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Wales Governance
Centre

The Past and the Future of Law in Wales

Lord Thomas of Cwmgiedd

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PLW



Wales Governance Centre at Cardiff University
Law Building
Museum Avenue
Cardiff
CF10 3AX

Email: wgc@cardiff.ac.uk

Web: <http://sites.cardiff.ac.uk/wgc>

About us

The Wales Governance Centre is a research centre that forms part of Cardiff University's School of Law and Politics undertaking innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance. A key objective of the Centre is to facilitate and encourage informed public debate of key developments in Welsh governance not only through its research, but also through events and postgraduate teaching.

Public Law Wales aims to promote discussion, education and research in Wales relating to public law and human rights. It also aims to promote expertise amongst lawyers practising in Wales in the fields of public law and human rights.

LORD THOMAS OF CWMGEIDD

After reading law at Cambridge and the University of Chicago, Lord Thomas of Cwmgiedd was a practising barrister in England and Wales specialising in commercial law (1971-1996), a Judge of the High Court and Court of Appeal of England and Wales (1996-2011) during which he was successively a Presiding Judge in Wales, Judge in charge of the Commercial Court, Senior Presiding Judge of England and Wales and deputy Head of Criminal Justice. He was President of the Queen's Bench Division (2011-13) and Lord Chief Justice of England and Wales (2013-2017). He was President of the European Network of Councils for the Judiciary from May 2008 to December 2010, having participated in its founding in 2003/4. He is Chairman of the Welsh Government's Commission on Justice in Wales, Chairman of the UK Financial Markets Law Committee, Chancellor of Aberystwyth University (from January 2018), an Honorary Fellow of Trinity Hall, Cambridge and a Fellow of the Universities of Aberystwyth, Bangor, Cardiff and Swansea. He was one of the Founding Members of the European Law Institute based in Vienna and is now a member of its executive committee.

1. It is a great pleasure to have been asked to give this lecture in a building so closely associated with the economy of Wales and now the government of Wales. It is so good of so many of you to have come on such a fine evening. I first want to say a little about the past to see the stage which we have reached. I then intend to speak of my own views of the issues facing the Commission on Justice in Wales, as the process of the Commission must be independent, open and transparent, but at this time it is necessary to respect the constitutional arrangements that must be carried out before it is in being.

The Past

2. It has been a great privilege to build on the foundations laid by great Welsh legal scholars and in particular Professor Dafydd Jenkins and to help real legal historians such as Professor Thomas Watkin and Richard Ireland establish the Welsh Legal History Society in May 1999. Wales was the one nation in the UK that did not have a legal history society; there was no reason for this, for Wales had its own distinctive law and legal system and made a significant contribution to legal developments, particularly in the Common Law.
3. It was undoubtedly a struggle, after the abolition of the courts of Great Session in 1830, to keep a separate identity for Wales, but it was kept for two main reasons. The first was the Welsh language, as the Presiding Officer mentioned. Its significance was demonstrated, for example, by the nineteenth century controversies surrounding the failure on occasions to appoint Welsh speaking judges. The second reason was the work and tenacity of the influential Welsh lawyer politicians, Sir David Brynmor Jones KC, W Llewellyn Williams KC, Clement Davies KC, and judges who sat in Wales, particularly Judge Gwilym Williams (whose statue stands outside the Law Courts in Cardiff), Judge Ivor Bowen (whose 1909 work on the statutes of Wales have just been reprinted), Judge Artemus Jones (whose name is known to every student of the law of tort), Judge H W Samuel and the stipendiary Magistrate, Sir Daniel Lleufer Thomas, and the well-known London judges – Lord Justice Bankes, Viscount Sankey and Lord Atkin of Aberdovey.
4. I think it is remarkable that the identity survived, particularly as there were, for reasons I examined in a lecture I gave in Swansea University in 2000¹, no distinct indigenous legal institutions in Wales. But as the contrast with other nations, such as Brittany², shows institutions do not prevent the erosion of an identity unless the spirit of a nation remains strong. In Wales that identity remained strong.
5. The threats to the distinct identity continued well into the late twentieth century, despite the work of Sir David Hughes Parry in securing the Welsh Language Act 1967; the greatest threat to the legal identity of Wales came from the Beeching Commission which had no Welsh member. Everyone knows what Dr Beeching did to destroy the railways of Wales, where the effect has by and large been permanent. What he tried to do to the legal system in Wales is less well known; he and the other Commissioners were wholly ignorant of, and totally indifferent to, Wales and its legal identity. It was only through the exertions of Lord Elwyn

1 *Legal Wales: Its Modern Origins and its role after devolution: National identity, the Welsh language and parochialism, Lord Morris of Borth-y-Gest Lecture. Vol I Welsh Legal History Society 113.*

2 See Vol VI of the Welsh Legal History Society: *Law and Justice in the Integration of Two Lands: France and Brittany and England and Wales*. I attempted to summarise the conclusions of the papers delivered at the colloquium in an address printed at page 231.

