

Towards a just Wales

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Counsel General for Wales

Speech at the National Eisteddfod, 4th August 2018

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Speech by the Counsel General for Wales, Jeremy Miles AM,
to the Bevan Foundation at the National Eisteddfod, 4th August 2018

Good afternoon, I'm delighted to be speaking with you today on this the first day of the National Eisteddfod here in Cardiff bay. As an Assembly Member it is a very special Eisteddfod for me this year, set as it is in the home of our national Parliament. Opening up the Senedd to the Eisteddfod is a very important symbol of our transparency and the accessibility of this institution and its place at the heart of Welsh cultural life.

Our role here as Assembly Members of all parties is to work in the way we best perceive it, towards a prosperous Wales, a fair Wales, and indeed towards a just Wales.

It is particularly appropriate to be speaking on the topic of a just Wales today not simply because we are meeting at the heart of Welsh democratic life, but also because Cardiff Bay, or Cardiff docks, has had its own part to play in the history of injustice in Wales.

A few hundred yards from here, one evening in March 1952, Lilly Vospert, was closing up her shop at 203 Bute Street. She was a clothier and an informal money lender to the communities of Tiger Bay. Tiger Bay at that time was one of the most cosmopolitan parts of the UK, with seafarers from all around the world making Cardiff their home.

One of those who had moved here was Mahmood Hussein Mattan, a merchant seaman born in what was then British Somaliland, whose trade had brought him to Wales in the 1940s. He had met a Welsh woman, Laura Williams, from the Rhondda and settled in Tiger Bay. As a multiracial couple, they suffered immense racism which played a part in breaking up their relationship. When Lilly Vospert was found dead the morning after shutting up her shop, her throat cut, Mahmood Hussein Mattan was arrested and charged with her murder.

He refused the services of an interpreter and struggled through proceedings with a flawed grasp of what was happening. The prejudice he had experienced in his daily life, was mirrored by his own barrister who described him to the jury as a "*half child of nature, a semi-civilised savage*". It was 1952. He was convicted on the evidence of one man, who himself had received a share of a reward offered by Lilly's family, a man who had previously identified another man, and against the evidence of another witness who denied that Mattan was the man she had seen leaving the scene.

He was refused leave to appeal and, aged 28, was hanged at Cardiff Prison, the last man to be hanged there. His wife only discovered her husband had been hanged when she turned up at prison to visit him. In 1998, his case was the first to be overturned by the Court of Appeal through the Criminal Cases Review Commission.

Here was a case of an individual unable to fully exercise his rights, facing a system failing to dispense justice equally to all and in some profound way, regarding defendants like Mahmood Mattan – lacking a voice, lacking a place in the culture in which the justice system is rooted – as somehow beyond the compass of its concern.

As we meet here today, to discuss our path towards a just Wales, can we truly say that these concerns do not still beset our justice system, albeit perhaps in very different sometimes more subtle ways, today?

We may of course be meeting in the Parliament of Wales, but matters relating to the criminal justice system are not devolved to our National Assembly.

And yet despite being reserved to Westminster, the justice system has played a crucial role in the democratic journey on which we are embarked – in taking responsibility for shaping our lives and the type of society which we want, a journey on which establishing this institution where we are meeting today, has been such a key milestone.

The Laws in Wales Acts of the 16th century repealed Wales' ancient laws and sought to bring about uniformity across England and Wales – political uniformity, administrative uniformity, linguistic uniformity and legal uniformity. Although distinct Welsh courts survived until 1830, the law and the legal system was – until recently – the same across England and Wales.

The Acts were sadly largely successful in their aim. Wales' identity survived largely as a cultural expression, in no small part of course thanks to institutions such as the National Eisteddfod.

During the Eisteddfod of 1938, which was also held here in Cardiff, a petition was launched supported by 30 of the 36 Welsh Members of Parliament to tackle another injustice – the Welsh language had held no status in public administration for four centuries. But the petition demanded equal standing for the Welsh language. It attracted more than 250,000 signatures and it paved the way for the Welsh Courts Act which gave the first rights in 400 years to use Welsh in courts here in Wales. And incidentally, Keith Bush QC will be giving a talk on the petition on the 'maes' on Wednesday.

