

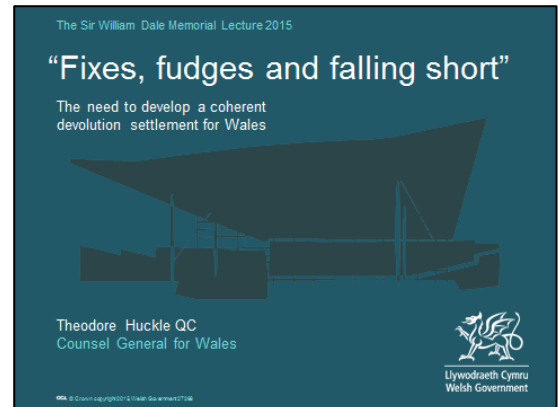
“FIXES, FUDGES AND FALLING SHORT”? THE NEED FOR A COHERENT AND LASTING DEVOLUTION SETTLEMENT FOR WALES

Sir William Dale Memorial Lecture, Institute of Advance Legal Studies, University of London

30 November 2015

Good evening ladies and gentlemen. Thank you for inviting me to give this year’s Sir William Dale Lecture.

As some of you will know, or may have heard during last year’s speech by the First Parliamentary Counsel, during his long and illustrious career as a lawyer, Sir William Dale undertook research into the legislative systems that would best meet the needs of newly independent countries. He advocated legislation that is accessible and easy to understand *“written in terms comprehensible to non-lawyers”*. He talked about clear and effective legislation devoid of unnecessary details and linguistic complexity. He encouraged *“man and woman to read and know the laws”*.



The message Dale advocated is a powerful one and is one of which we who are concerned with the law in the United Kingdom should heed. This is certainly the case in Wales, where we are very conscious of the complexity of the system within which we must develop laws. A prerequisite to developing comprehensible laws and effective systems of legislating is a coherent constitutional context for doing so. And sadly, as things presently stand, this is something I think we lack.

And here I turn to the title of this talk. The words quoted are those of Stephen Crabb MP, current Secretary of State for Wales. Mr Crabb recently said:

...the story of Welsh devolution has long been one of fixes, fudges and political expediency. Of falling short, and thinking short-term. We need to end the process of constantly tinkering with the devolution settlement. Let’s get devolution right. For the longer-term.

Well, who could disagree? The Secretary of State went on to say that he wants Welsh devolution to be clear and he wants people to be able to understand who is responsible for what. We all endorse all of these comments and I suspect Sir William Dale would shout “hurrah!” and “hear hear”.

I should make clear that though a member of the Welsh Government as its Law Officer, I am not a politician. I speak tonight from the standpoint of a lawyer and a law officer and with some diffidence I will analyse issues that are of course highly political. However, I speak from the perspective of a lawyer, a lawyer particularly concerned about the complexity of Welsh devolution and of the constitution more generally. I will seek to provide technical and practical explanations for the problems with the current devolution arrangements and within that context

will consider what is being proposed by the UK Government.

I will consider the extent to which the Welsh system of government is coherent and clear. This is a fundamentally important issue as it affects the rule of law, our respect for political institutions both in Cardiff and in London, and our democracy more generally. We are, I think, at a seminal moment in UK constitutional history. It is a time of deep questioning about the kind of relationship the nations of the UK want to have with the centre, and about the kind of relationship the UK (and its component nations) wants to have with Europe, and with other nations around the world.

Devolution to Wales: introduction

Devolution in Wales has a short but eventful history. There is no doubting that it has involved a number of compromises both between and within political parties; perhaps reflecting differences in view about Welsh nationhood, the language and devolution amongst the Welsh people themselves. These compromises were reflected in the weak and very limited system of devolution proposed in 1997, and the differences in Welsh society were arguably reflected in the referendum result when the majority in favour of devolving power was a small one.

Compromise can lead to things getting done, but it has not provided us with an effective and lasting constitution for Wales. As the American critic, poet and diplomat James Russell Lowell said: *"Compromise makes a good umbrella, but a poor roof; it is temporary expedient, often wise in party politics, almost sure to be unwise in statesmanship."*

I think this description of a compromise applies well as a metaphor for Welsh devolution, and my fear is that instead of using the recently proposed Wales Bill to build a roof, from the legal perspective the UK Government is offering Wales a smaller umbrella.

I will return to the draft Wales Bill, but before I do so I would like to set out some historical context for governing Wales, some of which is still relevant to Wales' current constitutional position. This history both recent and long past has a perhaps surprising influence on the system of government we have today.

For the story of Welsh law does not start with the nearly 50 pieces of primary legislation passed by the National Assembly for Wales since 2007, nor with the 5,000 or so statutory instruments made since 1999.

History of Welsh laws

During the reign of Welsh King Hywel Dda in the late 10th century the extant native laws of Wales are traditionally said to have been reduced to writing. Hywel came to be the ruler of a substantial part of Wales and it is said that the second part of his name – 'Da' meaning 'Good' - derives from the reputation the laws had – by the standard of the day – for being just and good. Indeed modern scholars contend that the laws contained elements of mercy, common sense, and respect for women and children that were absent from the law of England until recent times.

I have picked out as an example a provision from the old Welsh laws here that has surprising application in relation to the status of women. As we can see if a man *“sent away his wife without good cause”*, although his wife would only be allowed to stay in their house for 9 nights, their possessions are then to be shared fairly equally – and detailed provisions are made about how this is done. You would probably be stretching the teleological approach to interpretation to make it compliant with the European Convention on Human Rights but probably less so than with comparable laws elsewhere at that time.

Hywel's laws on divorce (ysgariad)

"If anyone send away his wife without lawful cause and take another in her place, by judgment the woman who has been put out is entitled to come to her home, and be in her home until the ninth day. And if on that day she is sent away first let all things which are hers go out from the house, and after the last of that number, let herself go out of the house. The husband shall have all of the pigs, the wife, the sheep. The husband shall have all the horses and mares, the oxen and cows, bullocks and heifers: the wife shall have the goats. Next the household equipment shall be divided as follows: all the vessels of milk, except one baeol [pitcher] are the wife's and all the dishes, except one meat dish, that is giddysgi [meat dish] are the husband's..."

What interests me most about the old Welsh laws, however, is that our ancestors undertook and successfully completed an exercise in codifying the law. In other words they resolved a very



"Hywel the Good, son of Cadell, by the grace of God, king of all Wales ... summoned to him from every commote of his kingdom six men who were practised in authority and jurisprudence ... to the place called the White House on the Taf in Dyfed ... the king selected from that assembly the twelve most skilled laymen of his men and the one most skilled scholar who was called Master Blegywryd, to form and interpret for him and for his kingdom, laws and usages..."

modern problem by making Welsh laws available, primarily in Welsh (as opposed to Latin), in a series of chaptered books – or codes. Famously, or at least amongst Welsh constitutional lawyers, Hywel convened an Assembly and selected the *“most skilled laymen”* and the *“one most skilled scholar, Master Blegywryd”* to *“form and interpret for him and for his kingdom, laws and usages”*.

Blegywryd was clearly the equivalent of the modern day law officer – ably assisted by his or her drafters of course! - overseeing a process similar to one we are considering doing today. This was a process that begun during the reign of Hywel but which continued over the centuries until the laws were repealed by the Law in Wales Acts, often referred to as the Acts of Union, of 1535 and 1542.

