

Commission on Justice in Wales

Some observations

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Background

I am grateful to the Commission for inviting me to submit some observations.

I am currently the senior partner in Wales for Blake Morgan LLP, a firm of solicitors which was created when my previous firm Morgan Cole merged with Blake Laphorn.¹ What follows, however, is my personal opinion which, while it will not come as any surprise to my colleagues, will not necessarily be shared by them. I am fortunate in being part of a practice whose collegiate spirit enables the public expression of contrary opinions.

Like many commercial firms in England and Wales, Blake Morgan has grown from a traditional and varied base, combining a commercial service with being a high street general practice. When I joined the original firm Morgan Bruce and Nicholas in 1982, it also had a strong trade union client base, focused in particular on the mining industry.

Today, about 150 people work for the firm in our offices in Cardiff, where our practice is predominantly in commercial and public law, advising private businesses, public authorities and other institutional clients such as universities and housing associations. Our clients are based both in Wales and further afield. Shortly before the merger we analysed the split of work in the Cardiff office between private business and other clients, and also between Wales-based and non-Wales-based clients (based on postcode), and in each case the split was about 50/50. The turnover of the Cardiff office is about £20 Million.

A starting point

While it is not the sole focus of the Commission's work, a central theme is the governance within Wales of issues relating to justice, and in particular whether (a) there should be shift of executive and legislative competencies from Westminster/Whitehall to Cardiff; and (b) there should be a distinct Welsh legal jurisdiction.

¹ While I have during my career done almost every type of legal work, by now my practice is mainly advising on commercial projects, state aid and public procurement law, as well as constitutional and public law, focused in particular on the law of Welsh devolution. Before taking up my role as senior partner in Wales, I worked for a day a week at the Wales Governance Centre at Cardiff University as senior fellow in Welsh law, teaching the law of Welsh devolution at both undergraduate and postgraduate level, as well as participating in and contributing to many of the Centre's projects and publications relating to the law in Wales. From 2001 until 2013, I was the UK's member of the Committee of Experts at the Council of Europe examining compliance by states parties of their obligations under the European Charter for Regional and Minority Languages. I am a member of the Law Commission's Wales advisory committee.

I would like to explain my starting point, my assumptions. I acknowledge that what follows could be classed as prejudices, and I am open to persuasion, but nevertheless:

- Wales should have as much autonomy in the governance of its affairs as makes sense in a complex world;
- In relation to matters where it does not have autonomy, Wales should be able to participate on the basis of parity with other actors at the same level; and
- In deciding where to draw the line between Wales-only governance and shared governance, the interests of the legal profession in Wales, while a relevant factor, are subsidiary to broader issues.

Devolving justice functions and access to justice

I am not qualified to give a detailed opinion on the question of whether or not devolving to Wales executive and legislative competencies in fields such as policing would make sense. It seems to me, however, that the policy arguments made in favour of doing are unanswerable, for instance through being better able to co-ordinate interventions in order to protect our most vulnerable people and in order to work towards reducing crime and anti-social behaviour.

A particular problem facing people in Wales is access to justice and to legal advice. This manifests itself in a number of ways:

- Courts closing
- Availability of legal aid dwindling
- High street solicitors' practices closing

This problem is of course not unique to Wales, but because Wales is a relatively small country whose rural and post-industrial small towns (which have traditionally supported courts and law firms) are not always very well connected, it is an imminent issue and a pressing one. Even outside those areas, decisions made in London to cut back on legal aid have made access to justice (which includes access to competent advice) difficult for most people.² Lawyers and (I venture to suggest) civil servants, do not always appreciate how stressful and difficult an experience it is for people to engage with the legal system.

The devolution of the administration of justice to Wales would (under current arrangements) involve an allocation to the Welsh Ministers of a proportionate per capita amount linked to the annual budgets of the Ministry of Justice and Home Office. With that money, it would be possible for Welsh Ministers to take pro-active steps to tackle the issue of access to justice among other Welsh priorities.

² Cutting legal aid appears to be a bit of a false economy, given the (albeit anecdotal) tales which abound of litigants in person struggling to represent themselves, so that the time of judges and court staff is not used as efficiently as it might be.

