Revisiting Legal Wales

The Counsel General for Wales has said that the creation of a Welsh legal jurisdiction and devolved justice system is 'inevitable'. [1] This is not the first time that a Counsel General has made such an announcement.[2] Similarly, Carwyn Jones, Counsel General in 2009, expressed that it would be 'inevitable' that the single legal jurisdiction of England and Wales would be called into question with a move to full legislative powers.[3]

The administration of justice in Wales is now under review by the Commission on Justice in Wales, established by the Welsh Government in September 2017. The UK Government has been adamant that the unified legal system works well for Wales.[4] On the other hand, the Welsh Government contends that the England and Wales system is 'no longer fit for purpose'.[5] In returning to the original concept of Legal Wales, this overview seeks to consider the constitutional and political developments that have led to the current debate regarding where justice should sit within constitutional arrangements for Wales.

The Basis of Legal Wales

The story of devolution in Wales is rooted in the unitary legal system of England and Wales since 1536.[6] Although some recognition of distinctiveness existed,[7] devolution in 1999 brought with it a renewed conception of a Legal Wales. In October 2000, Mr Justice Thomas (as he then was) highlighted the potential for the law and legal institutions to contribute towards the national identity that surrounded devolution.[8] The establishment of the National Assembly for Wales, and the ability to change the body of law in Wales, although modestly, was an impetus to reignite the role of the legal community in

[1] Welsh Government, *"A Welsh legal jurisdiction and a devolved justice system is inevitable" Counsel General tells Legal Wales conference* (12 October 2018) <https://gov.wales/newsroom/improvingpublicservices/2018/181012-a-welsh-legal-jurisdiction-and-a-devolved-justice-system-is-inevitable/?lang=en> accessed 19 October 2018.

[2] Winston Roddick QC, *The development of devolution and Legal Wales* (Centre for Welsh Legal Affairs Annual Lecture, November 2008).

[3] Carwyn Jones AM, *Law in Wales: The Next Ten Years* (Law Society in Wales Annual Lecture, 2008) 15.

[4] HM Government, *UK Government's Evidence to the Commission on Devolution in Wales, Part II: The Welsh Devolution Settlement* (2013) [13.4].

[5] Welsh Government, *Commission on Justice in Wales: Written Evidence submitted by the Welsh Government* (WG35141, 2018) 1-4.

[6] TG Watkin, *The Legal History of Wales* UWP 2007) 124.

[7] J Williams & T Jones, 'Wales as a Jurisdiction' [2004] PL 78.

[8] Sir John Thomas (as he then was), 'Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, The Welsh Language and Parochialism' in TG Watkin (ed.) *Legal Wales: Its Past, Its Future* (The Welsh Legal History Society, Vol I, 2001) 164.

Wales in a nation-building project. Prominent members of the judiciary, such as Sir Roderick Evans, set out objectives for Legal Wales:[9]

a. The repatriation to Wales of law making functions;
b. The development in Wales of a system for the administration of justice in all its forms which is tailored to the social and economic needs of Wales;
c. The development of institutions and professional bodies which will provide a proper career structure in Wales for those that want to follow a career in those fields;
d. Making the law accessible to, and readily understood, by the people of Wales;
e. The development of a system which can accommodate the use of either English or Welsh languages with equal ease so that in the administration of justice within Wales, the English and Welsh languages really are treated on the basis of equality.

Williams referred to the development of Legal Wales as 'a necessary component in the social and economic development of Wales and a litmus test for the maturity of Welsh national government and administration.'[10] On that measure, Wales remains a considerable way from maturity even after twenty years of devolution. The last two decades have been dominated by piecemeal reform to the law-making functions of the National Assembly, culminating in a reserved powers model of legislative devolution in April 2018. However, developing the objectives of Legal Wales in terms of administration of justice, remain behind.

The Inevitable Divide?

