

## Response to the Justice Commission from Ann Sherlock. Aberystwyth University

1. My research work over the past two decades has involved dealing with devolution, administrative justice, Commissioners in Wales and children's rights. These different perspectives on the public law landscape in Wales have informed this contribution which relates to the constitutional and human rights aspects of the Commission's work.
2. In relation to the devolution arrangements for Wales, a number of inquiries and Commissions<sup>1</sup> have raised questions, received evidence and made rational and principled recommendations, some of which have been adopted by the UK Government but others, due to political compromise, have not. In the evidence given in the past it is not uncommon to read that 'things can be made to work', or 'have been made to work'. The nature of the devolution settlements for Wales has necessitated this working around problems, and it is to the credit of many that working solutions have been found. However, a sound constitutional settlement should not have to depend on such pragmatic responses and goodwill. It is to be hoped that the response to this Commission's report will be principled and rational.
3. The different questions have been identified in various contexts already.<sup>2</sup> Regarding the legal system, there could be a continuation of the current single jurisdiction or two distinct jurisdictions, for Wales and for England. A distinct jurisdiction for Wales might share courts with England, might have its own courts but with the same judges as for England, or might have its own courts with its own judiciary. These questions are also separate from whether responsibility for the court system should be reserved or devolved. (These questions have been identified in the context of England & Wales / England/ Wales within the unifying framework of the EU legal system. With Brexit, it may be necessary to consider whether these questions need to be re-framed for this new context.) There is also the question of whether other aspects of the justice system should be reserved or devolved, for example, police, the probation service, and the prison service. Ultimately the decision on these options should be determined on the basis of overarching aims and principles adopted by the Commission. Such aims would include the provision of effective and affordable access to justice, dispute avoidance by encouraging improved procedures within public bodies and the learning of lessons, and early resolution of disputes. The overall devolution settlement

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<sup>1</sup> For example, the Commission on Devolution in Wales (Silk Commission), *Empowerment and Responsibility: Legislative Powers to Strengthen Wales*, 2014, chapter 10.

<sup>2</sup> Including for example, Assembly Constitutional and Legislative Affairs Committee, *Inquiry into a Separate Welsh Jurisdiction*, 2012, available at <http://www.assembly.wales/Laid%20Documents/CR-LD9135%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20-%20Inquiry%20into%20a%20Separate%20Welsh%20Jurisdiction-12122012-241484/cr-ld9135-e-English.pdf> ; Welsh Government *Consultation on a Separate Legal Jurisdiction for Wales*, 2013, available at: <https://beta.gov.wales/separate-legal-jurisdiction-wales> ; Commission on Devolution in Wales (Silk Commission), *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* 2014; Wales Governance Centre, *Justice in Wales: Principles, Progress and Next Steps*, 2016; the evidence presented to, and the reports of, the Assembly's Constitutional and Legislative Affairs Committee regarding the UK Government's Wales Bill in 2016, available at <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=15009> CLAC; Welsh Government's Explanatory Summary of its Government and Laws in Wales Draft Bill, 2016, available at: <https://gov.wales/about/organisationexplained/devolution/?lang=en> ; Lord Thomas of Cwmgiedd, *The Past and the Future of Law in Wales*, October 2017. Available at <http://sites.cardiff.ac.uk/wgc/files/2017/11/The-Past-and-the-Future-of-Law-in-Wales.pdf>

should be such as to ensure that the development and delivery of policies to deliver justice and other public services to individuals within Wales can be done in the most holistic manner. The justice system should be understood in a bottom-up way that includes initial decision making within public bodies, advice and advocacy services as well as legal advice, representation and the courts.

