Justice for Wales

In support of a Welsh Jurisdiction

September 2015

Foreword

When Wales became part of the English legal jurisdiction in the 1530s it did so as the result of a political process the purpose of which was to treat Wales as part of England and although Wales retained a court system different from England until 1830 the political purpose of Henry VIII was largely achieved. Hence, the well-known entry in past indices of Encyclopedia Britannica: "For Wales, see England".

The constitutional position of Wales in the 1530s was very different from what it is today and the differences will increase and become more fundamental as the process of devolution continues and the powers and responsibilities of The National Assembly continue to grow. Within the present jurisdiction we have two primary law making bodies – one in Westminster and the other in Cardiff. However, for the purposes of the administration of justice – from the running of the courts and the appointment and deployment of judges to the punishment and rehabilitation of offenders – Wales is treated as part of England. Decisions and policies made in London on the basis of

what is required for the large cities of England are applied to Wales whether they are suitable for Wales or not.

It is inconceivable that if we sat down and drew up a blueprint for a Welsh jurisdiction today that we would end up with the system and structures we have today.

The Welsh Government has made it clear that its intention is to see the creation of a Welsh jurisdiction and that in the immediate future Wales' position within the present jurisdiction should be strengthened. The purpose of this pamphlet is to set out some of the arguments for, and the advantages to Wales of, creating a Welsh jurisdiction – a jurisdiction tailor made to meet the demographic, geographic, linguistic and economic needs of Wales.

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Introduction

Of the four nations that make up the United Kingdom, Wales is alone in lacking its own justice system.

Justice for Wales wants to put that right.

We are a gathering of lawyers, including supporters of all the main political parties in Wales, both Welsh speakers and non-Welsh speakers, who have come together in a non-partisan campaign to call for the re-establishment of a Welsh jurisdiction.

The economic case for a Welsh jurisdiction is strong and the constitutional case is overwhelming.

We use the term re-establishment deliberately. Until 1830, Wales did have its own court system – the Court of Great Sessions.

Whereas the Administration of Justice Act 1830 considered it "expedient to put an end to the separate Jurisdiction for Wales", we believe that re-establishment of that jurisdiction is not merely expedient, but will bring positive benefits to Wales and the United Kingdom.

There is a growing recognition that a separate jurisdiction is inevitable and that sooner or later, Wales will *need* its own justice system. Those who would rather put it off effectively say that we should wait until the need is pressing before doing anything. This is a bit like saying that there is no point having insurance until something has gone wrong.

We do not believe that it is right to gamble with the futures of Wales and the United Kingdom in that way. This pamphlet seeks to explain why.

What is a Welsh jurisdiction?

Put simply, a Welsh jurisdiction would mean Wales having its own legal system and courts, just as Scotland and Northern Ireland do.

At present, Wales shares a legal system with England.

A judge who sits in Carlisle is as much a 'Welsh judge' as a judge who sits in Carmarthen.

The law created by the National Assembly of Wales is - in legal terms - as much a law of England as it is a law of Wales (even though voters in England had no say in its creation). Confusing isn't it?

In practice, the shared court system of England and Wales means that cases involving issues solely relating to Wales are routinely decided by courts in England and by judges with little or no connection to, or experience of, Wales or the law created by the National Assembly.

A Welsh jurisdiction would mean that only Welsh courts would decide cases relating to Wales, just as cases in Scotland and Northern Ireland are decided before those countries' courts. The law of Wales would no longer be part of the law of England.

There is nothing new or foreign to the United Kingdom in that concept. The UK has never had a single unified legal system.

Scotland's system pre-dates the Union. Northern Ireland's system was split from that of the rest of Ireland following partition – prior to partition, the Irish court system had itself existed separately to those of the other nations within the Union for over 100 years.

Throughout the history of the United Kingdom, distinct legal systems for its constituent nations (including, in the past, Wales) have been a constant feature.

The re-establishment of a separate jurisdiction for Wales would, therefore, require little change. It would open up possibilities, rather than compel radical change.

The simplest course would be to adopt the existing court structure. This would mean Wales having its own magistrates' courts, Crown Court, High Court and a Court of Appeal, as Northern Ireland does.

But a Welsh jurisdiction would not be bound by that structure and would be free to move to any other model that may be appropriate to Wales. For example, in criminal matters a single first-instance tier might replace the magistrates' courts and the Crown Court. The creation of a full-time Court of Appeal might not be needed. Perhaps the civil and criminal courts might be unified?

