



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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THE LAW OF WALES: LOOKING FORWARDS

Speech at the Legal Wales Conference

9 October 2015

Introduction

1. Almost exactly 15 years ago, when a Presiding Judge in Wales, I gave a lecture entitled *Legal Wales: Its modern origin and its role after devolution: National Identity, the Welsh Language and Parochialism*.¹ By modern I meant post 1830 (the date of the abolition of the Courts of Great Session). I traced the history of the courts in Wales, the Welsh Language and the interrelationship with the various Home Rule proposals. I concluded by pointing out how parochialism and introspection had severely damaged the administration of justice in Wales and expressed the hope that post devolution Legal Wales would develop in an innovative and outward looking way.
2. It is important more than ever in considering the issues that we currently face in the delivery of justice to be innovative and outward looking. And we certainly face a number of difficult issues. These include:
 - a. the role of fundamental rights;

¹ Lord Morris of Borth-y-Gest Lecture, 25 October 2000; Welsh Legal History, vol 1 page 113

- b. the relationship between the United Kingdom and the European institutions;
 - c. the constitutional relationships between the nations of the United Kingdom and between London and the large English conurbations;
 - d. the increasing effect of austerity and retrenchment;
 - e. overhauling the machinery of justice and law making;
 - f. the position of the professions;
 - g. challenges to our international position as a leading jurisdiction.
3. Each of these touches on politics and two are highly political subjects of some controversy. As Lady Clarke so eloquently emphasized this morning, it is vital that judges do not enter into politics. By becoming a judge, you accept that the former freedoms you enjoyed as a barrister or solicitor or legal executive are gone. The standing and independence of the judiciary are at risk if judges express views on matters of political controversy. I will therefore say nothing on the first two issues.

Welsh devolution

4. But I can and must say a word about upcoming changes to the devolution settlement for Wales which we can expect in the coming year.
5. On Monday 5 October 2015, I spoke at the London launch of *Delivering a reserved powers model of devolution for Wales*,² a report jointly undertaken by the Cardiff University's Cardiff Governance Centre and University College London's Constitution Unit. As then, I wish to pay public tribute to the immense achievement and to thank the very eminent persons who produced it. It is an excellent report – whether you agree with it or not. I cannot and will not say whether I agree or do not agree, for to express a view would be to enter into the political arena. But there are four points I made and would like to make again.

² <http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-ENG-V4.pdf>

6. First, the Secretary of State's wish to produce a clear and lasting settlement is to be applauded. Clarity, durability and workability are essential. It is not desirable to produce a settlement that will end up with more cases to be resolved in the courts
7. Second, the key to constitutional drafting is ensuring that it is rooted in principle, that it is future-proofed, and is grounded enough to deal with the inevitable and continuing technical revolution. It must be able to stand the test of changes in society.
8. Third, criminal and civil law have in part the function of enforcing the law. A legislature cannot make effective laws unless it can provide for civil or criminal means of enforcement through its primary legislation.
9. Fourth - the position of the court and tribunal system. It is important for me to stress at the outset that the question whether or not there should be a separate courts and tribunals system for Wales is also a matter for the politicians. However, it is essential to distinguish carefully the different ways in which the term "jurisdiction" is used. It is right for me to say that there is no reason why a unified court system encompassing England and Wales cannot serve two legal jurisdictions, as the report makes clear. Whether you have a court system that operates across two legal jurisdictions in a broadly unitary manner, but with a distinct identity in relation to a Welsh jurisdiction (if created) and provisions for training and deployment, or whether you have an entirely separate court system for each legal jurisdiction depends on much wider considerations, including economic considerations. If politicians decide that the issue is one to be considered, there will need to be a wide ranging debate and careful analysis, as there are far reaching implications and complex issues, including economic issues, and questions about legal qualifications and rights to practise and rights of audience. We were reminded recently of the last by the decision of the Court of Session in refusing to permit a QC admitted in

England and Wales to appear in a tax case in Scotland, even though the law is identical.³

Austerity and retrenchment

10. You all know the major effect austerity and the retrenchment of the state have had on the administration of justice in England and Wales. But do not think, as might have appeared from some earlier comments today, that this is a policy confined to the government at Westminster. Across the world, except Norway and city states like Singapore or the Gulf states, Parliaments are reducing the money provided for justice.
11. We all know that law is the infrastructure that binds society together, but the infrastructure that at first sight appeals to politicians and the public is the physical infrastructure – hospitals, schools, roads and railways. I therefore spend a lot of time explaining the centrality of justice to our society and how we cannot prosper, have a stable society or accountable government without a properly resourced system for the administration of justice. I would encourage you all to do the same.
12. But austerity and the retrenchment of the state have compelled a rethink of how we provide access to justice. This is a wide subject – the provision of legal aid, the cost of legal disputes and the way in which the courts deliver justice. It is to the last of these I now turn.