So around a thousand years ago Welsh law had been the subject of comprehensive review, had been codified and, by the standards of the day, was clearly accessible, in the language of the people, in a well ordered series of books that we can still read today.

By the end of the middle ages the concept of Welsh law has been brought to an end as a result firstly of the Statute of Rhuddlan in 1284 and subsequently by the Welsh Acts of Union – the 1536 Act making this blunt statement:

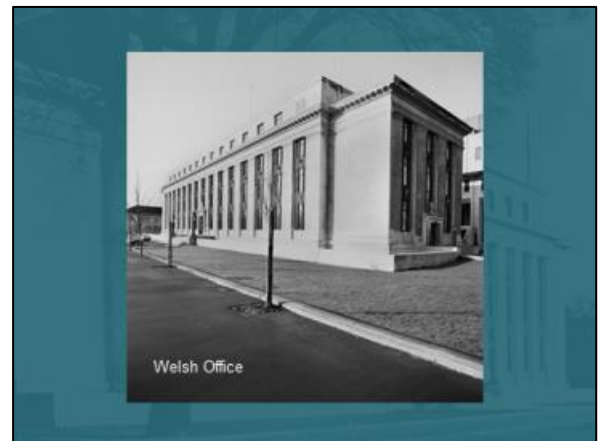
...the dominion, principality, and country of Wales justly and righteously is and ever hath been incorporated, annexed, united, and subject to and under the imperial crown of this realm as a very member and joint of the same...

And so Wales as an independent entity comes to an end, as does the concept of Welsh law. The honourable exception was the highly regarded Court of Great Session which administered the law in Wales differently – and by necessity through the medium of Welsh contrary to the laws of the

day – until abolished by the Law Terms Act 1830. Unlike the genuine Act of Union of the Kingdoms of England and Scotland this was an annexation and no Welsh institutions or Welsh legal jurisdiction were preserved.

And so it remained until the late 19th and early 20th centuries when distinct and different provision began to be made for Wales. Recognising the very different culture of Wales a small number of Acts of the United Kingdom Parliament were passed that applied to Wales only – on Sunday closing, the disestablished Church in Wales, education and the Welsh language.

Provision was made for limited administrative functions of government in Wales, creating for example the Wales Board of Education in 1907, the Agricultural Council for Wales in 1912 and later the Wales Board of Health. Most significant of all was the creation of a Minister for Welsh Affairs in 1951 and a Secretary of State for Wales in 1964, at which point the Welsh Office was created. This is a key point not only because of the significance of the creation itself of the Office but also because to this day the powers of the current Welsh legislature are based on the limited ministerial powers transferred to this office in the 1960s. The Welsh Office of the '60s is the foundation upon which our current system of government is built.



In 1999 the National Assembly for Wales was created by the Government of Wales Act 1998. While of course historic, as I have mentioned the National Assembly and the system of government it created was a compromise. The National Assembly was not a true legislature in the sense of holding a primary law making function; rather it was an elected body to which the limited powers of the Secretary of State for Wales were transferred. It was a body corporate exercising executive functions specifically and individually transferred to it from the executive in Westminster.



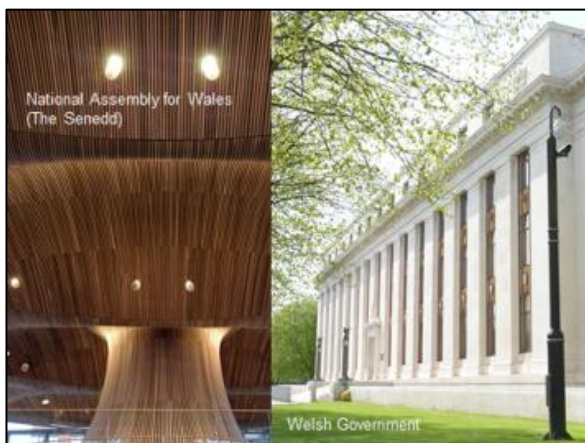
Which powers were to be transferred to the new institution was not something derived from considerations of constitutional principle. Rather it emerged firstly from a compromise between those in favour of the system of government that was eventually set out in the Scotland Act 1998, and those who did not want power devolved to Wales at all; and secondly from practical expedience. In 1999 what we saw in many respects was merely an administration being democratised and re-badged, in other words the Welsh Office's powers were held by a body of 60 politicians elected by the

people of Wales instead of by 2 or 3 Ministers appointed by the UK Prime Minister of the day.

The powers transferred from the Secretary of State to the National Assembly, as well as being very limited, had developed piecemeal; the subject of internal deals from the 1950s and '60s onwards through which responsibility for the administration of certain tasks and Ministerial decisions transferred to the Secretary of State for Wales and thus to the National Assembly.

This was an incremental process that continues to this day. Famously – and repeatedly – devolution has been described as *“a process rather than an event”*. This has proved true not only because we have had two Commissions, a Convention and 3 Parliamentary Bills on Welsh devolution in the 16 years since, but also because it already was true – in many respects what we have seen since the referendum of 1997 is a continuation of what was happening before. It has been an incremental, piecemeal process; similar to making a series of extensions to a house without stepping back to consider what the “Grand Design” really is, indeed even whether its foundations can bear the additional weight. Typical of the common law, perhaps, but surely, especially with the benefit of recent experience, we need to ask the obvious question as to whether – and apologies to the Minister for Transport – whether this is really the way to run a railroad.

Frustrations with the limitations of the new devolution arrangements set out in the 1998 Act did not take long to emerge. The adoption of a hybrid form of merged executive and legislature was soon stopped, and the system of internal delegation of power provided for in the Act was used to create what was called the Welsh Assembly Government, that confusing name itself a compromise. And the very limited powers of the National Assembly – and the inability to pass laws beyond making statutory instruments where the Secretary of State had previously been able to – made developing policy to effect real change extremely cumbersome and difficult.



It was not long before further change came with the passing of the Government of Wales Act 2006. This Act made significant changes to the corporate structure creating a formal executive and legislature and provided initially for a form of limited primary law making: the Assembly Measure. Further compromise, however, remained apparent. Assembly Measures were only permitted as individually specified from time to time by the UK Parliament by what was known as a Legislative Competence Order. A new way of devolving power piece by piece was born.

That period of often tortuous negotiation over what competence could be devolved in specific and often very narrow areas was, however, relatively short-lived, to the surprise of the promoters of the 2006 Act. This was because, following a second referendum in 2011, the people of Wales agreed that more comprehensive law-making powers should be devolved to Wales. The majority in this referendum was now considerably improved, showing the developing trust in and support for devolution in Wales, and a growing appreciation that, while very much wishing to continue as part of the UK, so far as practicable things Welsh should be done by Wales for Wales in Wales. People may not talk daily about the principle of subsidiarity on the streets of Pontypridd, but instinctively we understand it.

The National Assembly's power to pass laws remained limited because they were based on those areas I have referred to in which Ministerial powers were transferred initially from the Secretary of State. Administrative and executive devolution was converted at a stroke into legislative devolution. This meant a fragmented and complex line being drawn between what the National Assembly could and could not do.