Jones, Lord Edmund Davies, Lord Justice Tasker Watkins, Mr Justice Mars Jones, Lord Emlyn Hooson QC, and Judge Dewi Watkin Powell that the separate identity of Wales was protected. If Dr Beeching had known those against whom he was going to engage, he might not have had those thoughts in the first place, for they were real warriors.

Devolution

6. Devolution changed the position. It has been my unique privilege to have been a witness to this as a judge from the time in September 1997 that Wales and the Welsh people decided that they wanted devolution and to have seen its successful development over the last 20 years. In the various phases of devolution we in Wales have come a long, long way.
7. As regards the legal system, the detail of the developments is well known to you. Suffice to say that the distinct legal identity of Wales is established beyond question; the contrast between the words of Lord Morris of Borth-y-Gest in the debates on the ill-fated Government of Wales Bill 1978 and what Lord Bingham said in 2000 on the opening of the Mercantile Court in Cardiff are striking. Whereas Lord Morris could merely say of Wales that the Welsh people felt it was a nation, Lord Bingham spoke of Wales as a proud, distinctive and successful nation.
8. Significant though our legal history and these developments have been, they have relied on the spirit of the nation and on strong individuals. Moreover the developments have been piecemeal with no agreed long term strategy or goal.

The Establishment of the Commission

9. The Richard Commission, the Jones Parry Commission and the Silk Commission all looked at Justice as part of a wider remit. In particular, the Silk Commission made a number of carefully reasoned recommendations, based on evidence, in respect of justice, covering youth justice, the courts, probation and prisons.
10. The operation of the justice system in Wales has not, I believe, been looked at on its own since the inquiry made in 1817-21 by a Parliamentary Select Committee when the Courts of Great Session were examined; it was looked at incidentally as an aspect of the work on England again by various inquiries (such as the St Aldwyn Commission and the Peel Commission) in the twentieth century, culminating in the Beeching Inquiry.
11. As the First Minister rightly made clear on the twentieth anniversary of the vote for devolution, there was a need to look into Justice in Wales. He announced the establishment of the Commission. It was a great honour to be asked to chair it.
12. Although the Welsh Government has not yet published the terms of reference of the Commission and it would therefore be wholly inappropriate for me to address in detail what it is to do let alone express any conclusions on the recommendations, however tentative, it is important to ensure that there is the earliest possible engagement with the issues that the Welsh Government has said will be within the Commission's remit.
13. I therefore thought it would be helpful and of interest to use the opportunity of this lecture to express my own personal views on the scope of the issues facing us and, in particular,

why the establishment of the Commission is so timely and its task important, yet difficult. I have been surprised how many lawyers who have no connection with Wales have expressed a keen interest in it and the opportunity it affords to address difficult issues relating to the operation of legal systems in the early twenty-first century.

14. Why was the First Minister right in establishing the Commission and why is it so timely?

The Reasons why the Commission has a Real Task

15. First, as the First Minister explained, the Westminster Government took forward none of the recommendations in the previous Commissions' reports. The issues have not been grappled with. They must be. We must seek the best outcome for Wales in the circumstances that have changed so dramatically. There has been a profound constitutional change. Devolution is here to stay. It is necessary to examine how justice fits into this profound change.

16. That is reason enough, but there are, I think, other reasons which I will endeavour to explain.

17. Second, as I saw when a judge, it is becoming clear that the Westminster Government, particularly since Wales acquired primary legislative powers, has found it difficult to deal with a nation where the devolved powers exclude justice. Both in Northern Ireland and Scotland justice is devolved and so the issues relating to the implementation of legislation do not arise; each has a Justice Minister who can see to this important subject. There are several aspects:

- Some Welsh legislation needs alteration to procedure or the creation of forms.
- Some Welsh legislation needs training for judges and others.
- In those areas of justice where the court has to work closely with other state agencies such as, in family justice and in criminal justice, the structure in Wales is not the same as in England. It is necessary to pay heed to this and alter justice functions and engagement appropriately.

