

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/91858/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Evans, Adam B. 2016. Wales as nation or region? The Conference on Devolution's Judiciary sub-committee, 1919–20. *Welsh History Review* 28 (1), pp. 146-173. 10.16922/whr.28.1.6

Publishers page: <http://dx.doi.org/10.16922/whr.28.1.6>

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



WALES NATION OR REGION? THE CONFERENCE ON DEVOLUTION'S
JUDICIARY SUB-COMMITTEE, 1919-20

Adam Evans

Wales Governance Centre, Cardiff University

Abstract: *The Conference on Devolution, which sat between October 1919 and April 1920, has largely been relegated to a footnote status, a curio attracting only minimal attention in the academic literature. Within the admittedly sparse literature on the Conference, this sub-committee has attracted scant attention and yet it is one of the most fascinating chapters in the Conference's brief existence. Using previously unexplored evidence, this article demonstrates, the judiciary sub-committee's deliberations not only highlight the ambiguities about Wales' place within the Union, but were subject to a lobbying effort from central government unparalleled within the entire existence of the Conference.*

In the devolution debates of the late-nineteenth and early-twentieth centuries the national status of Wales was one of considerable ambiguity. At times Wales was included as an equal, a nation like England, Ireland or Scotland, while at others she was omitted entirely. Wales' status as an essentially contested territorial unit was apparent in the debates leading up to, and during, the proceedings of the Conference on Devolution, 1919-1920. The Conference was one of two occasions when the United Kingdom came close to a constitutional convention dealing with territorial governance in the round (the other being the Royal Commission on

the Constitution, 1969-73) and it has been described as “the nearest that devolution all round ... came to being implemented.”¹

While the ambiguous status of Wales bubbled under the Conference’s deliberations, it would rise to the surface during the proceedings of the Conference’s Judiciary sub-committee. Established to consider the consequences of devolution in England, Scotland and Wales for the judiciary, the sub-committee quickly became pre-occupied with the question of judicial devolution for Wales. Using previously undiscussed evidence, this article sheds new light not only on the judiciary sub-committee, but also on the intense efforts of the Lord Chancellor’s Office to prevent the recommendation of a separate judiciary for Wales. It demonstrates the centrality of Wales’ uncertain claims to nationhood throughout these deliberations and explains why this ambiguity prevailed even when the sub-committee refused to heed the government’s opposition.

Wales and the Devolution Debates of the late-Nineteenth and early-Twentieth centuries.

Assimilated into legal and political union with England in the 1530s-1540s, Wales’ stunted political identity played a considerable role in the ambiguity that surrounded her claims to nationhood in the debates on devolution and Home Rule between 1870 and 1920. Wales’ needs were, as Reid has commented, “always a little vague in Victorian and Edwardian

¹ Oonagh Gay, *Scotland and Devolution*, Research Paper 97/92, London: House of Commons Library, 29th July 1997, p. 6; James Mitchell, *Devolution in the UK* (Manchester, 2009), p. 97

schemes [of federalism].”² Wales was, for example, noticeable in its absence from Isaac Butt’s proposed scheme of Home Rule all round in the 1870s.³ This persisted even after the 1880s, a period famously described by K. O. Morgan as the “rebirth of a nation” thanks to the political and religious hegemonies of the Liberal Party and Nonconformity respectively and the nation-building that flowed from their dominance.⁴

Indeed, while Joseph Chamberlain, Lloyd George and Churchill all proposed schemes of devolution that would have treated Wales as a distinct political entity,⁵ by 1919 there still seemed to be a degree of ambiguity regarding the role of Wales within the United Kingdom. Lord Selborne and F. S. Oliver, the two leading figures in the ‘federal devolution’ and ‘imperial federalism’ campaigns of the early-twentieth century, excluded Wales altogether from the scheme of ‘Home Rule all round’ that they submitted to the 1917-18 Convention on Ireland.⁶ In fact, Selborne was something of a repeat offender with regards to Wales, as can be seen in a letter dated 31st May 1918 to Walter Long, by then a convert to devolution. In this letter, Selborne outlined his support for devolution as being based on combatting parliamentary congestion and meeting the needs of the Empire, but also dealing with the national demands and needs of England and Scotland (Wales was again absent from Selborne’s thinking).⁷ However, as the House of Commons debate which led to the

² Colin Reid, ‘An experiment in constructive Unionism’: Isaac Butt, Home Rule and federalist political thought during the 1870s’, *English Historical Review*, 129/537 (2014), p. 335.

³ Ibid.

⁴ Kenneth Morgan, *Rebirth of a Nation: A History of Modern Wales* (Oxford 1980), pp. 3-4, 56, 90.

⁵ Michael Burgess, *The British Tradition of Federalism*, (London 1995), p. 92; Richard Toye, *Lloyd George and Churchill: Rivals for Greatness*, (London 2007), p. 113

⁶ D. G. Boyce and J. O. Stubbs, F. S. Oliver, Lord Selborne and Federalism, *The Journal of Imperial and Commonwealth History*, 5/1 (1976), p. 68

⁷ Bodleian Library. The Papers of William Waldegrave Palmer, 2nd Earl of Selborne (MS. Selborne): MS. Selborne 84, fols. 120-22. Letter to Walter Long, 31st May 1918.

establishment of the Conference on Devolution demonstrates, Selborne was not alone in having a Welsh blind spot.

The Subordinate Legislatures Resolution and the Conference on Devolution

Between the late-nineteenth and early-twentieth centuries a wide range of forces brought ideas of ‘Home Rule all round’, ‘federal devolution’ or simply ‘devolution’ onto the political agenda. While the Irish Question and its role in stimulating reform is widely referred to in the historiography,⁸ other powerful stimulants for this reform agenda could be found in concerns about Britain’s continued leadership of the Empire and over the increasing congestion of business in Parliament.⁹ Indeed, this congestion was seen by a wide range of political actors, including Walter Long and Austen Chamberlain as a dynamic that threatened Parliament’s position at the heart of the British Empire.¹⁰

It was in this context that, between the 3rd and 4th June 1919, the House of Commons debated, and then passed the following resolution,

That, with a view to enabling the Imperial Parliament to devote more attention to the general interests of the United Kingdom and, in collaboration with the other Governments of the Empire, to matters of common Imperial concern, this House is of opinion that the time has come for the creation of subordinate Legislatures within the United Kingdom,