A Welsh legal jurisdiction

The question of a distinct Welsh legal jurisdiction is one that I have been considering for many years. With my then colleague at the Wales Governance Centre, Professor Dan Wincott, I gave evidence on the subject in May 2012 to the inquiry by the Assembly's Constitutional and Legal Affairs Committee into the establishment of a separate Welsh jurisdiction. A copy of the paper which Professor Wincott and I prepared can be found here:

<http://www.senedd.assembly.wales/documents/s7799/CLA4-11-12p1%20WJ%2028%20-%20Response%20from%20Mr%20Emyr%20Lewis%20and%20Professor%20Dan%20Wincott%20Cardiff%20University.pdf>

While things have moved on, and in particular the Wales Act 2017 has introduced a reserved powers model (of sorts) for Wales, the basic analysis and reasoning in that paper continue to hold true in my opinion. The main difference now is that I am less tentative in considering that a distinct Welsh legal jurisdiction ought to come into existence, sooner rather than later.

From a practical perspective, there are two related reasons which immediately come to mind. The first reason is in order to simplify and declutter the latest iteration of the Welsh devolution settlement. While the provisions relating to the Assembly's legislative competence which were inserted by the Wales Act 2017 into the Government of Wales Act 2006 represented an improvement on the ridiculously restrictive draft Wales Bill of 2015, nevertheless they have created a new and inordinately complex legal landscape, whose twin justifications appear to be the need to preserve the unified jurisdiction of England and Wales and to ensure that all current executive power exercised in Whitehall should stay there. The second reason is that it seems even more anomalous not to have a Wales-only legal jurisdiction while advocating the executive and legislative devolution of justice powers on the grounds that this will enable 'joined up working'.

To move slightly away from practical arguments, in many ways, the Wales Act 2017 dispensation can be seen as evidence of a continued failure to take Wales seriously.³ Whatever the position may have been before devolution, the fact of a Wales-based system of governance, with both legislative and executive powers exercised here, can no longer be denied. To adopt a phrase from the Welsh Government's submission to this Commission: 'Wales' constitutional arrangements remain highly unconventional, and are an outlier in global terms.' There appears to be no persuasive reason why this should be so.

The increasing possibility that the UK will leave the European Union and its supranational legal framework throws into sharp focus the need for Wales to be able to hold its own in shaping the arrangements which will apply within the UK, and between its constituent territories if Brexit happens. As Professor Sionaidh Douglas-Scott has put it:

³ Here is an article I wrote about the subject in 2014 <http://www.iwa.wales/click/2013/06/westminster-regards-assembly-as-jumped-up-inferior/>

Although it is not always acknowledged, EU membership provided an external support system for devolution. It insulated the devolved nations from a unitary UK-wide approach...something unlikely to continue after Brexit, when a unified approach is likely to dominate however unfavourable to devolved interests.⁴

In this context, it seems to me that the persistence of England and Wales as a legal territory will make life more difficult, as ever, for those seeking to get the best outcomes for Wales.

As I hope will be clear from my joint paper with Dan Wincott, I fully appreciate that this is easier to say than to do, and that a shift to a Welsh jurisdiction is a project which would need careful scoping, planning and delivery. I do not however consider that the obstacles are insuperable, and that this is in the 'too difficult' category. We are no longer in a position where we should simply wait and see. After all, thirty years ago, even twenty years ago, it was inconceivable that Wales would have its current degree of autonomous governance.

As for the detail of how this might work, some useful suggestions can be found in the joint Wales Governance Centre / UCL report from February 2016 *Challenge and Opportunity: The Draft Wales Bill 2015*⁵.

Objections from the legal profession

I would like to address some of the objections that I have heard expressed by certain members of the legal profession in Wales to the establishment of a distinct Welsh (and accordingly English) jurisdiction.

Fear of Welsh law diverging too much from English law

This is the vestige of the old idea that it is inherently dangerous and destabilising for the people of Wales to be making their own laws. That high-level concern is one that finds its expression in the other concerns mentioned below. As a matter of fact, however, the law of Wales already exists, even though as a matter of law it does not⁶. As a matter of law, the laws which the National Assembly and Welsh Ministers make are part of the law of England and Wales, as indeed are laws made by Parliament and UK Ministers which apply in England only. Those two sets of laws (Wales-applicable laws and England-applicable laws) mean that the law which applies in Wales is in practical terms increasingly different from that which applies in England. The divergent legislative momentum and inertia of both Westminster and Cardiff Bay mean that this will increase. So for those who have concerns about the impact of Welsh law, it is already too late. The genie is out of the bottle and the world has not ended. The National Assembly can already do things (e.g. change

⁴ *Without Map or Compass* London Review of Books 24th May 2018

⁵ <http://sites.cardiff.ac.uk/wgc/files/2016/01/Challenge-and-Opportunity-The-Draft-Wales-Bill-2015.pdf> see in particular pp 37 onwards.