In light of the public support, the bill sped through Parliament in 1942, partly reflecting the sentiment voiced by Viscount Sankey, a Law Lord and former Lord Chancellor, during a debate in the Lords:

“many Welshmen who speak English think in Welsh ... No doubt many Members of this House read French easily and speak it well; many speak it perfectly; yet how should we like to be examined and cross-examined in French? ...those who have heard, as I have heard, hundreds and hundreds of cases in Welsh courts will appreciate the position.”

Some years later, in the 1960s Wales achieved a degree of administrative devolution at least, with the creation of the office of Secretary of State for Wales. This was, of course, an era of passionate, often angry debate and protest about the status of the Welsh language, which led ultimately to the Welsh Language Act 1967 which again expanded the right to use the language in the courts

By 1999 we saw the creation of the National Assembly – which for the first time in centuries, made laws in Welsh, and in 2007 the formal establishment of the Welsh Government and a fully fledged Welsh legislature which has had full law making powers since the referendum of 2011.

What then is the role of these national institutions on our journey *“towards a just Wales”*? A journey to realise a vision of Wales where justice – in the sense of a system of rights and redress – reflects the values and particular characteristics of Welsh society, but also a fuller vision of justice, which embraces also, social and economic justice and a journey the next leg of which will surely feature prominently, as part of a compelling vision of a just Wales, the development of a distinct justice system for our nation.

I should say at the outset that this is about much more than the simple accumulation of powers for its own sake. This is about a capacity to express firstly, a commitment to some fundamental values inherent in a just society at a time when those values are in retreat elsewhere and secondly, a capacity to reflect in the system which enforces our rights and responsibilities, features which are particular to Welsh society and political culture, and indeed particular even to the economy of Wales.

And it is an important time to talk about justice and the rule of law, because they are currently under threat across the world. As Martin Luther King Jr famously reminded us:

“injustice anywhere is a threat to justice everywhere”

Fundamental human rights are in retreat in almost two-thirds of countries surveyed by the World Justice Project for the Rule of Law Index. The painful reality is that a worldwide surge in authoritarian nationalism and a retreat from international legal obligations is endangering the fundamental values which, despite being recent innovations in many places, we have upheld – but which if we are honest – perhaps have taken for granted.

The rule of law is under threat not only because of the rise of authoritarianism, but also because of more subtle forms of populism which undermine social and political norms, and even democracy itself.

In the United States the checks and balances on the exercise of power are now routinely portrayed as instruments for political gain rather than for the effective functioning of the constitution.

In the UK even, the judiciary has been attacked as the Daily Mail disgracefully branded some of our most senior and respected judges as “*enemies of the people*” even more alarmingly, the Lord Chancellor at the time plainly did not consider it her constitutional role to defend the judges and to defend the independence of our judiciary more generally – a fundamental tenet of the rule of law.

And the latest victim of populism here in the UK is the scandalous failure of the Home Secretary Sajid Javid to insist on assurances from the US against the use of the death penalty in the extradition of two terrorist suspects for trial. Subverting a basic tenet of the British justice system, upheld since the abolition of the death penalty in 1965 and – which perversely may be the more telling point – also defying decades of cross party consensus.

On top of this, we are a country in crisis when we look at our penal system. It is a disgrace and we have particular challenges here in Wales. Swansea’s prison is amongst the worst in the UK, with Cardiff and Parc Prison in Bridgend doing little better.

These aberrations defy our sense of ourselves in the UK as a country which upholds the rule of law. They are also a betrayal of our legacy as one of the architects of a global system of laws which exists to protect the rights of individuals.

2018 sees the 70th anniversary of the creation of the Universal Declaration of Human Rights, which established the first internationally agreed definition of human rights, drafted by representatives from the 50 member states of the UN. Famously, the United Kingdom was the first country to sign the Convention and its lawyers (including Welsh lawyers) were instrumental in drafting it.

The Human Rights Act, which has come under so much attack, also celebrates its twentieth anniversary this year. Despite the way it is sometimes caricatured by sections of the media, I consider the Act to be a progressive, inclusive piece of legislation, which protects all our citizens and allows people to challenge inequality and injustice, and to hold those in power to account. This was recently illustrated during the second inquest into the Hillsborough disaster, where families of the victims were able to use the Human Rights Act to seek, and to gain the justice, they so richly deserved.

So the notion that a government of the United Kingdom should be contemplating the weakening of human rights legislation, as this one has done, should be a wake up call to us all.