Since full primary law-making powers were introduced to Wales in 2011,[11] debate on the legal system revolved around the need, or not, of establishing a separate legal jurisdiction for Wales.[12] This blurred the Legal Wales objectives, as merely establishing a jurisdiction would not necessarily tackle the social and economic issues facing the administration of justice or accessibility of laws. This led focus away from the Legal Wales project to technical and constitutional issues of jurisdiction.[13] Himsworth offered

[9] As quoted in J Williams, 'Legal Wales' in J Osmond & JB Jones (eds.) *Birth of Welsh Democracy: The First Term of the National Assembly for Wales* (IWA WGC, 2003) 291-292.
[10] ibid 292.
[11] Government of Wales Act 2006, Part 4.
[12] National Assembly for Wales, *Inquiry into a Separate Welsh Jurisdiction* (Constitutional and Legislative Affairs Committee, 2012); Welsh Government, *A Separate Legal Jurisdiction for Wales* (Consultation Document WG-15109, March 2012).
[13] R Percival, 'How to Do Things with Jurisdictions: Wales and the Jurisdiction' [2017] PL 249.

an affirmative answer to the jurisdiction question by noting that a move to a legislative powers model would necessitate a separate jurisdiction.[14] In his view, establishing a primary law-making institution, without a corresponding legal jurisdiction would leave a 'fatal gap'.[15]

This was famously avoided through the 'apply and extend' principle that provided that laws created by the National Assembly would apply to Wales, but would extend over England and Wales, thus preserving the jurisdiction of the courts of England and Wales over Welsh law.[16] Due to this, and the limited nature of the conferred powers model of devolution, there was no particular urgency to establish a separate jurisdiction.[17] The constitutional commissions on devolution attempted to put forward issues of administration of justice within the constitutional debate but those were not taken forward in following dispensations.[18]

The fault lines of the 'apply and extend' solution became apparent when proposals were put forward by the UK Government for a reserved powers model.[19] The Draft Wales Bill 2015 placed the 'protection' of the unified jurisdiction as a priority and attempted to place very restrictive mechanisms on the legislative competence of the National Assembly.[20] For example, it placed a necessity test on the competence of the National Assembly for any legislation that modified 'private law', 'criminal law and civil sanctions', and many reserved matters that related to justice matters. This was coupled with a general reservation of the 'single legal jurisdiction of England and Wales'.[21] It would have limited the ability of the legislature to create new offences or place enforcement provisions in Welsh legislation.[22]

The jurisdiction issue became an urgent matter when the Welsh Government changed its approach through its own alternative draft Bill which would immediately establish a distinct, rather than

[14] C Himsworth, 'Continuing Asymmetries in the New Logic of the Devolution Settlement' [2005] 4 Wales Journal of Law and Policy 24, 30.
[15] ibid 32.
[16] Government of Wales Act 2006, s.94(4)(b) & s.94(6)(b), followed by s.108(4)(b) and s.108(6)(b); Government of Wales Act 2006, Explanatory Notes, 409 [374]; TG Watkin, *Legislating for Wales* (UWP 2018) [4.76].
[17] National Assembly for Wales (n 12) 4-6.
[18] R Rawlings, 'The Strange Reconstitution of Wales' [2018] PL 62, 68; The Commission on Devolution in Wales, *Empowerment and Responsibility: Legislative Powers to Strengthen Wales* (2014) Chapter 10; *Report of the Richard Commission* (2004) 193-194.
[19] HM Government, *Powers for a Purpose: Towards a lasting devolution settlement for Wales* (Cm 9020, February 2015).
[20] HM Government, *The Draft Wales Bill 2015* (October 2015) 86; Wales Governance Centre & The Constitution Unit, *Challenge and Opportunity: The Draft Wales Bill 2015* (February 2016) 28-29.
[21] Wales Governance Centre (n 20) 28-29.
[22] Rawlings (n 18) 70.

separate, jurisdiction.[23] This interpretation divides the law and courts of Wales and the law and courts of England, but the administration of justice remains unified. Administration of justice functions could then be devolved over time to create a separate jurisdiction, as recommended by the Silk Commission.[24] This epitomises the prevalence at the time of the need to fix the constitutional issues before tackling matters of administration of justice.