4. In terms of what is best for Wales in relation to its justice system, there must be regard to the particular characteristics of Wales in terms of its law, its political culture, its languages, its economy, demography and geography. Access to justice, a right in itself,<sup>3</sup> is essential in order for individuals and groups to exercise their other rights, and for public bodies to be held accountable for their actions.
5. Regarding what is 'working well' in Wales, the size of Wales appears to contribute to a general cultural willingness among civil society, government and public bodies to discuss and work together, and there appears to be a positive level of accessibility between these bodies and to Welsh Government and Assembly committees. Legislation such as the Well-being of Future Generations (Wales) Act 2015 evidences a desire for a holistic and joined-up approach to developing and delivering public services. The establishment of Commissioners to champion particular rights<sup>4</sup> is an important feature of post-devolution Wales. On the other hand, the geography of Wales, allied with poor public transport links, especially in rural areas, presents real challenges where local courts are closed and availability of local advice is limited. High levels of poverty and deprivation in certain areas are linked with issues of access to justice. Whether these factors are adequately, or indeed *can be* adequately<sup>5</sup>, taken into account when decisions are made for the whole of England and Wales is open to question. In this respect, the size of Wales within the single jurisdiction is a problem.
6. My work on the Older People's Commissioner and the Children's Commissioner for Wales in the context of administrative justice in its widest sense indicates that the Commissioners are able to take up individual issues with some level of success.<sup>6</sup> At times these are issues where an injustice has been felt by an individual but a change of policy is needed to rectify the situation.<sup>7</sup> The Commissioners can play a very valuable role in bringing to light such issues and championing them with the Welsh Government. There are, however, instances, where the reports of the Commissioners reveal decisions which were incorrectly taken.<sup>8</sup> Highlighting this type of case is also useful as it is essential that lessons are learned and that decisions are, as far as possible, right first time. It may be, however, that issues being raised consistently may indicate that a body has genuine problems with allocating resources or that

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<sup>3</sup> For example, Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2(3); European Convention on Human Rights, Article 6 (in relation to access to courts).

<sup>4</sup> For example, the Children's Commissioner for Wales, the Older People's Commissioner for Wales.

<sup>5</sup> See Lord Thomas (note 2 above) paragraph 30.

<sup>6</sup> (with J. Williams), The Children's Commissioner for Wales and the Older People's Commissioner for Wales and the Administrative Justice System, chapter 5 in S. Nason (ed) *Administrative Justice in Wales and Comparative Perspectives*, 2017.

<sup>7</sup> *Ibid*, pp137-138

<sup>8</sup> *Ibid*, p140

there are underlying systemic problems. While it is important that individuals have access to the advice, advocacy and representation that is needed to secure individual redress, repeat individual cases are not necessarily the most cost effective means of dealing with systemic problems. It is important that the aim is to get decisions right first time, and that any underlying, systemic problems which prevent this are investigated and dealt with. Identifying such trends is a valuable part of the individual case work of the Commissioners.

7. Avoiding, and early resolution of, grievances against public bodies is preferable to allowing the issues to develop into more protracted and costly disputes. Accordingly, the availability of expert advice is crucial, as are advocacy services. Both the Older People's Commissioner and the Children's Commissioner for Wales have pointed to problems with the availability and consistency of advocacy services.<sup>9</sup>
8. Having a single England and Wales jurisdiction has become increasingly anomalous (in a UK context as well as when compared with constitutional modules generally) as the law applicable in the two parts of the jurisdiction has diverged. What was originally a very limited settlement for Wales under the Government of Wales Act 1998 has been transformed into a very significant constitutional change culminating in the Wales Act 2017. Policy-making was initially divorced from law-making capacity under the Government of Wales Act 1998, and to a lesser extent under Part 3 of the Government of Wales Act 2006. Now, the failure to devolve justice matters means that policy-making and law-making are separated from the justice function in relation to the application and enforcement of the law. Action has been taken on an *ad hoc* basis without a formal constitutional approach.<sup>10</sup>
9. Welsh law currently comprises EU law, UK Acts of Parliament (including some whose provisions apply only in Wales), and Assembly laws. Having a single jurisdiction may create a false sense of uniformity of law across the entire Wales and England jurisdiction. Having two distinct jurisdictions – one where Welsh law would apply, the other where English law would apply – would, even without any further separation of the courts or personnel, or devolution, serve as an alert that the law of the particular jurisdiction would be applicable. This would be a basic but significant change. It would not, however, without other changes, serve other worthy objectives such as having a judiciary and profession which reflects Welsh society. Ensuring that there is an awareness of the potential divergence between the law applicable in each of the two units is a minimum requirement.
10. The law in Wales is more than the law on paper. In the European Union context, the term *acquis communautaire* is used to describe not only the laws but also the principles applicable at any time as interpreted and developed by the EU judiciary. It may be of value to consider whether we can talk of an *acquis Cymreig*, in other words not simply to focus on the letter of the laws made by the Assembly but to consider too the principles on which those laws are founded. There is a particular Welsh way of doing things. For example, since

