

# *Legal Wales*

*Some reflections on our future tasks*

delivered by

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## LEGAL WALES: SOME REFLECTIONS ON OUR FUTURE TASKS

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It is an enormous privilege to be honoured by this dinner and by so many of you having come. It is both a great personal pleasure to me and a striking illustration of the current standing of Legal Wales to see so many here and the multiplicity of interests. They range from those whose learning is in Medieval law or the legal practices of the Victorian age to those currently in practice in the whole spectrum of legal work – commercial, criminal, civil, family and administrative law; it is wonderful for me to see so many I know and am privileged to count as friends who have done so much for Legal Wales, but more importantly so many young in whom our future rests.

I was asked if I might offer some reflections on what we, as Legal Wales, need to do to take forward Legal Wales. I would like, however, to begin in the immediate past, for we have all come a long way in the period of under 10 years since Welsh Devolution was made the policy of present government when newly elected.

At first the interest was slight; I think it fair to say that there was little interest outside a very few in the consequences of devolution for the law and lawyers in Wales; there was little appreciation by politicians, officials and others of the significant contribution lawyers had to make.

That has changed at least in Wales. Here there is now a clear understanding amongst lawyers and non lawyers alike of the importance of the legal contribution. However, in London there remains outside the confines of those interested in Wales a lack of knowledge and understanding of the changes that have occurred; indeed there is virtually no understanding of the potential consequences of the changes which will begin this summer. Although England and Wales is now commonly the jurisdictional title, it would be a delusion not to take into account the fact that many do not understand that Wales is now in several respects different; the ghost of, “for Wales, see England” lives on.

The changes that have occurred are all well known to you and I need take no time in spelling them out, though I shall refer to some in the course of my short remarks this evening. It is important, however, not to forget that the change I have outlined has been a change of seismic proportions.

What I wanted to do was to look forward and see how we should begin to chart our future course.

## I. THE FACTORS THAT INFLUENCE

I would like to begin by referring to what, I think, are four factors which in fact influence the approach to our future course

### (1) The Government of Wales Act 2006

The most significant will be the coming into force of the Government of Wales Act 2006, after the elections in May, with the immediate power to make Assembly Measures, quasi primary legislation, under Part 3 and the extension in the range of the competencies of the Assembly; there is then the possibility that in future years and, subject to a referendum, the Assembly will be able to pass Assembly Acts with the continued possibility of an extension of the competencies.

### (2) The change in the position of the judiciary

The Constitutional Reform Act 2005 made clear the continued constitutional independence of the judiciary, but for the first time gave the judiciary of England and Wales its own independent structure and its own head. It became clear very quickly that once the position of the Lord Chancellor as head of the judiciary had been abolished, it was much more necessary for there to be regular engagement with Government. In relation to the Westminster Government, the formal separation of the judiciary has paradoxically necessitated greater engagement, as is happening, for example, in the current reform to the Magistrates Courts.

The same is emerging in relation to the Government in Cardiff.

### (3) Lack of control over events

The next factor is an unpleasant reality. Events which affect Wales can occur very rapidly and without warning and can arise out of matters which have nothing to do with Wales.

Let me illustrate this by the decision made last year by the Lord Chancellor that Cheshire would be transferred to the Northern Circuit in April of this year, thus bringing to an end this centuries' long specific joinder of England and Wales for the purposes of the administration of justice. The change in question had been contemplated for a very long time. One can find criticism of the trial of Welsh defendants in Chester at the end of the 19<sup>th</sup> century and certainly by 1909 it was

mooted that Chester be transferred to the Northern Circuit and Wales form a circuit on its own. The proposal for a Welsh circuit without Chester but including Monmouthshire was discussed in 1919 and by three committees, one in 1922, one in 1934 and one in 1936. The organisation of the circuit was again discussed by the Beeching Commission in 1969. Despite all this nothing happened.

However, in September 2005 the then Home Secretary decided, on the advice of the Chief Inspector of Constabulary, that the number of police forces in England and Wales should be significantly reduced so as to create a smaller number of larger police forces, more capable of dealing with more serious crime and terrorism. As by 2005 the administrative building blocks for criminal justice had become the 42 police areas, the issue of the reorganisation of the police raised the question as to the reorganisation of other parts of the criminal justice system, including the administration of the courts. This decision to look at the police force sizes thus raised again the question of the joinder of Wales and Cheshire, as both North Wales and Cheshire and North Wales were each too small to have their own police forces. However, it was a basic tenet of the proposed amalgamation of the police forces that no amalgamation should cross English regional or national boundaries. It was therefore out of the question that Cheshire and North Wales be amalgamated and thus Cheshire would have to be joined to another English force; the other parts of the criminal justice system were expected to follow changes to the police force areas. As you all know, the change in Home Secretary brought about as a result of local difficulties in the Home Office meant that the amalgamation of the police forces did not proceed; it might have seemed that two events wholly unconnected with Wales had first brought about the prospect of change and then removed it.