Ultimately, the UK Government managed to retain the single jurisdiction in the Wales Act 2017 without the restrictive clauses it thought necessary at the outset. Despite this, the issue of a Welsh jurisdiction and justice system is now firmly on the agenda. Ironically, it was by trying to ensure no gap in the unitary jurisdiction that the 'fatal gap' was exposed.

Continuing Changes to the Administration of Justice in Wales

It would be incorrect to suggest that the administration of justice in Wales has remained static. Reforms designed to recognise the national legal identity and the constitutional landscape in Wales have occurred throughout the last two decades. Other reforms are the result of deficiencies in the Welsh constitutional dispensation and the need to recognise that some aspects of justice are already devolved.

Administrative reform, often judge-led, have made landmark contributions to the vision of a Legal Wales.[25] The establishment of an all-Wales court circuit, now supported by a HMCTS Wales directorate and support unit, was a significant step forward.[26] Arrangements also allow both divisions of the Court of Appeal to sit for a number of days annually in Wales. Changes to rules and procedures that reinforce the right to use the Welsh language in legal proceedings also adds to the administrative distinctiveness in Wales.[27]

Institutional changes have also occurred with establishing the Mercantile Court in Wales and subsequently, the Administrative Court, and Administrative Court Office, in Wales.[28] This is significant

[23] Welsh Government, *Government and Laws in Wales Draft Bill: Explanatory Summary* (WG28243, March 2016) 19-20; Wales Governance Centre (n 20) 32-41.
[24] Welsh Government (n 23) [62]; Commission on Devolution in Wales (n 18) 123.
[25] Pill LJ, Speech at Legal Wales Conference (Cardiff, 9 October 2009).
[26] Mr Justice Roderick Evans, *Devolution and the Administration of Justice* (Lord Callaghan Memorial Lecture 2010).
[27] The Civil Procedure (Amendment No. 3) Rules 2018, No. 975 (L. 9).
[28] D Gardner, *Administrative Law and the Administrative Court in Wales* (UWP 2016).

as it recognises the constitutional status of Wales and promotes wider justifications of the benefits of decentralising the administration of justice.[29] Allowing cases against public authorities in Wales to be heard in the Administrative Court in Wales serves an important constitutional purpose which is consistent with Legal Wales.[30]

There are several other models where England and Wales justice institutions have made some administrative changes to recognise the constitutional position of Wales.[31] These can include initiatives such as establishing Welsh networks,[32] appointing permanent Welsh representatives,[33] establishing a Welsh advisory board or committee,[34] or having a permanent presence in Wales through a Welsh office or team.[35]

As the history of devolution in the UK makes us aware, administrative decentralisation can only go so far.[36] It may give Wales recognition of a legal identity, and respond to constitutional changes, but it does not allow for the Welsh Government to exercise justice functions to develop a substantive justice policy suitable for the social or economic needs of Wales. Coupled with that is the strain on the principle of accountability, and potential democratic deficiency, when reserved and non-reserved services interact, in areas such as learning and skills for prisoners for example.[37]

Other reforms have had a more direct impact on justice functions and institutions. The National Assembly can create new offences, penalties, and review mechanisms, but do not to have powers over justice institutions to implement them fully. For example, executive responsibility for some administrative tribunals were transferred to the National Assembly in 1999. The National Assembly has also established new redress and adjudicative mechanisms, such as Commissioners and the Welsh Language Tribunal, that have a Wales-only jurisdiction. The Welsh Government have made organisational changes to deal with its justice functions by establishing a Justice Policy Team and a Welsh Tribunals Unit. However, without independent Welsh institutions, that ensure judicial