Lately, the UK Government has of course confirmed that it intends to remain a signatory to the European Convention on Human Rights if only for the duration of this Parliament but, we are very very alert to the temporary nature of this commitment.

The Welsh Government believes that Wales, and the wider United Kingdom, should remain at the forefront of human rights protection across the world. And we have said on many occasions that we will oppose vigorously any dilution of the rights the people of Wales currently enjoy, a position I reiterate here today.

And one of the gravest threats to our rights is our exit from the European Union.

I don't need to tell you that the United Kingdom's withdrawal from the European Union poses the most significant political and constitutional challenge this country has faced for decades. As well as the legal, democratic and economic threats Brexit creates, the European Union has always played a huge role in advancing the field of equalities. Working with our European neighbours we have been able to uphold values which we secured as part of the consensus for justice following the trauma of war. We must not allow the UK's exit from the European Union to undermine this.

The Welsh Government is pressing the UK Government to commit to ensuring that the UK's withdrawal from the EU will not mean a rowing back from the equalities duties and safeguards we enjoy at the moment. The UK Government has indeed committed to consult the devolved administrations on the approach to equalities after Brexit. Including a common approach (or frameworks) across the United Kingdom if that's what's necessary.

I want to restate today that the Welsh Government will hold the UK Government to this commitment. The people of Wales did not vote for fewer equalities rights as part of their decision to leave the European Union and we will do everything in our power to protect those rights.

But the value of these rights to individuals in their daily lives is entirely contingent on how effectively they are reflected in our justice system. So let us look at what practical role they play and should increasingly play in a just Wales.

One of the most profound challenges to a fair justice system is that it is under immense strain due to repeated cuts in funding.

The Law Society recently reviewed the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which made major changes to the system of legal aid and funding of legal services in England and Wales. The review concluded that:

- legal aid is no longer available for many of those who need it;
- those eligible for legal aid find it hard to access it;
- wide gaps in provision are not being addressed.

Importantly for our discussion today, this is not uniform across the UK and Wales has been disproportionately affected by cuts to Legal Aid. There has been a 29 per cent reduction in legal providers in Wales, as against 20 per cent for the whole of England and Wales and 13 per cent for London. Spending on criminal legal aid in Wales is only 74 per cent of the figure for England, barristers on the Welsh and Chester circuit have decided they will no longer undertake criminal legal aid work until this is addressed by the Government – the approach of the Ministry of Justice is a fundamental threat to legal representation to all those facing criminal charges – and a threat to a fair justice system

Some parts of Wales are particularly struggling: the north west of Wales has a population of over 300,000 yet only one legal aid provider for housing cases. Across mid and west Wales, more than 60 per cent of criminal duty solicitors are over 50.

Legal services funded by legal aid are facing an existential crisis.

But in addition to this, in February 2016, the Lord Chancellor closed 10 courts and tribunals in Wales in a cost cutting exercise. Those at Dolgellau, Holyhead, Llangefni, Carmarthen, Prestatyn, Brecon, Bridgend, Neath and Port Talbot, Pontypridd and Wrexham.

The needs of those communities, their geography and transport links, were clearly outweighed by a desire to slash budgets. Access to the courts is inherent to the rule of law, a fundamental feature of the common law – and restricting access to courts can be a threat to the right to a fair trial under Article 6 of the European Convention on Human Rights.

The second major challenge which the justice system faces in Wales relates to the integration of justice, which is generally speaking not devolved with the range of other public services which are devolved. And the integration of those services is clearly essential in order to deliver a genuinely fair justice system and a key step on the journey towards a just Wales.

This is a complex and hugely important issue and differing values and political priorities are always at play in the debate about how best to deliver public services. There are difficult practical questions to be addressed about the integration of the justice system and the penal system which are not devolved with for example, mental health provision, family policy, care services, employability and skills, preventative services and the range of other public services, which are devolved.

It is clear to me that a coherent, holistic approach to public services leads to more effective delivery and to cost savings but much more importantly to improving the outcomes for vulnerable people in the justice system and for communities which are impacted – which surely must be the overriding priority at the heart of any compassionate public service and any system of justice.

But achieving this when responsibility for some aspects of the service is devolved and some are not, is almost impossible.

This brings us to the conundrum at the heart of the devolution settlement in Wales.

Our system of government is complex and confusing and it is certainly inconsistent with the rest of the UK.

