Think Different.
Think Plaid.

Developing A Welsh Legal Jurisdiction

Introduction

Since the advent of devolution in Wales over ten years ago the changes to the way in which our country is governed have been significant.

Whilst we in Wales celebrated the creation of a National Assembly the people of Scotland celebrated the re-convening of their own Parliament.

One of the reasons for the distinction between the powers of the two devolved institutions was that Scotland had her own distinct and separate legal jurisdiction and its own criminal justice system. Wales did not, and does not.

Changes are taking place within the Welsh legal system that would have been unthinkable some years ago . The creation of Legal Wales, the establishment of the Administrative Court for Wales, regular sittings of the Court of Appeal (both civil and criminal) in Cardiff and judicial review cases involving Welsh public bodies are now being heard here in Wales.

The National Assembly for Wales enjoys limited lawmaking powers, and following a successful referendum, will have the power to legislate in devolved areas without the interference of Westminster.

As a distinct body of Welsh law begins to build, it is inevitable that the idea of a distinct Welsh legal jurisdiction requires discussion.

A recent poll conducted by YouGov demonstrated that 63% of the people of Wales believe that the National Assembly should have powers equal to those of the Scottish Parliament. The creation of a separate Welsh legal jurisdiction would be a crucial step in this direction.

As the party of Wales, Plaid Cymru has a duty to be at the forefront of such discussions.

As the leader of Plaid Cymru's Parliamentary Group in Westminster, and Plaid's Director of Policy we warmly welcome this excellent discussion paper by the lawyer Fflur Jones.

Fflur provides an analysis of the current legal structure in Wales and makes clear suggestions as to the potential way forward in creating a future Welsh legal jurisdiction.

Wales is growing in confidence as a nation. Civic culture and society in Wales is strengthening. The time will soon come when Wales is ready to take full responsibility for the administration of justice.

We would be pleased if you could forward us any observations you may have.

Many thanks.

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Plaid Cymru Westminster Parliamentary Group Leader

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Developing a separate jurisdiction for Wales

The jurisdiction of England and Wales – pre 1998 situation

Unlike Scotland and Northern Ireland, since 1536 Wales has remained an integral part of the unitary legal jurisdiction of England and Wales. Scotland and Ireland had their own parliaments up to 1707 and 1801 respectively. Upon unification of these parts with Westminster, the pre existing separate legal systems of both Scotland and Ireland were specifically maintained, along with their separate systems of courts and legal professions. (1)

By contrast, one of the main purposes of the Laws in Wales Act of 1536 was to apply the law of England to Wales. Wales since then has therefore shared its courts systems, legal professions and primary law with England. The 1536 Act did not however remove the separate identification of Wales as an entity, and other small differences between the countries were retained and developed over the centuries. For example, the exclusion in respect of the common law rule of market overt in Wales but not in England lasted from 1536 until codification of the Sale of Goods Act 1994, occasional legislation was passed by Westminster having effect only in Wales (from the mid 19th century onwards especially), the Welsh Courts Act of 1942 gave limited authority for Welsh to be used in courts in Wales, the Welsh office was established in 1965, and the Welsh Language Act of 1967 followed closely – which finally repealed the notorious provision in an Act of 1746 (generally known as the Wales and Berwick on Tweed Act) whereby any reference to England in an Act of Parliament was to be treated as including Wales.(2)

Despite these subtle retained differences between England and Wales however, significantly, it was the absence in Wales of a proper 'jurisdiction' which the Kilbrandon Commission of 1973 cited as a justification for proposing lesser devolved powers for Wales as compared with Scotland at that time.

Legislation that is made only in relation to Wales or related to England and Wales therefore remains capable of being applied or enforced by the courts in both England and Wales, and Her Majesty's Court of Justice of England and Wales therefore have been the civil and criminal courts responsible for the administration of justice in both England and Wales (with a few other types of 'specialised courts and tribunals' also used for specialised subjects such as ecclesiastical matters, leasehold valuations etc.). The exceptions to this rule lie mainly in the field of immigration law, as the Asylum and Immigration Tribunal's jurisdiction covers the whole of the UK, while in employment law there is a single system of Employment Tribunals for England, Wales, and Scotland (but not Northern Ireland).

