CHAPTER FOUR

Challenges to Actions of the National Assembly for Wales

Malcolm Bishop QC and Keith Bush

This chapter, based on the paper presented by the authors to the conference at Cardiff Law School on 17th April 1999 sets out to be an introduction (sometimes irreverent) to the ways in which the decisions of the National Assembly may be the subject of challenge in the courts.

1 The Status of the Assembly

The opening words of the Government of Wales Act 1998 (section 1(1)) are as follows: "There shall be an Assembly for Wales to be known as the National Assembly for Wales or Cynulliad Cenedlaethol Cymru (but referred to in this Act as the Assembly)." So much for the equal status of the Welsh Language! Section 1 also provides that the Assembly shall be a body corporate the exercise of whose functions "is to be regarded as done on behalf of the Crown".

We should say in parenthesis that an opposition amendment which would have stated that the Assembly should be "Subject to the Sovereignty of" the UK Parliament was voted down by the Government on the grounds that "there is nothing in the Bill which is capable of calling into question the Sovereignty of this Parliament".[86] This is a little odd because a statement in precisely those terms is to be found in the Scotland Act 1998 and indeed in the legislation for Northern Ireland following the Belfast Good Friday agreement of last year.

Now the reason for exclusion of this attempted curtailment of the Welsh Assembly's powers is not because the Government took the view that they ought not to be so curtailed but because unlike Scotland and Northern Ireland the Welsh Assembly does not have any primary legislative powers and therefore a statement of subjection to the Sovereignty of Parliament is unnecessary. There was no need to say that the Welsh Assembly was subordinate to the Westminster Parliament because the Welsh Assembly could not pass its own laws even within its own sphere of activities; the situation was different for Scotland and Northern Ireland of course and therefore it was necessary to ensure that those statutory off-springs did not attempt (as off-spring sometimes do) to act above their station by tethering them to mother's apron strings.

So the Assembly is a body corporate. Again to understand the significance of its status it may be instructive to travel north of the border and to consider the quite different provisions made under the Scotland Act. That Act does not only establish a Scottish Parliament. It also establishes a Scottish Administration, the political heads of which, Scottish Ministers forming the Scottish Executive are Ministers of the Crown. Although the Government of Wales Act provides for there to be "Assembly Secretaries" appointed by "the First Secretary" and an Executive Committee of Secretaries, Secretaries have no power to act except in the name of the Assembly and within the powers delegated to them by the Assembly under section 62.

---

86 House of Lords Debates, vol. 589, col. 842 (11 May 1998).

Since the Assembly (or Secretaries) exercising the Assembly's powers (the nature of which we will discuss later) is "a body of persons having legal authority to determine questions affecting the rights of subjects" it will if it "Act(s) in excess of (its) legal authority" be "subject to the controlling jurisdiction of the King's Bench Division" as decided by Lord Atkin in *R v Electricity Commissioners,*[87] a case in which electricity companies challenged a scheme to rationalise electricity supply formulated by commissioners appointed under the Electricity (Supply) Act 1919.

Although most of the powers conferred on the Assembly involve, by their nature, a wide discretion as to how they are to be exercised, this discretion is not unlimited and will be amenable to judicial review if "used ... in a manner which is not in accord with the intention of the statute which conferred it". Those words of Lord Reid in *Padfield v. The Minister of Agriculture,*[88] were the genesis of the modern jurisprudence by which a ministerial discretion may be attacked. In *Padfield* a minister's attempt to take refuge in the concept of "an unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation" failed. Every discretion, so their Lordships held, is at least fettered by the need to respect the purpose for which the statute intends it to be used.

What Lord Reid said with typical Scots rigour is that Parliament could never have intended a discretion to be exercised unreasonably. God forbid! At the end of the day of course it all depends what you mean by unreasonable. One man's reasonable exercise of discretion is another's manifest irrationality. Accordingly since 1947 it has been held that proof of unlawfulness based on "unreasonableness" requires proof that a decision is one which no authority acting reasonably could possibly have arrived at. Or as has been put in more trenchant terms by in particular Lord Diplock, the Courts must decide that the decision maker has (temporarily one hopes) taken leave of his senses.

The town which has, since 1947, been linked inseparably with the idea of unreasonableness is of course Wednesbury, although ironically the decision of the Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* was that Wednesbury Corporation could not be shown to have been so unreasonable that it must have been acting unlawfully.[89] Lord Greene, M.R. had no difficulty in holding that a ban on visits by children under 15 to cinemas on the Sabbath, even when accompanied by their parents, was potentially reasonable since it patently related to the infants' physical and moral health.

2 Overview of the Assembly's Functions

The powers of the Assembly include ones which fall into the traditional categories of administrative, legislative and even judicial or quasi-judicial. The focus of the Assembly's administrative functions will be the control of a budget of approximately £8 billion per annum, comprising central government spending in Wales on those subjects previously under the control of the Secretary of State for Wales, notably the National Health Service, education, economic development, transport and agriculture. The largest single head of

---

87 [1924] 1 K.B. 171.

88 [1968] A.C. 997.

89 [1948] 1 K.B. 223.

expenditure will be support for local government (about £3 billion per annum excluding education spending), reflecting the fact that 80p out of every £1 which local authorities in Wales now spend is raised not through the council tax but comes as a central government grant from general taxation.