The reason why policing and the justice system are generally speaking not devolved to Wales is usually said to be down to the existence of a single legal jurisdiction for England and Wales.

When we recently moved from a conferred to reserved powers model of devolution, this exposed the fault lines in the devolution settlement, largely down to the UK government's wishing to "*protect*" the single legal jurisdiction of England and Wales and in effect to limit the divergence in the law that applies to England and to Wales.

But the law of England and of Wales has already diverged and will continue to do so. This is a natural and inevitable consequence of the creation of a legislature for Wales. Therefore a fundamental characteristic of a legal jurisdiction – one uniform body of law – no longer exists. The single jurisdiction that the UK Government is looking to protect is no longer fit for purpose.

But decisions about what should, or should not, be devolved to Wales should be based on a vision of a coherent system of government which can improve the lives of people in Wales. They should not, be based on a simple accumulation of powers in the abstract and equally they should not, as has been the case too often, just be based on what has gone before. The absence of a legal jurisdiction for Wales is a quirk of events nearly five hundred years ago, while the subject matter of the devolved powers is too heavily influenced by what was initially devolved to the Welsh Office some fifty years ago.

The existence of the single legal jurisdiction of England and Wales, and the associated reality that policing and justice are not devolved, is by far the single biggest remaining cause of complexity of the Welsh devolution settlement. The government of Wales act contains 44 pages of reservations and restrictions, many more than Scotland have. The difference is nearly all a result of the legal jurisdiction, and of the reservation of policing and justice.

This isn't just a matter of constitutional theory – it has very real practical implications. The line between what is devolved and what is not runs right through the middle of 'domestic' subjects, like policing and justice. Causing genuine confusion and complexity and hindering joined up working and good governance.

An arbitrary line has been drawn between what can be legislated for and what can't.

Whether by design, or by custom and practice over time, a principle of subsidiarity applies in other constitutions – there are no reasons in principle why the police, anti-social behaviour, alcohol licensing or criminal justice and related matters need be controlled centrally elsewhere – so they are usually not.

I should also say that the complexity of our constitutional arrangements, in particular the single legal jurisdiction, also has a negative impact on the law itself. As Counsel

General I am particularly concerned with access to justice. An aspect of access to justice, and indeed of any system governed by the rule of law, is the extent to which the law is accessible. The law in the UK is far from accessible partly because of the amount of legislation in force – over 5,000 Acts and more than 100,000 Statutory Instruments – and partly because it is not organised and structured in a way that helps people navigate it.

One of the most fundamental roles of a government is to uphold and promote the rule of law, and doing so involves ensuring that the law is accessible and understandable.

This is a question of social justice. Making the law accessible is vital to enable citizens to understand their rights and responsibilities under the law – something that has become increasingly important since the legal aid cuts and cuts to advice services.

So at the heart of my vision for a just Wales is an ability for Welsh citizens to be able to easily find and readily understand the law – the source of their rights and of their responsibilities. And I am looking forward to introducing legislation in the autumn which will set Wales on the journey to clear, accessible codes of law – the first part of the United Kingdom to take this step.

We firmly believe justice should be devolved in future and the anomalous constitutional situation is why last year the First Minister announced the establishment of a Commission to review the justice system in Wales – chaired by the former Lord Chief Justice, Lord Thomas of Cwmgiedd.

But in the meantime we want to start a debate about what a distinct penal and justice policy for Wales could look like. I want to stress that this is not about seeking powers for the sake of it, I and colleagues in government are not interested in that. We recognise as a government the need to articulate what a different vision of justice can look like for Wales, as a means of engaging people in the task of establishing a fairer more effective justice and penal policy, tailored to the needs of Wales – and set here in Wales through our distinct democratic structures.

Discussions have already begun about what a distinct Welsh penal system should look like. And we are seeking to ensure that a distinct Welsh voice is heard within the UK Government.

The current Lord Chancellor seems to be much more enlightened than his predecessors and its good that he is now expressing some of the views that we in Wales have held for a long time.

His call for prison to be about rehabilitation more than about retribution is something I think many of us would agree with. His comments about the need to have a serious debate about who we should lock up and for how long are welcome. And his recognition that short term sentences are counterproductive is clearly correct.

We know that short term sentences can be so disrupting that they dramatically increase costs to local services and actually increase the likelihood of reoffending. And we know that if the offender is a parent or carer those impacts and costs are magnified.

