him and the younger man's betrayal of his own character, and notes Rich now wears a chain of office. Thomas Cromwell, the prosecutor, announces that Sir Richard has been made Attorney General for Wales, at which point More says to Rich, *“For Wales. Why Richard, it profits a man nothing to give his soul for the whole world. But for Wales?”*

In the aftermath of devolution, it was thought that the most interesting constitutional points in Wales would arise as a result of so-called “Devolution Issues” being raised by parties in accordance with what was Schedule 8 of the Government of Wales Act 1998 and is now found in Schedule 9 of the Government of Wales Act 2006. There was even drafted a practice direction entitled Practice Direction on Devolution Issues (and Crown Applications in Wales); now see CPR r 54 Practice Direction 54A paragraphs 5.4 – 5.5 and White Book Volume 2 section 3N – 1.

**Paragraph 1 of Part 1 of Schedule 9 to the Government of Wales Act 2006 provides:**

(1) *In this Schedule “devolution issue” means–*

*(a) a question whether an Assembly Measure or Act of the Assembly, or any provision of an Assembly Measure or Act of the Assembly, is within the Assembly's legislative competence,*

*(b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is exercisable by the Welsh Ministers, the First Minister or the Counsel General,*

*(c) a question whether the purported or proposed exercise of a function by the Welsh Ministers, the First Minister or the Counsel General is, or would be, within the powers of the Welsh Ministers, the First Minister or the Counsel General (including a question whether a purported or proposed exercise of a function is, or would be, outside those powers by virtue of section 80(8) or 81(1)),*

*(d) a question whether there has been any failure to comply with a duty imposed on the Welsh Ministers, the First Minister or the Counsel General (including any obligation imposed by virtue of section 80(1) or (7)), or*

*(e) a question of whether a failure to act by the Welsh Ministers, the First Minister or the Counsel General is incompatible with any of the Convention rights.*

(2) *In this Schedule “civil proceedings” means proceedings other than criminal proceedings.*

**Paragraphs 5.1 and 5.2 of the Practice Direction on Devolution Issues provide:**

*“5.1 Where a party to any form of proceedings wishes to raise an issue which may be a devolution issue whether as a claim (or part of a claim) to enforce or establish a legal right or seek a remedy or as a defence (or part of a defence), the provisions of this Practice Direction apply in addition to the rules of procedure applicable to the proceedings in which the issue arises.*

*5.2 A court may, of its own volition, require the question of whether a devolution issue arises to be considered, if the materials put before the court indicate such an issue may arise, even if the parties have not used the term devolution issue.”*

In this way it had perhaps been thought that issues of constitutional importance might be raised by parties generally in civil proceedings giving rise to frequent references to the High Court or the Court of Appeal under Part 2 of Schedule 9. But no, with perhaps one exception, the cases have been few and far between and the most important ones have concerned the exercise of legislative powers being challenged not by parties to separate civil proceedings seeking to further their own cases, but rather by the Crown itself, in the shape of the Attorney General for England and Wales, acting on one occasion on behalf of the Secretary of State for Wales himself, on a reference to the Supreme Court, under Government of Wales Act 2006 Part 4 (Acts of the Assembly) section 112 (scrutiny of bills by the Supreme Court). Perhaps in those cases, the relevant Minister of the Crown, wishing to claw back with one hand what Parliament had previously given with the other over more than a decade of devolution in Wales, had decided to remind the Welsh of the limits of their devolved powers. In any event, such references do allow the Courts, and the interested observer, to test the boundaries of the devolution settlement in Wales. However, there is thus far, at least as far as I know, just one decided case and one in which judgment of the Supreme Court is still pending.

**(1) R. (on the application of Brynmawr Foundation School Governors) v Welsh  
Ministers [2011] EWHC 519 (Admin)**  
Queen's Bench Division (Administrative Court)  
9<sup>th</sup> March 2011

This case concerned whether the Welsh ministers had been entitled, pursuant to section 83 of the Government of Wales Act 2006, to delegate their powers to consult and make proposals about the provision of sixth form education under the Learning and Skills Act 2000 s.113A to a local authority.