⁸ See for example: John Kendle, *Ireland and the Federal Solution: The Debate over the United Kingdom Constitution, 1870-1921*, (Quebec 1989), pp. 221-224, 238; Alvin Jackson, *Home Rule: an Irish History 1800-2000*, (London 2004), pp. 217-224

⁹ For more detailed analysis of the development of Parliamentary congestion in the nineteenth and twentieth centuries and proposed remedies to this problem see: W.H. Greenleaf, *The British Political Tradition, Volume 3: A Much Governed Nation*, (London 1987) and Ivor Jennings, *Parliament*, Second Edition, (Cambridge: 1967 [1957])

¹⁰ TNA. CAB/24/5/12. Chamberlain, A. (June 1918). The Irish Question and Federalism, Printed for the War Cabinet; TNA. CAB/24/50/86. Long, W. (9th May 1918). War Cabinet note on federalism

and that to this end the Government, without prejudice to any proposals it may have to make with regard to Ireland, should forthwith appoint a Parliamentary body to consider and report—

1. Upon a measure of Federal Devolution applicable to England, Scotland, and Ireland, defined in its general outlines by existing differences in law and administration between the three countries;
2. *Upon the extent to which these differences are applicable to Welsh conditions and requirements; and*
3. Upon the financial aspects and requirements of the measure.¹¹

While there appeared to be little doubt in the minds of the movers of this resolution (the Unionist MP, Major Edward Wood – the future Lord Halifax – and the Scottish Liberal Murray Macdonald) as to the equality of England, Scotland and Ireland as nations, the same can quite clearly not be said about Wales, which was explicitly isolated from England, Scotland and Ireland for special consideration. Indeed, hesitancy about Wales’ national status was a recurrent feature of the Commons debate on subordinate legislatures; for example, Murray Macdonald, a veteran pro-devolutionist, referred to the UK Parliament’s dual role as the legislature for the Empire and as “the local legislature for the peoples of England, Scotland and Ireland.”¹² This sense that Macdonald considered Wales to be less a fully-fledged nation than a rather awkward sub-unit of England appeared to be confirmed by his subsequent comments in the debate:

¹¹ Emphasis added, *House of Commons Debates* [hereafter *HC Debates*] (5th series), 3 June 1919, vol. 116, col., 2126

¹² Macdonald, *HC Debates* (5th Series) 3rd June 1919 Vol.116 col.1887

She [Wales] forms at present an integral portion of England. With a few very minor exceptions, the same law and the same administration runs through both countries. How far it is consistent with the interests of Wales that she should have a legislature of her own, possessing the same powers as the legislature of the other countries, I do not know. In the Resolution the question is left an open one, and it is the opinion of Wales which must ultimately decide it.¹³

Although Macdonald's contribution and the wording of the resolution left the door open to a measure of Welsh self-government, neither can be considered particularly ringing endorsements of Wales' national status within the United Kingdom.¹⁴ Unsurprisingly, the response from Welsh parliamentarians was vigorous protestation at this perceived slight. Sir Robert Thomas, the Liberal MP for Wrexham, argued that Wales had "every right, when the question of Devolution is discussed, to be considered at least on a level with Scotland and Ireland."¹⁵ Thomas's colleague, T.A. Lewis, was similarly opposed to the motion's implication "that Wales stands on a somewhat different footing ... from Ireland, Scotland and England."¹⁶ Criticism also came from Hugh Edwards, Liberal MP for Neath, who noted his disapproval of "the way in which the motion refers to Wales."¹⁷

¹³ Ibid, c.1889

¹⁴ As the periodical *The Welsh Outlook* commented, this debate, and in particular the way in which Macdonald framed the resolution, "indicates the distance which Wales must yet travel to put itself on a level with Scotland and Ireland as regards its adaptability for the exercise of legislative and administrative autonomy" (*The Welsh Outlook*, Notes of the Month, July 1919, p.165).

¹⁵ Thomas, *HC Debates* (5th Series) 3rd June 1919 Vol.116 col.1949

¹⁶ Lewis, *HC Debates* (5th Series) 4th June 1919 Vol.116 col.2081

¹⁷ Edwards, *HC Debates* (5th Series) 4th June 1919 Vol.116 col.2123

Despite this discord, on 4th June 1919 the House of Commons as a whole voted in favour of the resolution by a margin of 187 to 34. Following this, in July 1919, in response to a written question tabled by Murray Macdonald, the Coalition government affirmed its intention to establish a commission on federal devolution.¹⁸ A month later, the Government, again responding to a written question, announced that the Speaker of the House of Commons, James Lowther, had consented to chair the inquiry.¹⁹ Finally, in October that year, the government announced the membership of the Conference on Devolution (thirty-two members were selected, drawn equally from each House of Parliament) and its terms of reference.²⁰ Sitting between October 1919 and April 1920, the conference focused on three major areas: firstly, whether devolution should be on a national or regional basis for England, Scotland and Wales; secondly, what administrative and legislative powers should be devolved to these legislatures and, finally, how these legislatures should be constituted. While the national status of Wales was not a prime subject of debate during these deliberations,²¹ it would come to dominate one particular aspect of the conference's proceedings: the sub-committee on the judiciary.

The Conference on Devolution's Judiciary Sub-Committee

¹⁸ *HC Debates* (5th Series) 10th July 1919, Vol.117, col.2003

¹⁹ *HC Debates* (5th Series) 4th August 1919, Vol. 119, c.21-22

²⁰ Conference on Devolution. Letter from Mr Speaker to the Prime Minister (with Appendices). Cmd. 692. (London, 1920), pp. 2-3; see also: Adam Evans, An Interlude of Agreement? A Reassessment of the Conference on Devolution's 'Consensus' on Powers, *Contemporary British History*, 2015, early access view: <http://dx.doi.org/10.1080/13619462.2015.1015421>.

²¹ However, while as early as its third meeting the conference had agreed that Wales and Scotland should both have national legislatures (Lowther, Chairman's Letter to the Prime Minister, p. 3; Bodleian Library, The Papers of Ronald Barnes, 3rd Baron Gorell (MOD), Diaries 1919-20, entry dated 30th October 1919), a memorandum penned by Murray Macdonald in April 1920 highlighted that, for some members of the conference at least, Wales's national claims continued to be the subject of greater ambiguity than those of Scotland and England (Add. MS 46104: Viscount Gladstone Papers. Vol. CXX (ff. 260). Papers of Lord Gladstone as a member of the Conference on Devolution, 1919-20. Papers rel. to the Devolution Conference: 1919-20: memorandum circulated to the conference by Mr Murray Macdonald, April 1920).

