Public Law Challenges in Wales:

The Past and the Present

At the Public Law and Devolution Conference held in Llandudno on November 26th 2010, Professor Thomas Watkin, the former First legislative Counsel to the Welsh Assembly Government, addressed the conference on the issue of 'the current legislative competence of the National Assembly for Wales'. He was asked the question "Is there a need for a separate judicial system in Wales?". The answer was a considered one that started with the words "Not Yet".

The question has clearly moved quickly into the public eye. At the Legal Wales Conference held in Cardiff on October 7th 2011 the First Minister, the Right Honourable Carwyn Jones AM, announced that a Green Paper is to be produced in early 2012 that would start the debate as to a separate legal jurisdiction for Wales. He pointed to the fact that whilst we now have distinct Welsh law, the law of England and Wales still applies in Wales which, if nothing else, provides for complex questions over present jurisdiction.

There is certainly a debate to be had (and indeed it will be had) as to the appropriateness and desirability of a separate legal jurisdiction in Wales. On the crest of such a momentous debate it is appropriate for us to analyse both where we are in relation to Welsh jurisdiction and where we have been. It will be the intention of this article to consider this within the context of the public law challenges within the Administrative Court.

A Brief History of the Law in Wales

Little is known of the legal system in Britain before the invasion by the Roman Empire in 43AD and during the occupation Wales and England were not separated but formed part of the province of Britannia. After the Romans left Britain in 410 AD the tribes that inhabited the area now known as Wales, as well as England, were still heavily influenced by the institutional systems imposed by the Romans. Although there is evidence of a court system in Wales from the sixth century, a distinctly Welsh national identity and legislative system had not yet formed:

> "*The Welsh were to continue to refer to themselves as Brytaniaid until the late twelfth century, and until that century also they referred to the land in which they lived as the Romans had done, Britannia*"[1].

It was during the reign of one of the Welsh princes, Hywel Dda (910 – 949), that a substantial part of modern Wales came together under one kingdom and that the native laws of Wales are traditionally said to have been reduced to writing[2]. At around the same time the Saxon kingdoms of England, under the Kings of Wessex, were consolidating into an English

[1] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p36
[2] For more detail on those laws see; Jenkins, D. "The Law of Hywel Dda" (1986) Gomer Press

kingdom with their own set of laws, thus representing a split in national identity and laws - from the Roman influenced Brytaniaid and tribal customs, to distinct and separate Welsh and English laws. Nonetheless, there was still a distinct link between the thrones, and Hywel Dda "*did homage to those English Kings, and attended their court...(with the title 'under king')*"[3]

The Welsh Kings (and Welsh law) were to continue, with varying degrees of success and influence, until the 12th century when the Norman conquerors of England turned their sights on Wales. In South and East Wales some areas were taken by force and Norman Lords were installed. This area became known as "the Marches". Other areas adopted client status and "*so the native tribal systems of Government began to be overtaken by the thorough version of feudalism practiced by the Normans*"[4]. Throughout the reign of the Plantagenet Kings in England, the Welsh Kings found themselves subject to greater English pressure and influence. This state came to its height in the 13th century. Under Edward I the law in Wales, which varied from area to area, became under pinned (although at this stage not overrun) by English law:

> "*The Statute of Rhuddlan, 1284, ushered many of the common law's features into the principality, and these too were to be a magnet drawing the native Welsh into the legal culture of the conquering English.*"[5]

This fusion of English and Welsh law was thereafter practiced in Wales but the English Kings remained sensitive to the client Kings and Marcher Lords wish to retain local justice. These wishes were observed to the extent that where in England public law litigation could be begun locally but ultimately determined in Westminster or the King's Court (that travelled with the King), "*in Wales... all stages of litigation were taken locally*."[6]