Austerity and the machinery of justice

13. Although austerity in effect provides no option but to undertake a fundamental overhaul of the machinery through which the courts deliver justice, it is also the right task to undertake.
14. The planned programme of reform of the courts is far-reaching – at the centre is the use of technology to make access better. One example is the Civil Justice Council's report into Online Dispute Resolution for lower value civil claims and a very similar set of proposals from

³ *Taylor Clark –v- HMRC* [2015] CSIH 32

JUSTICE. These suggest a three-stage approach within the court system i) avoidance through information and case analysis; ii) resolution through online facilitation and mediation; and iii) adjudication by a judge either by an online court or in a courtroom and with a reduced need for lawyers. This, combined with better, more user-friendly laws, a subject to which I shall turn, will make a real difference and ensure that access to justice is a reality.

15. This is part of the context in which the proposed consultation on court closure programme must be seen. The other part of the context is the failure, despite the pleas of the judiciary, to devise a coherent strategy for the location of courts in Wales. Although this was manifest in the parochialism that I explained in my lecture 15 years ago – a more modern example will bring home the point. I grew up in the then Breconshire. Brecon had a perfectly good venue for the Magistrates Court in the town hall and a grand assize court; the latter was axed by Beeching and the former, as best as I have been able to discover, replaced by a fine new court on the outskirts of the town built when someone was seeking something on which to spend a capital surplus at the end of one financial year.

16. We need, and I hope we will have, a proper thought through strategy. There will be fewer but better dedicated court buildings. There will be a return to the use of local public buildings to ensure justice continues to be done at a community level. We will exploit the great benefits of information technology and digitalisation to make sure the justice system is equipped for the future, and, most importantly, serves the public.

17. The then Senior President of Tribunals and I made the following announcement to the judiciary when the Ministry of Justice consultation on the courts and tribunals estate was launched in July 2015:

We have always conveyed our strong support for a major overhaul of the justice system through the effective use of

information technology, changing working practices and, most appropriately for today's announcement, a modernised court and tribunal estate. This consultation on the reconfiguration of the estate – where there is an existing surplus of capacity – is an important first step...

This proposal should not be seen as a continuation of the past policies of court closures, but as the first and necessary step on the overhaul of the machinery of justice to provide better and more cost effective access to justice using modern technology.

In April 2014, I told the House of Commons Justice Committee that we ought, in towns where it is not cost effective to have dedicated court premises, to provide court hearings in other buildings to which the public has access. It is clear that modern technology enables this and other means of improving access to justice to be achieved...

The Senior President of Tribunals and I encourage everyone to read the consultation papers published today and for judges, magistrates, professional court users and for members of the public to put forward their ideas to HMCTS with whom we will be working to improve, not curtail, access to justice. We are particularly keen to encourage those responding to the consultation to put forward specific proposals for alternative venues, particularly in rural areas, to improve access to justice.

18. That consultation closed yesterday, but I nonetheless repeat and stand by that announcement. The view I set out remains that of the judiciary – their support for any further closures is dependent on the provision of the investment and must go hand in hand with the implementation of a coherent strategy.

The machinery of law making

19. Access to Justice depends also on simpler law and access to that law.

20. When I spoke at this conference two years ago, I said:

In Wales, there is a huge advantage that Welsh legislation has but a short history. There is no reason, therefore, why it cannot develop its own innovative style...Furthermore, Wales can begin its own sensible organisation of Welsh law into a Code with chapters into which new laws can be inserted and old law amended, much along the lines of what is done in most states. Westminster is burdened by history. It is therefore a model that does not have to be followed.⁴

⁴ *The Role of the Judiciary in a rapidly changing Wales* – Legal Wales Conference, 11 October 2013.

21. I was very fortunate and privileged to speak alongside Sir Geoffrey Palmer QC, former Prime Minister of New Zealand, earlier this year in a seminar at Cardiff Bay. We both took a fairly radical stance on shaking up legislative processes, streamlining them and producing modern well drafted law on a model that does not follow Westminster burdened as it is with the legacy of centuries of legislation.

