

Government, Law and the Courts in the Evolving Welsh Constitution

First Minister's Keynote Address to the Legal Wales Conference – October 2011

I am delighted to be invited to speak at this conference. It is good to see the legal community getting together to discuss the Welsh legal issues of the day. You have a valuable part to play in helping us to make devolution work and to develop a legal system fit for Wales. It is through forums like this that the legal community can make their views known to us and those views are very important to us.

These conferences started in 1998 when the first Government of Wales Act established a body corporate known as the National Assembly for Wales.

There have been many changes since then.

My predecessor, Rhodri Morgan AM, spoke at this conference in 2005 about the UK Government's White Paper "Better Governance for Wales" which led to the Government of Wales Act 2006.

That is when devolution really started to get into its stride – for the first time we had a separate Ministerial executive authority for Wales – the Welsh Assembly Government which we now call the Welsh Government because people did not know what it meant and our own Welsh legislature, the National Assembly for Wales.

We had powers to make the same law as Parliament which were known as Assembly Measures but this was an unsatisfactory arrangement. The problem was the lengthy parliamentary process we had to go through to even get to the stage of making a Measure. They looked like Acts of Parliament but could sometimes take years to enact. An example is the smoking ban – we were the first to think of it but because of the time it took to acquire the powers we were the last country in the UK to implement it.

Nevertheless the last Assembly 2007 to 2011 was able to pass 22 Measures which will make a difference and improve the quality of life in Wales. There was the Rights of the Child and Young Persons Measure. When it comes into effect next year the Welsh Government will be under a duty to give proper consideration to the United Nations Convention on the Rights of the Child when developing its policies and legislation. This is the first legislation of its kind in the UK in relation to the Convention and the Scottish Government is now proposing to follow our lead and has recently published its own proposals.

We had legislation for improving the education system, housing and health and mental services; for improving the plight of carers and promoting healthy eating in schools and the Welsh Language.

We then had the Referendum in March when the people of Wales voted clearly in favour of the Assembly having the power to pass Acts. The Assembly will now be able to pass Acts across the full range of subjects in the 20 devolved policy fields in Schedule 7 without having to first get consent from the UK Government and Parliament.

Last week I announced our Programme for Government which will help to improve our public services, protect the vulnerable, further improve our education system and better prepare our young people for work, and promote our industry at home and abroad. The Programme will include several Bills

- to create an opt-out system of organ donation;
- to tackle under performing schools;
- to reform social services and provide for the first time a coherent Welsh legal framework to meet changing social expectations and demography;
- to address homelessness and empty dwellings, as well as improving standards and tenants' rights in the private rented sector;
- to consolidate existing legislation to make the planning system more transparent and accessible;

These are just a selection of the Bills proposed.

I am focussing on our proposals for changing Welsh law because I am in a room full of lawyers and I know that is what you will be most interested in. But I should point out that government is not just about making law. We only make law where it is needed. And where it is needed it is the courts and the legal profession not just in Wales but across the UK that are responsible for interpreting and applying it.

So what are the challenges the legal community faces? We already have divergence between Welsh law and the law in England particularly in the field of education, health and social care. Inevitably with the Assembly's new powers it will become increasingly divergent but because Welsh law will be tailored to meet the specific needs of the people of Wales. So it will be divergent for a purpose and not just for the sake of it.

The responsibility for the administration of the court system is not devolved and its judges are appointed by or appointed on the recommendation of the Lord Chancellor. But in cases where Welsh law applies, judges and anyone who appears before the courts must be able to distinguish between the laws applicable in Wales and those that in apply in England.

There have been changes in the administration of the courts system in recognition of the emerging and distinctive Welsh legal identity.

We now have an Administrative Court in Wales and judicial reviews against Welsh public bodies or involving devolution issues are being brought and heard in Wales.

During the period between April 2009 and April 2011, 307 claims were issued at the Administrative Court in Cardiff (of those 5 were transferred of Wales); 61 cases were transferred in from outside Wales. I recall a judicial review case about mussels in the Menai Straits. All of the parties except us argued that the case should be heard in London for apparently no better reason than the shopping was better. The Court of Appeal sat in Cardiff hearing 7 cases in

2010 and 4 cases this year. One case was heard in Wales by the Criminal Division of the Court of Appeal.

Cases have covered a wide range of subject matters where Welsh law has been applied. Most recently there has been the Brynmawr Foundation School case and the challenge by the manufacturers against the banning on electronic pet collars. Cases are mainly heard in Cardiff but may be heard and have been heard in other parts of Wales in the most appropriate venue. Currently designated venues are the courts in Caernarfon, Mold, Rhyl and Swansea. A case may now be administered and determined in the region to which the claimant has the closest connection. This makes absolute sense in terms of easier access to the court and the costs that may be saved. But even more importantly these developments should be seen as an opportunity to build local confidence in our justice system.

The Welsh language is increasingly being used in the courts, most frequently in the magistrates' court and in family law cases but also in other courts. There are 60 Welsh speaking Judges sitting in the courts and tribunals in Wales. In 2007 an entire murder trial in the Crown Court in Caernarfon was conducted in Welsh.

And how is the new Supreme Court adapting to the challenges of devolution? For a start there is the Constitutional Reform Act 2005 which contains measures to ensure that the Supreme Court has the knowledge and experience to apply the law of different parts of the United Kingdom. This is vital when it comes to devolved Welsh law and accommodating Welsh cases. Under the Act the First Minister of each devolved administration must to be consulted about prospective candidates for membership of the Court.