A striking feature of the Assembly's budget is how little of it will actually be spent by the Assembly directly. Almost all will be channelled through other bodies (the Welsh Development Agency, the Health Authorities, local authorities, school governing bodies, the Arts Council and so on). Control of appointments to many of these bodies (the now notorious quangos) will be a further administrative function of the Assembly. It is perfectly possible that even these administrative functions of the Assembly will be the subject of scrutiny in the courts. A voluntary body which found its funding taken away might be sufficiently aggrieved to mount a challenge if, for example, the decision-making process (which will be much more transparent than that behind the closed doors of the Welsh Office) appeared to be tainted with irrationality.

The legislative functions of the Assembly are likely to give rise to greater scope for challenge. It is axiomatic that they are "secondary" or "delegated" powers transferred from ministers (primarily the Secretary of State for Wales) to the Assembly and as such are at present limited in scope. It would be wrong, however, to dismiss them as of no consequence. They include, from the outset, powers such as that to fix the content of the national curriculum for schools in Wales, to fix the level of charges for eye and dental check-ups and for prescriptions (albeit with the agreement of the Treasury) or to control the legality of the sale of beef cooked on the bone.

It is now well established that the making of delegated legislation is amenable to judicial review, even to the extent of the quashing of a statutory instrument.[90] Although the legislative powers of the Assembly will, at the outset, consist entirely of powers previously delegated by existing statutes to ministers and now transferred to the Assembly, the constraints on the mode of exercising those powers will not be identical with those to which those ministers are at present subject. On the one hand, section 44 of the 1998 Act removes any requirement that the orders made by the Assembly should be subject to Parliamentary approval or subject to Parliamentary annullment. On the other hand, sections 106 and 107 provide that Assembly legislation (and indeed any action of the Assembly) will be *ultra vires* if it is incompatible with, respectively, European Community law or rights under the European Convention on Human Rights. Section 108 deals with other international obligations of the UK and although Assembly legislation incompatible with such obligations is not a nullity it is subject to being annulled by any Minister of the Crown.

As the law now stands the European Convention on Human Rights and Fundamental Freedoms is in a state of limbo. The Human Rights Act 1998 has received the Royal Assent but has not yet come into force. The Court of Appeal recently decided that arguments founded on the Convention had better await the coming into force of the legislation before being given final consideration. But this is not so for the Assembly. By section 107 the

---

90 *R. v. Secretary of State for Health, ex parte US Tobacco* [1992] 1 Q.B. 353, a case in which a tobacco company which had received a large government grant to set up a snuff factory in Scotland succeeded in obtaining the quashing, on the grounds of procedural unfairness, of regulations made by the Department of Health only four years later banning completely the sale of the product made at the factory.

Assembly has no power to make, confirm or approve any subordinate legislation, or to do any other act so far as the act is incompatible with any of the Convention rights. That is all very well but of course rights are decisively dependant upon remedies and since the clause as originally drafted did not specify who could challenge the Assembly for breach of its human rights obligations, at a late stage amendments were made so as to provide that a person would be able to bring proceedings under this Act provided he could be a "victim" under the Human Rights Act 1998.

The problem with that amendment however was that it came to be realised that since the Assembly was likely to be established before the Human Rights Act came into force there would be not much point in giving the right of challenge to a victim under the Act because the Act was not be in force and so no Act - no victim under the Act. The government therefore decided that if, as was its intention, the Assembly would be bound to observe convention rights from the outset there would need to be a further amendment to the clause by removing the reference to the Human Rights Act and substituting the reference (in sub-section (2)) to Article 34 of the Convention itself. This means from the very first moment of its being the Assembly must comply with the European convention and any victim of its failure so to comply can mount a direct challenge in the Courts.

Quasi-judicial functions of the Assembly arise mainly in the planning, environmental and associated fields. A decision whether to allow an appeal against a refusal of planning permission clearly falls within this category as does, even more clearly, a decision whether to uphold or to quash an enforcement notice. The functions of taking these decisions under, respectively Sections 78 and 174 of the Town and Country Planning Act 1990, are transferred to the Assembly. The decisions of the Assembly will be challengeable by the particular machinery under sections 288 and 289. There must be considerable uncertainty as to how, in practice, a corporate body operating a committee structure will effectively exercise a function requiring consideration along quasi-judicial lines unless it is delegated *in toto* to one of the Secretaries.

3 Methods of Challenging the Actions of the Assembly

Challenges may arise directly or indirectly. Direct challenges may arise under some specific statutory regime (as under the Town and Country Planning Act 1990) or by way of judicial review. Nothing in the Act purports to cut down the right of a person having sufficient *locus standi* to make use of either of these methods of challenging Assembly decisions. On the contrary, Schedule 8 paragraph 4(2) of the GOWA (Government of Wales Act 1998) appears to make it clear that the provisions set out in the Schedule relating to "devolution issues" are additional to any other power to institute proceedings which give rise to a devolution issue.

Schedule 8 does, on the other hand, provide specific machinery to deal with the situation in which a "devolution issue" arises in the course of any proceedings. It appears, therefore, to be designed to deal with indirect challenges to Assembly decisions. These may arise in the course of either criminal or civil proceedings. An example of how this might happen is given later.

Devolution issues are issues as to whether a function is exercisable by the Assembly, whether a purported exercise of a function is within the powers of the Assembly and whether a failure to act is a breach of a duty imposed on the Assembly. Having regard to the contents of sections 106 and 107 resolution of a devolution issue may involve consideration of whether

an action complies with European Community Law or the European Convention on Human Rights. At this stage it may be useful to consider the impact on the European convention on Assembly decisions. We can best do so by taking two examples of recent decisions of the Courts at Strasbourg to see how they may possibly affect a future Assembly decision.