In December 1919, as part of the conference's deliberations, two sub-committees were established: one on finance and the other on the judiciary.²² Little mentioned in the (admittedly sparse) literature on the Conference on Devolution, the judiciary sub-committee was established to explore the judicial consequences of devolution for England, Scotland and Wales. It would be the latter nation, however, that would dominate the sub-committee's proceedings, a legacy of her historical (under)development, in this case a reflection of her unique relationship to England and historic assimilation in a shared England and Wales legal jurisdiction.

Under the chairmanship of Lord Stuart of Wortley,²³ the sub-committee was tasked with the following remit:

To consider the existing organisation of the Judiciary (including the appointment of judges and the constitution of, and relations between, the higher and lower Courts of Law) in the United Kingdom as a whole and in its several parts; and

To report what changes will be necessary in order to adapt the existing organisation of the Judiciary to a scheme of Devolution which creates subordinate legislatures in the several parts of the United Kingdom.²⁴

²² For more details, see: Evans 2015; Wan-Hsuan Chiao, *Devolution in Great Britain*, (New York 1969 [1926])

²³ Aside from Lord Stuart of Wortley, the sub-committee on the judiciary's membership also included Ryland Adkins (a Coalition Liberal MP for Middleton and Prestwich), Lord Charnwood (an academic, philosopher and Liberal member of the House of Lords), J. Hugh Edwards (Coalition Liberal MP for Neath and formerly a leading figure in Cymru Fydd) and Donald Macmaster (Conservative MP for Chertsey and a former member of the Canadian House of Commons). Conference on Devolution 1920, p. 24.

²⁴ TNA. LCO 2/507. Devolution Conference, Judiciary Sub-Committee: reports and papers concerning the organisation of the Judiciary in the United Kingdom Devolution Conference, Judiciary Sub-Committee. Instructions to Judiciary Sub-Committee

However, while the sub-committee was tasked with the judicial consequences of devolution for England, Scotland and Wales, there was a clear asymmetry in the attention given to the different nations. England, for example, was not discussed in the sub-committee's deliberations, while Scotland was swiftly dispatched. This should not be surprising because, as the sub-committee's report noted, Scotland "enjoys and always has enjoyed a separate judicature of her own, administering a body of substantive law differing in many of its fundamental conceptions from that of England."²⁵ With a distinct judicial and legal system that predated the Anglo-Scottish union in 1707, "all the necessary separate administrative apparatus" already existed in Scotland.²⁶ Hence the sub-committee (and the conference more generally) recommended that only a "minimum of change" was required for Scotland.

On the subject of judicial appointments, for example, the committee recommended that those higher judicial appointments which had hitherto been appointed by the Crown on the recommendation of the Prime Minister should continue to be nominated by the UK Prime Minister, rather than the leader of a devolved Scottish administration. For those appointments made on the advice of the Secretary for Scotland, the committee recommended that, after devolution, they should be made on the advice of the minister discharging "duties substantially analogous to those now discharged by the Secretary for Scotland."²⁷ All other appointments should, they recommended, "continue so far as possible to be made in the same way as they now are." The reforms proposed by the sub-committee were therefore limited to the definition and punishment of major crimes ("adopting for this purpose the list usually

²⁵ The evidence for this section is drawn from Conference on Devolution, p.22

²⁶ Ibid.

²⁷ The post did not secure full secretary of state status until after the passage of the Secretaries of State Act of 1926.

found in Extradition Treaties”) to be reserved to Westminster alongside the “regulation of procedure in the trial of such crimes in Scotland.”

The Sub-Committee’s Deliberations on a Welsh Judiciary

In contrast to the sub-committee’s deliberations on Scotland and England, the question of a Welsh judiciary went on to dominate around three quarters of the report.²⁸ This level of discussion and the eventual, rather cautious, conclusion it reached on the subject was indicative of Wales’ distinct history and role in the union, in particular the absence of a Welsh legal tradition comparable to that which existed in Scotland, and uncertainty as to the strength of national sentiment in Wales. For example, while the committee’s report noted that they had been “assured that a strong sentiment exists in Wales in favour of the re-establishment in some form of a separate judiciary for Wales” (a reference to the Courts of Great Sessions that existed until 1830), it demurred to pass judgement on the strength of this demand. Instead, the sub-committee claimed that the only “competent judge” of such demand would be “a separate Welsh legislature or other legislative authority specially constituted under a scheme of devolution to represent the people of Wales.”²⁹ Having avoided entangling itself in the question of Welsh national sentiment, the committee proceeded to discuss the practicalities of a Welsh judiciary. In yet another sign of their different national histories and circumstances, the committee noted that, quite unlike the rather easy ‘transition’ envisaged for Scotland, a Welsh judiciary would need to take several considerations into account.

²⁸ Conference on Devolution, pp. 22-4.

²⁹ The following section is drawn from: Conference on Devolution, p. 23

The first such consideration was that of expense. Aided by evidence from Lord Justice Eldon, Bankes, Mr Justice Sankey and the Lord Chancellor's office (all of which will be examined in further detail later), the committee suggested that between nine and ten judges would be required to undertake the work then undertaken by High Court judges at assizes and by county court judges in the Welsh county court districts, alongside the hearings of Welsh cases then tried in London. A similar number of judges would be required, the committee recommended, even if the High Court and county court jurisdictions were united in the same bench of judges (a suggestion that the report implied was more 'blue skies' thinking than a strongly advocated proposal). Further expense would arise from the "necessary installation of a Central Office for the administration of a Welsh judicial system", with potentially more costs arising if the existing District Registrars of the High Court in Wales were turned into full-time roles.

A Welsh judiciary, the sub-committee suggested, would also address the question of how best to deal with appeals from the Welsh courts, "with due regard to economy". One possible solution would be to make use of the existing bench with an appeals system similar to the Exchequer Chamber (a court that dealt with matters of equity) prior to 1873. An alternative proposal, however, was the establishment of a special Appeal Court for Wales, something that would require an additional number of judges to the figure of nine or ten mentioned previously.