So in 2011 we began the fourth term of the National Assembly with the third system of government in 12 years, and the government had its third name, with "Welsh Government" having been adopted as a rebranding; the formal statutory change having to await section 4 of the Wales Act 2014. This remains the system today and it is changes to this system that are proposed by the draft Wales Bill. By 2011 significantly more power had been devolved by comparison to 1999 or even 2006, but the decisions taken in the 1960s still provided the foundation for the system. Much had changed but much stayed the same.

So what is wrong with the system of governing Wales, and why does it matter?

I should begin by saying that the current system is by some distance better than those that preceded it. There is no doubting that the National Assembly and Welsh Government now have significant powers and considerable autonomy in some subject areas, education and health being the most obvious examples. Within such subjects the National Assembly can legislate effectively as the comprehensive Legislative Programme of the current Welsh Government demonstrates. Moreover, the Memorandum of Understanding and Devolution Guidance Note 9, which give expression to what the Scots call the Sewel Convention, mean that *ordinarily* UK Parliament – though (being Sovereign) always having power to – will defer to the National Assembly and not make legislative provision as to devolved subjects unless Wales wishes it to, for example in order to have straightforward provision on a matter across the whole of the UK. I have been known to say, and I think it holds largely true, that the things which most affect most people in their ordinary lives in Wales – especially health and education – are now devolved to legislative control in Wales. As I explain later, even where that applies, there are unnecessary restrictions upon it. But in any event this makes it, of course, all the more puzzling that having been vested with control of important things for life in Wales, the people have not been given control of other important – and less important – things when they see that control given to others. And so Wales may have control of its education and health services, but not – unlike Northern Ireland, Scotland – and even Manchester apparently – of its police forces. This is a disconnect and an illogicality which the people in Wales increasingly doubt.

And so, as seemed to be universally accepted when the draft Wales Bill was proposed, there remain problems. The reasons for these can in my view be categorised as follows:

- a) the powers of the National Assembly and Welsh Government remain limited in scope, considerably more limited than any similar devolved or federal systems in the common law world, and as a result they lack coherence;
- b) even within these limited powers there are further constraints through which the UK Government seeks to exert control; and

- c) the system is overly complex and there is a lack of clarity about what is and isn't devolved, including in relation to legal mechanisms fundamental for a legislature to be able to legislate effectively.

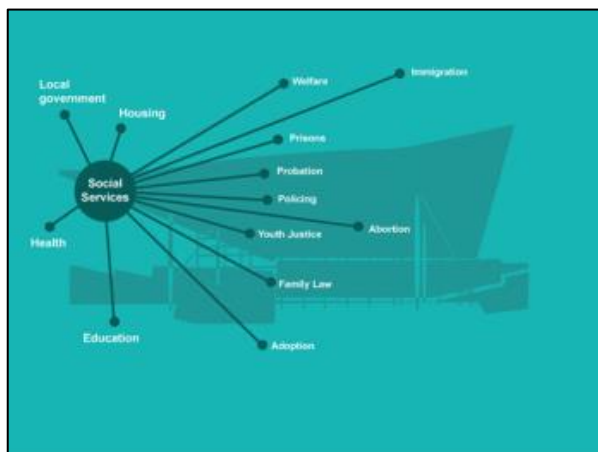
These reasons are interconnected and overlap but I will consider each in more detail in turn.

Reason 1: Limited and incoherent powers

I said earlier, I am approaching these issues from the perspective of a lawyer not a politician. While the breadth of the National Assembly's power is of course a highly political matter, it is also a highly technical one. As the Law Officer to the Welsh Government I routinely see tension between good government and policy making on the one hand and, on the other, what appears to be a somewhat arbitrary line between what is devolved and what is not.

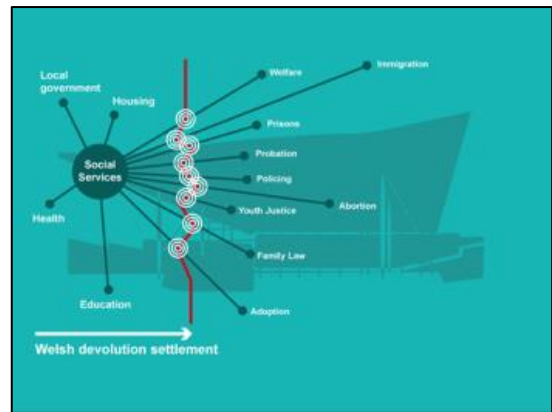
I spent some time earlier setting out the history of Welsh devolution partly in order to illustrate the point that it has evolved gradually with a lack of emphasis given to considering what is a coherent and workable system from the ground up. Transferring powers over certain areas of public policy to the Welsh Office in the 1960s was no doubt sensible at the time but it was aimed at a different outcome than the one we seek now. The then Welsh Office (the residuary UK functions for Wales are now exercised by a Wales Office, not a Welsh Office – did you see what they did there? – a terminological distinction whose significance may not of course be obvious to the uninitiated) – the then Welsh Office largely administered decisions taken elsewhere – it was a bureaucracy – and one should not assume that limited executive powers can be converted into coherent areas of competence of an effective legislature.

The reason for this is two fold. The first is that, although essential in any constitution in which power is shared, dividing what a legislature does into a series of subject headings is itself a somewhat arbitrary and artificial exercise. The problem with it is that there are bound to be extensive interconnections between subjects. So for any wholesale change in policy and law it is common for the content to relate to or be connected to more than one conferred subject. The interconnections may be policy related, administrative, financial, or legal; and at times can be such that interconnections become interdependencies. That isn't necessarily a problem when the inter-dependencies all fall within devolved areas, but it very much is when they don't.

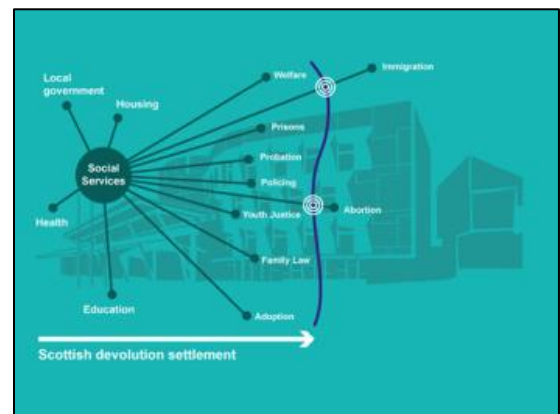


As illustrated here, a large Bill on social services will most likely impact upon a number of subjects that are also devolved – that's fairly obvious – but there are to greater or lesser degrees impacts on any number of subjects. Many of these aren't currently devolved to Wales, as can be demonstrated here.

The problem with limited competence is that the interconnections and interdependencies can often clash with the devolution settlement. The more the boundary drawn between what is devolved and what is not crosses these interconnections between subjects, the more difficult it is to implement policy and initiate reform, and the less coherent the system. It also makes the system more unstable as it means there is considerable potential for conflict.