Indeed, a new Court of Great Sessions might be created, with civil, criminal and appellate divisions, and judges sitting where required.

These are just some of the possibilities.

The Constitutional Case for a Welsh Jurisdiction

The single jurisdiction of England & Wales has two primary law-making bodies creating law of equal status for it – the UK Parliament and the National Assembly for Wales. Within the competencies of the Assembly, Acts of the Assembly are of the same legal status as an Act of the UK Parliament.

In democratic terms, voters in Wales have the advantage in that they have a democratic say in both primary law-making bodies. In contrast, voters in England have no democratic say in the National Assembly, yet it creates law that forms part of the law of England.

This concern is not merely academic. Unlike the Scottish Parliament and the Northern Ireland Assembly, the National Assembly can make laws that will affect people living in England (see sections 108(5) and (6) of the Government of Wales Act 2006).

With the Assembly moving to a reserved powers model - where the Assembly will be competent to create law on any subject matter save for those relating to reserved matters - for so long as Acts of the Assembly form part of the law of England as well as Wales, the scope for uncertainty as to the reach of the Assembly may increase.

What happens if a person living in England is affected by a law of the Assembly and there are other relevant laws made by the UK Parliament which might lead to a different outcome? No one knows.

Where a legal action implicates the laws of more than one jurisdiction and a court must determine which law is the most appropriate to resolve the action, there is a well-established body of rules known as 'the conflict of laws' or 'private international law' for the court and parties to follow. No such rules exist where the laws of more than one primary law-making body within the same jurisdiction are implicated.

Whereas people living in England suffer the democratic disadvantage of the shared jurisdiction of England & Wales, Wales suffers a deficit in justice.

In no other country in the common law world, does a territory with primary law making powers, share a court system in the way that Wales does with England.

Federal countries such as Australia and the USA have federal courts, as well as state courts. But the UK is not a federal country, and the courts of England & Wales are not federal courts.

At present, a court sitting in Sheffield or Luton is as competent to determine the meaning of Welsh legislation as one sitting in Swansea or Llangefni.

Concessions to the Welsh nature of a case may be made – the administrative court often sits in Cardiff and has an office there; the Court of Appeal visits (but has no office in Wales and appeals have to be filed in London); judges born in Wales may be allocated to hear Welsh cases – but these are merely steps that mitigate a fundamentally unsatisfactory situation.

It is important that judges understand the cultural milieu from which cases that they hear, and the laws they interpret, arise. The New Zealand judiciary, for example, is of high repute, but few would think it acceptable that New Zealand judges should routinely decide English cases and interpret English laws.

The legal legacy of 'England & Wales' should not be underestimated. Lawyers in England (and Wales) are used to the idea that the law in Wales is

the same as in England, with few exceptions. In significant areas of the law (for example, health care, planning and housing), this is no longer the case. There is a very real risk that judges whose entire professional lives have been based in England will interpret Welsh laws to mean the same as in England, and to minimize any differences. This would erode the ability of the people of Wales to make effective legislative choices.

The risk we perceive above is illustrated by the most recent Supreme Court ruling on the Assembly's legislative competence, which saw the majority give a ruling that seemed reluctant to acknowledge that the Assembly is, within its competences, entitled to the same respect in its democratic judgment as the House of Commons (*Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3).

The Supreme Court is required by the Constitutional Reform Act 2005 to be constituted such as to 'ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom'.

Invariably, the Court has at least two Scottish Justices (appointed from judges sitting in the Scottish courts) and one Northern Irish Justice (by convention, the most recent former Lord Chief Justice of Northern Ireland). The Supreme Court does not have a 'Welsh judge' and in the absence of a separate Welsh jurisdiction it is very hard to define one. We would expect that following the re-establishment of a separate jurisdiction for Wales, the president or chief justice of Wales would in due course join the UK Supreme Court.

We say that the constitutional case for the re-establishment of a separate jurisdiction for Wales is overwhelming. It would:

- Remove a democratic disadvantage vis-à-vis England;
- Remedy the judicial disadvantage vis-à-vis Wales;
- Provide clarity as to where the boundary is to be drawn between what is a 'Welsh' law and what is an 'English' law;
- Provide a clear set of rules to be followed in circumstances where both the laws of England and the laws of Wales are involved and there is a need to determine which is the most appropriate to resolve matters; and
- Act as an important signpost to judges and lawyers (and to the public, to business and to politicians, for that matter) that the law as it applies in Wales is different from England.

The Economic Case for a Welsh Jurisdiction

A justice system is fundamental to a country's prosperity. If Wales controlled its own justice system, it could manage that system to better suit Wales and its economic needs.

