

Manon George

"With the National Assembly for Wales now exercising primary legislative powers, is the development of a separate Welsh jurisdiction inevitable?"

When the Government of Wales Act 2006 Act was introduced there was no intention to disturb the unity of the England and Wales jurisdiction.¹ Both Scotland and Northern Ireland already had their own jurisdictions separate from the jurisdiction of England and Wales, and this was the famous argument why Wales could never have the same measure of devolution as Scotland.² Accordingly GOWA 2006 only delegated limited legislative and executive powers, and no judicial powers, to Wales. England and Wales therefore continued to share a single legal jurisdiction, and the same system of courts, judges and legal profession.

However on 3 March 2011, much sooner than was originally anticipated by the UK Government,³ the people of Wales were given the opportunity to decide whether the Assembly should have primary law-making powers in certain subjects under Part 4 of GOWA 2006. As a result of the affirmative vote, the Fourth Assembly has legislative competence over the range of Subjects set out in Schedule 7 to the Act. If an area of law is defined in Schedule 7, the Assembly is competent to make primary legislation in that area.

Now that the Assembly can make primary legislation, the question of whether there should be a separate Welsh jurisdiction is more relevant than ever. Even though, the All Wales Convention concluded that a separate jurisdiction was not a precondition of greater legislative powers,⁴ it is generally considered that the existence of a distinct body of law constitutes a separate legal identity⁵ or even a jurisdiction.⁶ And the UK Government previously said that if Wales had the same power to legislate as Scotland then England and Wales would become separate legal jurisdictions.⁷

Divergences in the law between England and Wales did not begin with Part 4 of GOWA 2006. The Secretary of State for Wales was empowered to enforce different policies for Wales through secondary legislation. These powers were later transferred to the new Assembly under GOWA 1998.⁸ The UK Parliament also legislated exclusively for Wales or made separate provision for Wales since the late 19th century. So even though Wales has for centuries formed part of the unitary legal system of England and Wales, the law of Wales has never been identical to that of England.

¹ Peter Hain MP and Rhodri Morgan, Written Evidence to the Welsh Affairs Select Committee, *Better Governance for Wales*, First Report, 2005-06, HC 551

<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmwelaf/551/551.pdf> para 5

² Peter Hain, Devolution HC Deb 16 July 1997 vol 298 cc386-7

http://hansard.millbanksystems.com/commons/1997/jul/16/devolution-2#S6CV0298P0_19970716_HOC_20

³ (n1) para 19

⁴ All Wales Convention Report para 3.9.22

⁵ T Jones et al, 'The Law of Wales or The Law of England and Wales?' (2005) 26(3) SLR 135, 142

⁶ *Ibid* 143

⁷ (n1) para 7

⁸ GOWA 1998 s.21

Considering the existing divergences and the new scope for greater divergences, what might have been addressed gradually has come into focus very quickly. It is now inevitable that a separate jurisdiction for Wales will emerge, sooner rather than later. It already has the general requirements for the administration of justice: population, a defined territory, a distinct body of law and legal institutions.⁹ The practical consequence of these is the need for divergent systems of legal education, divergent sets of judges and lawyers and divergent courts.¹⁰

DEFINITION OF JURISDICTION

For the purposes of this essay, it is considered that separate legal jurisdiction generally consists of a defined territory, with a distinct body of law, and a separate legal system;¹¹ a separate legal system in this context meaning things such as a judiciary, courts system and legal profession. The courts system will deal with cases of all kinds even if the area of law is not within the competence of that jurisdiction's government and legislature. On this basis, it should be remembered that the Scottish jurisdiction existed before legislative devolution. In fact, it was according to Rifkind 'the only territory on the face of the earth which has a legal system without a legislature to improve, modernise and amend it.'¹² Considering this, it is quite extraordinary that Wales is a territory with its own legislature but without its own court system.

The word 'jurisdiction' is often related to the question 'who has legal authority within a particular framework to do what in respect of what, whom and where?'¹³ For example, looking at Wales, we can say that the Assembly has legislative jurisdiction by having legal authority to make laws relating to the subjects in Schedule 7 of the Government of Wales Act 2006; which apply only in relation to Wales and which do not extend beyond England and Wales.¹⁴ Then the Welsh Ministers have executive jurisdiction by having legal authority to take executive action within Wales in respect of the areas devolved to them.¹⁵ However these jurisdictions are not exclusive. For example, the UK Parliament retains power to legislate over all devolved and of course reserved areas and the Welsh Ministers often have to exercise powers concurrently with UK Ministers.