22. I was therefore delighted at and strongly support as a matter of principle, the Law Commission's proposals on *The Form and Accessibility of the Law Applicable to Wales*. The task of codifying Welsh law is not that daunting largely due to the youth of the Welsh Assembly's legislative history. It also recognises an appetite for reform from judges, politicians, academics, the voluntary and advice sector and many more. The paper also notes the willingness of the Assembly to innovate. All in all, there is a real opportunity for Wales to lead the way in producing better law. In fact it is an opportunity that the Assembly must grasp, as it is difficult to see how it can afford the cost of not doing so, as it will deliver better law and less cost than the Westminster model can. The consultation summarises the benefits very succinctly:

We are suggesting...a move towards codification to improve the accessibility of the law, to improve its certainty and to facilitate its updating.⁵

23. I have already made passing reference to the planned HMCTS reform programme. One of the realities that the reform programme has to address is the ever-rising costs of obtaining legal advice and representation. Two problematic effects of these high costs are i) people simply not being able to access justice; and, ii) people bringing

⁵ Para 8.75, Page 155, *Form and Accessibility of the Law Applicable in Wales*, http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp223_for_accessibility_wales_with_cover.pdf

misguided claims in person, which often derail without the benefit of legal assistance or other clear guidance.

24. The judiciary is addressing the issue in part through the proposals of the Civil Justice Council and JUSTICE to which I have referred and the inquiry by Lord Justice Briggs. But clear, codified law can offer another part of the solution. Law that is simpler to understand can be more easily navigated by the public. Individuals, whether alone or with the support of family, friends or advice agencies, can more easily form their own view as to their legal rights and liabilities. Should they need to resort to the courts, the absence of lawyers is less of an issue.

The role of the Judicial Office and the judiciary

25. Before I turn to my last topic, the legal profession, I need to say something about the judiciary and the Judicial Office and the work that is done in respect of Wales. In summary
 - a. The judiciary has now put in place a system to address the effect of Welsh legislation on the courts and tribunals system and the new laws of Wales it must administer. We have been doing this for a long time in Whitehall but we now have an agreed process with the Welsh Government where early notification of proposed bills are discussed with the judiciary.
 - b. We have a dedicated Judges' Council Committee for Wales which advises both the Judges' Council and the Judicial Executive Board;

- c. We are supportive of the initiatives run by the Judicial Appointments Commission in respect to Welsh appointments;
- d. The Judicial College offers excellent training to judges, with the dedicated Welsh Training Committee.
- e. Under the leadership of Mr Justice Wyn Williams, the Lord Chancellor's Standing Committee on the Welsh Language has strengthened the use of Welsh in the courts. It is a mark of progress that in the last year a judicial review judgment was delivered in Welsh.⁶

The legal profession and international issues

26. The last topic to which I turn is the position of the legal profession in Wales. It is imperative that it continues to thrive and cater for the legal needs of individuals and businesses in Wales, and to provide the judges of the future.

27. However, the legal profession is undergoing a revolution – this is worldwide – and again what we do in Wales must be seen in this context. I spoke on this subject to the Cardiff Business Club in November 2014.⁷ I am very grateful to the Law Society, CILEX and the Bar Council for what it is doing to address these issues.

28. The profession in Wales is not immune in any way from the major international changes. There is no room for complacency. It faces

⁶ *Welsh Language Commissioner -v- National Savings and Investments and Other* [2014] EWHC 488 (Admin)

⁷ <https://www.judiciary.gov.uk/wp-content/uploads/2014/11/cardiff-business-club.pdf>

fierce international competition. It has a choice. It can stay as it is, but is it not likely to face severe decline if it does? It can see its salvation in providing back office services, but is this far too low an ambition which will see all its ablest lawyers leave? Or it can innovate and find for itself a distinctive place in the modern and fast changing world of legal services.

Conclusion

29. But the choice facing the legal profession as to the way it provides its services is part of a wider issue. In the past, there has been a real tendency to introspection and parochialism. The success of Legal Wales has, at least so far, been to lead Wales forward and place it in a wider international context. Today has seen excellent examples in the speeches of Lady Clarke and Judge Paul Mahoney. We owe an immense amount to Keith Bush QC, the Director, in devising the programme. The work that has gone into this programme shows that Wales can hold a strong position in Justice.

30. And so I wish to return to where I started. Legal Wales is, and must be, outward looking. With the limited resources available, Legal Wales must lead the adaptation to the changes and find a way forward. I have no doubt that Wales, a proud, distinctive and vibrant nation, can lead the way.

31. Thank you very much.