[29] May LJ, *Justice Outside London* (2010) <https://www.judiciary.uk/publications/cardiff-and-wales/> accessed 19 October 2018.
[30] Practice Direction 54D; R *(Deepdock) v The Welsh Ministers* [2007] EWHC 3347 (Admin).
[31] H Pritchard, *Justice in Wales: Principles, Progress, and Next Steps* (WGC 2016).
[32] The Wales Youth Justice Advisory Panel for example.
[33] The Judicial Appointments Commission for example.
[34] Law Commission, and Civil Procedure Rules Committee, for example.
[35] The Home Office for example.
[36] W Roddick QC (n 2); J Mitchell, *Devolution in the UK* (MUP, 2009).
[37] Welsh Government, *Commission on Justice in Wales: Supplementary Paper from the Welsh Government Cabinet Secretary for Local Government and Communities* (WG35635, 2018) 3.

independence and the rule of law, a constitutional and democratic gap for the administration of justice remains.[38]

The Welsh Government has alleviated this through intergovernmental and cross-border arrangements and recently established a concordat with the Ministry of Justice.[39] It also has a working level agreement with the Judicial Appointments Commission to appoint members of Welsh Tribunals.[40] Statutory reforms were required in the Wales Act 2017 to establish a President of Welsh Tribunals that provides judicial leadership, it also makes provisions for enhancing career opportunities for tribunal judges, and reorganises Welsh tribunals.[41]

These are positive developments, but intergovernmental arrangements and specific legislative reform are reactive initiatives to deal with a constitutional anomaly in the original devolution dispensation. The Welsh Government has expressed frustration that working on an intergovernmental basis makes finding solutions for difficult situations more complex.[42] Establishing new statutory judicial positions and institutions may eventually provide a catalyst to build justice institutions and governance arrangements for other areas of justice in Wales.[43] However, they have been born out of constitutional deficiency, not out of a positive vision for a Legal Wales.

Commission on Justice in Wales

The prevalence of the constitutional debate, and the ad hoc administrative decentralisation, means that there has not been a holistic approach to advancing Legal Wales. The establishment of the Commission on Justice in Wales is a chance to do so as it places administration of justice central, rather than as part of wider constitutional discussion.[44] Crucially, it is also an opportunity to build a strong foundation of evidence and research.[45]

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[38] Lord Thomas (n 8) 160-161.

[39] *Concordat between the Ministry of Justice and Welsh Government* (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719350/moj-wg-concordat.pdf> accessed 19 October 2018.

[40] Welsh Government, *Committee for Administrative Justice and Tribunals, Wales (CAJTW) Legacy Report: Welsh Government Response* (July 2016) 2 <https://gov.wales/docs/cabinetstatements/2016/160729justicetribunalsreportresponseen.pdf> accessed 19 October 2018.

[41] Wales Act 2017, Part 3.

[42] Welsh Government (n 37) 2.

[43] H Pritchard 'Building a Welsh Jurisdiction through Administrative Justice' in S Nason (ed.) *Administrative Justice in Wales and Comparative Perspectives* (UWP 2017) 218; Rawlings (n 21) 76-77.

[44] Lord Thomas of Cwmgiedd, The Past and the Future of Law in Wales (WGC & PLW, October 2018) [10].

[45] See for example, R Jones, *Imprisonment in Wales: A Factfile* (WGC June 2018).

The appointment of Lord Thomas, former Lord Chief Justice of England and Wales and a founding thinker of Legal Wales, is also an opportunity for the Commission to revisit the roots of Legal Wales within the modern devolution context. He is supported by Commissioners from backgrounds that include judicial, academic, legal practice, the police, and the operation of criminal justice. This has the potential to extend Legal Wales beyond its judicial and legal origins into areas such as policing and rehabilitation of offenders.

The remit of the Commission is two-fold. Its first task is to review the current operation of justice in Wales, and secondly, to set a long-term vision for its future.[46] It has a wide remit over five ambitious work streams that include; criminal justice, civil justice, the legal profession and legal tech and the economy, legal education and training, and access to justice.