Let us suppose that the Assembly in the interests of promoting the Welsh Language and generally fostering community life decided to use such powers as it has in order to deter absenteeism in rural areas. Just suppose that the Assembly decided that it was not in the interests of the Principality for cottages up and down Wales to be used as weekend retreats from the stresses of Liverpool and Birmingham or wherever and so remain unoccupied for the rest of the week. Housing and planning are devolved functions and the Assembly's powers in these areas might well enable such a policy to be pursued but what would the Court at Strasbourg think?

Some guidance may be derived from Article 8:- Respect for Private and Family Life Home and Correspondence. It may be argued that every Englishman's home is his or her castle (even when situated in Wales) and that a decision to prevent anyone using his own home would be struck down *in limine*. So thought Mr and Mrs Gillow of Guernsey. They quite liked their house "White Knight" on the island. The only problem was that according to Guernsey law they were not allowed to live in it. They worked abroad for many years and being thrifty folk let out their house in their absence. But of course they retained ownership and left the furniture behind. While they were abroad tighter residence controls were introduced and they were unable to obtain the necessary licence and proceedings were brought against them for the unlawful occupation of their own home

The Commission accepted that ownership *per se* may not be sufficient to establish that the property was Mr and Mrs Gillow's home but since they regarded it as such and could show that they always intended to return to live there then the Commission indeed regarded "White Knight" as the couple's home so that the refusal of the residential licence constituted an interference with their right to respect for the home under the Article. But was such interference permissible as being "necessary in a democratic society in the interests of... the economic well-being of the Country..."? "No", said the Commission. The interference was disproportionate to the mischief it was aimed at, namely protecting the local population against having to compete with well healed yuppies in the purchase of scarce housing and so driving up the cost. Consequently it was held not to have been necessary in a democratic society and Mr and Mrs Gillow could sleep in their own little bed again. No doubt the moral here is that if you do rent out your home make sure you leave the furniture behind.

On parity of reasoning therefore weekenders in Wales would be safe unless the Court could be persuaded that such a restriction was indeed necessary in a democratic society in the interests of the economic well-being of that society. We can think of quite a number of arguments which could be marshalled in support of the proposition that depopulation of the Welsh countryside and the inability of local people to buy houses at affordable costs deals an incalculable blow to the local economy such that interference with property rights is warranted. But that is an argument for another day.

One of the most important functions of the new Assembly will be in the field of Social Services and in particular in the field of child care. The attitude of the Strasbourg Court to the confidentiality of children's' records is instructive. This is well illustrated by the case of Gaskin. Mr Gaskin's mother died while he was a baby. He was taken into care in Liverpool

and placed with a succession of foster carers who he says mistreated him. On attaining his majority he wanted to bring an action against the Local Authority for negligence and to assist in this task wished to see his confidential case records. The High Court said no and this was affirmed by the Court of Appeal. Lord Denning was"in no doubt that it is necessary for the proper functioning of the child care service that the confidentiality of the relevant documents should be preserved. This is a very important service to which the interests – also very important – of the individual must in my judgement bow. I have no doubt that the public interest will be better served by refusing discovery and this I do"

In the light of so firm a decision Mr Gaskin could not have been surprised when the House of Lords refused him leave to appeal. But being a man of spirit he took his complaint to Strasbourg. The Court held that a balance has to be struck between the confidentiality of case records on the one hand and the individuals right of information about his past on the other, and that in striking this balance the UK (which argued that nothing ought to be disclosed without the consent of the makers of the requested information) had failed to secure respect for Mr Gaskin's private and family life, accordingly there had been a breach of Article 8. (There was however a sting in the tail. His lawyers claimed costs of £117,000. The Court taxed him down to £11,000. So it is not only in the Cardiff District Registry that the lawyers get a nasty surprise!)

This case is important it seems to us because it illustrates the preference for openness which is becoming an increasing hallmark of the Strasbourg jurisprudence and which the leaders of the Assembly would do well to bear in mind in all their deliberations. The culture of "Sir Humphrey knows best" is fading fast, and in Wales we have a unique opportunity to start with a clean slate so that our decision making process in the Assembly can be as open and transparent as is suitable to a sophisticated democracy.

Let us leave Europe for the moment and consider what may happen where a devolution issue arises in any criminal or civil proceedings. In that event the Court will have to consider, firstly, whether the point is frivolous or vexatious. If so, it does not qualify as a devolution issue at all (paragraph 2) and can, obviously, be rejected out of hand. Since there is nothing in Schedule 8 to suggest that it is intended to amend the substantive law the Court will presumably next have to consider whether it is the kind of issue which it is permissible to raise in the particular proceedings in question, having regard to the principles in *Boddington v. British Transport Police* and *R v Wickes*.[91]

In the former case the House of Lords upheld the right of a defendant prosecuted for breach of subordinate legislation (in that case a byelaw) to raise as a defence the invalidity of that legislation, including challenges based not on patent defects but on procedural errors. In *Wicks* their Lordships had, on the other hand, upheld the decision of the trial judge in the case of a defendant prosecuted for breach of an enforcement notice that it was not open to the defendant to attack the validity of the enforcement notice on grounds of procedural impropriety. In making it a criminal offence to fail to comply with "an enforcement notice" Parliament intended, said their Lordships, to refer to an apparently valid notice, notwithstanding that it might be vulnerable to being quashed by another court.

---

91 [1998] 2 All E.R. 203 and [1998] A.C. 98 respectively.