***83 Agency arrangements and provision of services***

- (1) Arrangements may be made between the Welsh Ministers and any relevant authority for—*
- (a) any functions of one of them to be exercised by the other,*
  - (b) any functions of the Welsh Ministers to be exercised by members of staff of the relevant authority,*
  - (c) any functions of the relevant authority to be exercised by members of the staff of the Welsh Assembly Government, or*
  - (d) the provision of administrative, professional or technical services by one of them for the other.*
- (2) Any arrangements under paragraph (a), (b) or (c) of subsection (1) for the exercise of functions of the Welsh Ministers do not affect the responsibility of the Welsh Ministers; and such arrangements for the exercise of any functions of a relevant authority do not affect the responsibility of the relevant authority.*
- (3) The references in subsections (1) and (2) to functions do not include functions of making, confirming or approving subordinate legislation contained in a statutory instrument*
- (4) In this section “relevant authority” means any Minister of the Crown or government department, any public authority (including any local authority) in England and Wales or the holder of any public office in England and Wales.*
- (5) This section applies to the First Minister and the Counsel General as to the Welsh Ministers.*

The claimant school governors applied for judicial review of a decision of the first defendant Ministers to enter into an arrangement with the second defendant local education authority pursuant to the Government of Wales Act 2006 section 83. Guidance published by the Welsh Assembly Government had indicated the Welsh Ministers’ intentions to delegate their powers to the LEA, deriving from the Learning and Skills Act 2000, to alter the provision of post-16 education. The LEA intended to close all sixth forms in its area, including the Claimant’s school sixth form at Brynmawr, and replace them with a single institution. It submitted its proposal to the Welsh Government. An informal consultation document was published listing three proposals for consideration. The governors were concerned about the proposals and challenged, inter alia, the legality of a delegation of the Welsh Ministers’ power.

A report was produced on the informal consultation procedure which stated that the government would have to delegate its powers before the LEA could remove the sixth form at Brynmawr School. The LEA wrote to the National Assembly for Wales asking if it recommended delegating its powers under section 113A of the 2000 Act to it in respect of the reorganisation of sixth forms by virtue of s.83 of the GWA 2006. It also requested an assurance that the options put forward would be legally possible before the assembly agreed to delegation. It was not until after formal consultation commenced that that assurance was given. Publication of the consultation document occurred prior to the assurance. The issues for consideration were (i) the legality of the arrangement made by the Ministers under s.83 of the GWA 2006; (ii) whether the consultation process was predetermined; and (iii) the timing of the consultation.

The application for judicial review was refused. (1) The Government of Wales Act 2006 was a statute that attracted constitutional status, applying *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151. The court had to take that into account when applying the rules of statutory construction to determine the scope of powers conferred on the Welsh Ministers or the National Assembly for Wales. Section s.113A allowed the Ministers to make arrangements for any relevant authority to exercise its functions, but section 83(3) excluded certain functions. However, the combined effect of section 56 and section 83(3) GWA 2006 meant that since the exclusion in s.83(3) did not apply, the functions conferred on the Welsh Ministers by s.113A of the 2000 Act were functions about which the Ministers could make arrangements with any local authority.

Had Parliament intended to further limit s.83 by excluding the functions of s.113A of the 2000 Act, it would have done so expressly. The maxim *generalia specialibus non derogant* did not apply. The transfer of functions concerning foundation schools was in the same statute as the power to enter into arrangements with such bodies. Parliament had intended the Welsh Ministers to be able to enter into arrangements regarding their functions with other relevant authorities, including local authorities. It could not be said that the Welsh Ministers were frustrating the policy and objects of the relevant provisions of the 1998 and 2000 Acts, particularly because of the clear indication in the language in section 33 of the 1998 Act that they did not occupy the entire field.

The Claimant's other claims against the LEA on the grounds of bias or predetermination of its decision and alleged defects in its consultation process also failed, though these are constitutionally less important

**(2) Attorney General v National Assembly for Wales Commission and others [2012]**  
**UKSC 53; [2013] 1 AC 792**  
Supreme Court  
21<sup>st</sup> November 2012