⁹ J Williams, 'The emerging need for a Welsh jurisdiction' Agenda, IWA, Winter 2010, 38

¹⁰ (n1) para 7

¹¹ T Jones and J Williams, 'Wales as a Jurisdiction' (2004) PL 78

¹² Lord Steel of Aikwood quoting the remarks of Mr. Malcolm Rifkind
http://hansard.millbanksystems.com/lords/1997/jun/17/referendums-scotland-and-wales-bill#S5LV0580P0_19970617_HOL_111)

¹³ D Wincott and E Lewis, Written Evidence to the NAW Constitutional and Legislative Affairs Committee Inquiry into a separate Welsh Jurisdiction <http://www.senedd.assemblywales.org/documents/s5904/Consultation%20responses.pdf> Para 2.4

¹⁴ *Ibid* Para 2.5.1

¹⁵ *Ibid* Para 2.5.2

When it comes to judicial jurisdiction, there is even more complexity. There is not a system of Welsh courts that have exclusive judicial jurisdiction over cases which arise in Wales. However saying that, in some areas, there is no denying that there has already been a trend towards decentralisation in the courts system over recent years, arguably to the point where nearly all the courts, up to and including the Court of Appeal, sit in Wales at least some of the time. In this respect, it could be argued that Wales has already emerged as a jurisdiction.¹⁶ Surprising as it may seem, the presence of a legislature need not be a defining characteristic of a jurisdiction.¹⁷ As for Scotland, the existence of a substantial body of distinct law and a separate legal system may be sufficient.¹⁸

Significant developments in the legal system in Wales include the establishment of Her Majesty's Court Services Wales so the administration of justice in Wales is now administered on an all Wales basis, the creation of a Mercantile Court for Wales, most judicial review cases involving Welsh public authorities are now heard in Wales, establishment of the Administrative Court of Wales, and the establishment of a Chancery Court in Wales. This has certainly made the judiciary and practitioners conscious of a separate Welsh identity¹⁹ and signals a trend in establishing a separate legal personality for Wales. However, a pure trend towards something is not enough. As Wincott and Lewis note, 'it is preferable to plan now for the increasing divergence that appears to be an inevitable consequence of political reality' rather than it happens in an 'ad hoc and unmanaged manner.'²⁰ Wales is still living in the shadow of the piecemeal, ad hoc transfer of executive functions to the Secretary of State for Wales, a reminder that a similar approach should not be adopted as regards the development of a separate jurisdiction.

A SEPARATE COURTS SYSTEM

There are two possible models for the future development of the legal system in Wales.²¹ One would be to establish a court structure and a legal profession independent of that in England, or secondly, the creation of more identifiably Welsh institutions, such as the Administrative Court, within the unitary legal system.

Taking the latter model, it has been argued that the fact Wales shares a legal system with England does not affect the existence of a separate jurisdiction, claiming that 'the courts service provides merely a system of procedures and tribunals for resolving disputes' and the 'common structure cannot detract from the reality that law has been enacted differently as between Wales and England.'²²

¹⁶ (n11) 78

¹⁷ *Ibid* 78

¹⁸ *Ibid*

¹⁹ Rt Hon Sir Malcolm Pill, Legal Wales Conference, Marriott Hotel Cardiff, 9 October 2009

²⁰ (n13)Para 5.3

²¹ (n11) 99

²² (n5)143

However Himsforth recognised the autonomy of courts systems and how things can be interpreted differently by individual courts, ‘the scope for autonomous reactions by individual courts do make the judicial contribution less amenable to regulation and this less directly susceptible to measures designed to produce uniformity of response.’²³ There is a general assumption that within a single legal system, a more or less uniform response from the courts can be provided for and thus a broadly uniform pattern of enforcement and implementation becomes achievable.²⁴ There should not be uniformity of response in Wales; the law of Wales should be applied in whatever way the National Assembly intended. As Lord Reed commented in the AXA Case,²⁵ the devolved Parliaments are accountable to the electorate rather than the courts.