However, much detailed work was done by the court administration as well as by the CPS and others on the consequent changes necessitated by the police forces amalgamating. In the case of the courts administration, the work done plainly showed that the decision that the government had made in 2004 to base the unified court administration on 42 areas had created very significant cost overheads; it would therefore, quite independently of the position of the police, be sensible to reduce the number of administrative areas to save money; as you all know this is something that HMCS has for years been pressed to do because of the cost of legal aid. In the event, therefore, although the police force amalgamation did not proceed, the re-structuring of the administration of the courts did with the consequence that from April this year, Wales and Cheshire will be separated administratively and Wales will for the first time be a unit for the administration of justice. None of this had anything to do with the wisdom or otherwise of creating Wales as a unit for the administration of justice; it was brought about by a report of

the Chief Inspector of Constabulary in relation to police efficiency and the impact on court finances of legal aid expenditure.

I have spelt this out at some length because it is a perfect illustration of the unpleasant reality of the way in which events wholly unconnected with Wales can suddenly affect Wales and fundamental changes be made within a very short period of time. This event is also an important reminder that matters affecting Wales do, as I have already observed, not loom large in London.

Finally it also demonstrates how sensible it is to plan for such events. Although it was inevitable, given devolution, that at some point during the current century Chester would be separated from Wales, the timing of the event has been a fortuity. However, as it had always been thought of as a possibility, consideration had been given to plans to deal with the change that are for the long term benefit of Wales. Two examples will suffice. First, consideration had been given to providing independent administrative support in North Wales for the administration of justice and there were plans for new court buildings.

Second, the sub-divisions for the administration of justice within Wales were based on a reappraisal of what was sensible for the 21<sup>st</sup> century and not what had been laid down in the Act of Union. Hence Cardiff and Newport have been brought together within South East Wales and Swansea made the centre for South West and Mid Wales.

**(4) The uncertainties – slow or fast change.**

It is clear, looking forward, that similar proposals for long term change could quite fortuitously occur at any time over the next 25 years. Timing is not a matter that one can with any certainty predict but what is essential is to be prepared to ensure that when proposals are made which affect the position of Legal Wales, we have thought through the way in which to deal with it.

It seems to me that there is a prospect that change could be much more rapid than one might have thought to have been the case a few years ago. For example, there is the uncertainty as to the electoral outcome of the Assembly elections later this year, there is the uncertainty as to the outcome of the Westminster Parliament elections in 2009 or 2010, there is the uncertainty as to the operation of co-habitation between governments of different political complexions in Westminster and Cardiff and finally within the last few months uncertainty in relation to the relationship of Scotland and England, including the West Lothian question. All of these issues are political and I will not comment on them, but these issues, or issues

none of us can presently think of, may bring onto the agenda changes in Wales, which although likely at some point in time, can suddenly confront us.

It is this unpredictability of political events that therefore necessitates thinking and planning. The consequences of not discussing and debating were illustrated by what we were told had happened prior to the 1997 general election – no discussion of devolution had taken place within government. It is obvious that the Government of Wales Act 1998 would have been a much better statute if there had been a proper opportunity for thinking, debate and discussion. We must not allow that to happen again.

## II. THE ISSUES THAT ARISE

What therefore are the issues about which those interested in Legal Wales should be prepared? The list is, of necessity, long. Speaking for myself, I do not think I would have contemplated such a list if I had been giving this talk ten years ago. Indeed some of these issues would not even have been contemplated five years ago. But let me attempt a review of some of the more important issues.

### (1) Legal Wales and the economy

In January of last year, a group of professionals from Birmingham's professional community and financial institutions, published a report entitled "High Court Judge Residency Impact Study for the Midlands". It argued that High Court judges should be based in the Midlands and that this would make a substantial contribution to the West Midlands economy. It is an impressive document and can be viewed on their website.

It illustrates well the common acceptance that there is a crucial link between the development of an economy, the legal services provided and the benefits that legal services can bring to an economy. This is true whether the economy be a highly developed one such as in the UK or US or that of a developing nation.