However, the committee did note that any decision regarding appeals tribunals would have to give “due regard to the possible preference of the great commercial and industrial interests in South East Wales for the greater prestige ... of an appeal tribunal sitting in London.” The sub-committee similarly suggested that “a Welsh legislature could not overlook the fact that a journey from Beaumaris to Cardiff is well-nigh as long and difficult as a journey to London.” Both of these suggestions were as much reminders of Wales’ longstanding close relationship to England (or rather the close east-west ties between north Wales and the north of England and south Wales and the south of England) as they were of Wales’ centuries-old shared legal system with England.

This legacy was precisely why the committee recommended that, as with Scotland, a devolved judiciary for Wales should involve only a “minimum of change.” However, the committee suggested this should be for “exactly opposite reasons” as for Scotland. Whereas Scotland enjoyed a legal system and legal institutions that were different from those in England, Wales, with the exception of the Courts of Great Sessions between the sixteenth and nineteenth centuries, had no comparable tradition of legal autonomy and distinctiveness. Instead, in Wales, as the committee’s report recorded, “the law is the same as the English law, and subject to changes made by a future Welsh legislature within the limits of its powers, is likely to remain as familiar as it now is to the judicial authorities now administering it.”

The committee therefore opted to “survey the field” and examined which of the existing judicial institutions “would actually require to be changed if Devolution should come into

force.”³⁰ Again this was a considerably more detailed analysis than that provided for Scotland. Starting with minor civil jurisdictions, the committee recommended that the jurisdiction of Wales’ county court judges could “with small changes be made to coincide exactly with the territorial limits of Wales (and Monmouthshire).” Furthermore, the committee claimed that the existing practice of selecting Welsh-speaking judges in the Welsh County Courts meant that for “small debts and other minor civil matters” there already existed “Welsh tribunals for Welsh areas.”

With regards to minor criminal tribunals, the committee suggested that any changes to the Quarter Sessions and Petty Sessions (described as “essentially local institutions, manned by magistrates of the County and Borough Benches in Wales”) should be left to the discretion of a Welsh legislature. However, the committee’s report did note that they had been “assured that Welsh national sentiment would probably be content” if the current arrangements for judicial and magisterial appointments in Wales (appointments made on the advice of the Lord Chancellor) remained in place post-devolution. This was in direct contrast with the sub-committee’s recommendations for Scotland, which where, as outlined earlier, that only select higher judicial appointments would continue to be made on the advice of Whitehall (with other appointments devolved to the relevant minister in a future Scottish administration).³¹ Again, this asymmetry can only be understood as a result of the very different historical and institutional contexts in Wales and Scotland, and the absence of a heritage of legal autonomy in Wales (and autonomous Welsh legal institutions) comparable to that which had existed for centuries in Scotland.

³⁰ The following section is drawn from Conference on Devolution, p.24

³¹ Despite this, the committee also recommended that such a judiciary, “if so desired, should be ... equal in independence to that of Scotland” (Conference on Devolution, p.24).

On the subject of major criminal and civil jurisdictions, the committee suggested that as those cases were currently tried in Welsh counties by circuit judges, these arrangements could easily remain in place “pending the decision of a Welsh legislature as to the creation of a separate Welsh system.” Because the North Wales Circuit included Chester, while Monmouthshire was on the Oxford Circuit, the committee recommended that following devolution Monmouthshire should be brought into the South Wales Circuit. However, in a further reflection of the close cross border and institutional ties between England and Wales, the committee proposed that, unless a Welsh legislature proposed otherwise, “no change should be made in the present connection between Cheshire and the North Wales Circuit”, citing the convenience of holding some Welsh cases in Chester.

As briefly mentioned earlier, the sub-committee’s conclusion on the subject of a Welsh judiciary was rather tentative in nature. Indeed, the committee suggested only that a Welsh judiciary should be created “if and when the Welsh legislature shall ask for it.” As such, the sub-committee recommended that any devolution legislation should include a clause “providing in express terms that Wales may have a separate Judiciary and all needful accessory judicial institutions on application to the United Kingdom Parliament by the Welsh legislature.” With these remarks the sub-committee signed off their report to the Conference on Devolution.

Sir Claud Schuster and the Creation of a Welsh Judiciary

In the sparse literature on the Conference on Devolution, one intriguing story has gone almost entirely uncharted:³² the sustained efforts made by the Lord Chancellor's Office to prevent the judiciary sub-committee recommending a separate Welsh judiciary.³³ Between 13th February and 26th April 1920, Sir Claud Schuster, who served as the Permanent Secretary to the Lord Chancellor's Office between 1915 and 1944, was a frequent correspondent with judges and figures involved with the Conference on the subject of a Welsh judiciary. These letters not only reveal his determination to be called as a witness to the sub-committee,³⁴ but they also demonstrate his "very great anxiety"³⁵ about the prospect of the sub-committee (and the Conference more generally) endorsing a Welsh judicial system.

One particular stream of correspondence during this period was between Schuster and a Welsh county court judge, Rowland Rowlands. While this dialogue was initiated by Rowlands, it was dominated by Schuster and his determination to prevent a Welsh judiciary being recommended by the sub-committee. Markedly inferior in rank to Schuster, Rowlands' particular use to him seems to have been as a 'man on the ground', an individual able to

³² The only other individual to discuss this story appears to be the legal scholar, Thomas Watkin, see: Thomas Watkin, 'Devious debates and devolution: the history of the campaign for a Welsh jurisdiction', *Click on Wales* [online], 7th August 2012, <http://www.clickonwales.org/2012/08/devious-debates-and-devolution-the-history-of-the-campaign-for-a-welsh-jurisdiction/>, accessed: 11th August 2014. However, Schuster is not mentioned by Watkin in his more detailed study, *A Legal History of Wales* (Cardiff 2007).