If the Court decides that there is an arguable point relating to the powers of the Assembly and that it is one which it is open to a party to raise in those proceedings then the Court will have to consider whether to refer the issue under Schedule 8. The Schedule empowers but does not require a Court before which a devolution issue arises to refer it to the appropriate Court for resolving it. Presumably a doctrine corresponding to that of *acte claire* in the European context will apply. It would be futile to refer an issue identical with or closely analagous to one which has already been decided or which the Court before which the decision arises is otherwise able to deal with itself.

A novel feature of the Schedule is that a devolution issue is to be referred to different Courts depending on the nature and the venue of the proceedings in which it arises. Magistrates' Courts are to refer devolution issues to the High Court. The Crown Court is to refer them to the Court of Appeal in the case of trial on Indictment but to the High Court in the case of summary matters (for example appeals against conviction from the Magistrates). The County Court and the High Court (except when itself a destination of a reference from a Magistrates' Court or Crown Court) are to refer devolution issues to the Court of Appeal. In the event that a devolution issue first arises or is first regarded as worthy of reference in the Court of Appeal or the House of Lords that tribunal may refer it to the Judicial Committee of the Privy Council and the decision of the High Court or Court of Appeal on a Schedule 8 reference are subject to appeal to the Privy Council.

It may be that the suggestion that a new point could arise during a hearing before the House of Lords when the appeal in question has been raked over several times already may not be as fanciful as is first thought. Indeed such a situation happened very recently when the second *Pinochet* appeal was decided on grounds not argued during the first hearing despite the enormous wealth of legal talent and (it has to be conceded) fantastic cost to the British taxpayer. So one could well have a situation where, midway through an appeal in the House of Lords, one of their Lordships raises a devolution issue which may then be referred to the Privy Council across Parliament Square in Downing Street where other Law Lords consider the matter so referred. Thus an interesting game of Judicial ping pong may develop.

In addition the decisions of the High Court or Court of Appeal on a Schedule 8 reference are subject to ultimate appeal to the Privy Council. It is interesting to note that during the debate in the Lords it was suggested that issues of this nature should be decided in Wales not London. The Solicitor General noted that the High Court and the Court of Appeal have power to sit wherever they please, and that there seemed to be no reason why the Judicial Committee of the Privy Council could not sit anywhere in the British Isles.[92] Provided the political will is there we see no reason at all why the Appellate Courts should not sit in Cardiff to decide matters appertaining to Wales. This is essentially a political rather than a legal question but we feel sure that the Counsel General to the Assembly will forcibly make the point to their Lordships that having exclusively Welsh matters decided in London is as out dated as the head note to the well known case of Stuart v Marquis of Bute decided in [1861] HL Cas 440 which begins with the words, :"The Third Marquis of Bute was born in Cardiff Castle, Cardiff, England."

The power under Schedule 8 is a power to "refer" analagous to the power to refer issues of Community Law to the European Court of Justice. No doubt rules of Court will provide the

---

92 House of Lords Debates, vol. 590, col 987 (9 June 1998).

machinery for such references and the Courts will evolve appropriate methods of responding to Schedule 8 references so as to enable their decisions to be acted upon by the referring Court. It is an inescapable fact, however, that the provisions of Schecule 8 could, in some cases, generate substantial delay and complexity in resolving the litigation involved. A nightmare scenario would be a case which gives rise to a difficult devolution issue depending on an uncertain provision of Community Law. Could this result in a double reference? First a reference of the devolution issue and then once that has been resolved (or even in order to resolve it) a further reference to Luxembourg to the European Court by the Court to which the devolution issue was referred. It is to be hoped that this forensic merry go round will not happen very often, although it is some comfort to reflect that if it does the lawyers involved are unlikely to be any poorer.

4 Grounds of challenge

Readers will of course be well familiar with the grounds on which Assembly decisions might be open to challenge: The well known trinity of illegality, irrationality, and procedural impropriety is, of course, well known. In Abercwmboi they speak of little else! Accordingly a detailed examination of the grounds of challenge would be out of place here. But it is worth noting that the Act expressly recognises (section 42 (2)) that the mere fact that the Assembly makes different provisions in relation to Wales than does a Minister acting under identical powers, in relation to England cannot be a ground of challenge. There ought, accordingly to be no mileage in arguing that doing things differently from England is prima facie irrational! But *quaere*?

A few years ago when the last government chose to re-draw local government boundaries and reorganise local government in Wales a problem arose about the terms and conditions and pension entitlements of Welsh local government staff. One of the authors was instructed as Leading Counsel on behalf of a local authority acting in a representative capacity for all the local authorities in Wales which sought leave to challenge the decision of the Secretary of State, Mr Redwood, which had the effect of leaving Welsh local government staff worse off than their English counterparts. It was turned down flat on the first application but after an oral hearing the Court eventually gave leave. Now the arguments deployed were many and varied. Reliance was placed on the Act of Union of 1536. The argument ran that since the purpose of uniting Wales with England was to confer upon Wales the inestimable benefits which King Henry VIII's subjects enjoyed in England that should extend to superannuation rights for local government officials in the Principality. A more contemporary argument was that it was irrational for the Welsh Secretary to act in a way which resulted in Welsh local government officials being disadvantaged in comparison to their English counterparts. It appeared to be a promising argument and the applicants were relishing the prospect of the ensuing forensic disquisition.

