



## Address given to an IWA Lunch on the 6<sup>th</sup> June 2002

by Mr Justice Thomas.

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### Developing Legal Wales: the Economy and the Future of Devolution

#### Introduction

In the Spring 2002 edition of *Agenda*, the Counsel General elegantly summarised the creation, after centuries of slumber, of modern Legal Wales - the legislative work of the Assembly and the parallel changes in the Courts and the legal profession .

I wish to look at the future development of Legal Wales in relation to the close interdependency of the two key issues facing Wales – the development of the economy and any future constitutional changes.

Legal Wales is, perhaps, an interesting microcosm of the wider issues facing our economic and constitutional development. In his inaugural lecture as President of the *Cymmrodorion* in May 2002, Professor RR Davies, one of the most distinguished living historians, sought to identify the characteristics of national identity in relation to Wales. Amongst the seven matters he identified were the law and legal institutions. It is perhaps therefore not inapposite to look at the wider picture through this prism.

I wish to do this by focussing on three specific examples, conscious of the fact that I have omitted many other issues of great importance such as the role of the Welsh language, the evolution of the Welsh Assembly Government from the original model prescribed by the Government of Wales Act and the innovation that the Assembly has shown in its legislation.

#### The three specific examples

These three examples of Legal Wales illustrate three very different issues facing Wales:

(i) **Heroin:** The most visible aspect of the legal system is that part of it that maintains law and order – the police, the prosecution service, the courts, the probation and prison services. It is now accepted that the most serious problem in criminal justice facing Wales is the increasing use of heroin; it has a devastating effect in deprived

areas and there is the ever present risk of it bringing the gun crimes and gangs of London and Manchester to South Wales.

(ii) **The maintenance of legal services in rural Wales:** Initial work done by the Law Society and confirmed by further evidence discloses that there is a serious question as to the economic viability of legal practices in much of rural Wales; the very low salary levels of partners in a number of firms threaten the future of practices. The major causes of this are easy to identify – the decline of the profitability of conveyancing which cross subsidised other work, the major changes to legal aid and the decline of the rural economy.

(iii) **The development of legal services as an economic enterprise:** But not all is negative; the contribution of chambers and law firms as economic enterprises has recently been recognised as significant in providing levels of well paid and highly skilled employment. In the City of London, legal services help underpin the pre-eminence of London as a financial centre and as a centre for international dispute resolution; the major firms operate as providers of legal services across much of the world. Firms, particularly in Cardiff and Swansea, are now emerging as significant economic enterprises within Wales and as providers of legal services across the UK.

Each of these examples illustrates a different impact on the economic development of Wales.

#### (i) **Impact of heroin**

The impact on young people, particularly in the deprived areas of south and north Wales of heroin addiction cannot be underestimated. It is a significant impediment to the development of a well educated, skilled and motivated workforce in some of these areas, particularly in the 16-25 year age group. It generates a significant amount of other crime.

#### (ii) **The impact of the loss of professional services in rural Wales**

Although it is of course now possible for many to obtain legal services at a distance through the use of modern technology, locally based professionals help underpin the viability of local economic activity, quite apart from the wider contribution made to a locality through their other work. The disappearance of solicitors firms from many towns across rural Wales would have a serious adverse economic impact on the local economies, quite apart from the wider social repercussions.

#### (iii) **The impact of law firms as economic enterprises**

In contrast to the negative impact of the matters to which I have referred, the success of some law firms in Cardiff and Swansea has been considerable; the current estimate is that legal services contribute just under 1% to the Welsh GDP – a figure to be contrasted with about 1.8% for agriculture. However in the UK, because of the huge

success of major firms in transactional and dispute resolution work, the contribution to the UK GDP is estimated currently to be at least 1.5%. A determined effort is being made by the UK Government, the Courts and the profession to expand this further. We must do the same here, as, despite the huge success of some firms based in Wales, we are still near the bottom of the league across the UK in terms of the number of persons and percentage of the labour force employed in legal services; the difference in the respective contributions to the GDP shows the challenge we face here in Wales.

## **The challenge**

In each of these examples, there is a challenge facing Wales, but under the present scheme of devolution, although the Assembly has secondary law making powers, no function or power which directly affects the legal system is devolved. Despite that fact, “Legal Wales” has been re-created, because the functions actually devolved have had an indirect impact on the legal system which has both enabled and necessitated the re-creation of Legal Wales. My three examples are illustrations of that.