The Commission underpins its work with principles that are consistent with the original Legal Wales objectives. Despite twenty years elapsing, they are strikingly similar in terms of 'first tasks' highlighted by Lord Thomas in his 2000 lecture. The Commission returns to the core matters highlighted in that lecture of providing better access to justice, through exploring technological innovation, and the contribution of the legal sector towards the economy.[47]

The Commission's principles also articulate other matters in more detail. For example, there is a clearer understanding that there are a wide range of services that contribute and support the justice system that go beyond the strictly legal, in areas such as the rehabilitation of offenders, debt advice, and housing services.[48]

Finally, Legal Wales was designed as an outward looking platform of 'what contribution can be made by "Legal Wales" to the nation'.[49] The Commission continues this approach. Its principles emphasise that justice itself is central to 'good governance, prosperity and fairness' in Welsh society as a whole.[50] This brings into question the relationship between government and justice functions. As has been suggested elsewhere by Lord Thomas, 'justice is central to society' and it is therefore central to enquire 'whether you can operate a system of government without devolving justice.'[51]

[46] Commission on Justice in Wales, *Call for Evidence* (February 2018) 1.
[47] Ibid; Lord Thomas (n 8) 164.
[48] Commission on Justice (n 46) 2-3.
[49] Lord Thomas (n 8) 114.
[50] Commission on Justice (n 46) 2.
[51] Lord Thomas (n 44) [18]

The Commission embodies the spirit of the original concept of Legal Wales, but is also a valuable advancement on the original objectives. It returns the importance of the administration of justice centrally to the constitutional arrangements in Wales and to its value to society more broadly.

Welsh Government Approach

Alongside the Commission, the Welsh Government has been exercising its functions in ways that are overtly connected to matters of justice and Legal Wales, based on improving social justice and calling for subsidiarity.[52] For example, it has been working with HM Prison and Probation Service and the Youth Justice Board on 'distinct justice delivery models' in Wales for women offenders and young people who offend.[53] Alun Davies AM, Cabinet Secretary for Local Government and Public Services, has further discussed the need to design a prison estate for the needs of people of Wales.[54] Also, recent consultations have expressly framed devolved matters as issues of justice, such as removing the defence of reasonable punishment against children, and removing the imprisonment sanction for non-payment of council tax.[55]

Another Welsh Government policy directly related to the original Legal Wales objective is the project on accessibility of Welsh law.[56] The Legislation (Wales) Bill is set to place a duty on the Counsel General to keep the accessibility of Welsh law under review and develop a future programme of consolidation and codification.[57] This contributes to the centrality of justice, similarly expressed to Lord Thomas, as the accessibility project is framed not just as improving resources for lawyers, but also as central to 'social justice, democracy, and efficiency'.[58] On-going Welsh Government reforms will naturally lead to further divergence in law and practice between England and Wales. This will bring the current model of administration of justice into question whatever the final recommendations of the Commission.

[52] Jeremy Miles AM, *Towards a Just Wales* (Bevan Foundation, August 2018); Welsh Government (n 4) 4.
[53] Welsh Government (n 37) 2.
[54] National Assembly for Wales, Plenary 9 October 2018 [277].
[55] Welsh Government, *Legislative Proposal To Remove The Defence Of Reasonable Punishment* (Consultation Document, 9 January 2018); Welsh Government, *Removal of the sanction of imprisonment for the non-payment of council tax* (Consultation Document, 11 June 2018).
[56] Law Commission, *Form and Accessibility of the Law Applicable in Wales* (Law Com No.366, October 2016).
[57] Welsh Government, *Draft Legislation (Wales) Bill* (Consultation Document, 20 March 2018) Chapter 2. The Legislation (Wales) Bill is set to be laid in the Senedd before the end of 2018.
[58] Ibid 7.

Conclusion

Although almost two decades old, the original vision of Legal Wales still provides a relevant framework to approach the issue of a Welsh legal system. An urgency in the need to take the administration of justice in Wales seriously has emerged following fundamental opposition between the UK and Welsh governments over the appropriate constitutional position of justice. That urgency is actively expressed by the work of the Commission and in contemporary government policies in Wales. Looking at Legal Wales today, the interpretation of 'inevitability' may mean devolving justice sooner rather than later.