However, as so often happens in the field of public law, the matter was overtaken by events. Mr Major resigned the Conservative leadership and caused there to be a new election in which Mr Redwood was an unsuccessful candidate. As a result he resigned his seat in the cabinet. A new Secretary of State was appointed and immediately rescinded his predecessor's decisions and agreed that Welsh local government staff should be on an equal footing with their English colleagues. So the case collapsed and the Secretary of State paid the costs. Whether that was an early indication of the perspicacity and sound judgement of the present leader of the opposition who recognised an insuperable argument when he saw one or simply the less elevated desire of a politician for a quiet life is not for us to say.

Apart from correspondence or non correspondence with English practices it has to be borne in mind that the Assembly is required to act in accordance with a wide range of constraints. Apart from those imposed by Community Law which of course prevails not only over any act of the Assembly in Cardiff but also over the Westminster Parliament itself, there is also the European Convention as well as an express requirement to abide by a set of standing orders and the rather more diffuse requirements to observe the principles of openness, equality of opportunity, sustainability and equal treatment of the Welsh and English languages.

These high sentiments, to which we all subscribe in theory, could well result in litigants navigating some very choppy waters. It is not difficult to see, for example, how the principle of equality of opportunity may well find itself in conflict with the principle of the equality of treatment of the Welsh and English languages in, say the case of a teaching post in a Welsh speaking area. It remains to be seen to what extent arguable breaches of these principles may be prayed in aid in challenges to Assembly decisions and, more importantly for lawyers, how the Courts will react to such challenges.

The Assembly is primarily a political body. Its members are all politicians drawn from the four parties operating within the Principality. They stand on a party manifesto and the governing party expects, or at least promises, to implement its manifesto commitments. So far so good. There is no difference you may say from the situation at Westminster. Local government for that matter operates on precisely the same system. Not quite. In *R v Waltham Forest LDC, ex parte Baxter*,[93] an elected councillor participating in the setting of the rate was held by the Court to be under a duty to make up his own mind on how to vote on that issue and could not lawfully abdicate his personal responsibility to the extent of voting blindly in support of party policy.

Westminster MPs can go into the "yes" or "no" lobby at the command of their party Whips without having, to put it politely, an overwhelming grasp of the minutiae of the legislation they are voting on - but not it seems local Councillors. What about Assembly members? It would be surprising if members of the Assembly were not subject to firm party discipline, particularly since one third of them have been elected not as constituency representatives answerable to their constituents but as party names on a regional list. Will effective whipping in support of a decision give rise to challenge on the ground that the politicians ought to relegate to secondary importance the demands of the party manifesto under which they were elected? That line of reasoning opens many interesting avenues and one can well see how a latter day Lord Denning could wreak havoc with Assembly decisions if he, or she for that matter, had such mind.

5 The consequences of an effective challenge

Let us leave that constitutional Armageddon for the moment and consider the consequences of an effective challenge. A novel provision, unique to Wales and Scotland (section 110 of the Government of Wales Act 1998, section 102 of the Scotland Act 1998) draws on the practice of the European Court of Justice by empowering a court which decides that an act of the Assembly was *ultra vires* to make an order "removing or limiting any retrospective effect

93 [1998] Q.B. 419.

of the decision" or "suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected".

The first point for consideration seems to us to be this: where a court finds that the "Assembly did not have the power to make" subordinate legislation, there is a distinction to be drawn between *ultra vires* in its narrow sense ("there was no power to make this regulation") and in the wider sense ("there was a power to make this regulation but power was improperly exercised")? Does "did not have the power to make" include the second case? And is the phrase "a provision of" significant? Presumably it covers the whole as well as part of the piece of subordinate legislation.

Nevertheless the desirability of preventing the administrative inconvenience of quashing a piece of Assembly legislation or, perhaps years after the event, declaring that such a piece of legislation was ineffective, is entirely laudable. Otherwise a court which decides that a regulation was *ultra vires* having been made in the exercise of a function the Assembly did not have, and therefore never had any existence, is retrospective to the date the regulation was purported to be made. It was null and void and of no effect and all consequences which flowed therefrom are to be set aside. This section mitigates that administrative nightmare by empowering the court to remove or limit the retrospective effect of its decision, or to suspend its effect to allow the defect to be corrected. Thus if subordinate legislation is struck down because of the failure to consult an interested party, the decision could be put into suspense until that consultation had been carried out.

That seems all very sensible but what about the situation where a regulation is declared to be invalid at the instance of a litigant. What is the effect of that invalidity on others who have conducted their affairs on the basis of the regulation for perhaps many years? An interesting question you may think. This section provides no direct answer but in effect empowers the court to do what it thinks just: a Celtic version of palm tree justice which it will be fascinating to see being worked out in practice.

With regard to criminal prosecution for a breach of a regulation found to be invalid the Solicitor-General said when the Bill was going through the House of Lords: "One can envisage circumstances in which the court may say the measure in question does not apply to a particular Defendant, but it would be wrong to unscramble a whole series of cases that may have been conducted in previous years. I am not saying that will apply in every case, but the court may reach that decision considering all the people who have relied on the provision over the years."[94]

That approach may well be administratively convenient but imagine the prospect of dozens, perhaps hundreds of Welsh people being fined or, in an extreme case, imprisoned for a breach of an Assembly measure with criminal sanctions and then being told that although the measure in question was unlawful nevertheless the fines must stand and the period of imprisonment served because otherwise it would all be rather a mess. No prophetic gifts are necessary to anticipate that were the courts to make such an order the European Convention would be immediately invoked resulting in an interesting tussle between powers of the courts to vary respective decisions under section 110 of the Government of Wales Act 1998 and its duty to apply the Convention. Any such dispute may well be protracted and the outcome

---

94 House of Lords Debates, vol. 590, col, 993 (9 June 1998).

uncertain. All these and similar issues resting as they do on the cusp of European Community Law, European Convention Law, the decisions of Westminster Parliament and those of the Assembly are likely to prove fruitful ground for the public lawyer practising in Wales. So there is always a silver living.