The Civil Court system- administered by the Ministry of Justice / Secretary of State for Justice and Her Majesty's Court Service consists in the main of:

- Privy Council
- The Supreme Court (formerly The House of Lords)
- Court of Appeal
- High Court of Justice
- County Courts
- Employment Appeal Tribunal
- Lands Tribunal
- Asylum and Immigration Tribunal

The Criminal Court system – administered by the Attorney General, Director of Public Prosecutions, Crown Prosecution Service consists in the main of:

- The Supreme Court (formerly The House of Lords)
- Court of Appeal
- High Court of Justice
- Crown Court
- Magistrates' Court

Additionally, the Justice system – meaning the police services, probationary services, and prisons were, and still are in the main funded and administered from Westminster, as are the manner in which social security issues are funded and administered through various Tribunals.

What has happened since devolution took place? – The Evolution of Devolution

Whilst the arrangements as described above remain mainly in place, exciting changes to the way laws are administered in Wales have also occurred since the later 1990s. Indeed, Winston Roddick describes Welsh jurisdictional events post 1997 as 'developments that were a spontaneous adjustment of the machinery of justice in Wales in response to devolution', or signs, as Tim Jones said, of 'Wales' emerging legal jurisdiction.'(3)

The jurisdiction of Wales and England under the Government of Wales Act 1998

In the absence of primary law making powers under the Government of Wales Act 1998 the National Assembly for Wales passed significant numbers of secondary legislation, and Winston Roddick quoted that 1,117 statutory instruments were passed during the first 4 years of the Assembly's life. A very large percentage of them were either unique to Wales, or where they paralleled similar legislation made in England, involved significant differences in drafting reflecting Wales' different circumstances. Since 1998 also, much more primary legislation emanating from Westminster applied only to Wales. The reason why these laws are unique to Wales or different from their parallel legislation in England is because they reflect Wales different and evolving circumstances.(4)

English and Welsh were also given equal legal drafting status, so all laws - primary or secondary from NAW must be bilingual, causing a further divergence from the old status quo of 'England and Wales' as one jurisdictional entity, as both the Welsh and the English texts are of equal standing.

The jurisdiction of Wales and England under the Government of Wales Act 2006

The GoWAct 2006 provides that the Assembly may now enact Measures with respect to specified Matters in the devolved fields in Schedule 5 of the Act. This is already increasing the rate at which our laws become different from those of England. As a consequence, matters that are dealt with in England under Acts of Parliament may be dealt with under Assembly Measures differently for Wales. As further Matters are specified (either by Act of Parliament or by an LCO initiated by the National Assembly) the likelihood of this divergence will increase.

To reflect this progressive march towards greater primary law making powers within the National Assembly, between 1998 and 2008 the following steps have already been taken towards the establishment of a separate Welsh jurisdiction:

1. Creation of Legal Wales – a legal civil society to engage with the new order brought about since the GoW Act 1998

2. 2000 - Administrative Court for Wales was established in Cardiff (part of the civil division courts)

3. Court of Appeal civil division now sits regularly in Cardiff

4. Court of Appeal criminal division also sits regularly in Cardiff

5. Most judicial review cases involving decisions of Welsh public authorities including the NAW are heard in Wales

6. Employment Appeals Tribunals now sit regularly in Wales

7. Chancery Court in Wales – has been sitting in Wales since pre 1998, but sharing its jurisdiction with Bristol. The sharing stopped in 1998.