Although this is now clearly accepted by Welsh Assembly Government, have we got ourselves properly organised to put this forward? Have we got the right grouping? Should we be doing more along the lines of Birmingham?

### (2) The Counsel General

The creation of the statutory position of the Counsel General is a very important provision of the Government of Wales Act 2006. We all know how important

the position is and the very significant contribution Winston Roddick QC made when he held the non-statutory position of Counsel General. It will be of great importance to ensure that the person appointed to hold this post will have the distinction and vision to deal with the issues facing us. We all have a real interest in the success of this. Experience elsewhere has shown that it may not be an easy task. How can we help in this and the task of developing the office and the system of law making in the Assembly?

### (3) The criminal justice system

Criminal justice is not a matter within the competency of the Welsh Assembly Government. At first sight it would seem unnecessary to say anything about the criminal justice system except in relation to the more distant future.

However it is clear from the way in which criminal justice policy is being developed that it is no longer possible to divorce, as was the policy of the second half of the twentieth century, those bodies that are the prime institutions of criminal justice – police, courts, prisons and prosecution services – from their interaction with the wider community. There is a return to the earlier policy of seeing the court as part of and at the heart of the community.

At the heart of the changes being implemented with respect to community justice and the improvement of the magistrates' courts is, therefore, the building of closer links with communities. In Wales this is exemplified by the decision to establish a community court at Merthyr. If this court is developed and follows the model of other courts at Liverpool and Salford, then it will be necessary for there to be strong links with local authorities and bodies that provide wider social services within the community. Therefore on this approach to criminal justice, there is already a necessary relationship to and involvement of the Welsh Assembly, as the governmental body responsible for local government.

Looking further forward, there is an important building block in place. All the agencies involved in criminal justice and the courts' administration now have an identifiable Welsh organisation -there is a lead crown prosecutor for the CPS, there is a national offender manager for Wales, a director of HMCS for Wales, four chief constables and two Presiding Judges. Thus in the administration and application of criminal justice, Wales is now an identifiable unit.

What does this mean for the future? First, it must mean an ability to run the system efficiently and with a proper use of resources. One of the most striking differences between a small nation like Wales and a much bigger nation like

England is that it is much easier to get things done more quickly in Wales. That certainly has been my own experience; it has nothing to do with personalities or national characteristics, but the simple fact is that in a small nation it is easier to gather together all those involved and to get decisions made more quickly. Secondly, and to the extent that the local agencies have discretion under the current legislative regime, should a consistent policy be developed in Wales for Wales as a whole? Let me give you an illustration. One of those areas where local authorities and police authorities have a very substantial discretion is in the application for ASBOs. There are some authorities in England and Wales who take the view that money spent on obtaining ASBOs is money well spent, as it gives the community greater security; there are others who take the view that it is better to spend the money in providing facilities which encourage people to desist from crime rather than spending the resources on court proceedings and orders that are meant to achieve the same end. The question which certainly needs debate is whether, bearing in mind the size of Wales and its distinctive character, a unified policy should be pursued within those areas where discretion is permitted. A third and more general question must, as I have indicated in a talk I gave to the Human Rights and Public Law Association last year, relates to the way in which the police and the community involvement is controlled and structured in Wales.

There is then, of course, the more distant future when there is always the possibility of a transfer of functions such as control over the police or probation services. This is an entirely political question. Save for the more general aspects of the development of relations between Legal Wales and the Assembly to which I attach great importance, this is an issue that may best await developments.

#### **(4) Effect on civil and family justice**

Similar questions arise in relation to civil and family justice which time does not permit me to elucidate. There is again a lot to be done, building upon, for example, the work done by the separate Welsh CAFCAS.

#### **(5) Development of the professions and universities in Wales**

The period since 1998 has seen very significant changes. Considerable leadership has been shown by many within the professions and those who support the professions. The universities have considerably strengthened legal education in Wales; some have developed courses in Welsh. Perhaps the most significant achievement is that the professions, the academics and the judiciary have come together to form the various associations which have played an important role in Wales since 1998.



However, the challenges faced by the professions and the universities here are considerable:

- (i) In publicly funded work there are significant problems in ensuring that the public in rural areas in some of the old industrial valleys are properly served by the profession.
- (ii) The development of the large firms in Wales has been remarkable and their ability to import work into Wales of very significant importance. However given the absence of strong financial institutions based in Wales, their struggle is always a difficult one. The competition from Birmingham and Bristol can never be underestimated.
- (iii) The Universities have to ensure that they nurture the development of a distinct Welsh identity, yet continue to strengthen their position as players on an international stage.
- (iv) We need to ensure that there is proper access to the laws of Wales as enacted by the Assembly.
- (v) As regards to the future, the real issue that we must consider is how it wishes to organise ourselves within Wales. I shall return to this.