The slow alignment of the law in England and Wales reached the event horizon under Henry VIII with the *Acts of Union*[7] in the 16th century, which imposed English law on Wales (albeit there is some evidence of some parts of Wales being in favour of and petitioning the King for a unified legal system[8]). These Acts may have brought the law in England and Wales into harmony but a separate judicial system existed, with separate justices of the peace, sheriffs and Courts to serve the newly created shires in Wales. Notably, Wales retained its status in having cases involving the Crown considered locally at Courts known as 'The Great Sessions'. Watkins summarises this position:

> "*The Great Sessions had a very wide jurisdiction, which embraced elements which were separate in the royal courts at Westminster. Like the Court of the King's Bench, the principal court of common law which since the fifteenth century only sat at Westminster, the Sessions had*

[3] Jenkins, D. "The Law of Hywel Dda" (1986) Gomer Press, pxii
[4] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p80
[5] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p106
[6] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p108
[7] Composed of *The Act for Law and Justice to be Ministered in Wales in like Form as it is in this Realm of 1535/6* and *The Act for Certain Ordinances in the King's Dominion and Principality of Wales of 1542/3*.
[8] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, pp124-125

jurisdiction over all pleas of the Crown, that is, serious criminal charges [and]*... pleas of assize... they were also to acquire a jurisdiction in equity*."[9]

By the 18th century the tradition of Welsh cases involving the Crown being heard in Wales was beginning to be chipped away at by the Court in Westminster. In 1723 the Kings Bench, in *R. v Athoe* [1723] Strange 553, accepted that the English assizes had jurisdiction to hear a criminal case that should have been heard by the Sessions in Wales. In 1769 the case of *Lloyd v Jones* [1769] 1 Dougl. 213, n. 10, bought the potential for Welsh civil cases to be heard by the English courts. Again we turn to Watkin to summarise:

"*Henceforth, Welsh litigants had a choice of forum within which to commence their litigation. Not only could the King's Bench review the decision of the Great Sessions on a writ of certiorari, it, and the Common Pleas, could actually deal with litigation from Wales from start to finish in exactly the same manner as litigation from England*."[10]

Finally, in 1830, following pressure from some eminent members of Parliament such as Edmund Burke, Parliament acted to abolish the Great Sessions. From that point onwards all of the most serious civil cases, including those cases we would now associate with public law challenges, were started and considered in London, although the hearings themselves were sometimes still heard in Wales. Importantly this removed the ability for Wales to keep its own judicial check on its public officials and brought Wales to what was arguably its least politically and judicially autonomous, with no legislative, executive, or judicial authority of its own.

The position in 1830 remained at a constant for another fifty one years until, in a renaissance, Parliament recognised the Welsh identity for the first time in a legislative guise. The *Sunday Closing (Wales) Act 1881* was the first act to make provision for Wales only. The practical effect of the Act was small, but it represented the first step towards separate laws applicable in Wales only. The twentieth century followed with other small additions to the legal Welsh national identity, such as the establishment of the Welsh Board of Health. These small executive bodies and quangos continued to crop up but there was still no Welsh presence in the highest areas of Government. Nonetheless the tide eventually turned, however, "[a] *specific executive authority for Wales came much later than in Scotland, the post of Secretary of State for Wales only being created in 1964, along with a Welsh Office based in Cardiff*"[11]. Slowly, a Welsh legislative and executive identity was forming again, leading Wales down the road to devolution. Notably, however, the most important cases before the High Court, Court of Appeal, and House of Lords were still being conducted through London.

Whilst various bills and reports proposed devolution throughout the early twentieth century momentum behind the measure first seriously grew in the UK Government after the Kilbrandon Report[12] which "*recommended an elected Parliament in Scotland and a Welsh*

[9] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p129
[10] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p157
[11] Lyon, A. "Constitutional History of the United Kingdom" (2003), Cavendish Publishing Ltd, p429
[12] The Report of the Royal Commission on the Constitution, 1969-1973, Cmnd 5460

Assembly, with powers in purely domestic matters"[13]. The initial referendum in Wales on devolution in 1979 was comprehensively defeated, just 20% of voters backed a devolved government in Wales. The conservative government of the 1980s and 1990s did not engage with devolution which resulted in the next referendum being delayed until 1997. In 1997 the measure passed, but only just, with 50.3% of voters being in favour of devolution[14]. The result of the referendum was the *Government of Wales Act 1998* ("GOWA 1998") followed by the *Government of Wales Act 2006* ("GOWA 2006"). In essence, GOWA 2006 created a National Assembly for Wales with law making powers in certain defined areas. It also created a separate executive. The day to day exercise of executive functions are carried out by the Welsh Ministers, headed and appointed by the First Minister.