6 The role of the Welsh language

Let us spend a short time looking at the Welsh language - yr Iaith Gymraeg. The Assembly is subject to a duty (Section 47 (1)) to give effect in the conduct of its business to the principle that the two languages should be treated on the basis of equality (in so far as it is "appropriate" and "reasonably practicable"). How this is to work out in practice remains to be seen. In a very brief debate on this section in the House of Commons it was suggested that a committee consisting only of members from the South East of Wales would work principally in the English language and that meetings not open to the public could be held in Welsh in the north west[95]. The opposing view was that instantaneous translation equipment must be available even where a small group met in subcommittee; but if Welsh was being used "the feed from the translation" should be made available to the English media. The government did not indicate which view it preferred but urged adherence to the Welsh Language Board's Guidelines which would mean that each language would be treated equally. It seems to us that this must mean that there should be made available a Welsh translation of all English proceedings and an English translation of all Welsh proceedings which should include not only proceedings of the Assembly itself but also of its committees and sub-committees. In other words Hansard in Wales must be bilingual.

Apart from its duty to treat Welsh and English as of equal validity in the conduct of its own business the Assembly is also empowered (Section 32) to "do anything it considers appropriate to support....(c) the Welsh language." Interestingly this power is not confined to Wales. So it is possible for the Assembly to support the Welsh language by teaching or publishing among Welsh people living in England. It could, for example, provide a phrase book of rugby terms in Welsh for the use of the London Welsh Rugby team or an easy guide to Welsh places of historic interest for the Great Britain Caravan Club. It could also, presumably support a more ambitious scheme to stimulate interest in and knowledge of the Welsh language amongst the inhabitants of Patagonia. Speaking for ourselves that is all to the good. When one has a language as ancient, rich, and beautiful as our own why shouldn't our national Assembly encourage its study and use in other parts of the United Kingdom and indeed the world?

On a more mundane level there are two concrete requirements relating to the Welsh language with which the Assembly must comply. All its standing orders must be made in both English and Welsh and the English and Welsh texts of any subordinate legislation made by the Assembly which is in both English and Welsh when made shall be treated for all purposes as being of equal standing (section 122 (1)). It is unclear whether this provision requires that there should be an English and Welsh version of each subordinate piece of legislation or whether if the Assembly decides that there should be two such versions each should be equal with the other. Our view is that the combined effect of section 47, which provides for the equal treatment of the English and Welsh languages in the conduct of Assembly business and its duty to have regard to the spirit of any guidelines under Section 9 of the Welsh Language Act 1993 (section 47 (2)) strongly suggests that all subordinate legislation should be

95 House of Commons Debates, vol. 305, col. 734 (2 February 1998).

published in two versions subject only to exceptions on the basis of appropriateness and reasonable practicality.

In this respect it is not clear how these concepts (to be found in section 47(1) of the Act) are to be construed. Section 122(2) provides for the Assembly to in effect ascribe its own meaning to a Welsh word or phrase. It can declare that any Welsh word of phrase appearing in the Welsh text of any subordinate legislation is to be taken as having the same meaning as the English word or phrase in the English version. That being so it seems it will be difficult to argue that it is not appropriate or reasonably practicable to publish a Welsh version of the text because there is no Welsh word for so and so. The Assembly itself can declare that a Welsh word has the same meaning as a word appearing in the English text. In any event it must be remembered that the Welsh no less than the English language is constantly developing and indeed expanding. The accepted Welsh word for television "teledu" was thought up by someone in the 1950's It has now attained common currency. Indeed scholars point out that Bishop Morgan's Welsh bible contains very many words and phrases which that remarkable prelate and saviour of the language simply made up as he went along. Surely the Assembly staff are more than equal to the task of continuing the development and enhancement of our national tongue?

Now many Welsh lawyers, including one of the authors, cannot profess fluency in the language of heaven but since the text of Assembly subordinate legislation is to be of equal validity whether in English or Welsh it may well be worth investing in a crash course of "Welsh for Lawyers", because it will be a perfectly legitimate exercise when faced with an ambiguity in the English text to go to the Welsh version and see whether this clarifies the issue and of course vice versa.

7 A Case study

That is sufficient theory for the moment. We are now going to consider a case study showing how public law is likely to develop as the work of the Assembly gets underway. First we are going to consider a report appearing in the Welsh Times (formerly the Western Mail) on the 17th of April 2003: The report reads as follows:

> "A Llanfairfechan man is challenging the right of Conwy County Council to prosecute him for roofing his bungalow with roof tiles instead of Welsh slate. The Judge at the High Court in Cardiff is due to hear a reference from the Llandudno Magistrates' Court seeking a ruling on a number of points raised by Mr John Shuttleworth of "Mon Repos", Llanfairfechan. Mr Shuttleworth has erected the Hacienda-style bungalow and roofed it with red roof tiles. As a result he has been prosecuted for failing to comply with a notice served by the council ordering him to remove the tiles and replace them with slate. The council say that they were required to take action against Mr. Shuttleworth under the Fitness for Habitation (Wales) Order 2000 which includes within the definition of houses unfit for human habitation any new houses built in the counties of Conwy, Gwynedd or Ynys Mon which do not have roofs of Welsh slate except where the local authority find that "exceptional circumstances" apply.
>
> "The council, when deciding to serve the notice on Mr. Shuttleworth, rejected his argument that the non-traditional Spanish-style appearance of "Mon Repos" was an

exceptional circumstance. The council argue that there is nothing exceptional about a non-traditional design.