The economic case for a Welsh jurisdiction is twofold; there is the impact that it could have on the business sector in general, and on the legal sector specifically.

The existing jurisdiction of England & Wales may be the jurisdiction of choice for many litigants who otherwise have little territorial connection to the UK. The primary beneficiaries of that popularity, however, are London's major commercial law firms.

Indeed, the focus of the jurisdiction is increasingly fixed on London's status as a centre for international litigation, at the expense of serving the needs of – and encouraging the growth of – homegrown businesses.

By controlling our own justice system in Wales, we could make sure that the needs of international litigation did not take priority over the everyday business of the courts. In doing so, we would already be making Wales a more attractive place to do business.

In its report entitled 'Doing Business 2015', the World Bank ranked the UK only 36th in the world for 'Enforcing Contracts – how judicial efficiency supports freedom of contract'. According to the World Bank, enforcing a low-to-mid value contractual claim in the UK typically costs 39.9% of the value of the claim. This compares unfavourably with Germany (14.4%), France (17.4%), Australia (21.8%) and the United States (30.5%).

Assuming a claim value of £52,000, a contested trial requiring expert evidence as to the quality of the goods and then a lengthy enforcement process (an average of 437 days), the report estimates that the total costs (including court fees and professional costs would be £20,800 (as of June 1, 2014).

Those figures will only get worse. On 1st April 2015, the cost of simply issuing proceedings in England & Wales for a money claim of £10,000 or more increased to 5% of the value of the claim, with a cap on the maximum fee of £10,000.

What this means for a claim such as the World Bank example above is an increase in the fee from £910 to £2,600. That is an increase of 285%; and overall court costs as assessed in the report would go up from 3.7% to 7% of the overall value of the claim. For a claim of £200,000 or more, the issue fee will go up from £1,515 to £10,000 – an increase of 660%. It also means, of course, that those bringing claims of between £10,000 and £200,000 will pay proportionately greater court fees than those with claims in excess of £200,000. The court fee for a claim of £3 million, for example, will amount to only 0.33% of the claim, rather than 5%.

The effect this will have on the ability of small-to-medium size businesses to pursue claims is obvious. Many will not be prepared to commit the cash flow required to pay such a large sum upfront to pursue a claim against a party intent on not paying or unable to pay. Of course, it is often the issuing of proceedings, demonstrating a resolve to pursue a claim, which brings about a settlement. But the cost of taking that initial step has increased very significantly. And the cash required could be tied up for some time (more than 14 months according to the World Bank survey).

In relation to SMEs in Wales, the hike in court fees amounts to a new tax on 'doing business' and a real restriction on access to justice. They may well put some enterprises out of business because they cannot afford the double hit to cash flow which will result from the reduced threat of litigation

enjoyed by unscrupulous debtors and the high upfront cash sum required to be paid to the court in order to enforce payment.

Whilst the present jurisdiction may be popular with international litigants, it is far from perfect for business and specifically discriminates against SMEs. Is that a justice system which best meets the economic needs of Wales?

We believe that a separate jurisdiction for Wales could be swifter, with a lower cost-to-claim ratio, and used as a tool to encourage business to settle and develop here.

We also believe that a separate jurisdiction for Wales would create a direct stimulus for the legal sector in Wales (and a buoyed Welsh legal sector will be in a stronger position to participate in that international market only 2 hours away).

In 2009, the First Minister Carwyn Jones AM (then Counsel General), spoke of a 'Devolution Dividend' for the legal profession in Wales. Public and administrative law linked to devolution should be a 'growth area of work'. Divergence should be seen as an opportunity: 'The law of Wales will be different and firms can advise English clients in this.' Welsh law and a legal system might mean that: 'Economic and social advantages…flow from developing the legal profession in Wales and in the development of law that is suited to the particular situation in Wales.' We agree.

Opportunities should also arise for the universities in Wales to work in partnership with the profession and Welsh Government to ensure that there is Welsh focused training and expertise.

A Welsh jurisdiction would create Welsh employment in legal functions currently undertaken in England, and in services supporting the administration of justice.

Law is a knowledge industry that suffers in Wales due to unequal competition elsewhere in the UK. With the educational, professional and judicial centre of the jurisdiction of England & Wales being in London,

many lawyers are taken away from Wales by its gravitational pull and with those lawyers, valuable skills and resources. Much of the legal work relating solely to Wales, and the profits thereof, likewise leaves Wales. To take just one example, the vast bulk of advocates who appear in administrative law cases in Wales are based in England – despite Wales having some excellent public law advocates, up to and including QC level.

