



Note of the Models of Devolution Expert Evidence Seminar
Aberystwyth University 25 June 2013

Experts in attendance:

Professor R. Gwynedd Parry – Swansea Law School

Dr Catrin Fflur Huws – Aberystwyth University Department of Law

Mr David Dixon – Cardiff Law School

Commissioners in attendance:

Paul Silk

Eurfyl ap Gwilym

The discussion focused primarily on the legal arguments around the models of devolution ~~due to the background of those participating.~~

The general arguments in favour of the reserved powers model

It was noted that the reserved powers model could create a legislature that would have far greater scope, although the scope could also be widened under a conferred powers model. It was agreed that a change in the model of devolution could not only impact on the powers devolved but also how they were used: ~~for example, to the extent that~~ uncertainty about the existing devolved boundary might put the Assembly off using the full extent of its existing powers. The current Welsh settlement can cause problems in terms of understanding what powers are actually devolved. The example of the Welsh language was given – while the Welsh language is listed as a devolved matter under Schedule 7 (with one exception) there are other matters which are not devolved but have Welsh language implications; due to the construction of the devolution settlement those areas of Welsh language policy are non-devolved. Additionally it was noted that, while having twenty headings that classify what is and is not devolved appears to be neat, in reality, because there are so many overlaps within a subject area, a number of problems will be encountered during policy and legislation development.

A short discussion was had on the public perception of the current model of devolution in Wales particularly around the fact that it seen by some to be a grudging settlement that allows Westminster to limit the powers of the Assembly. It would appear to some that Westminster has more control over Wales than it does over Scotland and that Wales is at a disadvantage under the current governance model. Another key difference is that the default position in Scotland is that a new policy area is devolved (eg post Leveson press regulation) unless the UK Government steps in to make it reserved.



Attention was also given to the issue of legal challenge with a number of points being raised. Firstly the issue of the burden of proof was raised with it being noted that Westminster is better equipped to deal with the burden of proof issue as Cardiff does not have the resources to discharge this properly. The issue was also raised that under the present arrangements it is possible that a legal dispute could lead to paralysis between the two governments and that this is not an efficient method of government. Further to this it was argued that the reserved powers model gave the appearance of a devolved administration being “trusted” with powers, and it was noted in the case of ~~Scotland was used as an example and the fact~~ that of its 199 Acts, not one has been challenged by the UK Government or a Government body.

In the case of ~~This issue was discussed further in terms of~~ Wales, with it ~~was being~~ generally agreed that, under the current agreement, Westminster had a greater~~more~~ vested interest in becoming involved in devolved issues. This was, illustrated by the greater number of jagged edges in the Welsh settlement. There was complete agreement that there is a need for clarity under the current system and that one of the side effects of the settlement’s structure is that Cardiff Bay is becoming risk adverse in creating legislation. Further to this it was noted that an effective~~one~~ way of stopping devolution in Wales from gaining momentum was to continue with the conferred powers model – as well as to continue with~~and~~ the current number of Assembly Members. It was also discuss~~ed~~ that the conferred powers model controls the divergence of law between England and Wales.

The implications on private law

While discussing the models of devolution it was noted that the powers devolved under the existing conferred powers model tend to be public law focused and therefore ~~it~~ focuses mainly on aspects of government policy e.g. health, education etc. A reserved powers model, depending on how the reserved powers were defined, may be more likely to devolve laws that would affect private law and would~~it~~ impact on the individual’s interaction with the courts. A result of this could be that the individual could start to be impacted more by the divergence of law (in terms of ~~the~~ individual litigating against ~~the~~ individual and not the state). It was noted, however, that a reserved powers model could reserve parts of private law to Westminster as happens in both Scotland and Northern Ireland.

The link between models of devolution and a separate jurisdiction

An extensive discussion took place on the issue of a separate jurisdiction for Wales. It was first noted that there had already been a process of devolution of legal institutions in Wales in an administrative sense and indeed some tribunals were fully devolved. It was also argued~~noted~~ that there is a need for separate jurisdiction in Wales so that ~~the~~ future of legislation in Wales can be dealt with within~~supported by~~ a devolved court system and judiciary. It was also argued~~discussed~~ that if Wales moved to a reserved powers model of devolution there may be a stronger case for a



separate jurisdiction so that the artificial constructs of the England and Wales jurisdiction could be removed.

The impact of a separate jurisdiction on the legal profession was also discussed with it being noted that commercial law firms have said that, if England and Wales were to separate [in jurisdictional terms](#), they would find it difficult to do business [from Wales](#). It was also agreed that there is a link between north Wales and the north of England in terms of legal business and the free flow of business may be reduced if England and Wales were separate jurisdictions. ~~It was also noted that public engagement in relation to devolution must be improved as there are lawyers that are uncertain of what is or isn't devolved; this is due to the complicated nature of the settlement and lack of a published body of Welsh law.~~

The practical implications of a separate jurisdiction were discussed with it being noted that a phased approach would be possible. It was agreed that there are painless adjustments that could be made and that the mechanics were currently there to support incremental change. Over time it would be possible for the whole legal infrastructure to be devolved to Wales. It was noted that if the model of devolution is changed there could be demand for changes to the legal infrastructure, whether or not a separate jurisdiction is established.

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