8. April 2007 – rearrangement of the administrative boundaries for the administration of justice in Wales by Her Majesty's Court Services (HMCS) – the administrative region ceased to be Wales and Cheshire and became instead HMCS Wales. Since then Court services in Wales are administered on an all Wales basis. (5)

Full legislative devolution – the way forward in the immediate future

The problems with passing primary legislation using the vehicle provided within the GoWA 2006 are well rehearsed. The Act does however provide a statutory basis for the transfer of further legislative powers to the Assembly without the need for fresh legislation, provided a positive vote is first achieved in a referendum on this issue in Wales. Should that be achieved, then WAG would issue a commencement order (section 105 of the Act) after which Part 3 of the Act would be replaced by Part 4 (s106) and the Assembly would be able to pass Acts of the Assembly in relation to the fields specified in Schedule 7. The procedures for passing Assembly Acts (ss110-111) and the system of pre and post-enactment scrutiny are broadly the same as for Assembly Measures, (s112).

Again therefore, this step should take Wales closer to achieving the 5 essential components of a distinctly Welsh legal system identified by Sir Roderick Evans, (6) being:

1. The repatriation to Wales of law making functions

2. The development in Wales of a system for the administration of justice in all its forms which is tailored to the economic and social needs of Wales

3. The development of institutions and professional bodies which will provide a proper career structure in Wales for those who want to follow a career in those fields

4. Making the law accessible and readily understood by the people of Wales

5. Development of a system which can accommodate the use of either the English or Welsh languages – rendering both of equal status

Full legislative devolution – the way forward in the longer term

Wales' rights under the GoW Act 2006 – even under Part 4 and Schedule 7 do not however follow the Scottish model, in which matters reserved to Westminster are specified and everything else is devolved. Instead Schedule 7 of GWA 2006 contains a further list of those powers that are specifically devolved to NAW. The explanation given for this was that whilst Scotland is a separate legal jurisdiction *"An important feature of the enhanced legislative competence of the Assembly is that it will legislate within a unified England and Wales jurisdiction"* (Bush 2006). A Joint Memorandum issued in 2005 also made this point:

"If the Assembly had the same power to legislate as the Scottish Parliament, then the consequences for the unity of England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions… in order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects." (7)

This position seems therefore to hark right back to the findings of the Kilbrandon Commission report of 1973. The reasoning behind treating Wales and Scotland differently appears still to be very much entrenched in the fact that Scotland enjoys a separate legal jurisdiction, whilst Wales does not.

How important / necessary therefore is it for there to be a separate Welsh jurisdiction into which legislative powers can then be devolved using the Scottish approach?

Achieving parity with Scotland in terms of the 'reserved powers model' contained in the Scotland Act 1998 is of crucial importance to the development of Wales as a nation with full law making powers in its own right. In view of the historic resistance to such proposals as a result of the absence in Wales of a separate Welsh jurisdiction, once the referendum has been won and Part 4 and Schedule 7 of the GoWA 2006 are in force, **focus** should first be given to establishing the minimum amount of distinctive Welsh jurisdiction compatible with transferring powers on the Scottish model – for without greater devolution of jurisdictional powers and the administration of justice to the National Assembly in Wales any calls for a move to the reserved powers model is likely to be met with resistance by some political parties / the public at large on the grounds that Wales does not have appropriate administrative systems to cope with such powers. Any such calls for greater powers on these lines could be criticized on the grounds of being unjustifiable without there

being a semblance of an administrative system to support those greater law making powers being firstly in place.

How can this be achieved – the 'Minimum and Maximum' models

In order to assess how this long term goal can be achieved it is sensible to list those matters that could possibly be achieved under the present devolution system (the minimum devolution model) and those jurisdictional and administrative matters which seem to be currently incapable of being devolved until we have a new constitutional settlement under a further Government of Wales Act. In other words, the steps listed under the 'minimum model' below seem to form the 'administrative box' to which the tools of full jurisdictional devolution can subsequently be included once greater powers are bestowed on the Assembly by way of a further legislative settlement.

Those matters that fall within the 'minimum model' therefore appear to be:

1. The One Wales Agreement already contains a commitment to consider (a) the feasibility of the devolution of the criminal justice system within the contexts of devolution funding and (b) moves towards the establishment of a single administration of justice in Wales.