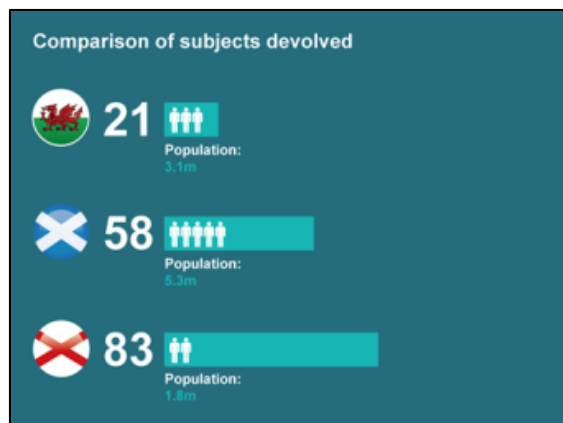


By comparison with the devolution arrangements elsewhere in the UK, the subject areas devolved to the National Assembly for Wales are few in number whilst the number of exceptions is great. In Scotland the Parliament can legislate, we think, on 37 more subject areas, and the Northern Ireland Assembly many more. Looking at an equivalent Bill on Social Services in Scotland we can see in the slide that nearly all of the interconnections are with other devolved subjects – the clash with the devolution settlement, therefore, is minimal.



Looking at the position more generally the graphic on the next slide illustrates the contrast

between the breadth of powers devolved in each Nation.



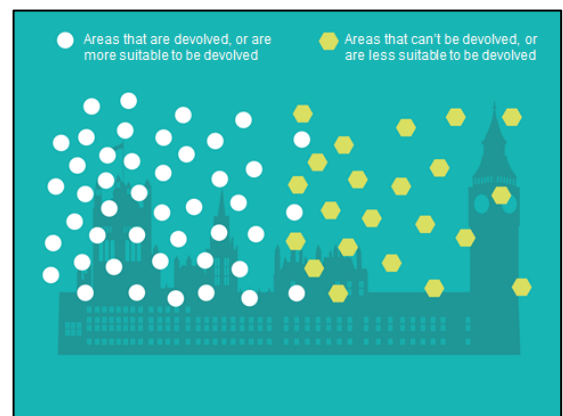
I don't think it is controversial to say that from a technical and practical perspective the more subjects that are devolved the more legally coherent devolved government will be. Conversely the fewer the subjects that are devolved the less the legal coherence. Likewise, the more exceptions there are within subject headings the less coherent the system is.

This is not a case for devolving everything or independence, far from it. There are many subjects which, it might be argued, should never be devolved, as doing so could itself threaten the democratic cohesion and purpose of the United Kingdom – something the process of devolution is intended to strengthen and not weaken.

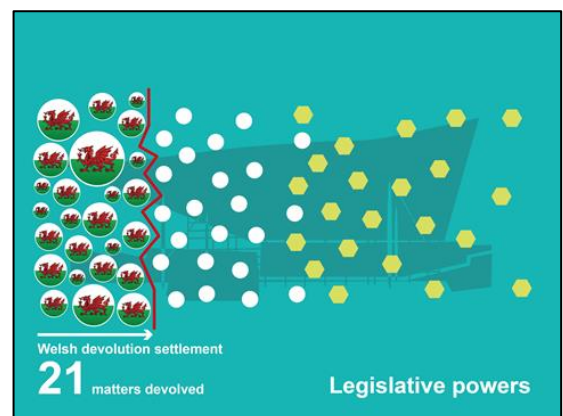
Here I have plotted out a representation of all subjects upon which a legislature may wish to legislate. On the right there are subjects that might realistically never be devolved. These include constitutional matters integral to the existence of the United Kingdom such as the Crown itself, nationality, immigration and foreign affairs, national security and defence; and matters related to the economy and the single market such as monetary policy, the European Union, the currency and aspects of trade. But as you move from right to left we start to see subjects that are capable of being devolved. In other words there is no compelling reason why – based on the principle of subsidiarity at least – the power has to be retained at the UK level. The question then is to consider which of these powers make up a coherent whole that should be devolved while minimising the interdependency between subjects that are devolved and subjects that are not. You will note that I am referring to devolution in general terms here, and not to the specifics of devolution to Northern Ireland or Scotland or Wales.



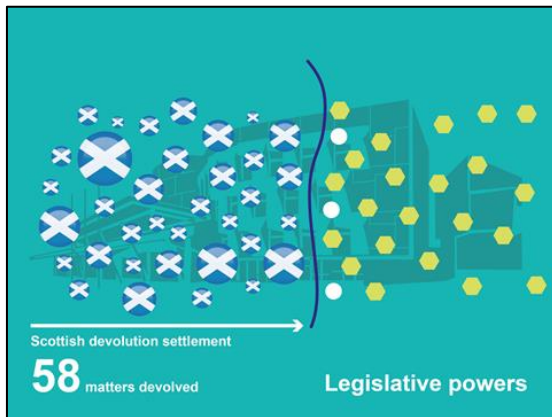
This can be shown in a different way with shapes illustrating those subject areas, with circles representing those subject areas more suitable to be devolved and hexagons those that are less suitable.



Next we see an illustration of the subjects that have currently been devolved to Wales, and also of where the line has been drawn between what is devolved and what is not. It shows the narrowness of the Welsh devolution settlement and it demonstrates how the boundary between what is devolved and what is not clashes with the interconnections between subjects. This is because many subjects that are capable of being devolved aren't devolved.



This is in marked contrast - as we can see here - with the position in Scotland. You can see firstly that far more subjects are devolved, and secondly how there is considerably less tension between what is devolved and what is not. This is because the boundary drawn is very different and the way reservations have been drawn has ensured more coherence in respect of what is devolved, with considerably fewer interdependencies.



It is no coincidence that since 2011 three Assembly Bills have been challenged at the Supreme Court for adjudication as to whether they fell within competence, while in the 16 years since the Scottish Parliament has been legislating no Bills have been referred to the Court in the same way. We are far from sure that this is a function of *how* you draw the line, but rather one of *where* you draw the line, that is the political will to devolve properly and consistently, with a proper and consistent view of subsidiarity.

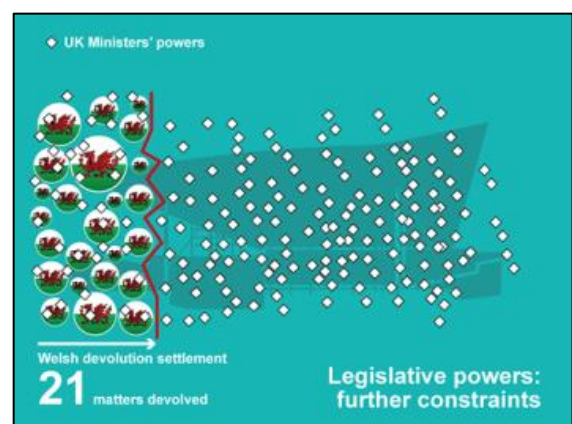
So to summarise the first problem; the subjects devolved today are based on decisions taken 50 years ago to administer a limited number of subjects in Wales, and those subjects are themselves limited in scope and by exception. This arguably makes the system relatively incoherent and has the potential to make it unstable.

Reason 2: further constraints on the powers

The second problem is that the narrow range of subjects devolved is in fact further constrained, and in ways which are not always transparent. To be within the National Assembly's competence a Bill must not only "relate to" a subject listed in Schedule 7 to the 2006 Act and not "fall within" any of the numerous exceptions to those subjects, it may also not fall foul of other restrictions set out in that Schedule.