For women in Wales these issues are further exacerbated by the fact that there is no women's prison in Wales. The Welsh Government has been working closely with the Ministry of Justice on the recently published Female Offender Strategy in an attempt to ensure Wales' unique legislative and policy landscape is respected. Family contact during the sentence is much more difficult for Welsh women due to the travel distance.

There are many examples of women sent to prison for a matter of weeks for non-payment of court fines. Often they are single parents of children or carers for elderly relatives, which leads to dramatically escalating costs to devolved services and a terrifying chain reaction of adverse impacts on dependent family members.

Children taken into care often suffer a disruption at school and huge upheaval which has a long term impact as well as the immediate traumatic separation from the parent. We know only too well that this kind of adverse childhood experience can lead not only to problems in later life but to substance misuse, juvenile offending and other life limiting trauma

The impact, therefore, will always last for far longer than the length of the sentence. Custody can lead to a loss of employment and of housing. Children taken into care might be in care for many months and in some cases might never be able to return to the care of the parent. And this all for the sake of a custodial sentence of a few weeks and for a crime caused largely by poverty.

This is not only unjust. It is unjustifiable.

We are already taking action where we can. The Cabinet Secretary for Finance has announced that imprisonment for non-payment of council tax will be abolished.

And my colleagues the Cabinet Secretary for Local Government and Public Services and the Leader of the House are working with UK Ministers in partnership with the Youth Justice Board Cymru and the prison and probation service on an emerging Welsh policy on female offending and youth justice.

But on our journey towards a just Wales we should not have to work in this way. We should not have to fight to have our voice heard. We should not have to contend with financial, practical, and policy tensions between public services that are devolved and public services that are not devolved.

Achieving a just Wales requires fundamental and radical change.

As a starting point, we need constitutional change. This means an increase in the areas of responsibility over justice for the Welsh Parliament and Government. I want to be clear that this does not mean power for power's sake – but means developing a system of government that provides us with the tools that we require to provide

services fairly, compassionately and effectively. Most significantly this involves devolving policing and justice matters to Wales.

This is in line with public opinion as polls have consistently suggested that there is a clear majority in favour of further devolution. Two specific polls in recent years showed 63 per cent were in favour of devolving policing in Wales and 60 per cent either “*strongly supported*” or “*supported*” devolution of justice with only 28 per cent against.

It also means developing a less complex system of government within which the people of Wales can be clear who is responsible for what. Somewhat incredibly the same poll that concluded that 63 per cent of the population are in favour of devolving policing showed that 48 per cent believed policing was *already* devolved in Wales.

The complexity of the division of power and of the law itself in Wales impairs accountability and ultimately democracy itself.

A more straightforward division of powers should be accompanied by the creation of a Welsh legal jurisdiction and a formal body of Welsh law. In turn this law should be rationalised into an accessible, codified Welsh statute book.

Once devolved, we will face a major challenge in deciding how best to develop our systems of policing and justice. We will need to decide how to focus not only on punishment when that is what is right and proper, but also how to act in the greater good by rehabilitating offenders into society and ensuring that young people in particular are not caught in downward spiral of anti-social behaviour, crime and imprisonment which is often caused by substance abuse and a lack of parental and other support.

Crucially we must find ways of integrating the support services provided by local authorities in particular with the justice system so that ultimately there is less crime and fewer demands on our prisons.

When we think of justice, we think most obviously about the administration of justice through the court system – the upholding of rights and the punishment of wrongs in accordance with the law. But it is of course a much broader concept. It means a society committed to the rule of law, to human rights and to equality – the same status, rights, and responsibilities for all the members of society.

But justice also has a profound social dimension. A just society is an equitable society.

So our vision of a just Wales requires a holistic approach. It demands an emphasis on developing skills, education, good work, and promoting fairness, equal opportunity and inclusive prosperity so that no matter what your social background, and no matter from where in Wales you come from, you have an equal opportunity to flourish and to fulfil your potential in a society committed to justice, equity and the rule of law.

We have an opportunity to change Wales now and for the future.

We have an opportunity to take the next step on our journey towards a just Wales – in all its glorious manifestations – and as we embark today upon a week of national celebration, let us all re-dedicate ourselves to the task of doing so.

And of not simply moving towards - but of achieving together – a just Wales.

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