⁶ *pace* the feeble and rather patronising 'recognition' of Welsh law in section A2 of the Government of Wales Act 2008, introduced by the Wales Act 2017

housing law or education law, make laws that increase the cost to the public purse) which might cause 'concern', and, to cite one example has already legislated about some of the most profound aspects of life in the Human Transplantation (Wales) Act 2013.

Businesses will not come to Wales / will leave Wales because they won't want Welsh law to apply

This and similar concerns, when analysed, tend to have two aspects.

The first has to do with a 'business-unfriendly' atmosphere – the cost of (e.g.) being an employer in Wales is too high because of additional regulatory burdens. This is the old argument against regulation of any kind, from health and safety legislation to anti-bribery laws. The argument rather assumes that (a) such burdens will be imposed and (b) they will be so onerous that, in making a decision as to where to base business activities, these will be the deciding factor. Neither of these is a given, and the second runs contrary to the declared intentions of all political parties in Wales to make Wales a friendly place for business.

The second is the idea that Welsh contract law and Welsh courts will be different and therefore confusing. The first point to make is that there is no reason why Welsh contract law should differ from the current law of England and Wales. If it does, it will be because the National Assembly has legislated for difference (e.g. to protect children in relation to contracts made by them). Businesses are entitled to make contracts under any law they choose, and to choose which courts will hear their cases. Where there is express agreement between businesses as to choice of law and forum, a court will not overturn this. I frequently advise businesses based outside England and Wales, who have entered into contracts made under the laws of England and Wales and choose the Courts of England and Wales (or in both cases just 'England').

Wales cannot deliver the quality of justice that England and Wales can

Making the assumption that those who have this concern do not take the view that Welsh people or Welsh lawyers are inherently inferior in quality (an easily refutable point of view), what is left?

The concerns appear to be of two kinds.

The first is that in certain specialist areas of law Wales will not have the experience/capacity among practitioners or the judiciary to deal with certain types of cases, e.g. patent cases involving detailed scientific evidence. Leaving aside the observation that Northern Ireland, with a far smaller population than Wales, appears to be able to deal with this type of case, there are ways of managing this problem, for example involving 'borrowing' judges / practitioners from England.⁷ The Wales Governance Centre / UCL paper to which I refer above envisages one solution being two jurisdictions but with the same judicial personnel being available across both jurisdictions. In any event, it appears to me to be a very narrow ground on which to object to a distinct Welsh legal system. Such

⁷ Anecdotal evidence from Northern Ireland suggests that lawyers who become judges there will have a broader expertise and be able to have a more joined-up approach to the law.

specialist cases are rare in Wales, whereas the needs of people for a well-functioning, accessible system of justice and competent legal advice are everyday things.

The second concern is a rather self-serving one from lawyers, that they may lose business if they are thought of as 'Welsh lawyers' rather than England and Wales lawyers. Quite apart from the point that the best interest of lawyers is not necessarily a sound basis for policy decisions, it will only be a problem if we allow it to be. Increasingly, Scottish lawyers are becoming dual-qualified as solicitors in England and Wales. The possibility of Brexit has led to a large number of England and Wales lawyers applying to enrol as solicitors or barristers in Ireland. On the pessimistic assumption that the professions in Wales and in England will offer mutual barriers to entry, Welsh-qualified lawyers may have to obtain dual qualification, as of course will English-qualified lawyers. The more likely assumption is that lawyers currently entitled to practise in England and Wales would remain entitled to practise in England and in Wales. In either case, this will only be a problem if the legal profession in Wales lacks the gumption and self-confidence in to adapt, and sell its services and to work together to take advantage of the opportunities which a new arrangement could bring. The profession in Wales has already adapted, as lawyers always must do, to changing political, legal, economic and social circumstances. I hope that positive experience will be enough to dispel the danger of 'negative self-talk' in the profession.