These restrictions prevent the National Assembly from making any change to the law even where it would otherwise be within its competence. Perhaps not surprising is an inability to change the Human Rights Act and the European Communities Act 1972. More surprising, however, is a long list of provisions in the Government of Wales Act itself that the Assembly can't change – in other words it can't govern itself for example by changing the way its elections are held or the number of Members returned.

What is perhaps unexpected is the fact that the Welsh legislature often requires the consent of the UK Government when it passes Bills. This is required when a Bill seeks to modify or remove any power of a Minister of the Crown, the only exception being where doing so would be incidental to or consequential upon another provision in the Bill. While this exception does provide some flexibility, the fact remains that there are hundreds of restrictions within otherwise devolved areas – and as illustrated here this confusingly blurs the line between what is devolved and what is not.

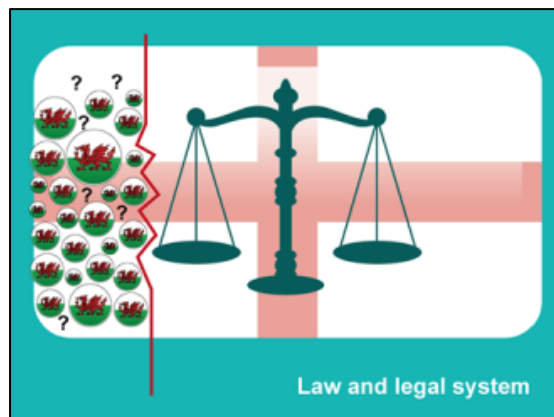


This is another factor which can make the system unstable because of the real potential for conflict and delay. The issue referred to the Supreme Court on whether consent was required for

the Welsh Government's Bill simplifying the procedure for local authorities to make byelaws was a case in point. Commentators were heard to say that when a Bill about the process for making local byelaws on public conveniences cannot be passed without being taken to the highest court in land, there is a fundamental problem. In the result the Supreme Court seems to have agreed.



A further and little understood potential constraint on the National Assembly's ability to make laws is the legal system within which it operates. Wales does not have its own legal jurisdiction or distinct body of law. The Government of Wales Act 2006 is also silent about the law itself and the legal mechanisms provided by the private law and criminal law.



It is the Welsh Government's position that the Assembly may modify the private law as appropriate and make provision about the criminal law as long as doing so also relates to a devolved matter. Despite the Supreme Court adjudicating unanimously in support of this position in the second case referred to it by the Attorney General on the Assembly's Agricultural Sector Bill, the UK Government still questions the Assembly's power to make amendments to the private law. As was argued by the Attorney General during that case, it is said, for

example, that despite housing being devolved, the law of property and contract is not. But what if a change to the latter is the most desirable way of fulfilling a policy to improve housing? We say that is within competence, the UK Government has argued that is not.

The contrast here with Scotland is great. For largely historical reasons the Scots of course have a separate legal jurisdiction and Scots criminal and private law are generally not reserved matters. In consequence they have no such concerns, beyond being subject to a necessity test when modifying the private law in relation to reserved matters. There is no general reservation of the private law itself.



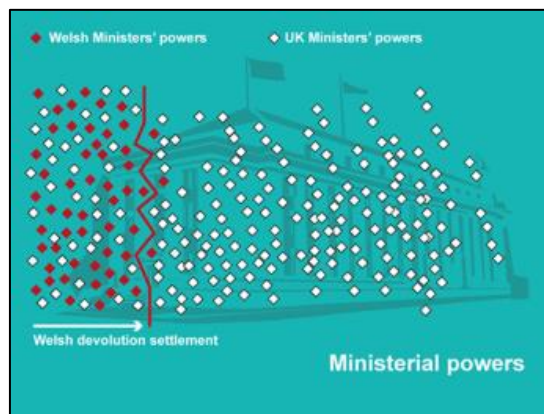
Constraint on the powers of the Assembly or not, there is a legal, financial, and administrative interconnection between all laws made in Wales and the shared jurisdiction of England and Wales. As we will see later when considering the draft Wales Bill, this is something that is clearly of concern to the UK Government. They seem to be uncomfortable with the divergence in law that is emerging. However, devolution of legislative power is essentially incompatible with attempts to make broad reservation of "the law".

Reason 3: complexity/lack of clarity

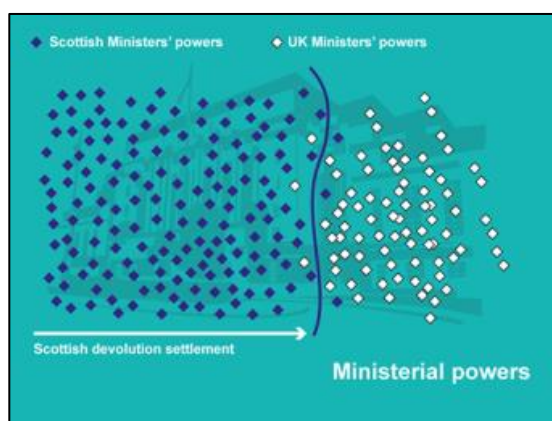
The third fundamental issue with the Welsh devolution settlement is that it is complex and therefore lacks clarity. Having appeared before the Supreme Court on three occasions arguing about what the Government of Wales Act 2006 means, this is a subject upon which I could give another lecture and would be happy to do so. But suffice it to say that the main reason the 2006 Act is complex is that it has to reflect a complex devolution settlement that evolved incrementally instead of being based on agreed general principle.

This complexity derives from its narrowness and the further restrictions including the constitutional anachronism I referred to earlier. It derives also to an extent, at least before the position was clarified by the Supreme Court – in the way that we in Wales always felt it should – from the 2006 Act's silence on certain issues, private law and criminal law being among them.

Also complex and difficult for people to understand is the confusing difference between the power of the legislature and the powers of Ministers. These powers don't always match and as we have already seen where UK Ministers have powers within devolved areas this is a constraint on devolved power. As an example, although education is in general terms devolved, setting teacher's pay is not, as the power to do so is held by UK Ministers. The same is not, however, true of the pay of professionals working in the health service in Wales. This discrepancy in relation to obvious levers of governance is hard to understand let alone justify. Incredibly there is no list of such powers and generally they can only be discovered after legal research.



Again there is a contrast here with Scotland where general provision was made to transfer all Ministerial powers in subjects within the competence of the Scottish Parliament to the Scottish Ministers. Exceptions to this are very few and are listed in the Scotland Act 1998.



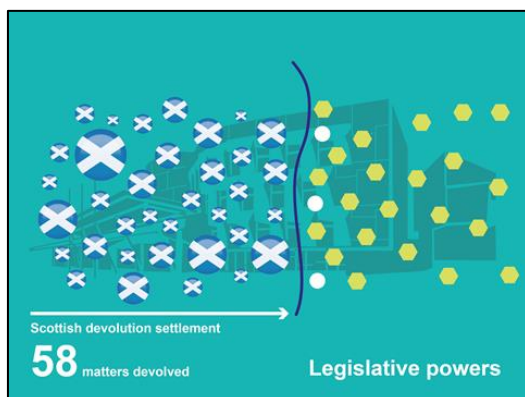
The complexity is a fundamental problem because it unfairly undermines the legitimacy of those who govern us in Cardiff and reflects badly on those who govern us from London. It impacts on accountability – and therefore democracy – because people do not understand who is responsible for what, and they cannot easily find out. And in consequence it has the potential to damage fundamentals such as the economy and even the rule of law.