Despite the enormous efforts made, particularly by the Judicial Office and by the judiciary, as well as the Government of Wales and the Ministry of Justice in London, the lack of a distinct government justice function for Wales is a serious problem.

18. Third, as I explained in the Lord Williams of Mostyn Memorial Lecture in 2015³, justice is central to our society - to the prosperity of society, to the maintenance of democracy and for the harmony and good order of society. I have repeated this on many occasions as it is critical that politicians, civil servants and our society at large understands the importance of the centrality of justice. Justice affects everything. If certain functions of government are devolved, then there have to be proper and distinct arrangements for justice. I am not surprised that this has not been something that the Government in Westminster has ever really considered. There has been so much pressure on Government that an understanding of devolution and the special position of justice in our society has not been top of the agenda. However, it is important to examine whether you can operate a system of government without devolving justice, which is so central for the reasons I have given. Of course, it may be possible to do

3 *The Centrality of Justice: its contribution to Society and its delivery*, published in *Being a Judge in the Modern World* OUP, 2017.

so, but the issues must be addressed on the basis of the centrality of justice, particularly given the huge issues that are currently before the Assembly in Cardiff Bay and Parliament in Westminster.

19. Fourth, as has now been at last accepted, the legal profession and the courts are an important contributor to the economy in their own right. It is an industry. But there are major changes underway – let me highlight two.

- Undoubtedly, the digital revolution and the advent of artificial intelligence is having and will have a profound effect on both the profession and the courts. Whatever some may say, this will happen in a global context, as it is simply impracticable to develop markets dependent on digital technology and artificial intelligence without common principles or at least an understanding of the basic principles. Steps are already underway for that purpose across the major economic blocks, the EU, the USA and China. It is essential that the implications of this are understood in Wales, action is taken before it is too late and Wales plays a real role.
- Brexit is another factor. It is both an opportunity for the legal profession, but also a real risk for the profession. The implications of Brexit for lawyers in Wales need to be examined and understood.

It is of central importance to the Welsh economy and the good governance of Wales that the profession in Wales is strengthened and the best lawyers are able to achieve eminence and success whilst remaining in Wales and not going to London. This has been a problem for many years; for example, in the discussions on devolution in 1919-20⁴, the issues of the attraction of London was a prominent factor. These issues must be examined.

20. Fifth, it is essential to recognise that it is far easier to get things done in a small nation. You can get everyone interested round a small table and get a decision made quickly, as was shown when the Mercantile Court was established in Cardiff or all those interested in the Welsh Criminal Justice system were brought together. My experience with Westminster and Whitehall was that it was impossible to do the same; you can never have a small meeting. It is therefore possible in Wales quickly to take those bold decisions that make a nation a leader.

21. Sixth, it is important to analyse the issues carefully, as the issues are quite difficult and there are many potential solutions. For example, a distinct executive government justice function for Wales is not the same as a separate court system, as I shall explain.

22. Seventh, there is a need for analysis before a clear plan can be laid out and adopted. Of course the issues have been discussed for 20 years (or perhaps I should say for 200 years), but circumstances have changed and change should not be made without a proper analysis and a long term plan. We have too much experience of making decisions without a proper plan and without a view to the long term. It must be right to try and find a solution that will work for the long term if it can be achieved - successive phases of devolution have been an inevitability, but given the success of what has so far been achieved, it should be possible to recommend long term options for the solution of these issues.

4 The main forum was the Speaker's Conference which considered "Home Rule" for each of the four nations. A sub-committee for the judiciary was established under Lord Stuart of Wortley, which reported in April 1920. I set out a summary of this at pages 128-132 of the lecture on *Legal Wales* referred to in footnote 1.