This case certainly concerned a Devolution Issue namely the scope of the power of confirmation of byelaws exercisable by Secretary of State and Welsh Ministers “concurrently” and whether clauses of Local Government Byelaws (Wales) Bill passed by Welsh Assembly and removing need for confirmation in respect of specified list of byelaws and giving Welsh Ministers power to add to list and thus removing or modifying “any pre-commencement function of a Minister of the Crown” was outwith the powers of the National Assembly or whether the removal or modification was “incidental to, or consequential on” another provision of Bill and thus within its powers so as to be within its legislative competence under the Government of Wales Act 2006 section 154, Schedule 7, Pt 2, para 1(1), Pt 3, para 6(1)(b) and the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672), art 2

The Government of Wales Act 1998 set out the initial devolution settlement for Wales and established the National Assembly for Wales which had the legal responsibility for exercising the devolved executive and legislative functions. By article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 made pursuant to section 22(1) of the 1998 Act the functions of the Secretary of State under section 236(11) of the Local Government Act 1972 “*shall be exercised by the Assembly concurrently with the Secretary of State*”. In May 2011 Part 4 of the Government of Wales Act 2006 came into force, conferring on the Assembly the power to pass without recourse to Parliament primary legislation within its defined legislative competence. By paragraph 1(1) of Part 2, and paragraph 6(1) of Part 3, of Schedule 7 to the 2006 Act a provision of an Act of the Assembly which removed or modified any pre-commencement function of a Minister of the Crown fell within that legislative competence only if the Secretary of State consented to it or it was “*incidental to, or consequential on*” any other provision in the Act. In 2012 the Assembly passed the Local Government Byelaws (Wales) Bill, which was awaiting Royal Assent. The Assembly's standing orders referred to clauses in such a Bill as “sections”. Section 6 of the Bill would remove the power of the Welsh Ministers and the Secretary of State to confirm certain specific byelaws (“the scheduled enactments”) which currently required confirmation. Section 9 would empower the Welsh Ministers to add to the list of byelaws which could be enacted without confirmation. The Secretary of State for Wales was willing to give consent, pursuant to paragraph 6(1)(a) of Schedule 7 to the 2006 Act, to section 6 of the Bill and give up the right to confirmation of the specific provisions identified by section 6, but would not agree to the inclusion of section 9.

The Attorney General, on behalf of the Secretary of State for Wales, therefore made a reference to the Supreme Court under section 112 of the 2006 Act for a determination as to whether sections 6 and 9 of the Bill were within the legislative competence of the Assembly.

### **112 Scrutiny of Bills by Supreme Court**

(1) *The Counsel General or the Attorney General may refer the question whether a Bill, or any provision of a Bill, would be within the Assembly's legislative competence to the Supreme Court for decision.*

(2) *Subject to subsection (3), the Counsel General or the Attorney General may make a reference in relation to a Bill at any time during—*

*(a) the period of four weeks beginning with the passing of the Bill, and*

*(b) any period of four weeks beginning with any subsequent approval of the Bill in accordance with provision included in the standing orders in compliance with [section 111\(7\)](#).*

(3) *No reference may be made in relation to a Bill—*

*(a) by the Counsel General if the Counsel General has notified the Clerk that no reference is to be made in relation to it by the Counsel General, or*

*(b) by the Attorney General if the Attorney General has notified the Clerk that no reference is to be made in relation to it by the Attorney General.*

(4) *But subsection (3) does not apply if the Bill has been approved as mentioned in subsection (2)(b) since the notification.*

### **108 Legislative competence**

(1) *Subject to the provisions of this Part, an Act of the Assembly may make any provision that could be made by an Act of Parliament.*

(2) *An Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence.*

(3) *A provision of an Act of the Assembly is within the Assembly's legislative competence only if it falls within subsection (4) or (5).*

(4) *A provision of an Act of the Assembly falls within this subsection if—*

*(a) it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings), and*

*(b) it neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes (or gives power to confer, impose, modify or remove) functions exercisable otherwise than in relation to Wales.*

(5) *A provision of an Act of the Assembly falls within this subsection if—*

*(a) it provides for the enforcement of a provision (of that or any other Act of the Assembly) which falls within subsection (4) or a provision of an Assembly Measure or it is otherwise appropriate for making such a provision effective, or*

*(b) it is otherwise incidental to, or consequential on, such a provision.*

(6) But a provision which falls within subsection (4) or (5) is outside the Assembly's legislative competence if—

(a) it breaches any of the restrictions in Part 2 of Schedule 7, having regard to any exception in Part 3 of that Schedule from those restrictions,

(b) it extends otherwise than only to England and Wales, or

(c) it is incompatible with the Convention rights or with [EU]<sup>1</sup> law.