Much has been said about the fact that the National Assembly has no power to legislate except in relation to the specific conferred areas of competence – a 'conferred powers model of

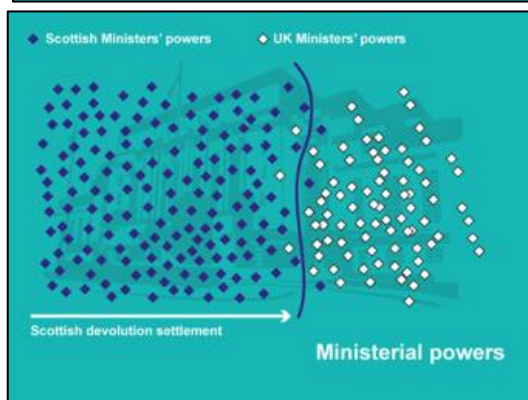
devolution'. In Scotland and Northern Ireland, on the other hand, everything is devolved unless it is specifically reserved to the UK Parliament – a 'reserved powers model of devolution'. Many have called for a move to a reserved powers model for Wales as a means of making it more understandable. But this something that is widely misunderstood, partly because a reserved powers model means different things to different people. Some equate it with a move to something similar to the very different Scottish model of devolution, while others consider it to be a technical matter with little change in the powers devolved.

My view on this is clear; if merely replicating or tweaking the Assembly's current powers, moving to a reserved powers model would not of itself improve understanding to any significant degree – it must, as the Welsh Government has argued, be accompanied by a re-statement of the settlement based on the principle of subsidiarity. The model used is essentially a drafting technique and unless there is a substantial agreement as to the proper extent of the competence of the National Assembly there will be no appreciable difference in clarity. As I have said, it is really about where the line is drawn between what is devolved and what is not, it isn't so much about how that line has been described.

So you will see I think there are problems with the Welsh system of devolution version 3. This can be demonstrated by drawing together the slides I have shown you and showing the contrast with Scotland. These slides represent the basic building blocks of governing – the competence of the legislature to legislate, the corresponding powers of Ministers, and law itself and the legal system.



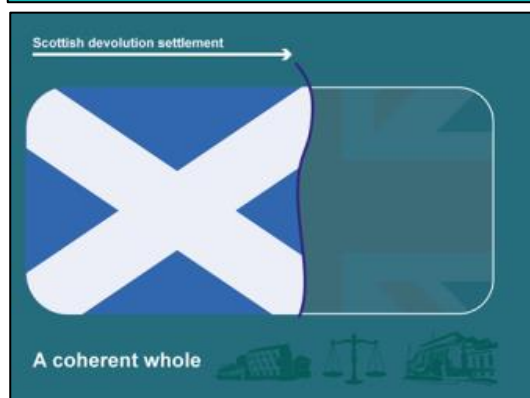
Firstly we see the competence of the Scottish Parliament to legislate about a broad range of subjects areas. Most subjects suitable to be devolved are devolved.



Then we see the corresponding powers of the Scottish Ministers and those retained by UK Ministers, which almost always correspond with the legislative competence of the legislature.



And finally we see Scots law and the Scottish legal jurisdiction; and the freedom the legislature has to use legal mechanisms like the private law and criminal law.



Brought altogether we see that devolution on Scotland makes up a coherent whole.

The system in Wales on the other hand is far less coherent and this is why I can agree with the Secretary of State that it has fallen short.

The draft Wales Bill

The issue then becomes what do we do about it and upon what basis of principle? Does the recently published draft Wales Bill provide a solution to the flaws in the current settlement, does it work and will it stand the test of time as the Secretary of State has claimed?

Limited and incoherent powers

Probably the most important point to understand about the draft Wales Bill is that despite ambitious rhetoric and high hopes, the proposals for the new settlement are cut from the same limited piece of cloth as its predecessors. It is again underpinned by an attempt at reflecting a *compromise*, though in that respect it has already failed as the all but universally negative reaction to the draft Bill has demonstrated.

Most fundamentally it takes as its starting point not an attempt to create a more workable and coherent system, but merely what has gone before. There has been no attempt to reconsider the foundations and start afresh. The only effect of the move to a reserved powers model is to hold a mirror up to what must now, in 2015, be judged as the somewhat shaky foundation of the 1960s, from the point of view of effective democracy and the rule of law. There are 40 pages of reservations and nearly a hundred exceptions to reservations – this is more than double the equivalent for Scotland. It seems that no opportunity has been missed to reserve subjects. We seem to be back to the thinking behind restricting byelaws on public conveniences.

New specific powers are devolved but they are very limited in nature. Their effect does not have a significant affect on the overall coherence of the Assembly's powers as a primary legislature.

Extra and new constraints on the devolved legislative authority of the National Assembly

Surely, however, those paternalistic and constitutionally anachronistic further constraints on the powers of the National Assembly are to be removed? Sadly the answer is no; to our great surprise they have actually been significantly enhanced, and the effect of one of the two unanimous decisions of the Supreme Court in favour of Wales actually proposed to be reversed.

The restriction on the Assembly's ability to modify or remove functions of Ministers of the Crown does not apply at present where doing so is incidental or consequential upon another provision. It also only applies to functions conferred upon Ministers before May 2011. The UK Government proposes that its consent should be required in *all* cases, no matter when the function was given to Ministers and no matter whether modifying or removing the function is incidental or consequential upon something else. Put simply this is a wide ranging veto for UK Government Ministers, one which could be misused to thwart *any* Bill proposed to the Welsh legislature.

In addition, new ways have been found to constrain the powers of the National Assembly. The veto on modifying or removing functions of Ministers of the Crown is proposed to apply also to a new concept called "reserved authorities" – one of which are the Courts of England and Wales – and 5 new tests of "necessity" and "no greater than necessary effect" have been introduced.

In addition to the added complexity that these new tests of necessity bring, a further question arises as to whether it is appropriate to make this sort of question justiciable in the courts. It is surely not. They may be seen as a constraint on decisions that should properly be for the democratically elected legislature. The courts are rightly reluctant to substitute their decision for that of the decision-maker, but the proposed necessity tests would squarely put the courts in that position.

One of these new tests purports to delineate what is devolved and what is not in so far as the private law and criminal law is concerned. This is a problem because these are the very tools that must be available to any legislature, in essence the ability to change the law – they are not subjects that can simply be reserved. The motivation appears to be a desire to restrict the National Assembly's ability to modify the basis of law within the shared jurisdiction. But a legislature exists to modify the law, how can it realistically be constrained in this way?

This would leave Wales with a narrowed legislative competence constrained by Ministerial vetoes, other restrictions and additional tests that have to be met before modifying the private and criminal law.

Given what is proposed it is difficult to understand what was meant when both the Prime Minister and the Secretary of State spoke of the respect they have for what they have called the Welsh 'Parliament'. Treating a legislature with respect surely requires the UK Government and Parliament to demark clearly such a Parliament's competence and leave it exercise its power at its discretion and based upon its people's mandate.