23. Let me then turn to some of the issues in four areas.

The Criminal Justice System

24. Although the criminal courts, both the Crown Court and the Magistrates' courts, generally work well across England and Wales (given the resources provided) and modernisation through digitalisation is proceeding apace (as the Presiding Officer mentioned in her introduction), the real problems facing the criminal justice system are those relating to the prison system and to reducing re-offending.
25. There can be little doubt that the prison population is far too high for the resources that are, or realistically can be, committed to prisons. It is not acceptable to society that prisoners have to spend very long periods each day in their cells; insufficient is done to try and rehabilitate them. I do not think that there is anyone with real knowledge of the system who doubts that the present position is unsustainable.
26. The prison population has effectively doubled in the period since the early 1990s. Sentences are much longer. It is very difficult for any government in Westminster to take any legislative steps to reduce it. For example, although it is close on five years since the sentence of imprisonment for public protection (IPP) was abolished and the Parole Board has carried out its task in a highly effective way, there is no real prospect of a legislative solution to the problem that there are inevitably going to be a hard core of those subject to this sentence who have no prospect of release. Another example is the fact that the size of the prison population is not due to a rise in the number of those receiving short sentences; the trend is for a constant growth in those sentenced to prison for four years or more. In short, the prospect of prisons being effective in rehabilitation has waned. It is not for me as a recently retired judge to question these matters; they are simply facts which must be taken into account.
27. In addition to the issues relating to the size of the prison population, the alternatives of non-custodial punishment and the management of prisoners on release have faced other difficulties. In short, the probation service has had a very difficult period and is under severe pressure. In the period after 2000, there were reorganisations of the service culminating in the contractualisation of a significant part of the service in 2015. Entering into long term commercial supply contracts is, in my experience as a commercial lawyer, problematic even for experienced businessmen. It was therefore not surprising that, as is well known, significant problems have arisen.
28. There are good reasons why it is essential to examine whether it is possible for Wales to establish more effective rehabilitation and more effective steps to prevent young men turning to crime.
- First, the geography and demography of Wales is very different to that of England – one obvious example is that there are no urban conurbations comparable in size to the large cities of England; another is the concentration of some areas of severe economic deprivation. Clearly the system for England has to be designed for the very different demography. Is it the best outcome for Wales that the same system should be applied to Wales?

- Second, as I have mentioned, some of the services that are key to the operation of the criminal justice system are differently organised in Wales as a result of the devolution that has taken place. The best examples are health, particularly mental health, and education. It is not clear that the system has properly adapted to making the best use of the devolved context, particularly in youth justice, in underpinning prisoners on release and in taking early steps to prevent young people drifting into crime.
- Third, although solutions to these issues are not easy, it is right they be considered in a small nation where it may well be possible to achieve real change much more easily. Quite often Finland is pointed to as an example where a significant re-appraisal and a consistent long term policy has transformed the criminal justice system.

Access to Justice

29. The reform and modernisation programme of the courts of England and Wales is proceeding apace as a result of an investment of £1 billion made by the Westminster Government, though there is an urgent need for the Westminster Government to bring forward the necessary primary legislation. What is being planned and implemented takes account of the needs of Wales to the greatest extent possible within a unitary system and within the resources made available for that unitary system.
30. However, it must be emphasized that the decisions made plainly cannot focus on the needs and interests of Wales. They have to focus on the overall interests of the system. Moreover, the input of the Welsh Government is necessarily very limited, as it has no justice function. Although Wales shares with Cumbria and Cornwall similar demographic and geographical issues, they are not identical. For example, North Wales presents a unique series of issues arising out of the dissolution of the long association with Chester and the time taken to travel between the North and the South. Cardiff is a Capital City of a nation, though many find that difficult to accept. Cardiff's courts and facilities must reflect that now established fact. The courts must be designed to accommodate regular sittings of the Court of Appeal Criminal Division and the Civil Division of the Court of Appeal. The Supreme Court has sat in Scotland with great success and has committed itself to sitting in Belfast and Cardiff, as the capitals of the two other devolved nations. There must be facilities for this. These are questions that must be examined.
31. Another and much more controversial issue is the provision of legal aid, an issue of particular importance in more deprived areas of the United Kingdom. A number of people have raised with me over the years the question of whether it is practicable to design a structure that can properly deal with the provision of legal aid in the large conurbations of England that have a huge influence in the design of a system, but also deal with what is needed in Wales, particularly if legal aid is to be provided across the bulk of Wales and firms based in Wales are to play a prominent role. It is an argument that needs examination in the context of a strong and Wales based legal profession.

Jurisdiction and the Court System

32. Jurisdiction and the court system is the issue which, from the First Minister's short speech, has attracted the greater attention. This is a complicated area.