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<sup>9</sup> Children's Commissioner for Wales, *Missing Voices - A review of independent professional advocacy services for looked after children and young people, care leavers and children in need in Wales*, 2012; A. Dunning, *A Scoping Study of Advocacy with Older People in Wales for the Older People's Commissioner for Wales* (2010)

<sup>10</sup> See Lord Thomas (note 2 above), para 17.

devolution, Welsh law and policy has taken a more rights-based approach to policy and law than is the case in England and has drawn on international human rights treaties to a much greater extent. There has also been a greater willingness and enthusiasm in the Assembly and Welsh Government to embrace social rights. In areas of the law such as education law, communitarian rather than market values have been more in evidence in the law in Wales compared to that applied in England. The approach to rights by way of 'due regard' duties<sup>11</sup> is more focused on proactive rather than reactive protection, and, although individual redress by way of judicial review would be possible, perhaps could be said to be more communitarian than individualistic. There appears to be a greater desire for a more holistic way of working.<sup>12</sup> These underlying principles and values need to be appreciated when the law is being interpreted and applied. While access to one of the commercial legal databases will provide an accurate account of the law in force on a particular day, the spirit of the law may be harder to capture. It may be suggested that a separate jurisdiction will contribute to the '*acquis Cymreig*', or the Welsh way of doing things, being better reflected in the legal system when it comes to the interpretation of statute law in Wales but also in relation to how the common law might develop over the long term in Wales.

11. Further to the previous point regarding the greater prominence in Welsh law compared to that to England of social rights, and the preference for proactive 'due regard' duties, there might be some gaps in expertise. Since the enactment of the Human Rights Act, awareness of the ECHR rights has developed considerably, but it may be questioned whether the same expertise exists in relation to other rights. Compulsory core modules at University law schools will cover the 'Convention rights' and Human Rights Act processes, but may deal to a lesser extent with the type of rights that underlie much Welsh Government and Assembly policy and legislation. While appreciating the proactive intent of 'due regard' duties, it is also important that lawyers are aware of the opportunities to litigate where necessary by way of judicial review actions.
12. In terms of what must be taught to law students, the most minimal and the most essential requirement is that all involved are aware that there is divergence between the two systems and that it is increasing all the time. A distinct legal jurisdiction for Wales would provide a clear alert of the possible divergence. It will never be possible to be exhaustive on covering every detail of the law. The details will change but the general principles and skills will endure. What is important is that we raise awareness of the need to ensure that one is completely up to date on the law to be applied, and that we teach the skills to research what the law on a particular subject is at a particular time is, and inculcate the understanding that this is an ongoing process. (Indeed, this is going to become even more essential over the next few years given the need to keep abreast of Brexit-related changes in the law.)  
Developing the accessibility of the law in Wales is hugely important in this respect. Academic

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<sup>11</sup> Rights of Children and Young Persons (Wales) Measure 2011, s.1 regarding the duty on Welsh Ministers to have due regard to the rights in the UN Convention on the Rights of the Child (UNCRC); Social Services and Well-being Act 2014, s. 7 regarding the duty of those exercising functions under the Act to have due regard to the United Nations Principles for Older Persons and to the UNCRC; Additional Learning Needs and Education Tribunal (Wales) Act 2018, ss 7 and 8 regarding duties to have regard to the UNCRC and UN Convention on the Rights of Persons with Disabilities.