On March 3rd 2011 a referendum was held in Wales whereby 63.5% of voters approved increasing the powers of the National Assembly for Wales by providing for the Assembly to have power to make primary legislation, known as Assembly Acts, in twenty broadly defined areas[15]. Under the now redundant schedule 5 of GOWA 2006 the Assembly's powers were very clearly defined and limited in each area of competence. The result of the referendum was to bring into force schedule 7 of GOWA 2006, a much redacted (at least in terms of text) version of schedule 5 whereby the Assembly now possesses all legislative powers in those areas, unless schedule 7 provides for an exception. For example; all legislation relating to education in Wales is now made by the Assembly, except any legislation dealing with research councils.

We can observe from a brief examination of the history of Welsh legal autonomy that legislative, executive and judicial competence in Wales have varied from full control over all three functions to control over none of the functions. At present some legislative and executive functions have been assumed by the Assembly. We now turn to the extent to which the judicial check on these powers are conducted.

The Administrative Court in Wales

The Administrative Court (part of the Queen's Bench Division of the High Court) hears all applications for judicial review and also some statutory appeals and applications. It is by way of the judicial review procedure that a person may challenge the act or omission of a public body. Such applications had been the preserve of the Queen's Bench Division based in London for hundreds of years, although prior to 1974 they were not contained within the unified judicial review process but by a number of writs (such as the writ of certiorari). Since 1999, in line with the act of bringing a devolved Government to Wales, a claim for judicial review could be brought in the Administrative Court in Wales in a case where the claim or any remedy sought involved a devolution issue or an issue concerning the National Assembly for Wales, the Welsh Assembly Government or any Welsh body (including a Welsh local authority), whether or not it involved a devolution issue. Practically the claim could be issued in Cardiff and cases could be heard in Wales, but the type of claim was limited to those

[13] Lyon, A. "Constitutional History of the United Kingdom" (2003), Cavendish Publishing Ltd, p430
[14] Lyon, A. "Constitutional History of the United Kingdom" (2003), Cavendish Publishing Ltd, pp431-432
[15] Jennings, M. "Results of the National Assembly for Wales Referendum 2011" Paper number: 11/017. http://www.assemblywales.org/11-017.pdf. Accessed 21/08/2011

claims where the defendant authority was in Wales, not considering the claimant's location. Further, the administration of the claim and the majority of hearings were still dealt with in London. Devolution had been followed by advancement in devolved justice.

The idea for decentralised Administrative Court centres arose out of the 2007 working group report "Justice Outside London", chaired by Lord Justice of Appeal and then vice-president of the Queen's Bench Division, Sir Anthony May. That report recommended that fully operational offices of the Administrative Court should be established in Cardiff, Birmingham, Manchester and Leeds and that its judges should regularly sit to hear Administrative Court cases in those centres. The main basis for the recommendation to decentralise the Administrative Court was that "*proper access to justice is not achieved if those in the regions can only bring judicial review and other claims in the Administrative Court in London*"[16]. However, the report gave special attention to the case for devolved justice in Wales based on constitutional considerations, concluding that; "*decisions in relation to Wales are made in Wales by the Assembly or by the ministers of the Welsh Assembly Government and a judicial review of such decisions should be heard in Wales*"[17]. From April 21st 2009 the position changed and the vast majority of types of Administrative Court cases (there are still some exceptions) have been administratively handled and heard in Cardiff, Birmingham, Leeds and Manchester, as well as London.