³³ TNA. LCO 2/507. Devolution Conference, Judiciary Sub-Committee: reports and papers concerning the organisation of the Judiciary in the United Kingdom Devolution Conference, Judiciary Sub-Committee: reports and papers concerning the organisation of the Judiciary in the United Kingdom

³⁴ The judiciary sub-committee (as with the finance committee) appears to have been unusual in seeking evidence from external parties. Indeed, the Conference's failure to seek outside expertise, aside from the examples of the sub-committees, would be the subject of criticism by Lord Emmott in a letter to his fellow Conference member, Viscount Gladstone (BL. Add. MS 46084. Viscount Gladstone Papers. General correspondence of Lord Gladstone, 1880-1930. Vol. C (ff.334). 1918-121: letter from Lord Emmott to Viscount Gladstone, 16th March 1920). See for example, TNA. LCO 2/507: Letter from Schuster to Lowther, 13th February 1920; letter from Schuster to Lowther, 14th February 1920

³⁵ TNA. LCO 2/507: Undated letter from Schuster to Lord Charnwood.

report on and perhaps to some degree influence Welsh sentiment on the subject of judicial devolution. As such Schuster not only used his correspondence with Rowlands to request that he informed him “at the earliest moment possible”³⁶ if he became aware of proposals that had been made to the sub-committee, but also as a means of lobbying Rowlands to personally oppose any fundamental reform to the England and Wales judicial system.³⁷

These efforts can be seen, for example, in a reply to a letter Rowlands had sent outlining his preference for a “better and more workable scheme” of judicial devolution than one that would see Wales “cut away from England for judicial purposes.”³⁸ Such an alternative, Rowlands suggested, could include the formation of a body of Welsh circuit judges (made up of the county court judges in Wales) that would then constitute the Welsh Division of the High Court of Justice.³⁹ Schuster outlined his opposition to even that level of reform, stating that he did not “understand what would be gained by turning the Welsh county court judges into Welsh circuit judges.”⁴⁰ He similarly dismissed the demand for change to Wales’ legal and judicial arrangements as being driven by “vague national sentiment”, and, clearly frustrated by the topic, he demanded that Rowlands inform him “what more ... the Welsh want than they have got at present [?].”⁴¹

³⁶ TNA. LCO 2/507: Letter from Schuster to Rowlands, 27th February 1920

³⁷ Ibid.

³⁸ TNA. LCO 2/507: Letter from Rowlands to Schuster, 29th February 1920

³⁹ Ibid.

⁴⁰ TNA. LCO 2/507 Letter from Schuster to Rowlands, 1st March 1920.

⁴¹ Ibid.

Schuster's correspondence with Rowlands was but one part of a much more intensive campaign against a Welsh judiciary. On 4th March 1920, for example, he wrote to B. J. Bridgeman, superintendent of the county courts department at the Treasury, requesting the costs of running the judicial system in Wales.⁴² As Schuster admitted, this request was made so that both he and the Lord Chancellor could "suggest to the Committee that if they cut off Wales from England, Wales would either have to bear the financial consequences of the separation or receive a subsidy from England".⁴³ Schuster also asked Bridgeman to confirm whether it was "not also true in the County Court that so far as the larger courts make up the deficiency on the small Courts, Wales would lose by the separation inasmuch as the more remunerative courts looked at all round are England [sic] and the less remunerative courts Welsh".⁴⁴ Schuster's strategy was plain to see: to prove that the judicial system in Wales, as it then stood, was dependent on England and thus a separate Welsh judiciary was financially unsustainable.⁴⁵

In a similar vein, Schuster sought to demonstrate that there was an insufficient caseload to sustain a Welsh judiciary. On 6th March, Charles Stubbs, on behalf of B. J. Bridgeman, wrote to Schuster providing him with details of the number of days spent at the North Wales and Chester Assizes for both criminal and civil cases in 1919.⁴⁶ As can be seen in Table 1, these figures demonstrate the limited workload of the Welsh Courts. For example, only two days were spent in total in 1919 on criminal and civil cases in Welshpool/Newtown, with three days a piece spent in total in Mold (all on criminal cases) and Dolgellau (one day on criminal

⁴² TNA. LCO 2/507. Letter from Schuster to B. J. Bridgeman, 4th March 1920

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ TNA. LCO 2/507: Letter from Stubbs to Schuster, 6th March 1920

cases, with two spent on civil cases). Even the busiest Welsh town, Caernarvon (which spent eight days in total on criminal and civil cases, was easily outstripped by Chester, where the Assizes spent twelve days a piece on criminal and civil cases.⁴⁷

⁴⁷ Ibid.

Table A: Number of Days Court sat North Wales and Chester Assizes 1919

	Winter Assize		Summer Assize		Autumn Assize		Total Year 1919	
	Crime	Civil	Crime	Civil	Crime	Civil	Crime	Civil
Welshpool or Newtown		1	1				1	1
Dolgellau		1	1	1			1	2
Caernarvon	1		2	3	2		5	3
Beaumaris	1			1			1	1
Ruthin	2		2		2		6	
Mold	1		2				3	
Chester	3	4	4*	7*	5*	1*	12	12
*On one of those days both criminal and civil work was undertaken- thus reducing the grand total for the year by two days								

48

Around the same time, Schuster was in close communication with other figures who had been asked to appear before the judiciary sub-committee. This included John Sankey, a judge who would go on to become Lord Chancellor under Ramsay Macdonald during the Labour and then National Governments between 1929 and 1935. On 7th March 1920, Sankey wrote to Schuster asking for an informal meeting the following day with the Lord Chancellor and expressing his reservation about the competency of the sub-committee and their awareness of the “tremendous difficulties they are up against if they wish to alter the present system.”⁴⁹ In response Schuster, somewhat predictably, conveyed his frustration at the committee’s preference to take evidence from people “some eminent like yourself, and some not so

⁴⁸ Source: TNA. LCO 2/507: Letter from Stubbs to Schuster 22nd March 1920

⁴⁹ TNA. LCO 2/507: Letter from Sankey to Schuster 7th March 1920

eminent” before they went through “the more pedestrian task of learning the present system”, Schuster asked Sankey for his assessment of the proposals that had, so far, been made to the committee and for advice as to how “how best to arrange” the evidence that he would “some time or other” be called upon to make.⁵⁰

Throughout March 1920, Schuster remained resolutely focused on the issue of a Welsh judiciary. Indeed, this can be clearly seen from his response to a letter from the clerk of the Conference on Devolution, Gilbert Campion that enclosed the précis of Lord Dunedin’s evidence that had been submitted to the sub-committee.⁵¹ Dunedin’s evidence was, unsurprisingly (as a former Secretary of Scotland and Lord Advocate), focused exclusively on the “existing Civil and Criminal jurisdiction in Scotland” and how devolution should effect “Scotch judicial institutions and procedures.”⁵² However, as influential as Dunedin’s evidence appears to have been in shaping the judiciary sub-committee’s recommendations for Scotland,⁵³ Schuster appeared to be rather uninterested. Instead, Schuster suggested to Campion that “it would be of greater assistance” if he could have a précis of the evidence given by Lord Justice Bankes.⁵⁴