#### **(6) The Welsh language**

The development since 1988 here has again been very significant; there are again key issues which must be faced. First, although it is universally accepted that there is a need to develop terminology building on the outstanding contribution made to this by Robyn Léwis in his legal dictionary, progress has until very recently been slow. It is, I think, recognised that this is a project that cannot be delayed and the longer it is delayed from coming into full effect the more difficult will be the problems. Second, there is the need to progress the issue of bilingual juries. Very significant progress has been made in ensuring that in the magistrates' courts those who wish to have their cases heard in Welsh can have them heard in Welsh by magistrates who understand Welsh and can adjudicate in Welsh; similarly progress has been made in the civil courts. It has always seemed to me a matter of regret that similar progress has not been made in the Crown Court so that cases can entirely be heard in Welsh as happens in the civil and magistrates courts; the mantra of random selection should not bar the principle of equality in the treatment of the two languages. Third, we need to examine how the style of legislative drafting can be moulded or adapted so that it can the more easily accommodate our bilingual heritage than appears to be possible with the style of drafting used at Westminster. Fourth, and probably most importantly, there is a need to foster and develop Welsh courses at universities. It is no use having a legislative system that is bilingual or the possibility of cases being heard in Welsh, unless those who are to work in the

system have the benefit of proper education which teaches them to use Welsh in exactly the same way as they use English.

**(7) Development of the tribunals**

With the publication of the Tribunals, Courts and Enforcement Bill, it has become clear that tribunals within the United Kingdom are to have their own separate identity, to some extent distinct from the courts. The Bill provides for the organisation of tribunals on a UK-wide basis with a Senior President, normally a Court of Appeal judge from one of the three jurisdictions, having overall responsibility. As regards tribunals that have a separate identity in Scotland and Northern Ireland, because of the well established difference in their legal system, there appears to be no general problem. I am not, however, so sanguine as regards Wales. There are certain tribunals that are organised on a Wales basis with a Welsh President or Chairman. Hitherto it appears that the President of a Welsh tribunal has been regarded as little more than the equivalent of a regional tribunal in England.

This is an important and immediate issue. Wales should not be left out of its proper place and must be treated equally with England, Scotland and Northern Ireland. There are UK tribunals. There are England and Wales tribunals. But where there are Welsh Tribunals, there is no reason in principle why they should not be treated in exactly the same way as Scottish and Northern Ireland Tribunals.

**(8) Organisation and development of the courts**

The years 1999 and 2000 saw the establishment of an Administrative Court in Wales and a Mercantile Court adding to the Chancery Court that had been established in the 1990s. There is now an established pattern of the visits of the Court of Appeal, Civil Division, to Wales but not yet a regular sitting of the Court of Appeal, Criminal Division, in Wales. As you all know, Lord Justice May was asked to examine the way in which civil justice is administered outside London; the meeting which many of you attended in Cardiff when he came to seek your views made an important and impressive contribution to the debate. His report is expected shortly. I would very much hope we would see what is most needed in Wales which is the establishment of a proper office for the Administrative Court so that cases involving Wales and in particular the Assembly Government can be entirely administered and heard in Wales.

**(9) Divergence of the law of England and the law of Wales**

I do not think, in the light of the enactment of the Government of Wales Act 2006,

it will be possible to defer any longer an examination of the way in which, for the future, a significant divergence of the law of England and the law of Wales should best be catered for by our judicial system. A number of factors will influence the decision such as (a) the scope of the legislation passed by the Assembly, (b) the style of the legislative drafting and (c) the effect of bilingualism. There will be a number of options to consider, but the principal options clearly are:

- (1) Judges authorised to hear Welsh Cases
- (2) A separate Division of the High Court, as has been advocated by Lord Carlile of Berriew in his 2002 David Lloyd George Memorial Lecture.
- (3) A separate jurisdiction of the High Court, akin to civil, criminal and family
- (4) Separation of Wales from the English system at all levels below the House of Lords, as was proposed at times during the last century.

I will not express a view, but this is an issue Legal Wales needs to address. The issues are very wide – for example, when the issue was considered in 1919-1920, one of the questions addressed was the effect it would have on careers of lawyers and the work they could do.

