



27 March 2012

Mr. Steve George, Committee Clerk  
Constitutional & Legal Affairs Committee  
National Assembly for Wales  
Cardiff Bay, Cardiff,  
CF99 1NA

*By email to: [CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)*

Dear Mr. George

**Oral Evidence to the Constitutional & Legislative Affairs Committee of the Welsh Assembly**

I have pleasure in enclosing a copy of my Oral Evidence. As you can see I have expanded Clause 21.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Lord Morris".

Enc:

cc: Mr. Carwyn Jones, First Minister  
Lord Prys Davies  
Mr. Justice Roderick Evans  
The Rt Hon the Lord Judge  
Lord Justice Pill  
Lord Carnworth



1. I am grateful for the opportunity to make my observations to the Constitutional and Legislative Affairs Committee of the Welsh Assembly.
2. My starting point is that I am a devolutionist which, short of considerable argumentation, means that I wish to bring government closer to the people in Wales. At first blush a separate Welsh (legal) jurisdiction is not a governmental activity, although one of the consequences of the considerable development in powers for the Welsh Assembly since my first proposals in 1976 is that there is a new corpus of law emanating from the Assembly, both before and after the new powers recently granted to it.
3. I would say in passing that in any negotiation between the Assembly and the Westminster Government for further powers there are matters of governmental activity which should have a high priority, such as accountability for Welsh broadcasting, the police, aspects of energy production and perhaps a re-appraisal of how to achieve greater democratic accountability, possibly jointly, of the responsibilities of the Environmental Agency in Wales. I deliberately do not traverse what might be termed "the financial relationship with Westminster", a re-appraisal of which is long overdue.
4. The Secretary of State for Wales had few powers in the beginning. Under governments of both persuasions, those powers were substantially increased, particularly during the period of my stewardship of the office from 1974-79. The driving force for the negotiation for new powers, which occurred simultaneously with the presentation of devolution proposals, was the need to create administrative experience in the Welsh Office in new fields which could serve as the building blocks for the powers of the future Assembly. Without such acquisition the new Assembly would have an even steeper learning curve. I deal with this aspect of my work in some detail in my book *"Fifty Years in Politics and the Law"* chapters 16 and 17.
5. I mention these matters since politics is "the art of the possible". Wise politicians might wish to prioritise more transfers of political decision making, which this proposal is not, however desirable it may be.
6. Let me welcome the administrative decisions which have been taken by a wise judiciary to ensure that the sittings of various important courts now take place in Wales. As enumerated none of these, I surmise, would have unintended political devolutionary consequences.
7. Not having practised as a lawyer in Wales since my very young days I have no experience of the consequences of devolution on practitioners in Wales. I surmise that a lawyer in the civil – possibly criminal field, advising a client on matters in Wales would have to ensure that he checked both the effect of Westminster laws, and laws emanating from Cardiff, both before and after the granting recently of "law-making" powers to the National Assembly. These matters might have to be judicially determined wherever the case was set down.
8. I am, however, unclear as to what a separate jurisdiction entails. I am not alone in this as the first question the Committee asks is the meaning of the term "Separate Welsh Jurisdiction". Short of Wales becoming an independent state nothing can really be wholly

separate. Even the devolution proposals which I proposed and now adopted in subsequent legislation envisaged the judicial determination of disputes between the Assembly and Westminster by the Supreme Court in London.

At least we have a clear answer to one part of the question. A "Separate Welsh Jurisdiction" cannot mean the undermining of this.

9. On the assumption that a more limited "Separate Welsh Jurisdiction" is contemplated in the question it must mean higher and lower courts operating separately from the courts of England. Judges, I presume, would be appointed specifically to the courts in Wales. This harkens back to the courts of the Great Session in Wales (abolished in 1830) to which judges were specifically appointed and I think I am right in my recollection, could still practice as counsel in the courts at Westminster nonetheless.
10. In one of the arguments that used to be put to me when I was working out my proposals for devolution was that Wales, unlike Scotland, did not have a separate legal system with its legal corpus quite distinct from the English Common Law. My reply was "so be it; what does it matter?" The repatriation of democratic decision-making was a different issue and independent of a legal jurisdiction and was no bar to devolution, in our case in Wales.
11. I note that in civil matters there is an appeal from the Scottish Courts direct to the Supreme Court and I surmise if Scotland achieved independence this would be discontinued.
12. However, it is for the proposers of a "Separate Welsh Jurisdiction" to set out what they mean by it, and not for consultees to guess. Does it mean a separate court of appeal in Wales?
13. I have, however, a limited experience of the courts in Northern Ireland as I held the office of Attorney General there, concurrent with being the A.G. for England and Wales. My main responsibilities were for the criminal law with my own Director of Public Prosecutions for the Province whom I supervised and discussed cases of difficulty. The A.G.'s responsibilities were, of course, wider. In addition, and it is not an exhaustive list but the Attorney was the guardian of the public interest. I had a responsibility for commencing contempt cases, for charities and determining whether a Nolle should be entered in prosecutions. This is not an exhaustive list. I have no recollection of any difficulty arising from the fact that Northern Ireland had a separate jurisdiction. I had appropriate relations with the judiciary in the course of my regular visits. I was honoured to be called to the Bar of Northern Ireland.
14. My most onerous responsibility was taking decisions on a very frequent basis, though not as frequent as some of my predecessors, as to whether a defendant should have a jury trial for an indictable offence, or be tried by "The Diplock Courts" without a jury. As a life-long jury man in criminal trials and one of its defenders, I admired the stewardship of the judiciary in their exercise of their probably unwelcome jurisdiction.