(7) For the purposes of this section the question whether a provision of an Act of the Assembly relates to one or more of the subjects listed in Part 1 of Schedule 7 (or falls within any of the exceptions specified in that Part of that Schedule) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

### **154 Interpretation of legislation**

(1) This section applies to—

(a) any provision of an Assembly Measure, or proposed Assembly Measure, which could be read in such a way as to be outside the Assembly's legislative competence,

(b) any provision of an Act of the Assembly, or a Bill for such an Act, which could be read in such a way as to be outside the Assembly's legislative competence, and

(c) any provision of subordinate legislation made, or purporting to be made, under an Assembly Measure or Act of the Assembly which could be read in such a way as to be outside the powers under which it was, or purported to be, made.

(2) The provision is to be read as narrowly as is required for it to be within competence or within the powers, if such a reading is possible, and is to have effect accordingly.

(3) In subsection (1)(c) “made” includes confirmed or approved.

## **Schedule 7 ACTS OF THE ASSEMBLY**

### **Part 2 GENERAL RESTRICTIONS**

#### **Functions of a Minister of the Crown**



**1** (1) A provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any precommencement function of a Minister of the Crown.

(2) A provision of an Act of the Assembly cannot confer or impose, or confer power by subordinate legislation to confer or impose, any function on a Minister of the Crown.

(3) In this Schedule “pre-commencement function” means a function which is exercisable by a Minister of the Crown before the day on which the Assembly Act provisions come into force.

#### **Enactments other than this Act**

**2** (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any of the provisions listed in the Table below—



**TABLE**

<i>Enactment</i>	<i>Provisions protected from modification</i>
<i>European Communities Act 1972 (c. 68)</i>	<i>The whole Act</i>
<i>Data Protection Act 1998 (c. 29)</i>	<i>The whole Act</i>
<i>Government of Wales Act 1998 (c. 38)</i>	<i>Sections 144(7), 145, 145A and 146A(1)</i>
<i>Human Rights Act 1998 (c. 42)</i>	<i>The whole Act</i>
<i>Civil Contingencies Act 2004 (c. 36)</i>	<i>The whole Act</i>
<i>Re-Use of Public Sector Information Regulations 2005 (S.I. 2005/1505)</i>	<i>The whole set of Regulations</i>
<i>[The Public Audit (Wales) Act 2013 (anaw 3)</i>	<i>Sections 2(1) to (3), 3(2) to (4), 6(2) to (3) and section 8(1) in so far as that section relates to the Auditor General's exercise of functions free from the direction or control of the Assembly or Welsh Assembly Government.]</i> <sup>2</sup>

(2) Sub-paragraph (1) does not apply to any provision making modifications, or conferring power by subordinate legislation to make modifications, of section 31(6) of the Data Protection Act 1998<sup>3</sup> so that it applies to complaints under an enactment relating to the provision of redress for negligence in connection with the diagnosis of illness or the care or treatment of any patient (in Wales or elsewhere) as part of the health service in Wales.

(2A) Sub-paragraph (1), so far as it applies in relation to sections 2(1) to (3), 3(2) to (4), 6(2) to (3) and 8(1) of the Public Audit (Wales) Act 2013 does not apply in relation to any provision to which sub-paragraph (4) applies.

(2B) But, subject to sub-paragraph (2C), a provision to which sub-paragraph (4) applies cannot modify or confer power by subordinate legislation to modify section 8(1) of the Public Audit (Wales) Act 2013.

(2C) Sub-paragraph (2B) does not prevent the conferral of functions on a committee of the Assembly that—

- (a) does not consist of or include any of the following persons—
  - (i) the First Minister or any person designated to exercise the functions of the First Minister,
  - (ii) a Welsh Minister appointed under section 48,
  - (iii) the Counsel General or any person designated to exercise the functions of the Counsel General, or
  - (iv) a Deputy Welsh Minister, and

(b) is not chaired by an Assembly member who is a member of a political group with an executive role.

(3) Sub-paragraph (1), so far as it applies in relation to sections 145, 145A and 146A(1) of the Government of Wales Act 1998, does not apply to a provision to which sub-paragraph (4) applies.