⁵⁰ TNA. LCO 2/507: Letter from Schuster to Sankey 8th March 1920

⁵¹ TNA. LCO 2/507: Letter from Campion to Schuster, 8th March 1920

⁵² TNA. LCO 2/507: (Précis of Lord Dunedin’s evidence, undated)

⁵³ The sub-committee’s recommendations that judicial devolution in Scotland should be brought about with a “minimum of change”, that “the definition and punishment of major crimes (*mala in se*) adopting for this purpose the list usually found the Extradition Treaties” should be reserved to Westminster and the continuation, post-devolution, of those higher judicial appointments i.e. those “conferred on the advice of the Prime Minister” appear to have been taken word for word from Lord Dunedin’s evidence (Conference on Devolution 1920, p. 22; Précis of Lord Dunedin’s evidence, undated: LCO 2/507).

⁵⁴ TNA. LCO 2/507: Letter from Schuster to Campion, 9th March 1920. Bankes, a Lord Justice of Appeal, was a Welshman who served as Chair of the Flintshire Quarter Sessions for 33 years between 1910 and 1943. See: P. A. Landon. (2004). ‘Bankes, Sir John Eldon (1854–1946)’, rev. T. G. Watkin, *Oxford Dictionary of National Biography* [online], <http://www.oxforddnb.com/view/article/30572>, accessed: 13th October 2014

The Evidence of Sankey and Bankes to the Judiciary Sub-Committee

On 15th March, while awaiting the précis of Bankes' evidence, Schuster received a summary of the evidence Sankey had given to the sub-committee on 10th March.⁵⁵ As he had informed Schuster in his correspondence of 7th March 1920, Sankey avoided expressing a personal opinion on either the desirability of, or the necessity for, a separate judiciary in Wales and like the sub-committee, he also sought to side-step the issue of national sentiment in Wales, noting only that while he "considered that there was sentiment towards national entity ... he would not like to say how strong that was."⁵⁶

Despite being noncommittal as to whether a Welsh judiciary was desirable or necessary, Sankey nevertheless outlined suggestions on the "lines upon which a separate judiciary might be set up." Unlike Scotland where, "for historical reasons", a separate judicial system continued to exist, the absence of a Welsh court system led Sankey to consider it "desirable ... [to] avoid needless disturbance to the present practice and procedure." After the rather uncontroversial recommendation that the decisions of the English Court of Appeal "up to the time of separation must be binding," Sankey then proposed a Welsh Civil Appeals system based on the Exchequer Chamber that had existed until the late nineteenth century (as was earlier noted, this suggestion was mentioned by the sub-committee's final report). On the subject of criminal law, he similarly argued that criminal appeals should "go to a Welsh

⁵⁵ TNA. LCO 2/507: Letter from Campion to Schuster 15th March 1920

⁵⁶ The following section is drawn from: TNA. LCO 2/507: Précis of Sir John Sankey's evidence, 10th March 1920

criminal appeal court constituted under the same conditions as the English Court of Criminal Appeal.”

Shortly after receiving a summary of Sankey’s evidence, Schuster was sent a précis of the evidence Bankes gave to the sub-committee on 11th February 1920. Unlike Sankey, Bankes had little hesitation in revealing his true feelings on the subject of a devolved Welsh judiciary.⁵⁷ Perhaps emboldened by the fact that he was a Welshman, Bankes told the committee that he entertained “considerable doubt whether Wales would gain much, if any, advantage from any further devolution of the Judiciary than exists at present under the County Court system.” As a result, when Bankes did offer suggestions as to how devolution could operate they were grounded in a belief that this should entail only a minimum degree of change, “continuing as far as possible the existing state of things under which the same law prevails in Wales as in England.” Unsurprisingly, therefore, Bankes recommended that the legislative competence of the Welsh legislature should be carefully circumscribed in the legislation establishing such a body, thus limiting the potential amount of future legal divergence between England and Wales.

As for the administration of the law in Wales, after devolution, Bankes reminded the sub-committee that “Wales has a history”, highlighting the existence of the Courts of Great Sessions up until 1830 and more significantly, for the purposes of his argument, the County Courts Acts of 1846 and 1888. According to Bankes, this legislation meant that a “devolution of the Judiciary with a restricted jurisdiction in Civil matters is, therefore,

⁵⁷ The following section is drawn from: TNA. LCO 2/507: Précis of Lord Justice Bankes’s evidence, 11th February 1920

already an accomplished fact.⁵⁸ As for criminal matters, justice was also “administered locally, either summarily or in the Court of Quarter sessions.” Further devolution, Bankes concluded, would therefore be confined to civil and criminal matters that were outside the jurisdiction of the county courts, courts of Quarter Sessions and local justices of the peace.⁵⁹ However, Bankes argued that “with the single exception of the industrial area of South Wales”, the volume of work arising from this business in Wales was small, “therein lies the difficulty of suggesting a scheme for any further devolution of the Judiciary.”

If a Welsh judiciary was to be established, Bankes noted, then it would require full time judges, and yet if the existing county court system was to be maintained then, he argued, there was “not enough business to justify the appointment of any considerable number of men.” The image Bankes painted for a future Welsh judiciary was thus one of a catch-22 situation, unable to financially justify the creation of a sizeable body of judges and yet without such a cohort, “it seems doubtful whether quite a small number could cover the ground satisfactorily.” The only solution, to this quandary, which came to Bankes’ mind was for the distinction between the County and High Court jurisdictions to be abolished, with a “Body of Judges”, assisted by registrars and similar officials, to conduct all civil business in Wales. He also recommended that these judges should be charged with the criminal work that was undertaken at that time by the Judges of Assize, “and if thought advisable, with the criminal business of Quarter Sessions.” There remained, however, the supply-side questions of expenditure and talent.

⁵⁸ This view would be echoed by the sub-committee, whose report described the county courts as providing “Welsh tribunals for Welsh areas” (Conference on Devolution, p.24) and was also an argument deployed by Schuster.