15. I understood, because of the small size of the judiciary, both of the High Court and the Court of Appeal, there could be practical difficulties in ensuring that the availability of judges who had not already been “contaminated” by previous knowledge of other stages of a case. My understanding was that any such problems could be and were overcome.
16. This leads me to a conclusion that before the Committee proceeds any further it might wish to canvass the practical implications of whatever is on the table by taking advice from judges, lawyers and others experienced in the work of the Courts of both Northern Ireland and Scotland.
17. Since preparing my evidence I have had the advantage of consulting with the Rt Hon the Lord Carswell, a former Lord of Appeal in Ordinary and Lord Chief Justice of Northern Ireland. I have, with his consent, attached his analysis in a separate and independent factual note.
18. It is not at this stage possible to estimate the cost of creating an “independent jurisdiction”. I surmise they would be considerable. The Committee might want to consider this as a priority.
19. It is self-evident that the pool for the appointment of Chief Justice and judges of the Court of Appeal in Wales would be small if it were decided that promotions would only be made from within the Welsh Judiciary. If, as is likely, a separate Attorney General for Wales were to be appointed, his relationship with the Attorney General for England and Wales would have to be decided. In Northern Ireland the England & Wales Attorney General is still the Advocate General I believe.
20. I am told that in Dublin the model adopted is a judge-led system, which must be demanding on judicial time. In Northern Ireland there is a Director of the Court Service who consults where appropriate with the Lord Chief Justice. If this were the model adopted for Wales, a Director of the Court Service would be required. Other issues to be determined would be family courts and responsibility for magistracy.
21. It may be that it would be more fruitful for the Committee to inquire how the recent developments of court sittings in Wales might be extended and consolidated. I do not know what proportion of Welsh court work is involved in the “Regular Sittings” of the Court of Appeal Division, or indeed the other courts. A presumption that “Welsh work” should be set down for hearing in Wales I surmise would be welcomed.

It may be that a way forward is to delineate that part of the Ministry of Justice and the administrative machinery of the courts further to Wales. It would mean a recognition of the need for special provision for Wales given that the Assembly has law-making powers, as opposed to the present unitary jurisdiction. I am not competent to advise on such policies. If the political will is there some practical progress could be achieved without incurring significant expenditure.

22. I do not think there is any further assistance I can give.

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Note:

The acknowledged legal historian for Northern Ireland is Sir Anthony Hart, a retired High Court Judge and Professor Desmond Greer has written extensively and authoritatively in this field.

Note on "Requirements of a Legal Jurisdiction" is attached.



*Lord Morris of Aberavon*

*27/3/2012*

## Requirements of a separate legal jurisdiction

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### 1. Judiciary

A separate judiciary, both first instance and appellate. Matters requiring consideration include:

- Appointment - a judicial appointments commission, or some other mechanism; the question then arises who has the final say in the appointment, Lord Chancellor or First Minister or some other person (appointments made by The Queen are made on the recommendation of a minister), and whether that person can refuse the appointments commission's recommendation or only refer it back for reconsideration;
- Qualification for appointment - would it be only members of the local Bar, or would members of the English Bar be eligible?

### 2. Barristers

Matters requiring consideration include:

- Qualification for call to the Bar;
- Queen's Counsel or equivalent, and who appoints or recommends for appointment;
- Rights of audience of other Bars (bearing in mind the EU requirements), and rights of such persons to be called to the Bar of Wales;
- Training facilities, both pre- and post-call;

- A complaints and discipline structure;
- An equivalent of the Bar Council to govern the Bar;
- An inn of court or other corporate body.

### **3. Solicitors**

Similar considerations to those relating to barristers, a corporate body such as the Law Society, requirements for admission, training, complaints and discipline.

### **4. Rules of court**

A separate legal system would require its own rules of court, with a rule-making body.

### **5. Court administration**

A self-contained organisation, funded and appointed locally, to run the courts and administer the judiciary (the court service now in place may or may not be sufficient).

### **6. Local legal materials**

Text books relating to the local corpus of law and statute books would be required in the course of time.

### **7. Crown and prosecution service**

An attorney general to head the Crown legal service, a director of public prosecutions and a public prosecutions department, a Crown Office to handle Government legal matters, a youth justice service and various ombudsmen or inspectors to oversee and regulate different aspects of the law and the legal profession.



## **8. Law commission**

A body to consider the development of the law and make recommendations to the Assembly is likely to be required.

All this would have to be negotiated in the light of issues of removal of jurisdiction of English courts and professional bodies and the extent of jurisdiction of Parliament over Welsh legal affairs. That would require primary legislation in Parliament.

Sources for Northern Ireland include the Government of Ireland Act 1920, the Judicature (Northern Ireland) Act 1978, the Justice (Northern Ireland) Act 2002 and such text books as those of Sir Arthur Quekett and Harry Calvert.