<sup>12</sup> See for example Well-being of Future Generations (Wales) Act 2015.

commentary on the law in Wales may also be valuable and it is important that it is given recognition; at present the kind of careful and detailed analysis of legal developments which might be of particular use to practitioners would not be highly regarded within the Research Excellence Framework (REF) and academics may be encouraged to focus on work that scores more highly in REF terms.

13. It may be that students in Wales benefit from studying in the smaller of the two units within the current single jurisdiction, and in a distinct Welsh jurisdiction in the future, where awareness of devolution and legal divergence is perhaps higher. To the extent that we alert students to the growing divergence in content between the law in England and the law in Wales, students in Wales need to realise that, rather than their legal education being more 'parochial', they are getting the best of both worlds in being exposed to academic education which covers the law in England and the law in Wales, and which leads them to have a broader comparative view of law. For those not studying in Wales, as divergence increases Welsh law schools would be well placed to provide continuing professional education which covers what is needed, possibly on a distance learning basis.
14. An understanding of the bilingual nature of Wales and its law is a minimum requirement for all working with the law within Wales. It is essential that there are lawyers and judges who can work proficiently in both Welsh and English, and it is important that we continue to encourage as many students as possible to study through the medium of Welsh. (I understand that a separate submission will be made by one of my colleagues in Aberystwyth on this point.) However, for those who are not bilingual, there must be an appreciation that the interpretation of laws made bilingually must take account of this. This should not be an alien concept to any students who have studied European Union law who will know that one cannot assume that the interpretation of a provision of EU law is free from doubt without having considered the various language versions.<sup>13</sup> Perhaps in practice, to feel obliged to seek linguistic advice in one's 'home' jurisdiction may seem more unusual: if this is the case, a distinct jurisdiction which places a clear 'Wales' label on the legal system may again be of value in itself.
15. Apart from these points relating to the extent to which the legal system responds, and can respond, adequately to the needs and values of Wales, a distinct legal system for Wales would remove the anomaly, and associated complexity, of there being a single legal jurisdiction with two law-making bodies. As was seen in relation to discussion of the Wales Bill (which became the Wales Act 2017), the wish to preserve the single England and Wales jurisdiction led to greater complexity in this regard.<sup>14</sup>

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<sup>13</sup> Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, paragraphs 18 and 19 regarding the doctrine of *acte clair*.

<sup>14</sup> See the evidence presented to, and the reports of, the Assembly's Constitutional and Legislative Affairs Committee regarding the UK Government's Wales Bill in 2016, available at <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?lId=15009> CLAC; Welsh Government's Explanatory Summary of its Government and Laws in Wales Draft Bill, 2016, available at: <https://gov.wales/about/organisationexplained/devolution/?lang=en>

16. In terms of the devolution settlement, the key guiding principle should be whether services can be better developed and delivered by devolving currently reserved areas. I am not in a position to provide many practical examples, but in principle the logic of holistic development of services points strongly in the direction of further devolution. Those with direct and practical experience of the following areas will be better placed to consider the implications: for example, whether Welsh Government policy in relation to children's rights and its positive approach to children and young people in the justice system as 'Children First Offenders Second' can be fully realised when youth justice is not devolved; whether Welsh initiatives in relation to children's rights, domestic violence and community safety in general can be effectively developed without the devolution of policing. Devolution of these aspects of the justice system would ensure that the values and strategies underlying devolved areas such as housing, education and well-being could be better reflected in policing and probation. It would also clarify accountability. At present for example, Police and Crime Commissioners are accountable to the UK Home Secretary but are attentive to, and engaged with, Welsh Government's strategic aims. This is an example of making things work, but it is dependent on the goodwill and particular stances of individual Commissioners and it is not a constitutionally sound way of working for the long term.
17. While the logic of the constitutional argument appears to me to point conclusively to a separate legal system with the devolution of justice matters to the Assembly, it must be assessed whether there are the financial and other resources to cope with this level of change, especially in the short term before the benefits that might be expected long term from a more holistic way of working have become evident. These resource issues are not ones that I am in a position to assess or comment upon, other than to be concerned that an under-resourced settlement would be extremely unwise.

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