33. I think it is important to distinguish between three different matters:

- The justice function within an Executive Government. I have on several occasions said that Wales needs a distinct justice function, which is an essential executive government function; I have already referred to the reasons why this is essential – a ministerial function is necessary to provide the machinery for implementation of Welsh primary legislation, as court procedures may have to be changed, forms provided and training paid for. I have hitherto not expressed a view on whether this should be in Whitehall or here in Cardiff, as this is a question on which a serving judge could not comment. It will be a matter on which the Commission will have to reach a view, because the need for the proper and distinct performance of such a function for Wales by a government is beyond question.
- The court system – a unitary system at all levels (as exists at present), a slightly modified system, an entirely separate system or a system akin to Scotland and Northern Ireland which share on most issues a common final appellate court.
- Jurisdiction is often used as a shorthand expression for a court system, but it has other meanings. In these other meanings it can refer to:
 - i. The power a legislature has over a territory
 - ii. The power a court has over a territory
 - iii. The power a court has over a person or a thing (the Latin tag of jurisdiction in personam or jurisdiction in rem)
 - iv. The power a legislature has over a person or a thing

34. In any discussion, these different issues must be distinguished, as it is possible, though not necessarily desirable, to envisage several possible combinations. Wales has in the past had many different combinations, as I shall endeavour to explain in the Sir John Lloyd Memorial Lecture I am scheduled to give in March 2018. It would obviously be wrong for me to have any view as to the best solution at present, but it is again a matter with which the Commission will have to grapple.

35. The Commission will have to have regard to many matters including the centrality of justice to any democratic government and society, the desirability of removing the distinction in the governance between the courts and tribunals (which I addressed in a lecture I gave last year to the Wales Commercial Law Association⁵ and has been accepted by the Executive Government as I summarised in my August 2017 Report as Lord Chief Justice⁶), the cost implications (including the acute issue as to the contribution to be made by each litigant through fees as highlighted by the decision of the Supreme Court in *R (UNISON) v Lord Chancellor*⁷ and the contribution of the taxpayer), the importance and practicability of what is commonly called cross jurisdictional practice within a common economic area.

5 <https://www.judiciary.gov.uk/wp-content/uploads/2016/12/lcj-single-judiciary-wales-Oct-2016.pdf>.

6 <https://www.judiciary.gov.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf> at page 24

7 [2017]UKSC 50

The Professions and Legal Education

36. As is evident from what I have so far said, a successful legal profession – barristers, solicitors and legal executives – is essential for Wales. However, for reasons I have also explained, the profession faces enormous change.
37. I am persuaded that the scope of this is not understood by many practitioners in Wales, despite the efforts made by the Law Society and others. Nor is the speed at which change might occur. Nor do a significant number have the necessary in house assistance in relation to such changes. A significant part of most legal professions is conservative and has a tendency to think all will be well and it is not necessary to change anything.
38. It is therefore necessary to work out what needs to be done. It is essential to ensure that the best lawyers remain in Wales and that there is no need to go to London to achieve a career of the highest distinction and reward.
39. Fundamental to this is legal education. As education is a devolved matter, this falls within the scope of the current powers of the Assembly and Welsh Government, but the freedom of the Welsh Universities to innovate is constrained in practice by the requirements of the regulators of the professions.
40. Undoubtedly this is the right time in which to examine this, not only because of the significant changes which will flow from digitalisation, artificial intelligence and globalisation, but because, whatever view is taken on jurisdiction in all its senses, the current regulators are examining the requirement for entry and thus the scope of what students should be taught. Is the curriculum balanced sufficiently towards the twenty first century? There is a real prospect that Wales can make a real and distinct contribution. It has a small number of law schools that can work together; the Learned Society of Wales is engaged and helping; and there is the proposal by Lord Lloyd-Jones for an Institute for Welsh Law.

Conclusion

41. I have tried to provide a snapshot of some of the issues facing the Commission, but I have expressed no views on how they should be addressed.
42. The work of the Commission can get nowhere far without the engagement of the professions, the judiciary, the universities – both those interested in the political science of governance and those interested in law. I will therefore trespass much more on your goodwill in the ensuing year, but I know that the Commission will receive your ideas, your criticisms and your strong support.
43. The Commission's objective should be to formulate answers and recommendations that reflect:
- The rule of law in Wales
 - The centrality of justice to the governance of Wales, to its prosperity and to the wellbeing of society
 - The best outcome for Wales and the Welsh people, particularly for those in Wales engaged with the delivery of justice.

44. As Lord Bingham said, Wales is a proud, distinct and successful nation. The task for the Commission will be to ensure that Wales in the future can live up to that description in its law, in its system of courts and in its delivery of justice.