We now have the opportunity to examine the future development of Legal Wales in the context of the economic strategy put in place by the Assembly and the expressed aspirations for change to be considered by the Commission under Lord Richard QC and the Assembly.

How is the future development of Legal Wales to be affected by that economic strategy and any constitutional change?

There are I think three key questions that must be asked in any analysis of the constitutional and economic issues facing Wales. Let me consider these using the three examples I have chosen:

### **(1) What policies does Wales need to tackle the issues facing the Welsh nation, particularly in the context of enhancing the economic development of Wales?**

The ability to develop policy suited to the needs of Wales is one of the cornerstones of devolution. It has plainly been difficult to begin the task of indigenous policy development, but the indigenous development of policy is now firmly underway.

- In relation to heroin, the necessity for a policy was identified by the Welsh Assembly Government in the paper “*Tackling Substance Misuse in Wales*”, published in April 2000.
- In relation to the other two examples, the position is different as the issues have only so far been identified.
- The need to tackle the question of legal services in rural areas has been identified not only as regards the profession but also through production of an

integrated Strategy for the Location of all Courts and Tribunals on the Wales and Chester Circuit. This is timely as the Lord Chancellor is about to issue a consultation paper in relation to legal services and the Court Service published in May 2002 its initial plans for the location of courts and hearing centres, though this was not an integrated strategy, but one only for locations for the hearing of civil and family cases.

- The need to foster legal services as part of economic development has been identified as important to the Welsh economy. Again steps are in hand to see what policy is needed and should be developed in this area.

In each of these areas the identification of the challenge has shown the need to consider what policy is required for Wales; that policy may, or may not, be different to that for England.

But even if a policy developed for Wales is not very different to that for England, Scotland or Northern Ireland, another cornerstone of devolution is the capability of implementing and adapting that policy more easily. There is significant evidence to suggest that a small nation will find it easier to cut across traditional departmental lines and implement or adapt that policy more effectively.

Thus, in my view, the first question that must be asked is what are the areas of policy or policy implementation where Wales needs the ability to develop or implement policy. In each of the three examples I have taken there is a clear need to examine and answer this question.

## **(2) What powers and what institutions does Wales need to deliver those policies?**

The legal system of England and Wales is unitary, but highly flexible. It has responded in a visible way to devolution, for example, by creation of the Mercantile Court of Wales and Administrative Court of Wales and the sitting of appellate courts, particularly the Court of Appeal in Wales. But an examination of the needs of policy in the three examples I have used may show the need for further and more substantial change. The issues are complex, particularly as to the extent of any change needed to powers or institutions:

- (i) **Heroin.** It is now accepted that any effective policy on heroin cannot be properly formulated or implemented unless there are brought together those who have the necessary power to implement it – the police, the prosecution, the courts, the probation service, the prisons, local authorities and the health and education services.

It can immediately be seen that a line runs straight through the current devolution structure, because some powers are devolved - health, local government and education and some are not - the courts, the police and the others. Steps towards

an interim solution have been made through the Advisory Committee on Criminal Justice to the National Assembly for Wales (which brings together all those interested) and in the Assembly Advisory Body on Substance Misuse, but there is no body or institution that brings together the necessary powers and functions within Wales.

There are several possible solutions to this type of problem. One possibility, adopted in many systems to such a problem, is a comprehensive devolution of function and power across a wide area of home affairs so that such issues can comprehensively be dealt with by the devolved government. An alternative is the gradual devolution of one or more of the functions – the police, the probation service or the courts by way of example. Another is a relatively minor adaptation within the present scheme.

What the correct solution is for Wales must depend upon the answer to what is needed for the ability to formulate or implement policy in Wales, taking into account other areas of policy as I shall explain in a moment. If a major transfer is to be made, then there are working models in Scotland and Northern Ireland; for example the current Northern Ireland Justice Bill provides an interesting model for the organisation of a separate judicial system for a devolved government.

But let me assume a comprehensive devolution of function and power is not what is needed (or practicable); it is then critical that formal or institutionalised structures are created through which central government functions and Welsh Assembly Government functions can be brought together. Such a structure is necessary to enable policy for Wales to be properly formulated and implemented in areas where the division of functions runs straight through the area of policy.

- (ii) Rural Services:** As I have mentioned, there is at present no clear idea of the true extent of the problems in rural Wales and no clear policy for their solution. The provision and administration of funds for legal assistance are a function of the Legal Services Commission ultimately under the Lord Chancellor's Department. There is a director of the Legal Services Commission for Wales just as there are directors for the regions of England; the Commission and LCD are very conscious of the problems and most helpful. Steps are now being taken within Wales to consider the issues and policies in a Welsh context.

