

A Welsh jurisdiction.¹

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Introduction

‘The first elections to the National Assembly for Wales on 6 May will not represent some constitutional "big bang". Devolution is not a single defining event but a process.’

This oft-quoted statement by Ron Davies captures the reality of the way political devolution is evolving within Wales. The devolution settlement for Wales is markedly different from that for Scotland and Northern Ireland. So too is the legislative structure. The Assembly comprises of 60 members as opposed to 129 SMP and 108 members of the Northern Ireland Assembly. Unlike Scotland, Wales does not have the power to adjust the basic rate of income tax. Nevertheless, post the referendum on law making powers the process of political and law making devolution has taken a significant step forward. Quite rightly this has given fresh impetus to the question of a Welsh jurisdiction. As with political devolution, this is a process and the ultimate decision on a Welsh jurisdiction will depend upon whether a number of factors are present.

Wales as an emerging jurisdiction?

A jurisdiction requires a population; however, it does not have to be a large population. Northern Ireland (1.8 million) and the Isle of Man (80,543) are both jurisdictions. With a population of nearly three million, Wales comfortably meets this requirement.

Tim Jones and Jane Williams identify three common characteristics of a jurisdiction:

1. defined territory;
2. distinct body of law; and
3. a court structure and legal institutions.

Since the Local Government Act 1972, Wales has a defined territory. In addition, Wales has a distinct and growing body of law. Whether the body of Welsh law is yet sufficiently large enough to support an independent Welsh court structure and legal institutions is debatable. One obvious but important observation to make is that there must be enough work for the courts to undertake, and enough work to support a Welsh legal profession. The body of law must also be sufficiently large to justify the necessary changes that would have to be made to legal education within Wales.

Mr Justice Roderick Evans in his 2010 Lord Callaghan lecture identified their judicial structures as an important feature of the Scottish and Northern Irish jurisdictions. Wales, however, is part of the unitary jurisdiction of England and Wales. One of the reasons given in the 1973 Royal Commission

¹ Based on a paper delivered to the Irish-Scottish Forum (AHRC Centre for Irish-Scottish Studies at the University of Aberdeen) Scottish Parliament, November 2010

on the Constitutions for not recommending for Wales the same powers as Scotland was that Scotland was a jurisdiction and Wales was not.

There is increasing potential for Wales to become a jurisdiction, although in the absence of separation it cannot become completely politically and legally divorced from England/United Kingdom. The decision on a separate Welsh jurisdiction is ultimately one for politicians and not one that the judiciary or the legal profession can impose. It would require the devolving of the administration of justice (or parts of it) to Wales. However, that decision must be based upon a body of evidence supporting the idea of sustainable jurisdiction that can operate effectively and ensure that it attracts good quality members of the legal profession and the judiciary.

In part, the debate centres on the need to decide whether a separate Welsh jurisdiction is a precondition of greater legislative powers for the Assembly, or whether it is a product of enhanced powers.

Plaid Cymru, in its very informative paper *Developing a Welsh Legal Jurisdiction*, suggests that 'focus should be given to establishing the minimum amount of distinctive Welsh jurisdiction compatible with transferring powers on the Scottish model.' It proposes that the GWA 2006 should be amended to include the administration of justice as a field devolved to the National Assembly. This would include an independent prosecution service for Wales, further devolving the court administration in Wales, a Welsh Judicial Appointments Commission, and a distinctly Welsh legal aid system. To this we would need to add, a distinctly Welsh qualification for practitioners in Wales. This could be a component of a qualification that would cover both the English and the Welsh jurisdictions.

However, the All Wales Convention emphasised that the legal structures in Wales should keep pace with political devolution. It concluded that,

'... a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence for the National Assembly for Wales, even if the National Assembly for Wales has the substantial powers of the Scottish model.'

Roderick Evans stated that the ultimate decision on a Welsh jurisdiction, or an amended Wales and England jurisdiction, 'may be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.' How responsive has it been?

The current framework

The unitary model of the administration of justice has evolved since devolution and has responded in part to the changed constitutional arrangements within the United Kingdom. In 2007 the Wales and Chester Circuit was disbanded and Wales became a separate circuit. Her Majesty's Courts Service (HMCS), which is responsible for managing the administration of the courts across England **and** Wales, is now organised into English regions, the Royal Courts of Justice, *and* Wales. Court administration in Wales now reflects legal and political boundaries.