To be effective devolution must mean what it says, and be devolution of real power to translate the will of the people in Wales into real and effective action – by creation of law. Put another way, it is allowing another democratically mandated legislature to take decisions for its

constituent people, whether you agree with them or not.

These restrictions also arguably fall foul of two important constitutional and democratic principles. The first is that they are not consistent with the question posed to the people of Wales in the referendum of 2011. Asked if the National Assembly should be able to make laws in the 20 areas it has responsibility for without needing the consent of Parliament before doing so, the people gave a strong affirmative answer.

While the issue here concerns the consent of the UK Government, not Parliament, the fact is that the Assembly is not straightforwardly free to make laws on *all* matters in the 20 subject areas – and this despite the answer in the referendum being an overwhelming yes. There is already a problem in relation to democratic accountability under the current system and this would be made worse were the proposed Wales Bill to become law.

The second issue is that constraints like these – if required at all – should operate on a legislature to legislature basis – it is in my view constitutionally inappropriate for the Welsh legislature’s ability to make laws to be subject to a veto exercisable by the UK executive and to frequent adjudication by the judiciary.

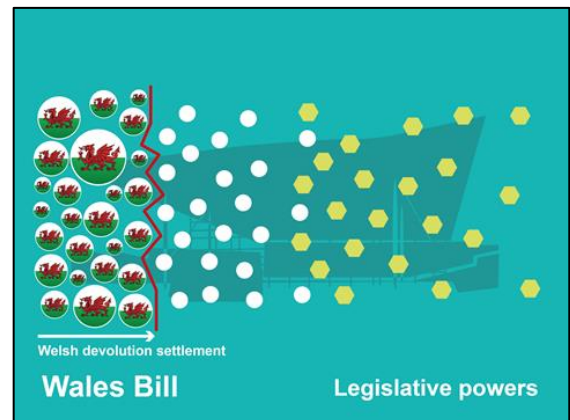
Complexity/clarity

It should be clear from what I have said already that the draft Bill does not in my view reduce complexity, improve clarity or improve governance in Wales, the very things that politicians of all parties called for. The UK Government’s approach to the competence provisions in the draft Wales Bill do not deliver a simpler, clearer settlement overall. Whilst some simplification is brought about by providing that everything is devolved except that which is reserved or restricted, the draft Bill creates new, complex layers of restrictions and tests that would inevitably require testing in the Supreme Court.

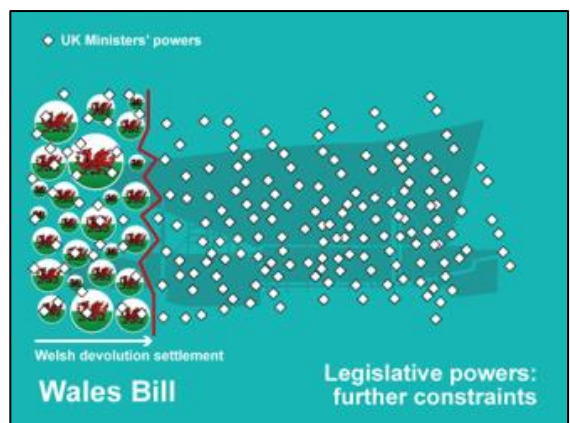
In considering whether the National Assembly has competence to legislate we undertake a process under which we must assess 6 legal questions. The draft Bill nearly doubles this with 11 questions to be answered. In passing perhaps I can observe that the Speaker will need good advice, and indeed some luck I would venture, when assessing these questions for the purpose of deciding when the new English votes for English Laws procedures apply.

These questions reflect the complexity of the settlement and unless that is addressed there is little or nothing that could be done to improve its clarity. One thing that can be done, however, is improve the drafting of the description of the subjects reserved and the exceptions to them. Here reference is routinely made to the “subject matter” of Acts of Parliament. But will the public know what the subject matter of the Universities and College Estates Acts 1925 and 1964 is? Or of the Schedule to the Agricultural Credits Act 1928? Or of the “INSPIRE” Regulations 2009? Or the subject matter of any of the 75 Acts or Regulations referred to. And will they understand what the subject matter means when the subject matter is changed or repealed?

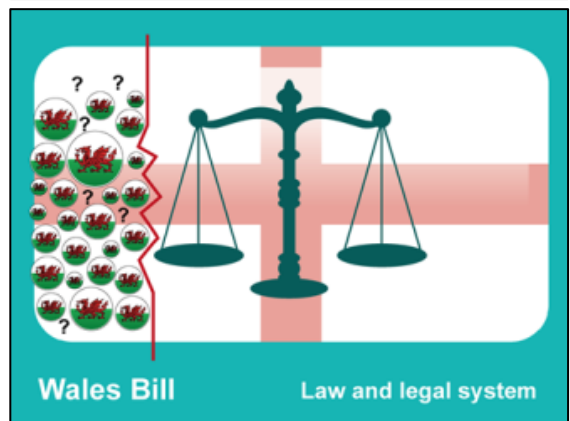
Bringing all this together, to illustrate we see here - first of all - that the powers of the National Assembly remain limited.



We see also that there are further constraints on this competence where the UK Ministers hold powers within the devolved areas.



And we see that the UK Government proposes strict tests on Assembly Acts in order to limit divergence in the law within the shared legal jurisdiction of England and Wales.



The overall picture is one of a narrow, constrained and complex system, which is surely not conducive to good government.

To conclude on this point, I am unequivocal in my view that the Bill if enacted would make the structure of Welsh devolution considerably worse, inaccessible and democratically vulnerable. It would make the system more confusing and even opaque – something which threatens to create a worrying disconnect with the people.



The answer

So what *is* the solution to this problem?

The First Minister was the first to call for a constitutional convention where leaders from the UK and devolved governments would have been able to sit down and discuss the principles of devolution, and what had to be done to achieve the robust and workable devolution settlements needed practically and democratically to equip the UK for its future. In logic and in the search for cohesion within the UK, it is difficult to see why in the long term the current asymmetry should persist, rather it might be thought be sensible to seek to reach agreement as to what – as a matter of modern democracy – should be devolved throughout the UK. In the immediate aftermath of the Scottish Referendum, the Prime Minister said (and I quote) *“I want Wales to be at the heart of the debate on how to make our United Kingdom work for all our nations. Sadly there has been no convention and little debate.”* Sadly there has been no convention and little debate.

The First Minister has nevertheless approached his discussions with the Secretary of State upon the basis of good faith – something also advocated by the Secretary of State. And we do not as a government believe that the Secretary of State has deliberately sought to develop a Bill that would hinder devolution in the way that everyone outside UK Government said it would. But in our view, and in the view of all commentators and academic experts, something has gone wrong in the machinery of UK Government in producing this draft Bill and too little consideration has been given to principle and finding a long term solution.

I believe the long term solution is an obvious one and it involves devolving more power to Wales and adopting the Scottish model of devolution. It is the solution already advocated by three of the four main Welsh political parties and the cross party Silk Commission. Polling has also consistently showed that a majority of the people of Wales are in favour of devolving more power to Wales.

Further powers are required to make the system more coherent and to enable our institutions to do their work effectively. And the Ministerial veto held by Whitehall which requires the National Assembly to seek consent even when legislating within the devolved areas must be brought to an end. This undermines the Welsh legislature’s powers, undermines accountability and creates the potential for ongoing conflict.