"The case is of considerable interest to the legal profession because of the issues which it raises. Mr Shuttleworth, who is representing himself, argues that the proceedings against him ought to be dismissed on a number of grounds. One is that the type of roof covering is nothing to do with fitness for human habitation. Another is that favouring Welsh slate is contrary to Article 92 of the Treaty of Rome because it amounts to aid granted so as to distort competition in favour of the production of certain goods.

"Mr Shuttleworth also argues that the requirement to use Welsh slate is contrary to Article 8 (Respect for Home) and Article 1 of the First Protocol of the European Convention on Human Rights and Fundamental Freedoms. In an ironic twist Mr Shuttleworth who hails from Halifax, is arguing that Conwy County Council have wrongly interpreted the Regulations. He claims that the word "exceptional" means no more than different from the majority of cases and since his bungalow is different in design from most houses in Llanfairfechan (or Wales for that matter) the rule ought to be relaxed in his favour. In support of his argument he is drawing attention to the fact that the Welsh text of the Regulation uses the word "neulltuol" which, he argues, only means "particular" or "special".

"A spokesperson for the Assembly's Counsel-General denied that the Regulations were unlawful. "Questions of the interpretation of the Regulations", said the spokesman "are matters to be dealt with in the Magistrates Court and our Counsel will oppose any attempt to raise them here. It is only the matters referred by the Magistrates as devolution issues which can be considered by the High Court".

""We are confident", he went on "that our policy of sustainable development and energy conservation, part of which involves encouraging the use of local materials instead of those transported long distances by road, can legitimately be furthered by these Regulations. We are also sure that this case has nothing to do with human rights and that the Assembly is entitled to impose restrictions on the use of roofing materials other than slate in order to promote the economic development (to say nothing of the Welsh way of life) of areas of North/West Wales where the standard of living is abnormally low and there is serious and increasing under-employment. These are matters for which Article 92 makes specific provision".

"At the hearing Counsel for the Assembly and for Conwy County Council are expected to ask the Judge who will be sitting with an assessor to assist in relation to linguistic questions (unless the Recorder of Cardiff is available to sit as an additional Judge of the High Court) to refer the alleged breach of European Law to the European Court at Luxembourg for its opinion."

Is the above scenario purely a flight of fancy? Embellished it may be, but it illustrates a number of practical questions of substantive law and of procedure with which the courts will inevitably have to deal. Section 604(5) of the Housing Act 1985 contains a power to make orders which is at present vested in the Secretary of State but which is transferred from the 1st July 1999 to the Assembly. It is a power "..by order (to) amend the provisions of subsection (1) or subsection (2) in such manner and to such extent as he considers

appropriate." Those subsections define the concept of unfitness for human habitation. It will be seen that Section 604(5) is a "Henry VIII" clause, empowering the Secretary of State to amend a statute by statutory instrument. Whilst an order made by the Secretary of State is subject to annulment by resolution of the Lords or Commons, an order made by the Assembly is not (see section 44(2) of the 1998 Act.)

Subordinate legislation of this kind is therefore the closest that the Assembly can get to primary legislative powers. Would the Assembly be sufficiently adventurous to try to exploit opportunities like this in order to pursue policies quite different from those which the relevant primary legislation has until now been used to further? What constraints are imposed by the general purpose of the Act under which the order is made even if the Act empowers the Assembly to make orders which actually amend the Act itself? These are clearly issues for which, in view of the unique nature and position of the Assembly, there are no precedents.

Another feature of the case is that it involves public law issues and issues of general law (such as statutory interpretation) which go beyond the scope of "devolution issues" as defined by paragraph 2 of Schedule 8 of the 1998 Act. How should an Assembly order be interpreted? Has another public body, such as a local authority, acted lawfully when seeking to enforce Assembly subordinate legislation? Issues such as these, together with questions of the *vires* of ministerial acts are the normal subject-matter of the work of the crown side of the High Court, the Court of Appeal and the House of Lords. Yet the concept of the devolution issue means that some public law issues may be referred through a different procedure to a different final court of appeal before the issue is brought back down and across to the court which is siezed of the other public law issues. An analogy has earlier been drawn with a game of ping-pong but many might see a closer parallel with snakes and ladders!

In defence of the concept of the devolution issue one can of course point to the desirability of consistency with the provisions contained in the parallel legislation relating to Scotland and to Northern Ireland. The development of a common constitutional court, applying the same basic principles, is an attractive prospect. It should be noted, however, that the concept of the devolution issue as defined in the Scottish legislation is narrower than in the GOWA. In the case of Scotland the key concept is that of legislative or administrative competence. Is the Parliament or Executive acting within its area of competence? In the case of Wales the concept of a devolution issue extends to questions of "whether a purported or proposed exercise of a function by the Assembly is, or would be, within the powers of the Assembly" - a very wide test, giving rise to the overlap with ordinary judicial review whilst arbitrarily separating some issues relating to the Assembly's powers from others.

When, of course, further legislation takes place, bringing the powers of the National Assembly for Wales into line with those of the Scottish Parliament, these anomalies will disappear. In the meantime we shall have to learn to use the procedures in ways that avoid as much as possible the risk that public law proceedings relating to the Assembly sink into a procedural morass.