2. Once the referendum has been won, and Schedule 7 in place, attempts should also be made to expand the provisions of Schedule 7 of the GoWA 2006 to include the "*administration of justice"* as a devolved field to the NAW. Section 109 of the Act provides how Schedule 7 may be amended by way of an Order in Council:

3. Within the field of *'administration of justice'* in Wales, the inclusion of (8):

    a. An independent prosecution service for Wales to be established.

    b. The further administration of the courts to become a Welsh responsibility and to assume a distinctly Welsh identity. This issue is already reflected to an extent in the provisions of the One Wales Agreement, and the devolution of administration that has already happened as listed at page 3.

    c. The transfer of responsibility for the administration of justice to the WAG and the establishment of depoliticised, non partisan Welsh Law Officers, which are already in existence in Scotland.

    d. Arrangements for the selection of the judiciary and magistrates and members of the tribunals operating in Wales on the recommendation of a Welsh Judicial Appointments Commission or another similar body that is a separate Welsh entity, although remaining answerable to the Secretary of State / Lord Chancellor's department for the time being and until the Assembly is bestowed with greater law making powers.

e. Establishment of administrative authorities to service the legal system (this has and is already happening).

f. Additional financial provision, sufficient to cover the costs of court system and the administration of justice.

g. A legal aid system *distinct* from that operating in England – i.e. one that assumes a distinctly Welsh identity.

h. The devolution of the CPS to Wales may be possible on an executive level.

The maximum model – some of the tools that will then assist Wales to assume full jurisdictional and administrative devolution:

1. Responsibility for the probation service, prisons and policing. This would be in keeping with the four Welsh forces' demonstrated commitment towards collaboration between them at a national Welsh level which should ease a shift to a devolved system of policing within Wales. The forces have already established national bodies such as the Association of Chief Police Officers and the Police Authorities of Wales and are co-operating over projects such as language training, but the budgetary requirements for administering the police, prisons, and probationary service may mean that these are areas best left alone until greater law making powers – and possibly revenue raising powers are bestowed on Wales, or an agreement has been reached for the devolution of an adequate budget or funding to cover these issues by the National Assembly.

2. Responsibility for a separate social security system and its enforcement. Again budgetary considerations may mean this is an area best left alone until greater devolution of powers to Wales has been achieved. Developing a separate social security system that is fundamentally different to that provided in England could also bring its own particular challenges in the fields of benefits migration / fraud and the like which could push up the budgetary requirements even further to administer the system.

3. A legal aid system that is separate from that operating in England and is administered on a Wales only basis.

4. A Welsh legal profession with its own arrangements for regulation and its own requirements for admission. Whilst steps have already been taken by the establishment of Legal Wales / Wales circuit etc to develop a distinctly Welsh identity to lawyers practising in Wales, universities in Wales for example would be likely to suffer if they were only able to offer courses to train up Welsh lawyers unable to practice elsewhere. Many law firms depend on earning their bread and butter from England based clients too, and so this aim is arguably a very long term goal. Perhaps it would be more attractive to

develop a system such as that in existence between lawyers of England and Wales and their counterparts in the Republic of Ireland, where each profession's qualifications are mutually recognised to a great extent, rather than the situation in Scotland, where full cross qualification is necessary if a Welsh or English lawyer wishes to practice in Scottish law.

5. Appropriate rules determining the qualifications for the right to practice law in Wales, perhaps including a bilingual capacity. The comments at point 13 above also apply to this goal.

6. Legal training specifically directed towards Welsh legal practice

7. Systematic bilingual publication of the law relating to Wales and of Welsh practice rules. This possibly could be a minimum term goal depending on the budgetary implications of pushing for such a requirement, and bearing in mind the National Assembly's laws are bilingual with equal status given to both languages.