⁵⁹ The following section is based on: TNA. LCO 2/507: Précis of Lord Justice Bankes’s evidence, 11th February 1920

“Sufficient salaries”, Bankes claimed, would have to be offered in order to attract “the best available men.” Yet even were such salaries offered, Bankes feared that attracting such candidates would be a difficult task due to the nature of the work they would be charged with (the low level of major civil and criminal work would mean a workload dominated by more minor cases) and the travelling required to administer justice across Wales. Nevertheless, if sufficiently talented judges were recruited and “a sufficiently elastic system of procedure [was put in place] to enable them to adapt their sittings to circumstances”, then Bankes believed that this could offer a model of judicial devolution that “would work satisfactorily.”

An additional question, “of real importance” that needed to be resolved was whether the Welsh court’s jurisdiction would be exclusive⁶⁰ or concurrent with England. According to Bankes, unless the jurisdiction was to be exclusive, as in Scotland and Ireland, it would seem “hardly worthwhile to set up a separate Judiciary for Wales.” Even then, Bankes’s preference clearly remained for only a modest degree of reform. Hence his recommendation that the appetite for an exclusive jurisdiction and Welsh judiciary among the commercial community of south Wales should be ascertained before any steps were taken in that direction and that in matters of equity “it might be convenient to allow a concurrent jurisdiction with the Chancery Division of that High Court of Justice as the machinery of the Court is so specially adapted for dealing with certain classes of Equity matters.”

⁶⁰ Bankes suggested that no fewer than eight judges would be required in the event of an exclusive Welsh jurisdiction and, in the first place, recommended that the existing county court judges of the Welsh circuits be appointed Welsh judges (TNA. LCO 2/507: Précis of Lord Justice Bankes’s evidence, 11th February 1920).

Similarly, he proposed that Welsh judges should be appointed by the Crown “on the recommendation of the Lord Chancellor”, should hold office on the same terms as the English judges and it should be “rendered impossible for the Bar to impose any restriction upon *any* Barrister appearing in any of the Welsh Courts.” Taken as a whole, these were recommendations that, if followed, would result in a Welsh jurisdiction with much more bounded autonomy vis-à-vis that which already existed in Scotland, a reflection of Wales’s historic integration into the English legal system.

Claud Schuster’s Evidence to the Judiciary Sub-Committee.

Having received summaries of Sankey and Bankes’s evidence, Schuster was called to appear before the sub-committee.⁶¹ Schuster’s evidence represented the culmination of his two-strand strategy, which, as outlined earlier, queried both the financial sustainability, and the caseload, of a Welsh judiciary (as well as his more general belief in the effectiveness of the existing judicial arrangements in England and Wales).⁶² Echoing the evidence of Sankey and Bankes, Schuster argued that usage of the courts in Wales was largely for minor cases (such as debt repayment and local cases), whereas more serious cases in which defences were established and the evidence was “sufficient to cause the action to go to a trial” were “either non-local or are of such a nature that in the view either of the litigants or the master they ought to be tried in London.” To further press this argument, Schuster pointed to the example

⁶¹ The precise date of his evidence is not made available in the archives, but thanks to other, dated, documentation in the archives it would appear to be sometime between and 23rd and 30th March.

⁶² The following is drawn from: TNA. LCO 2/507: Schuster’s evidence to the judiciary sub-committee, undated

of Glamorgan where, despite the presence of a “local Welsh bar”, experience suggested “that the Glamorganshire litigant prefers to be tried in London.”

Even when suggesting that certain changes could be possible, Schuster’s comments were tempered by his innate conservatism and hostility to reform of the England and Welsh judicial system. For example, despite suggesting the possibility of his “detaching Chester from the North Wales circuit and putting it on the Northern Circuit”, Schuster warned that “a substantial injury would be inflicted upon the Bar of the North Wales circuit” as a result. Furthermore, he claimed that dividing county courts along the boundary between England and Wales would lead to inconvenience being inflicted upon inhabitants of both the North and South Wales Circuits – another reminder of the historic linkages and integration between England and Wales, especially between north Wales and north-west England, on the one hand, and south Wales and southern England, on the other.

However, those potential inconveniences paled into insignificance when compared to the problems that Schuster argued would follow from the establishment of a Welsh judiciary. According to Schuster, the costs of any such judiciary would be considerable, not least because under the existing arrangements the Welsh courts were financially reliant, indeed “a burden”, on the Exchequer and the more remunerative courts in England. As a result, if the Welsh Court system was to be “severed” from Courts in England, the consequence, Schuster claimed, “would be to relieve England of a considerable charge and to impose that charge upon Wales.”

This was but one of a number of dangers that Schuster warned would face a Welsh judiciary. In particular, Schuster queried the talent pool that a Welsh judiciary would be able to draw upon. Returning to his earlier comments about the lack of caseload in Wales, he claimed that this “would not be sufficient to support a bar strong enough in its turn to produce nine such men [judges of the Welsh High Court].” These problems would be intensified, Schuster argued, because of the flight of talent that a Welsh judiciary would face. Making the argument that “however strongly national sentiment may operate, there will always be a tendency for the aspiring lawyer to come where the biggest prizes are offered”, Schuster claimed that the attractions, and potential rewards, of a legal career in London would be such “that the young Welshman, if he can, will come to London, and that Wales and the Welsh Bench and Bar will be the poorer for his absence.” A Welsh judiciary would therefore represent, at least in the mind of Claud Schuster, a damaging breach with the status quo, an England and Wales legal system that had been “brought to perfection in the latter half of the Nineteenth Century.”

Aside from a letter from Judge Rowlands on 30th March 1920, which included a clipping from the previous Friday’s *Western Mail* that claimed the sub-committee was going to recommend a Welsh judiciary,⁶³ Schuster appeared to have written or received no further correspondence on the subject of a Welsh judiciary until 26th April 1920, when he wrote to Hugh Edwards in response to the publication of the Conference on Devolution’s report. While this letter included a critique of specific elements of the sub-committee’s recommendations, it was essentially a restatement of his previous arguments against a Welsh

⁶³ Extract from the *Western Mail* enclosed in letter from Rowlands to Schuster, 30th March 1920: LCO 2/507

judiciary. Schuster, for example, took particular exception to point 22 of the sub-committee's report.⁶⁴ This not only recommended that "the creation of a Welsh Judiciary should be effected if and when the Welsh legislature shall ask for it", but, and as was earlier noted, also proposed that devolution legislation should include a clause "providing in express terms that Wales may have a separate Judiciary and all needful accessory judicial institutions on application to the United Kingdom Parliament by the Welsh legislature."⁶⁵