The Administrative Court in Wales has now been hearing Administrative Court cases for almost three years. The Administrative Court Office ("ACO"), the office that supports the Court, has been handling the administrative aspect of those claims for the same time period. Since the decentralisation, between April 29th 2009 and December 31st 2011, the Administrative Court in Wales handled 496 claims, 420 of which were issued in the ACO in Wales and 76 were transferred to the ACO in Wales from other offices, a judicial order having directed transfer. The number of claims, it must be conceded, is comparatively low. For example, when compared to the most prolific regional Administrative Court, Birmingham, the numbers pale in the comparison, with Birmingham issuing 1757 claims in the first three years to Cardiff's 420[18]. One possible explanation is that it may be that the variation can be put down to population size. In 2008 Wales had a population of 3 million[19] whereas the Midlands had a population of 9.8 million[20] creating an obviously smaller pool of potential claimants. The Justice Outside London report did expressly observe that claim numbers were likely to be smaller in Wales but, for the very reason that this article will not dwell on claim numbers, the report did not pay great credence to those lower numbers. The

[16] "Justice Outside London Report" (2007), para 51. http://www.judiciary.gov.uk/publications-and-reports/reports/general/justice-outside-london/index/cardiff-and-wales reports/reports/general/justice-outside-london/index/cardiff-and-wales. Accessed 16/07/2011.
[17] "Justice Outside London Report" (2007), para 51. http://www.judiciary.gov.uk/publications-and-reports/reports/general/justice-outside-london/index/cardiff-and-wales reports/reports/general/justice-outside-london/index/cardiff-and-wales. Accessed 16/07/2011.para 60.
[18] Statistics provided by the Administrative Court Office in Wales.
[19] Office for National Statistics, http://www.statistics.gov.uk/cci/nugget.asp?id=1135 accessed on 07/06/2011
[20] Office for National Statistics, http://www.statistics.gov.uk/cci/nugget.asp?id=1130 and http://www.statistics.gov.uk/cci/nugget.asp?id=1129 accessed on 07/06/2011

report firmly concluded that it was access to justice and constitutional reasons that justified and, indeed, required an Administrative Court in Wales in order that Welsh public law matters can be litigated in Wales.

The legislative landscape for where a judicial review (as well as the statutory appeals and applications also considered in the Administrative Court) can be lodged and ultimately heard are contained within practice direction 54D of part 54 of the Civil Procedure Rules 1998 (as amended). The considerations to which a party lodging a judicial review must consider when assessing an appropriate venue (and also the considerations for a Judge considering transfer) are contained at paragraph 5.2 of that practice direction. They are worth setting out in full:

> *5.2 The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to the following considerations as applicable –*
> *(1) any reason expressed by any party for preferring a particular venue;*
> *(2) the region in which the defendant, or any relevant office or department of the defendant, is based;*
> *(3) the region in which the claimant's legal representatives are based;*
> *(4) the ease and cost of travel to a hearing;*
> *(5) the availability and suitability of alternative means of attending a hearing (for example, by videolink);*
> *(6) the extent and nature of media interest in the proceedings in any particular locality;*
> *(7) the time within which it is appropriate for the proceedings to be determined;*
> *(8) whether it is desirable to administer or determine the claim in another region in the light of the volume of claims issued at, and the capacity, resources and workload of, the court at which it is issued;*
> *(9) whether the claim raises issues sufficiently similar to those in another outstanding claim to make it desirable that it should be determined together with, or immediately following, that other claim; and*
> *(10) whether the claim raises devolution issues and for that reason whether it should more appropriately be determined in London or Cardiff.*

What is to be noted is that whilst there are these ten considerations, including one on devolution, the practice direction only gives priority to the location of the claimant, thus under pinning the conclusions of the Justice Outside London report that access to justice should be improved by decentralisation. However, paragraph 5.2 lists only considerations, it is clear following paragraph 2 of practice direction 54D that the claimant may lodge a claim in any ACO. The practice direction mirrors the Kings Bench decisions of the 18th century in that public law matters that arise out of Welsh authorities' decisions can be decided upon by a Court in England. On the face of it the decentralised Administrative Court in Wales, whilst representing greater legal autonomy in public law litigation than in the 19th and 20th centuries, is not as close to autonomous as perhaps it once was.