(4) This sub-paragraph applies to a provision of an Act of the Assembly which—  
(a) is a provision relating to the oversight or supervision of the Auditor General or of the exercise of the Auditor General's functions,

(b) provides for the enforcement of a provision falling within paragraph (a) or is otherwise appropriate for making such a provision effective, or  
(c) is otherwise incidental to, or consequential on, such a provision.

- 3 A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any provision of an Act of Parliament other than this Act which requires sums required for the repayment of, or the payment of interest on, amounts borrowed by the Welsh Ministers to be charged on the Welsh Consolidated Fund.
- 4 A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, any functions of the Comptroller and Auditor General [ or the National Audit Office]

### ***This Act***

- 5 (1) A provision of an Act of the Assembly cannot make modifications of, or confer power by subordinate legislation to make modifications of, provisions contained in this Act.
- (2) Sub-paragraph (1) does not apply to the following provisions—  
(a) sections 20, 22, 24, 35(1), 36(1) to (5) and (7) to (11), 53, 54, 78, 146, 147, 148 and 156(2) to (5);  
(b) paragraph 8(3) of Schedule 2 [;]<sup>2</sup>  
(c) any provision of Schedule 8[...] <sup>3</sup>.
- (3) Sub-paragraph (1) does not apply to any provision—  
(a) making modifications of so much of any enactment as is modified by this Act, or  
(b) repealing so much of any provision of this Act as amends any enactment, if the provision ceases to have effect in consequence of any provision of, or made under, an Act of the Assembly.
- (4) Sub-paragraph (1) does not apply in relation to a provision to which paragraph 2(4) applies.

### ***Part 3*** ***EXCEPTIONS FROM PART 2***

#### ***Functions of Ministers of the Crown***

- 6 (1) Part 2 does not prevent a provision of an Act of the Assembly removing or modifying, or conferring power by subordinate legislation to remove or modify, any pre-commencement function of a Minister of the Crown if—  
(a) the Secretary of State consents to the provision, or  
(b) the provision is incidental to, or consequential on, any other provision contained in the Act of the Assembly.
- (2) Part 2 does not prevent a provision of an Act of the Assembly conferring or imposing, or conferring power by subordinate legislation to confer or impose, any function on a Minister of the Crown if the Secretary of State consents to the provision.

On the reference, the Supreme Court held (1) that the effect of the word “concurrently” in article 2 of and Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 was that the Assembly and the Secretary of State were each to have the power to exercise the “concurrent” functions, and that it was to be left to their good sense to decide which should exercise a particular function in a particular case; that the courts should be involved only where normal public law principles justified quashing a particular exercise of a function on the ground that it should not have been exercised by the particular person or entity; and that, therefore, the direction in the Order that the Secretary of State's functions under section 236(11) of the Local Government Act 1972 should be exercisable by the Assembly “concurrently” with the Secretary of State meant that, subject to the normal public law principle of rationality, it was open to either the Secretary of State or the Assembly to exercise any of those functions.

(2) That the effect of section 236(11) of the 1972 Act was to confer on the Secretary of State a function which the Welsh Bill, if enacted, would remove from the Secretary of State in relation to the scheduled enactments; that the fact that the function concerned was conferred by a default provision which specifically envisaged that there might be legislation which transferred the function to someone else did not alter the fact that the confirmatory function of the Secretary of State fell within the ambit of paragraph 1 of Part 2 of Schedule 7 to the Government of Wales Act 2006 ; and that, accordingly, since section 6 of the Bill would remove a pre-commencement function of a Minister of the Crown, paragraph 1 of Part 2 of Schedule 7 placed it outwith the legislative competence of the Welsh Assembly unless paragraph 6(1) of Part 3 of Schedule 7 applied.