Furthermore, Lord Hope of Craighead said of Scottish appeals to London, ‘the fear is sometimes expressed that an appeal to a court based in London dilutes that distinctiveness of Scots law.’²⁶ Judges in a London-based court may not necessarily have an understanding of the Welsh context to a case. Taking crime as an example, Jones recognised that the ‘average and overall picture of crime in Wales is not the same as in the rest of the UK.’ It has geographical and population hotspots with large parts of the country with little crime at all. Jones identified this ‘uniqueness’ as a feature making Wales a candidate for being responsible for its own administration of justice.²⁷

For this reason, the first model would be more suited to Wales’ needs. Wales needs its own jurisdiction with its own separate High Court and Court of Appeal. However Morris LJ believes it ‘self-evident that the pool for the appointment of Chief Justice and judges of the Court of Appeal in Wales would be small if it were decided that promotions would only be made from within the Welsh Judiciary’.²⁸ He considered a more ‘limited’ separate Welsh jurisdiction²⁹ of ‘higher and lower courts operating separately from the courts of England’ and judges ‘appointed specifically to the courts in Wales,’ assuming that they would not have to be from Wales.

The old argument ‘if it ain’t broke don’t fix it’ may also apply. As the former Lord Chancellor said, the courts in Wales ‘are well used to considering bespoke text, related to specific geographical areas or circumstances, and in areas ranging from public law to contract.’³⁰ In his opinion, it does not follow that, ‘because there are different legal texts to be applied on each side of the border, there needs to be separate

²³ C Himsforth, ‘Devolution and its Jurisdictional Asymmetries’ (2007) 70(1) MLR 31, 48

²⁴ *Ibid* 48

²⁵ *AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland)* [2011] UKSC 46 (12 October 2011)

²⁶ Lord Hope of Craighead, ‘Scots law seen from south of the border’ (2012) 16(1) Edin. LR 58, 64

²⁷ J Jones, ‘The Next Stage of Devolution? A (D)Evolving Criminal Justice System for Wales

[http://www.pbs.plymouth.ac.uk/solon/journal/issue%202.1/The%20\(d\)evolving%20criminal%20justice%20system%20in%20Wales%20final.pdf](http://www.pbs.plymouth.ac.uk/solon/journal/issue%202.1/The%20(d)evolving%20criminal%20justice%20system%20in%20Wales%20final.pdf) 14

²⁸ Rt Hon Lord Morris of Aberavon (n13) para 19

<http://www.senedd.assemblywales.org/documents/s7122/Additional%20Response%20WJ%20-%20Hon%20Lord%20Morris%20of%20Aberavon,%20KKG,QC.pdf>

²⁹ *Ibid* para 9

³⁰ Rt Hon Jack Straw MP QC, The Administration of Justice in Wales, Speech to Law Society Wales, 3 December 2009

jurisdictions by virtue of those differences alone.’³¹ It is therefore worth considering to what extent a separate Welsh legal jurisdiction, in terms of separate Welsh law, would be compatible with a unified England and Wales court system and judiciary. Retaining a unified jurisdiction may also save money, because some services which Wales may wish to have may not be cost-effective. Jones gives building prisons, which are obviously expensive to build, as an example.³² Would such costs have to be met from the Barnett fund? However so far there is no evidence of costing therefore it needs to be determined how much better or worse off Wales might be if it had its own court system with its own budget.³³

THE SUPREME COURT

It may still be possible for a unified court system to operate for England and Wales, even if they were to become separate legal jurisdictions. The Supreme Court is one example which demonstrates that it is possible for a court to be cross-jurisdictional. The Court operates across all jurisdictions, deciding cases in accordance with the laws applicable in that jurisdiction. It is the final court of appeal for all UK civil cases, and criminal cases from England, Wales and Northern Ireland, and therefore sets precedents which must be followed by lower courts within those jurisdictions.