Reversing this tide – supporting existing legal service providers already based in Wales and attracting *new* providers into Wales - would be a significant boost to the Welsh economy.

We call for the re-establishment of a separate jurisdiction for Wales, not as a protectionist move to set up professional barriers to others, but instead as a demonstration – an advertisement even – of confidence in the abilities of those already engaged in delivering justice here in Wales; and as a call to other practitioners in England and elsewhere to join in the development of a dynamic and progressive fresh 'sister' jurisdiction within the United Kingdom.

Access to Justice

Access to justice is crucial.

There is no point in the people of Wales having rights if they cannot afford to enforce them in the courts.

A separate jurisdiction would allow Wales to address the issue of how to increase access to justice in a way that is tailored to the needs of Wales.

As argued above, a swifter system with a lower cost-to-claim ratio would improve access to justice for small and medium sized businesses.

In the criminal courts, differing patterns of crime in England from Wales lead to very significant differences in the level of criminal legal aid provision, with the overall spend in England being some 50% per capita higher. The re-establishment of a separate jurisdiction for Wales would allow the system of criminal legal aid provision in Wales to be re-balanced.

Recent reforms to create a two-tier system of criminal legal aid contracts for solicitors might properly be revisited within a separate jurisdiction for Wales. That system – which places a limit on the number of solicitors firms able to act as duty solicitors – was created with a view to servicing the high volume criminal work in England's major conurbations. It envisages fewer, very high capacity firms located in the heart of those conurbations, in the place of numerous, smaller but nevertheless expert legal service providers with a wider geographical spread. It can quite properly be argued that that system is less well suited to the geography and topography of Wales.

In the civil courts, there are a whole range of potential schemes that might be considered to increase access to justice. One such scheme is the Conditional Legal Aid Fund (CLAF) which has worked in other common-law

jurisdictions of broadly comparable populations to that of Wales, such as Western Australia. The Bar Council produced a consultation paper on the subject of a CLAF as long ago as 1997. Put simply, a CLAF would support money-recovery cases (upon favourable advice from counsel). Upon cases succeeding, the fund would recover the costs from the unsuccessful party, and recover a percentage of the damages received by the successful party. By not only recovering costs, a CLAF could run at a surplus, which could be used to subsidise non-money recovery civil and family cases, and possibly criminal legal aid also. A party assisted by a CLAF receives a benefit from the community. It may be thought that the successful legally-aided party should contribute something back to the community so that others can benefit.

One of the benefits of a CLAF is that it removes the traditional incentive for government to reduce the numbers of people eligible for legal aid. Under a CLAF, the more people are eligible for the fund's support, the more percentages the Fund may recover, and the greater the prospects of the fund running at a surplus. Eligibility for support from a CLAF might even be extended to business.

Other schemes for extending access to justice might include introducing compulsory insurance for company directors against prosecution for fraud. There are a number of possibilities – the point about a Welsh jurisdiction is that the system used to deliver legal aid, and its scope and extent, can be chosen to suit Wales.

In the wider sense, we are confident that the re-establishment of a separate jurisdiction for Wales will improve access to justice. It will see more talented lawyers join those already based here, meaning that Welsh parties will have to travel less to obtain the legal services they need. And with the delivery of justice at all levels below the Supreme Court to be within Wales, it will bring the courts closer to the people of Wales.

Can We Do It?

Yes.

We are 'big enough' - Wales (3.1 million) has a population larger than that of the jurisdictions of Northern Ireland (1.85 million), Western Australia (2.57 million), South Australia (1.69 million), Tasmania (0.5 million) and Northern Territory (0.25 million).

Victoria (5.8 million), the home of the international solicitors' firm Slater & Gordon (the first law firm in the world to go public and the 7th largest international law firm operating in the UK by revenue), has a population less than twice the size of Wales.

If Wales was an American state, it would rank 30th in population – larger than the jurisdictions of Iowa, Mississippi, Arkansas, Utah, Kansas, Nevada, New Mexico, Nebraska, West Virginia, Idaho, Hawaii, Maine, New Hampshire, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, District of Columbia, Vermont and Wyoming.

Jersey (95,000) and Guernsey (65,000) both have vibrant legal sectors. If Gibraltar (29,000) can run its own justice system, of course Wales can.

The infrastructure of a court system already exists in Wales.

We believe that the skills, talent and ambition required exist here in Wales also.

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