(3) That whether a particular provision in an enactment was “*incidental to, or consequential on*” another provision for the purposes of paragraph 6(1)(b) of Part 3 of Schedule 7 to the 2006 Act was a question of fact and degree which depended on substance rather than form; that a provision was incidental or consequential if it raised no separate issue of principle but was necessary to give effect to a piece of legislation; that the primary purpose of the Bill, which was to remove the requirement for the confirmation of byelaws by the Welsh Ministers as part of the overall streamlining and modernising of the way in which byelaws were made in Wales, would be undermined if the Secretary of State's confirmatory function remained in respect of any of the scheduled enactments, and there would be no point in removing the Welsh Ministers' confirmatory function unless the Secretary of State's concurrent confirmatory function were also disposed of; that since the Secretary of State's confirmatory function under section 236(11) of the 1972 Act was a default function which arose if no other statute conferred it on any other body or person it was not an important function; that, since the scheduled enactments concerned byelaws which were directed to local, small scale issues, by their very nature it would be for the Welsh Ministers rather than the Secretary of State to confirm them and it would be perverse for the Secretary of State to retain that function when it was being removed from the Welsh Ministers; and that, accordingly, section 6 was “*incidental to, or consequential on*” the purposes of the Bill and so was within the legislative competence of the Assembly, applying *Martin v Most 2010 SC (UKSC) 40, SC*.

(4) That, pursuant to section 154(2) of the 2006 Act, section 9 of the Bill was to be read as narrowly as was required to bring it within the Assembly's legislative competence; that, accordingly, the scope of the power which section 9 would confer on the Welsh Ministers was limited to byelaws made under enactments which currently either (i) identified the Welsh Ministers and not a Minister of the Crown as having the confirmatory power or (ii) identified a Minister of the Crown as having that power, but the removal of that power would be “incidental ... or consequential” within the meaning of paragraph 6(1)(b) of Part 3 to Schedule 7 to the 2006 Act; and that, so construed, section 9 was within the Assembly's legislative competence.

### **(3) Attorney General for England and Wales-v-Counsel General for Wales & Attorney General for Northern Ireland (Case No. UKSC 2013/0188)**

This case referred to as the Agricultural Sector (Wales) Bill Reference by the Attorney General for England and Wales, another reference under section 112 Government of Wales Act 2006, was heard on 17<sup>th</sup> - 18<sup>th</sup> February 2014 and judgment is still pending. The Reference involves whether the Agricultural Sector (Wales) Bill relates to the subject of agriculture or to the subject of employment. Agriculture is a matter within the legislative competence of the National Assembly for Wales, while employment is a matter reserved to the UK Parliament.

The Bill was passed on 17<sup>th</sup> July 2013 having been introduced as an Emergency Bill on 8<sup>th</sup> July 2013. Its purpose is to re-introduce in Wales legislation in respect of agricultural wages. Such legislation had previously been contained in the Agricultural Wages Act 1948 but was repealed by the Enterprise and Regulatory Reform Act 2013, enacted by the UK Parliament. The Bill proposes to establish a regime setting minimum terms and conditions of employment for agricultural workers, including minimum wages and sickness and holiday entitlement.

The Attorney General for England and Wales contends that such provisions that relate to employment matters are outside the Assembly's competence. When the Bill was introduced, the Assembly Member in charge of the Bill made a statement in accordance with section 110(2) of the Government of Wales Act 2006 that in his view the provisions of the Bill would be within the competence of the Assembly. The Director of Legal Services for the Assembly published a paper summarising the "substantial arguments" both for and against that statement.

#### ***107 Acts of the Assembly***

*(1) The Assembly may make laws, to be known as Acts of the National Assembly for Wales or Deddfau Cynulliad Cenedlaethol Cymru (referred to in this Act as "Acts of the Assembly").*

*(2) Proposed Acts of the Assembly are to be known as Bills; and a Bill becomes an Act of the Assembly when it has been passed by the Assembly and has received Royal Assent.*

*(3) The validity of an Act of the Assembly is not affected by any invalidity in the Assembly proceedings leading to its enactment.*

*(4) Every Act of the Assembly is to be judicially noticed.*

*(5) This Part does not affect the power of the Parliament of the United Kingdom to make laws for Wales.*

**Schedule 7 ACTS OF THE ASSEMBLY**  
**Part 1 SUBJECTS**

***[Agriculture, forestry, animals, plants and rural development]***

**I** *Agriculture. Horticulture. Forestry. Fisheries and fishing. Animal health and welfare. Plant health. Plant varieties and seeds. Rural development.*

*In this Part of this Schedule “animal” means—*

- (a) all mammals apart from humans, and*
  - (b) all animals other than mammals;*
- and related expressions are to be construed accordingly.*