A Closer Look at the Present Position

Whilst the legislative perspective establishes a presumption that a judicial review will be considered in accordance with a claimant's location, if we examine the judicial perspective a slightly different pattern emerges. In 2006 the Court of Appeal (Civil Division) gave judgment in the case of *Condron v The National Assembly for Wales* [2006] EWCA Civ

1573. This was the first occasion upon which the issue of the venue of Administrative Court claims involving the devolved government was considered by a Court. In that claim all the hearings, in the Administrative Court and Court of Appeal took place in London, a fact which Richards LJ took a dim view of:

> *"There are procedures in place to enable Welsh judicial review cases and similar statutory challenges to be heard in the Administrative Court in Wales…: In my view the present case cried out to be heard in Wales both at first instance and on appeal, and it is a matter of considerable regret that efforts were not made to have it listed for hearing accordingly. Practitioners and listing officers alike need to be alert to this issue."*[21]

Only the next year the Administrative Court was required to consider the issue of venue in *R (Deepdock) v The Welsh Ministers* [2007] EWHC 3347 (Admin). With the dicta of Richards LJ in mind the point on venue was considered prior to the actual determination of the claim and HHJ Hickinbottom Q.C. (as a Judge of the High Court), as he then was, went even further than the Court in *Condron*:

> *"The devolution settlement as a matter of principle transfers political accountability to the organs of devolved government in Wales; and, where a decision of such a body is challenged, the devolved administration is directly accountable through the Courts. The location of the relevant arm of government is in any event a factor that must be taken into account in considering the appropriate venue for proceedings... [W]ith the increased impetus given to devolved government by the Government of Wales Act 2006 and with increasing powers actually being devolved to the National Assembly for Wales, there is in my view a deepening imperative that challenges to any devolved decisions are (like the decisions themselves) dealt with in Wales... [S]uch cases should be heard in Wales unless there are good reasons for their being heard elsewhere."*[22]

It appears, therefore, that *Deepdock* sets a precedent to suggest that as well as the presumption that the claimant will lodge a claim in the ACO to which they have the closest connection, there is also a presumption that decisions from devolved bodies in Wales will be accountable to the Administrative Court in Wales.

There have also been post-decentralisation decisions that confirm *Deepdock*. The issue of venue reared its head within nine days of the opening of the decentralised ACO in Wales and in a serendipitous occurrence the claimant was the same Mrs. Condron that gave rise to the first *Condron* case referred to above. In *R (Condron) v Merthyr Tydfil County Borough Council* [2009] EWHC 1621 (Admin) Mrs. Condron requested that her claim be considered in London as, to quote her advocate; "*She considers that she will not have a fair trial. Opencast coal mining in Wales is highly contentious and the Claimant is concerned that any regional court may not be impartial*"[23]. This argument is not dissimilar to that accepted by the Kings Bench Division in *R. v Athoe* in the 18th century when it removed the autonomous jurisdiction from the Great Sessions, and commenting "*unfavourably on the chances of Justice being done... in Wales*"[24]. In the 21st century Beatson J's judgment came to a very different conclusion;

---

[21] Condron v The Welsh Ministers [2006] EWCA Civ 1573
[22] The Queen on the application of Deepdock Ltd v The Welsh Ministers [2007] EWHC 3347 (Admin), para 20.
[23] The Queen on application of Condron v Merthyr Tydfil County Borough Council [2009] EWHC 1621 (Admin), para 57
[24] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p156

> "*The submission that cases should be heard at a location remote from the places and events with which they are concerned is to my mind an extraordinary one... in a case involving a Welsh public authority... there may be justification for a more robust approach. In those cases the court may be more proactive in initiating the transfer. The Practice Direction implements the Justice Outside London report. That states in paragraph 65 that there is a 'strong expectation' for Welsh judicial review cases against the decisions of devolved institutions and of Welsh local and public authorities will be heard in Wales, and if issued elsewhere transferred to Wales, absent good reason.*"[25]