It should also be noted that whatever happens, the UK has significant European and international obligations which have been made part of domestic law and which have to be applied uniformly across the UK anyway.³⁴ Also, much of the decision-making by the UK has been made, as the Human Rights Act 1998 requires, by taking into account the jurisprudence of the European Court of Human Rights in Strasbourg.³⁵

However change that should be a UK Government priority is Welsh representation in the Supreme Court. Wales should be represented in the same way as Scotland and Northern Ireland. Two of the twelve Justices for example are Scots lawyers and the convention is that they both will sit in Scottish appeals if they are available, and arrangements are made for them to be heard on days when that can be achieved.³⁶ This ensures that there is an expertise in Scottish law. Panel selection is very important for the Supreme Court. In making their selection they do so to ensure that the panel comprises those Justices with expertise in the area of law that is in issue. For example, Lady Hale is the expert in family and employment law cases; Lord Walker the expert in chancery law cases; and Lord Mance and Lord Collins in commercial cases.³⁷ For that reason there should be Welsh Justices in the Supreme Court to ensure that there is also expertise in Welsh law.

³¹ *Ibid*

³² (n27) 32

³³ (n13) Para 8.3

³⁴ (n26) 65

³⁵ Lord Justice Thomas, ‘Our Changing Governance Structures: Clarity and Confidence, Welsh Governance Centre St David’s Day Lecture 20120

³⁶ (n26) 67

³⁷ *Ibid* 68

THE LEGAL PROFESSION

Another factor to consider is the potential impact of a separate jurisdiction on the legal profession in Wales. Wales currently enjoys many advantages from the link with England in the administration of justice, including ‘access to broad fields and powerful resources.’³⁸ However there is not a lack of degree qualified lawyers in Wales. But would they be happy to train in just Welsh Law, or even be restricted to practicing in Wales only?

Scottish lawyers who want to practice in England and Wales for example are required to undertake additional training, and vice versa for English and Welsh lawyers, as well as other common lawyers, before they can practice in Scotland because the jurisdictions are so different. Northern Irish lawyers on the other hand generally do not have to retrain because the law and legal practices of Northern Ireland are not that distinct from that of England and Wales so it is therefore easy for lawyers to cross between the two jurisdictions. If Wales were to have its own separate legal jurisdiction the recommended model would be one similar to Northern Ireland. This would probably have the least impact on the legal profession in Wales because the likelihood is that existing lawyers would be sceptical of re-qualifying, and there is a danger that young professionals would flee to England in search of more money and experience. It would be a shame to build major barriers between the jurisdictions. It would be interesting to see the impact, if any, of having to re-qualify on the Scottish profession.

What is extremely important though is a Welsh context to legal training and education. Lawyers advising clients in Wales and judges hearing cases in Wales need to be competent in the law which applies in Wales, whether Wales is given a separate jurisdiction or not. As Lord Pill commented, ‘a tradition of judicial separateness, and of dealing with a devolved administration, requires skills which cannot, however, be acquired in a moment.’³⁹ Possible options would be to devise a test of competence to practice for lawyers and special training for judges sitting in Wales. There may not need to be much change in the way law is taught in Universities in Wales, just a difference in the professional training course. For example, students with degrees from law schools in England and Wales are qualified to enter the professional stage of legal education in Northern Ireland.

CONCLUSION

³⁸ (n19)

³⁹ *Ibid*

The main argument for a separate Welsh jurisdiction is that it makes ‘constitutional sense’ if the institution which makes the laws also has the responsibility and the accountability for their administration.⁴⁰ In truth the present legal system is already dealing with differences between the law as applicable in England and Wales, and it seems logical that such differences should be given its due acknowledgment by Act of Parliament. This would also provide consistency between the constitutions of Scotland, Northern Ireland and Wales. However, for those whom are sceptical about a separate Welsh jurisdiction or worried about the breakup of the Union, it should be reminded that a Welsh jurisdiction would only be separate up to a point; the Supreme Court would continue as the final court of appeal and would be subject to the ultimate authority of the European Court of Justice.

The purpose of Welsh Devolution was to bring democracy closer to the people. In limited areas, there is already a distinct Welsh jurisdiction, therefore even though it may have not been the UK Government’s original intention for it to happen so soon, the logical next step is to bring justice even closer to the people for whom these new laws have been made.

⁴⁰ Winston Roddick QC, ‘The development of devolution and Legal Wales,’ Centre for Welsh Legal Affairs, Aberystwyth University, 28 November 2008