Again it is necessary to consider within Wales what policy is needed, bearing in mind the wider impact on the economy of Wales. If the view were taken that the policy could both be formulated and administered within the present unitary arrangements, then the question must arise as to what is needed within the unitary arrangements to ensure that the collateral or wider interests of Wales are taken into account in the formulation and implementation of policy. Unlike heroin and other aspects of criminal justice where there may be needed a structure to bring together within Wales devolved and non devolved functions, this example may raise the question of a single central government function, where a formalised

structure for Welsh Assembly Government representation may be needed to see that policies formulated take into account Welsh interests and any different needs in Wales.

- (iii) **The law firm as an economic enterprise** Again steps are in hand in conjunction with the Welsh Development Agency to build on the success so far achieved and to close the gap with England. The work to be done may very well confirm that this significant economic success is dependent on the ability to bring legal work from England and do it within Wales as part of a unitary court and legal system; this is particularly important as English law has a profound influence across the commercial world, is used in so many commercial contracts worldwide and the courts of England and Wales are familiar to international business.

As I have mentioned in relation to the example of heroin, a much wider devolution of functions, including the courts, might be considered as one possible solution to facilitate the formulation and implementation of policy. It is, however, right to emphasise there may be major countervailing considerations. A good example is the law firm as an economic enterprise and the contribution it makes to the economy of Wales. If such countervailing considerations were to prevail, then it would be essential to ensure that there was a structure for the representation of Welsh interests in the central administration to facilitate the development of the wider interests of Legal Wales and the Welsh economy.

The creation of indigenous legal institutions was characterised by Lord Bingham as a step towards recognising Wales as a proud, distinctive and successful nation. The nurturing and development of these institutions is essential to Wales. If the institutions are to remain within a unitary system, consideration needs to be given to putting a formal structure in place to ensure that that development happens.

Again it can be seen that the identification of what is needed for policy must heavily influence any change to the structure of the scheme of devolution. It is for these reasons that the second question I have posed arises and must be answered.

### **(3) How is this kept within a manageable constitutional arrangement?**

Drawing on the legal system as a microcosm and using my three examples, the task of evolving a workable constitutional arrangement for Wales can easily be seen to be a very considerable challenge.

One approach to the task is, as I have suggested, to delineate those areas of policy where it is considered desirable that Wales can formulate and implement (or just adapt, or just implement) policy better through devolved powers than through central government. One touchstone must be the ability to enhance the economic development of Wales so that the gap between it and England and many other nations within the European Union can be closed. On this approach the functions and powers

required and structures needed would be policy driven. Another touchstone is to keep the structure as simple and comprehensible as possible, as an over-complex system has very considerable dangers of its own.

One possible conclusion as a result of this approach may be that there is a need for a very much wider devolution of power, including much wider secondary or primary legislative power, and a much wider devolution of function, including significant parts of the legal system (as is the case in Scotland and Northern Ireland). Another conclusion might be that such a wide devolution of further functions and powers is not necessary (or practicable), particularly in the light of the economic effects. It is inevitable, unless the solution adopted is of a comprehensive devolution of function and power in a manner akin to Scotland, that there will be the need:

- first to identify those areas where the division of Welsh Assembly Government and central government functions crosses significant areas of policy making and implementation and create structures or institutions to deal with it;
- secondly to identify in those areas where the function is not devolved, what is needed to ensure that the interests of Wales can be properly safeguarded.

These matters cannot be left to arrangements dependent on individual personalities, but must rest upon firm institutional or structural foundations. Attention to these very difficult issues must receive equal consideration to the possible further devolution of powers and functions, not least because, taking the examples I have used, they are of crucial importance to the economic development of Wales. These issues give rise to the third question I have posed which must, in its turn, be answered.

## **Conclusion**

I have used Legal Wales to illustrate the complexity of the issues, as legal institutions are a key identifier of a nation and Legal Wales is a useful microcosm for similar issues which exist within other areas of government. I have no doubt, however, with extensive debate and analysis on a practical level, and a good measure of boldness and self-confidence, a solution can be achieved which fairly balances the conflicting interests within and without Wales and which above all can contribute to Wales' economic development by building on the success already achieved. To this debate and analysis, it is essential Legal Wales makes its full contribution.