*Exceptions –*

*Hunting with dogs.*

*Regulation of scientific or other experimental procedures on animals. Import and export control, and regulation of movement, of animals, plants and other things, apart from (but subject to provision made by or by virtue of any Act of Parliament relating to the control of imports or exports)–*

- (a) the movement into and out of, and within, Wales of animals, animal products, [...] <sup>3</sup> plants, plant products and other things related to them for the purposes of protecting human, animal [ or plant] <sup>4</sup> health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and*
- (b) the movement into and out of, and within, Wales of animal feedstuff [...] <sup>5</sup> [ , ] <sup>6</sup> fertilisers and pesticides (or things treated by virtue of any enactment as pesticides) for the purposes of protecting human, animal [ or plant] <sup>7</sup> health or the environment.*

*Authorisations of veterinary medicines and medicinal products.*

The argument in favour of the provisions of the Bill being within the legislative competence of the National Assembly may be summed up as follows. The Assembly is empowered by Part 4 of the Government of Wales Act 2006 to make laws known as Acts of the National Assembly for Wales (section 107(1)). An Act of the Assembly may make any provision that could be made an Act of Parliament (section 108(1)). An Act of the Assembly is within its legislative competence if it relates to one or more of the Subjects listed under any of the headings in Part 1 of Schedule 7 (subject to exceptions and restrictions which do not apply), *Agriculture* is one of those Subjects, the relevant provisions of the Bill clearly relate to *Agriculture* and they are therefore within the legislative competence of the National Assembly for Wales. Further for the avoidance of doubt, section 154(1) applies to any provision of an Act of the Assembly, or a Bill for such an Act, which could be read in such a way as to be outside the Assembly’s legislative competence. Section 154(2) provides that any such provision is to be read as narrowly as is required for it to be within competence if such a reading is possible and for it to have effect accordingly.

The key issue in the case is perhaps whether the relevant provisions in the Agricultural Sector (Wales) Bill do “relate to Agriculture”. The Welsh Government’s case is that it does and that any effect of employment rights and duties is incidental to the purpose of the relevant provisions which relates to Agriculture. The argument against, of course, as advanced by the Attorney General for England and Wales, is that the provisions of the Bill, at least in part relate not to Agriculture but rather to Employment, a matter reserved to the competence of the United Kingdom Parliament in Westminster. Judgment of the Supreme Court is pending.

## Conclusions

Whatever the Supreme Court rules in the Agricultural Sector (Wales) Bill Reference, it is essential for all those involved in implementing the devolution settlement in Wales that it functions properly and that its scope is clear and well understood. The National Assembly for Wales needs to be able to get on with the legislative task that Parliament has given it and the Welsh Assembly Government must be allowed to implement policies which the people of Wales have elected them to do. This should be allowed to take place without the threat of repeated challenges to the legislative competence of the National Assembly. It is not without significance that the first two recommendations of the second Silk Commission report are that:

- 1. The existing conferred powers model should be replaced by a reserved powers model. The two Governments should agree a process and timetable for developing and agreeing the new legislation setting out the powers reserved to Westminster.*
- 2. There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions. In the meantime, consideration of potential Minister of the Crown powers in National Assembly Bills should be done promptly by the UK Government and with a presumption of consent.*

Whilst a reserved powers model would not necessarily remove the need for the Attorney General occasionally to clarify the boundaries of the National Assembly's competence, since there have already been cases involving the competence of the Scottish Parliament which has long benefitted from a reserved powers model of devolution, and whilst legal uncertainty might be to the benefit of a small band of lawyers based principally in London, it is not in the interest of Wales that these legal doubts should continue to arise.

The United Kingdom Government should have the courage to view Wales more favourably than Sir Thomas More did in *A Man for All Seasons*. The Welsh people surely already have that same courage.

In the words of one particularly famous English Bard, in his play *Henry IV Part 1*, at Act 3 Scene 1, put into the mouth of his character Owen Glendower (more commonly referred to as Owain Glyndwr):

*Three times hath Henry Bolingbroke made head  
Against my power; thrice from the banks of Wye  
And sandy-bottomed Severn have I sent him  
Bootless home and weather-beaten back*

Let us hope for the National Assembly's sake that it is indeed three times lucky for a Welshman!