Professor Bogdanor has described the UK system as one in which power in relation to “domestic” matters has been devolved to the Nations. This is an understandable concept and is one that could be used for those subjects we considered earlier that are capable of being devolved. With one or two exceptions the description also accurately reflects the position in Scotland and Northern Ireland. But that is not the case for Wales. The word “domestic” can be used to describe those subjects already largely devolved to Wales like health, social care, education and housing but also very many of those that are not. The majority of the functions of the police are “domestic”, so too the justice system. There is a core of highly interconnected domestic subjects that are capable of being devolved but only around half of them have been devolved to Wales.

There is no justification in logic or fairness for the people of Wales to be treated so differently

from those in Northern Ireland or Scotland so far as the breadth and effectiveness of devolved legislative authority and executive control is concerned.

And so I would suggest that put simply the line between what is devolved to Wales and not must be moved. Devolution provision for Wales must incorporate and fully express those matters properly viewed as domestic matters in the same way as in Scotland.

Most obviously this means devolving justice and policing – the main domestic matters not yet devolved. Taking policing as an example, the vast majority of the work of the police relates to keeping communities safe – and the aspects of their work that are not, need not be devolved. As is the case in Scotland issues like terrorism, drug enforcement and international crime may readily be reserved. Thus it is interesting, to say the least, for us in Wales to note that it appears to be uncontroversial to talk of the potential for devolution of policing to Manchester, whereas devolution of policing to Wales is apparently “off the table”. And this notwithstanding the well demonstrated cohesive working practices enjoyed between the forces of England and Wales on the one hand and the devolved forces in Scotland and Northern Ireland.

The anachronistic veto held by UK Government Ministers within devolved areas must also be brought to an end.

And to coincide with all of this a separate Welsh legal jurisdiction should be created, under which the Welsh Parliament and Government would assume responsibility for the private law within the devolved areas. This would solve the complexities and tensions caused by the existing single jurisdiction of England and Wales, and significantly reduce the complexity of the existing system.

Indeed in my view there is nothing to stop us immediately creating a *distinct* legal jurisdiction of the form advocated recently in the joint report prepared by UCL’s Constitution Unit and the Wales Governance Centre. I stress that this is a matter of proper arrangements for the *system of law* as a necessary consequence of legislative devolution to the National Assembly for Wales. This is not a separatist agenda, for we in Wales do not have one of those. An important aspect of this is that there appears to be no reason at all why – at least initially – the distinct jurisdictions of England and Wales could not share the same judiciary as they currently do. This is only an extension of the long established reality that the House of Lords, now the Supreme Court, in each case sitting as a committee of the Privy Council, may act as the highest court of appeal for many jurisdictions outside the jurisdictions of the UK. As we understand it the Lord Chief Justice agrees that in principle this is a practical proposition. It also deals with the regularly raised objection to a separate jurisdiction, namely that it implies separate regulation of the legal professions from England. Let me reassure again that Welsh Government has no intention to make it more difficult for Welsh lawyers (a) to be attracted to practise in Wales or (b) to practise throughout England and Wales, or for that matter for English lawyers to practise in Wales.

I should stress that the proposals to create a Welsh legal jurisdiction, and to devolve most of the justice system are not properly viewed as novel or radical. Rather than would simply regularise an anomaly and bring Wales into line with the system adopted everywhere else in the common law world, and the other devolution settlements created at the same time as ours for populations in Scotland and Northern Ireland which are respectively slightly larger than, and indeed *smaller* than, that of Wales.

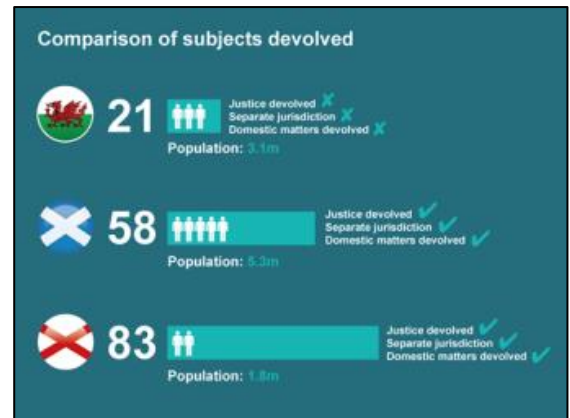
So far as we are aware, every sub-nation legislature in the common law world has an accompanying legal jurisdiction, and indeed every sub-national legislature in the common law world has power to legislate on a coherent grouping of “domestic” powers. Random examples are shown here, the criteria for selection being that their names began with ‘N’ and their population in each case is less than that of Wales.

For those who say the Welsh jurisdiction would be too small, look first at our neighbours – in particular to Northern Ireland with its population of 1.7m compared with ours of 3.1m – which is the most likely precedent to follow, and then beyond. If Wales was an American state, of the US’s 51 legal jurisdictions, 20 would be smaller in population. Between Australia and Canada, the combined population of which is less than the UK, there are 20 legal jurisdictions. In each of those countries more than half of these jurisdictions serve populations that are smaller than Wales, and in some cases they are smaller than Cardiff’s. There are 29 state legislatures in India and, even in the world’s second most populous country, 9 of them serve populations smaller than Wales.

It’s not a size thing then, is it, really? It MUST be a matter of legal coherence and effectiveness, both of the principles of devolution and of the law that expresses them.

Conclusion

May I end by reiterating how different the Welsh devolution settlement is by comparison to any other within the UK or the common law world. The differences in the settlements are such that devolution in the UK is often described as being ‘asymmetric’. But to my mind the appropriate description here is not just of asymmetry but of an anomaly as to the political and legal position of Wales.



The draft Wales Bill does nothing to address the anomaly, in fact at times it reinforces and worsens it. We already have a case of uneven distribution of powers devolved, and what is now proposed involves further vetoes and constraints, confusion over who is responsible for what, and restrictions even on using legal mechanisms such as civil and criminal law because of the lack of a separate legal jurisdiction.

So it is not surprising that Welsh devolution is considered by many to be problematic and confusing. There are reasons why every other system is different. But there is clearly a reluctance to accept that and sadly the draft Wales Bill does nothing to regularise the position. It is exactly what the Secretary of State said it shouldn't be – it is another “fudge” and it falls well short.

Winston Churchill once said that: *“The longer you can look back, the farther you can look forward.”*

This is certainly a time to look forward but we in Wales can look far back too at our history of making modern and effective laws. We must all – including and perhaps especially the lawyers – work to create a stable and lasting system of Welsh devolution. To do so we should learn the lessons from the past, both the history of other systems across the common law world and our own history in Wales, and not repeat the mistakes of the past. We must take inspiration from the good and just ancient laws of our past, we must understand how decisions taken in our recent history underpin but can also *undermine* Welsh devolution, and we must not permit that to happen. We need strong and effective law, a strong and effective law of devolution.

And so I come back to where I began, to Mr Crabb's own words. In this most important of matters for democracy and the future of the UK, we must not fix. We must not fudge. We must not do things for political expediency. We must not fall short in meeting the proper aspirations of the people of Wales. We must not think short-term. We must end the process of constantly tinkering with the devolution settlement. In short, we **MUST** get it right this time.