The spirit of the *Condron* cases and *Deepdock* has also been observed more recently in *Jones v The Director of Public Prosecutions* [2011] EWHC 50 (Admin) where the Court found itself in a similar position to that in the first *Condron* case. On this occasion an appeal by way of case stated from Caernarfon Crown Court had been lodged in the Administrative Court in Manchester. The point on proper venue was made by Wyn Williams J who stated that; "*a hearing in Wales would have been desirable given the obvious local interest in the outcome of the case*"[26].

In practice it appears that the Welsh public authorities are also keen to uphold the spirit of the precedent and will often apply for cases lodged in England to be transferred to Wales. This practice has been encouraged by the Right Honourable John Griffiths AM, when he was Counsel General for Wales:

> "*There appears to be a presumption that Administrative Court cases from Wales should be heard in Wales...* [and] *for some time the Welsh Assembly Government have applied for transfer of Welsh cases.*" [27]

What appears to have developed is a presumption that cases involving Welsh public authorities will be considered in Wales. Further, following the case law, the Courts and the parties seem largely proactive in their encouragement of the presumption. Since the creation of the National Assembly and the Welsh Government both legislative and executive powers became devolved, it was perhaps inevitable that judicial powers were to follow. It certainly makes sense that cases that directly affect the devolved institutions are considered in Wales. For example, cases such as *The Queen on the application of the Governors of Brymawr Foundation School v The Welsh Ministers* [2011] EWHC 519 (Admin), in which the Administrative Court was required to determine the extent to which the Welsh Assembly Government could delegate its powers to Welsh Local Authorities, was lodged, managed, and determined in Wales. Beatson J's judgment in that case determined that "*given the constitutional status of GOWA 2006, the court is reluctant to read implied limitations into it by reference to legislation which is not constitutional in nature*"[28]. Nonetheless, administrative law in Wales now finds itself akin to a position it found itself in 18th and 19th century when the Great Sessions had authority to consider Welsh Public law matters but so did the Kings Bench in London. However now with the additional force of a presumption that Welsh matters be considered in Wales.

---

[25] The Queen on application of Condron v Merthyr Tydfil County Borough Council [2009] EWHC 1621 (Admin), para 61
[26] Jones v The Director of Public Prosecutions [2011] EWHC 50 (Admin)
[27] Speaking at "The Administrative Court Event: North Wales" at the Mold Law Courts on the March 24th 2011
[28] [2011] EWHC 519 (Admin) at paragraph 87

The Future

The question that headed this article was; "Is there a need for a separate judicial system in Wales?". As previously mentioned an interesting debate lies ahead in the impending Green paper. Whatever the final decision the Welsh legal system has existed in a variety of guises over hundreds of years and the manner of challenge to public bodies has changed with it. Some of these changes resulted in greater legal autonomy, some resulted in greater ties with England. The present Administrative Court allows challenges to any public body, in England or Wales, to be lodged, administratively handled, and determined in Wales. The current dicta on venue includes a legislative emphasis on the claimant's choice of venue and a judicial emphasis on Welsh challenges being heard in Wales. They are perspectives that seem to work in harmony and appear to combine to allow for greater access to justice and devolved judicial checks.

A quote from Professor Watkin having started this article it seems appropriate that he also have the final word:

> "*Such is the Wales of the twenty first century, with its laws being made in Cardiff, Westminster and Brussels, and adjudicated upon by a variety of courts. In that there is nothing new for Wales, and therefore no reason for doubting that Wales will continue to develop in a manner true to its rich legal heritage*".[29]

David C. Gardner[30]

[29] Watkin, T. "The Legal History of Wales" (2007), University of Wales Press, p206

[30] David Gardner is the Administrative Court Office Lawyer for Wales and an employee of Her Majesty's Courts and Tribunal Service. The views expressed in this article are those of the author and not those of the Ministry of Justice, HMCTS, the ACO or its staff members.