Lord Bingham when Lord Chief Justice broke tradition by adding 'Wales' to his title; there is now a Lord Chief Justice of England and Wales. Both divisions of the Court of Appeal (Criminal and Civil) sit in Cardiff, although it is still administered from London. The Administrative Court also sits in Cardiff

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and most proceedings can be issued at the District Registry in Cardiff. Importantly, these include challenging the National Assembly.

These initiatives have strengthened the legal identity of Wales, although they are a component part of a wider programme of decentralisation throughout England and Wales.

Sir Malcolm Pill at the 2009 Legal Wales Conference said,

‘(A)s central government recognises the legitimacy of the Assembly and devolved administration, it is important, in my view, that the unitary system gives equivalent recognition in the judicial structure suitable for Wales.’

The unitary model currently enables Wales and England to benefit from a strong unified legal profession and judiciary and a shared court structure. This is important and builds on many years of experience. Since devolution, the administration of courts and tribunals in Wales has responded to the emergence of Legal Wales. It has been a cautious approach and linked in part to the pace of development within the law making capacity in Wales and the size of the body of Welsh law. As law-making capacity increases, and as the body of Welsh law grows, the unitary model needs to adapt further. Thus far, it has proved to be reasonably flexible in accommodating developments.

As devolution progresses, the challenges will increase and tensions will arise. How should appointment procedures for the judiciary reflect the needs of a more dualistic body of law? What are the implications of more Welsh Law and greater devolution of the administration of justice for the Welsh legal education? Should there be a Wales only law degree and professional qualification? What does the legal profession in Wales need to do to respond to the demands of Legal Wales? Should we have a separate professional body for lawyers who practice in Wales? What are the implications are for cross border practitioners? The law schools and the profession must build up the capacity within the profession to meet the needs of Legal Wales, but also to accommodate the ongoing relationship with England. However, law schools in Wales and professional legal training providers face a dilemma. To what extent can they further develop a Welsh based law degree/professional qualification without losing the all-important market of potential students living in England, other EU countries and overseas? That is a significant challenge facing the sector.

As an aside, it is also necessary for Wales to enhance its law reform capacity. I have argued elsewhere that the setting up of a Wales Law Reform Commission is desirable. It need not follow the format of the Law Commission of England and Wales, but the presence of such a body with a specific Wales focus, whilst not a prerequisite of being a jurisdiction, would assist greatly in the development of the necessary corpus of law.

Devolving the administration of justice must reflect the growth of the corpus of Welsh law and, very importantly, political devolution. It cannot lead the way, although it is essential that it does not fall too far behind. The unitary model works and will do so for the near future. However, as the body of distinct Welsh law grows in devolved areas, so too will the tensions within the unitary system.

A separate Welsh jurisdiction is not inconsistent with remaining part of the wider England and Wales/United Kingdom jurisdiction. For non-devolved matters, the unitary jurisdiction will be needed. Whether Welsh jurisdiction judges could or should hear cases involving non-devolved matters, effectively acting on behalf of the unitary jurisdiction, is a matter for discussion. In

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principle, that should not be a problem and may assist in ensuring that the courts are fully utilised. Difficulties will arise when devolved and non devolved matters arise in the same case. It will be necessary to devise criteria for deciding which court should hear the case. Of course, if Welsh jurisdiction judges are also able to hear non-devolved cases, then this problem will be avoided.

Conclusion

Yes, devolution is a process rather than an event for the Judiciary, the legal profession and the law schools in Wales as much as in the world of politics. Similarly, the development of a Welsh jurisdiction is a process. At some stage, the political decision will have to be taken to break away in part from the existing unitary jurisdiction model. Devolving the administration of justice must match the pace of devolution and the growth of the corpus of Welsh law. It cannot lead the way, although it is essential that it does not fall too far behind.

The unitary model works and will do so for the near future. However, as the body of distinct Welsh law grows in devolved areas, so too will the tensions within the unitary system. Primary law making powers will lead to a more identifiable body of Welsh law and strengthen the argument for further devolving the administration of justice and the courts in Wales. The parameters of a Welsh jurisdiction working alongside rather than completely absorbed within the English jurisdiction will become apparent. At some stage in the future, a clearly defined Welsh jurisdiction may be necessary. Meanwhile, the process of devolving the administration of justice should continue within the unitary model at a pace reflecting greater legislative powers and the growth in Welsh law.