**(10) The need to be outward looking.**

We cannot however devote all our energies to our own internal development. We have a great deal to teach others, as the work done to date has shown – how to develop a bilingual system of justice and how to run a small judicial system efficiently. We need to build on the contribution our Universities and others are making in this area.

### **III: THE MEANS OF DEALING WITH THE ISSUES**

May I finally turn, after that rather long list of issues, to the means necessary to deal with those issues. I would like to examine this under three headings.

**(1) The relationship of the professions and the judiciary to the Assembly and the Government in Cardiff**

When the Welsh Assembly Government was created, it became readily apparent that engagement with the judicial branch of Government and with the profession was essential. That engagement was helped by the creation of the post of Counsel General and the very constructive role played by the profession in attempting to

work with the Assembly. But it has not all been plain sailing. The role of the lawyer is not always easily understood by those in Government. In London certainly the view of the judiciary and of the profession taken by those in Government has often been seen as one of conservatism and obstruction of policies that the Government wishes to pursue. It is not always easy to explain to a politician that the function of a lawyer or a judge is sometimes to say no because what is proposed is either unlawful or in breach of an important right of minority individuals. However, as a result, I think both the profession and the judiciary have often been cast in the light of “you can’t do this”, as “can’t do” people whose views ought not to be sought. Last year I found myself in the position of being immensely frustrated by legal advice that seemed to be saying, yes what you want to do is perfectly sensible but there are x, y and z reasons why it cannot be done. I found myself saying what I want is a “can do” lawyer, not a “can’t do lawyer”. I can therefore readily understand the frustrations that some in the Executive Government feel they have with lawyers.

An important message that I would like to give is that we have a great deal to do in persuading those in Government of the true role of a lawyer - how he is there to say “no” when it is appropriate, but how he can and should be constructive in helping find a way of achieving a desirable result. He should never be a “can’t do lawyer”, but should always see if there is a way in which a properly desired result can be achieved. It is I think of vital importance to ensure that the role that we have as the judiciary, the professions and teachers of law is one that is seen as constructive in the development of law and institutions in Wales and understood by all, and particularly those in government, to be such.

It is therefore important when considering the various issues which I have enumerated, that we are in a position to pursue a policy of what I would describe as constructive engagement – that is to say putting forward ways in which real change can positively be brought about in relation to the economy, to the new constitutional order and the other issues I have outlined for the benefit of the people of Wales. I think this is essential to deal with the real challenges which will arise either when Assembly measures under Part 3 of the Government of Wales Act bring about a significant divergence between the laws of England and the laws of Wales or if Part 4 of the Government of Wales Act is brought into effect and the Assembly given express powers to make primary legislation.

In London, the government sees engagement with the judiciary and the profession as essential to the proper functioning of the state and I believe that this is now understood also in Cardiff. We must be constructive, as it is of vital importance

when legislative procedures are designed to pass quasi-primary legislation and when matters more directly relevant to Legal Wales are decided by the Assembly and Government in Cardiff, there is a sound and well developed relationship between Legal Wales and the Welsh Assembly and the Welsh Assembly Government.

**(2) Ensuring that Wales is not forgotten in London**

However, for the present and foreseeable future most of the important decisions as regards Wales are made in London – either in Westminster, Whitehall or the Strand. As I have already noted, developments or issues in Wales do not loom large in decision making; the fact that Wales is developing its own separate Government and legislation is not always understood or appreciated. It is therefore of great importance that the voice of Wales is heard in London. One method is to ensure that there is a Welsh voice on important decision making bodies, as there is on the Judicial Appointments Commission. What is most important is to ensure that there is proper coordination of our voice in London so that the interests of Wales are not overlooked. We therefore need to find a means of ensuring this is done.

**(3) Joint organisation – the development of the Legal Wales Standing Committee**

Finally, it seems to me that we should examine again whether we have got our structure right and sufficiently resourced. This is not to suggest that there is a need for a separate Welsh profession, but it is to suggest that we may need to develop this into an organisation which can ensure that:

- (i) there is proper connection between London and Cardiff;
- (ii) our voice is heard.

Neither the bar nor the solicitors nor our teachers of law nor the judiciary can do this on their own. We have in Wales a unique relationship that has been developed by the Associations and by the Standing Committee on Legal Wales. We need to ensure that Legal Wales, through these bodies and in particular the Standing Committee, is structured and resourced to carry out the tasks I have outlined.

That is the last, but most important, of my reflections for the future. But again may I thank you for the great honour you have accorded me, for all the help and friendship you have shown me and for your patience in listening to these reflections.