8. Further and more extensive devolution of the issues already achieved under the 'Minimum model'.

Other policy considerations

As can be seen from the 'minimum model' list above the potentially wide ambit of amendments to Schedule 7 to devolve powers over the administration of justice as considered above are also unlikely to be achievable in their entirety as many of them will encroach on areas where Westminster wishes to hold matters very firmly in its grasp. Further specific advice should first be sought on how such extensive jurisdictional devolution could be achieved by way of amendments to Schedule 7 before justifiable calls should be made on the need for a new Act for Wales along the lines of the reserved powers model included in the Scotland Act 1998**.** As Winston Roddick stated, it should not be thought that the evolutionary process currently underway could lead eventually to devolution of the administration of justice altogether. Instead, the more significant jurisdictional changes and the separation of power in that regard would need to be included as part of a brand new Act for Wales – where those items on the 'maximum model' list could 'fall' into the administrative shell already created by the present settlement. This would be necessary to avoid what the Richard Commission described as *"ad hoc, piecemeal development on a case by case basis, not founded upon any agreed general policy or informed by any clear set of devolutionary principles".* When a new act for Wales is being discussed therefore matters such as the constitution of the Supreme Court, to include sufficient Welsh representatives etc. should also be properly defined and agreed, and included on the statute book.

For the reasons discussed above, the process of gaining <u>full</u> jurisdictional devolution for Wales is therefore unlikely to be achieved in the short term future. The 'minimum

model' amendments should however sought to be achieved, to the best of our abilities, along with the launch of a sustained campaign referring to and contrasting the settlement in Scotland and in Northern Ireland – demonstrating that the settlement in Wales is a far cry from that enjoyed in Scotland.

Attempts should also be made to build up the political will across the different parties to achieve jurisdictional devolution in part, and subsequently in full for Wales. A convention should be established to look more closely at the issues that would arise from the establishment of a separate Welsh jurisdiction. Any civil servants' resistance to any jurisdictional devolution proposals would arguably be better dealt with by cross party support to a convention's findings rather than an individual stance by Plaid Cymru on the matter. Budgetary constraints should be considered carefully by any such convention as well – for as referred to briefly above the financial budget needed for administering both civil and criminal justice in Wales would be significant.

The call for a separate Welsh jurisdiction / attempting to accelerate that process by introducing amendments to the Schedule 7 of the GoWA 2006 falls very neatly with Plaid Cymru's stance that it acknowledges the sovereignty of the people of Wales in the matter of Wales' constitutional status. The right therefore for the NAW to administer within Wales and for the people of Wales justice emanating from the ever increasing number of NAW generated laws, and from the UK parliament, goes hand in hand with the sovereignty of the people of Wales in this regard. It should be of no consequence either that the laws in England and Wales do not differ or vary significantly on a number of issues. The right to administer the justice of those laws applicable to the people of Wales should still be placed with NAW, being the legislative authority which hopefully will carry more and more responsibility for passing primary laws in Wales in the near future. It should also be of no consequence that the administration of justice given to NAW would be over matters still reserved to Westminster. In Scotland for example, some aspects of criminal law remain reserved matters, but the power to administer justice in relation to such matters remains firmly with the Scottish parliament.

Awen Fflur Jones

Foot notes

1. **T Jones et al *"The Law of Wales or the Law of England and Wales"* SLR Vol26 no 3 P135-145**
2. **Ibid.**
3. **Winston Roddick – *Lloyd George Lecture 2008 – Devolving Justice***
4. **Ibid**
5. **Source: Ibid, and Philip Richards, *"Taking Control of Justice"***

6. **Roderick Evans as quoted in J Williams '*Legal Wales'* in Osmond J and Jones JB (eds) *Birth of Welsh democracy; the first term of the NAW* (Cardiff IWA 2003)**
7. **As quoted in Nigel Johnson, *The Government of Wales Act 2006: Welsh Devolution Still a Process and Not an Event? [2007] 4 Web JCLI***
8. **As discussed in Keith Patchett's article on *"Welsh Law"* in *Agenda Winter 2007/08***