Our example incorporates a question of European Community Law and gives rise therefore to the risk of a double-referral, first the referral of a devolution issue to the High Court and the further referral of the Community Law question to the European Court of Justice. At the same time there is an issue of Convention rights under the European Convention on Human Rights to be determined. Whatever conclusion the High Court comes to will be subject to appeal. Having climbed the ladder to Luxembourg or the Privy Council it may, if the

litigants are of strong enough stuff eventually come sliding down the snake again and end up back in the magistrates' court (which will probably by that time have been closed down). Needless to say a conviction by the justices may result in an appeal to the Crown Court, by case stated to the High Court, on appeal to the Court of Appeal and so on - a fresh set of snakes and ladders.

Finally, our case raises linguistic questions. How, where and by whom are they to be decided? In its own way section 122 of the 1988 Act is revolutionary. It has the effect that the domestic law of England and Wales will no longer be exclusively enacted in the English language. The courts are of course accustomed to have to apply foreign or international law expressed in languages other than English. When the need arises there is no conceptual difficulty about doing that. It is proved by evidence from a witness familiar with the language and the law in question.

The law of England and Wales is not and cannot be the subject of evidence. It is something of which the courts take judicial notice. The assumption is that the judges are in a perfect position to understand construe and apply a statute or statutory instrument. If some statutory instruments are couched in a language other than English then that assumption breaks down. At the very least, procedures will be needed in order to be able to respond on those occasions (no doubt rare but nevertheless highly sensitive) when an ability to understand the complementary nuances of two ways of expressing the same rule becomes important.

Only time will tell whether the Mr. Shuttleworths of this world will be beating a path to the doors of our courts with grievances of a similar complexity to those described in our example. There can be no doubt, however, that lawyers and the courts will have to prepare for this kind of challenge.

8 Public Law in Wales and for Wales

Of course it may be the case that our National Assembly will invariably act with such scrupulous concern for the legal constraints on its powers and that challenges to its decisions will be extremely rare. But a long experience in acting for local authorities up and down the Principality leads us to the view that such optimism is likely to be misplaced. Having regard to the extent of the constraints upon the Assembly's powers and the inevitable false starts which are the unavoidable hallmark of pioneering legislation such as this we foresee a rich harvest of litigation for the public law practitioner in Wales.

We have come a long way from the disappearance of the last vestiges of a distinct Welsh legal system in 1830 with the abolition of the Court of Great Session. The coming into being of the Assembly puts within grasp a very great prize but it demands that distinct legal institutions serving Wales be re-established. Devolution is bound to generate conflicts of interest between the citizen, the Assembly, and central government. In seeking to resolve these conflicts the Courts must be and must be seen to be entirely neutral.

But neutrality does not mean blindness. It must acknowledge the existence of emerging Welsh administrative jurisprudence; it must not treat disputes affecting the powers of Wales' National Assembly as if they were the same as disputes between the powers of a local government *vis a vis* the Secretary of State. To do so would be to risk embroiling the courts unnecessarily in political controversy, for they would be seen as allying themselves with London instinctively and perhaps as being intrinsically hostile to the aspirations of Cardiff

rather than the impartial ring holder which is their constitutional position. In this respect it seems to us to be unthinkable that disputes affecting Assembly decisions should be litigated anywhere other than within the Principality. The recent announcement by the Lord Chancellor that Crown Office matters will hence forward be able to be litigated in Wales is a step forward. But it is a small step. We need to ensure that the Court of Appeal and the Judicial Committee of the Privy Council when they consider litigation concerning Assembly functions should sit where those functions are being implemented here in Wales.

This will become of increasing importance with that greater use of the Welsh language in public administration in Wales which will undoubtedly follow from the decisions of the Assembly. It is inevitable that the use of Welsh in the Courts, including those dealing with public law issues, will increase. It ought not to be forgotten that the right to use Welsh in Court under section 22 of the Welsh Language Act 1993 only extends to Courts in Wales. Is it seriously to be suggested that a Welsh litigant wishing to challenge a decision of the Assembly in the Court of Appeal may only do so if he forgoes his right to speak Welsh? This of course is not to suggest that only Welsh speaking Judges may sit in the High Court or the Court of Appeal. That would be extremely difficult to achieve despite the undoubted talents of both Her Majesty's Judges and Her Majesty's Lords Justices of Appeal. But there is nothing to prevent the Court of Appeal sitting in Cardiff and operating a system of simultaneous translation (precisely as happens in Strasbourg) to enable parties, and lawyers for that matter, to express themselves in the language in which they feel more comfortable. But although we need courts sensitive to the Welsh dimension of litigation involving Assembly matters we also need a strong and specialist corpus of lawyers based here in Wales able to offer legal advice and, if necessary, seek to justify that advice in public law cases affecting the Assembly in Wales

We owe the decision to take the degree of control of our own destiny which the Assembly provides to the wafer thin majority of 6,721 Welsh voters. Paper thin indeed. The electorate in 11 local authorities voted for devolution and 11 against, while although named in the White Paper as the likely Assembly headquarters our capital city produced a substantial majority against. So there is much work to be done if the Assembly is to win and retain the overwhelming public support which is necessary for success. In winning that public support a strong and home based legal profession has an important and, in our view, decisive part to play. It is up to each one of the members of that profession to do our part to ensure that the practice of public law in Wales is worthy of the Welsh people.