Section 30(2) applies where the Lord Chancellor recommends a candidate (selected by the Judicial Appointments Commission) for appointment to the Prime Minister. It gives him (the Lord Chancellor that is) the power to reject the candidate selected if, in his opinion, their appointment would leave the

Court without sufficient knowledge or experience of the law of each part of the United Kingdom.

Our interpretation of what section 30(2) means by sufficient knowledge and experience of the law is that it is the law of every part of the United Kingdom including that of Wales. I personally take a particular interest in who is appointed and would expect candidates who I am consulted about to demonstrate knowledge of the law applying in Wales and have a firm grasp on the concept of devolution. Currently Justices with close links in Scotland and Northern Ireland sit in the Supreme Court. In the future it would be good to see a Justice from the legal community in Wales, and who knows - perhaps it could be someone in this room?

As well as the knowledge and experience to apply Welsh law the Supreme Court, and indeed the lower courts, have to grapple with some complex constitutional problems on devolution and these are not always easily resolved by the application of conventional constitutional theory. Devolution is a ground-breaking area of law and these issues must be looked at in the context of our ever-evolving UK constitution.

In recent years there have been a number of high-profile Scottish devolution cases which have implications for Wales, most recently the case of *Axa v Lord Advocate* in which the Counsel General has intervened. I understand Keith (Bush) will be holding a session on this case later this morning. For those of you not familiar with the case it is a challenge by Scottish insurers to the validity of an Act of the Scottish Parliament. Under the Act people with the condition known as pleural plaques (a condition which arises from exposure to asbestos but does not display any symptoms) to claim damages. One of the issues considered by the Supreme was whether Acts of the Scottish Parliament may be subject to the common law jurisdiction of the court.

The outcome of their decision has implications for the status of Acts of the Assembly and therefore it is important to us. This was one of the first issues

facing Theo Huckle when he was newly appointed as Counsel General. Within his first few weeks in the job he appeared in person in the Supreme Court, something that previous Counsel Generals, including myself had shied away from. My Government was very pleased by the positive reception our Welsh Law Officer received from Lord Hope and their Lordships when he appeared before the Court. We are expecting the judgment soon. So what does this divergence in law mean for the practitioners who are working with the law everyday?

An inevitable consequence of devolution is that although we now have distinct Welsh law, the law of England and Wales still applies in Wales. The challenge for the legal practitioner is knowing which law applies when and this isn't always easy. The Welsh Government is acutely aware that devolution law has added to the complexity of the statute book and we are looking at ways of improving accessibility including consolidation of the law applying in Wales. The Counsel General is due to speak this afternoon and he will talk more about this.

I have talked about where we are now. So where do we go from here? What next?

There is the issue of funding for Wales. The UK Government is establishing the Commission for Devolution which will be a Calman-like process for Wales and in the first instance will look at fiscal devolution for Wales. As part of its work it will consider aspects of the Holtham report on funding reform. We will continue to work closely with the UK Government to ensure this work progresses as quickly as possible in order to achieve a fairer funding package for Wales. Once the finance part of the work is completed the Commission will, as did the Calman Commission in Scotland, go on to look at the wider constitutional settlement. It will have a chance to look at the way in which the devolution settlement has developed incrementally and whether that has resulted in something that is sustainable.

Then there is the issue of jurisdiction and how far do we go down the road of creating a distinctive legal jurisdiction for Wales. Nowhere in the world are there two legislatures operating in the same jurisdiction and both responsible for the same policy area. Is it inevitable, now that the Assembly has primary law-making powers, that we must move in this direction and if so what would we need to do to achieve it? What would the benefits be? I and former Counsels General have said previously that it is inevitable that we will have to consider that matter. And now that we have had the referendum the Counsel General and I agree that we cannot shy away from that.

Therefore, today I have made a statement to the Assembly that we intend to have a public debate on the issue. It is not something that is only for Ministers and civil servants to debate. We want an open and thorough debate on all the issues and want the widest input possible. Early next year we will issue the first Green Paper which will invite the thoughts of the legal community and academics, as well as the wider community. That process cannot be rushed. We will particularly welcome your views, which will be invaluable in that debate.

Of course, the first and fundamental question is what are we talking about when we say "separate legal jurisdiction"? This is a question that hides many complexities. Many people have already written about what they think it is but we need consensus on what we are talking about in relation to Wales. Any debate is going to be clouded and obscure if we are talking at cross purposes. It does not necessarily mean complete devolution. Scotland has its own jurisdiction but matters such as employment are reserved. We will want to consider what it means at its irreducible minimum and what then might flow from having a separate jurisdiction.

We also need to think about what a separate legal jurisdiction would mean for the courts and the legal professions in Wales? What training would the legal professions need? We do not want to create something that cuts us off from the expertise elsewhere in the United Kingdom. I would hope that we could

continue to have unified legal professions able to work in both jurisdictions. They should have access to the biggest market possible.

The responses we receive will help to inform the Welsh Government's thinking in preparation for the second stage of the work of the Commission on Devolution. I encourage you to start thinking about these and other issues now.

Wales has come a long way in a relatively short time. Twelve years ago we were expected to do little else other than to shuffle money and did nothing that was different. We inherited a civil service that effectively rubber stamped the policies of Westminster. But there has been a real change and the Civil Service in Wales has had to adapt to that change and I am happy with the way they are handling the challenges. We are establishing a central business district in Cardiff which offers potential for attracting commercial law practices to Cardiff.

But there are still exciting and challenging times ahead of us. The legal community has played an important part in that journey and I look forward to your continuing involvement and contribution to the issues which are so fundamental to the future of Wales. I hope you enjoy the conference. Conferences like this are very helpful for legal profession. Thank you.