Unsurprisingly, Schuster fervently disagreed with this proposal, arguing that it would be "looked upon as an invitation to the Welsh Parliament to pass a statute separating the judiciary", with "disastrous" consequences.⁶⁶ He was similarly disparaging about paragraph 23 of the sub-committee's report, which recommended that the first judges appointed to a new Welsh judiciary should be such drawn from "present judges of the High Court of Justice for England and Wales as may have special Welsh experience or familiarity with Welsh judicial or other public business."⁶⁷ In Schuster's opinion there was not "the smallest possibility that any Judge or Lord Justice who now holds office in the Supreme Court⁶⁸ would abandon that office in order to have a place in a separate Welsh judiciary."⁶⁹

Explanations

⁶⁴ TNA. LCO 2/507 Letter from Schuster to Edwards, 26th April 1920

⁶⁵ Conference on Devolution, p.24

⁶⁶ TNA. LCO 2/507 Letter from Schuster to Edwards, 26th April 1920

⁶⁷ Conference on Devolution, p.24

⁶⁸ This refers to the Supreme Court of Judicature which existed between the 1870s and 1981, now known as the Senior Courts of England and Wales, and not the modern Supreme Court created by the Constitutional Reform Act 2005

⁶⁹ TNA. LCO 2/507 Letter from Schuster to Edwards, 26th April 1920

To the last Schuster remained an implacable opponent of a devolved Welsh judiciary. Yet while there can be no doubt about the strength of his feelings on the subject, one is left wondering why he cared so much about it. In particular, why, despite arguing that the administrative costs of the justice system in Wales were borne by the English and that there was insufficient caseload to sustain a Welsh judiciary, Schuster felt “very great anxiety” at the prospect of the judiciary sub-committee recommending such a reform.⁷⁰ Reading through Schuster’s private correspondence and his evidence to the judiciary sub-committee, one could almost be forgiven for thinking that his opposition was borne out of a genuine concern about the viability of a Welsh judiciary. However, there may be a more prosaic explanation.

A potential answer lies in James Bulpitt’s concept of the centre’s operational code, a concept which refers to the centre’s (i.e. Whitehall) approach to territorial governance.⁷¹ According to Bulpitt this code is dominated by a desire to maintain the centre’s control over high politics and as a result, territorial reform tends to be a ‘small c’ conservative process that seeks as minimal a reform as is necessary to meet demands and circumstances in the ‘periphery’⁷² Complementing this concept is the idea of departmental culture. According to David Richards and Martin Smith (political scientists and public policy specialists), departments are “organisations with institutionalised policy preferences which privilege certain policy outcomes”, preferences which are products of a department’s culture and philosophy.⁷³ As

⁷⁰ TNA. LCO 2/507: Undated letter from Schuster to Lord Charnwood

⁷¹ James Bulpitt, *Territory and Power in the United Kingdom: an Interpretation*, (Essex 2008 [1983]), pp. 20, 50, 65.

⁷² *Ibid.*, pp. 99, 160

⁷³ David Richards and Martin Smith, How departments change: windows of opportunity and critical junctures in three departments, *Public Policy and Administration*, 12/2 (1997), 62-3

Dorey explains, at the heart of this idea is “the notion of ‘custom and practice’”, i.e. “how we do things here”, with these norms and values inculcated in civil servants through the course of their careers.⁷⁴ As a result of this internalisation and socialisation process, “each bureaucracy reflects the historical development and institutional context of its administrative setting.”⁷⁵ This concept of departmental culture (memorably described by Kaufman as ‘departmentalitis’ in the case of government ministers who go ‘native’⁷⁶) appears to be particularly applicable to Claud Schuster. Indeed, Schuster’s twenty nine year tenure (1915-144) as Permanent Secretary to the Lord Chancellor’s Office led to him being described as “one of the most influential Permanent Secretaries of the 20th century.”⁷⁷

This blend of Bulpitt’s concept of the centre’s operational code and the idea of departmental cultures might, for example, explain Schuster’s muted response to the committee’s work on a devolved Scottish judiciary in contrast to his sustained and energetic lobbying efforts against a Welsh equivalent. After all, the Scots already had a distinctive legal system, headed by the Lord President of the Court of Session (and not the Lord Chancellor as in England and Wales).⁷⁸ Wales, aside from the Courts of Great Sessions between 1542 and 1830, had no such tradition of judicial independence. Unlike Scotland, judicial devolution for Wales therefore posed a far more substantial loss of power and territorial reach for the Lord Chancellor’s Office. As such, departmental interests and national history combined can be seen to explain Schuster’s opposition to a Welsh judiciary.

⁷⁴ Peter Dorey, *Policy Making in Britain: An Introduction*, Second Edition, (London 2014), p.110

⁷⁵ David Judge, *Political Institutions in the United Kingdom*, (Oxford 2005), p. 127

⁷⁶ Gerald Kaufman, *How to be a Minister*, (London 1997 [1980]), p.15

⁷⁷ J.G. Hall and D. Martin. *Yes Lord Chancellor: A Biography of Lord Schuster*, (Chichester 2003), p. x

⁷⁸ James Kellas, *The Scottish Political System*, (Cambridge 1989 [1973]), pp. 4, 23

Bulpitt's 'operational code' may be equally applicable as a means of interpreting the evidence of Bankes and Sankey. While not (at least at that period of time for Sankey) members of the core executive, Bankes, Sankey and Schuster were all pillars of the judicial 'centre' in England and Wales. As such Bankes and Sankey's shared belief that if devolution were to happen it should continue "as far as possible the existing state of things"⁷⁹ and "avoid needless disturbance to the present practice and procedure"⁸⁰ appears to correspond very closely with the conservative approach to territorial modernisation Bulpitt ascribes to the centre in *Territory and Power*.⁸¹ Even Judge Rowland Rowlands' support for a modest scheme of reform that would avoid Wales being "cut away from England for judicial purposes"⁸² appears to conform to Bulpitt's ideas in *Territory and Power*. In this case, Rowlands can be seen as having acted as a local agent of the centre in a judicial dual polity. Remember, Schuster, Bankes and (ultimately) the sub-committee all argued that Wales already had a form of judicial devolution, courtesy of the county courts,⁸³ a (limited) dual polity in which Rowlands served as a county court judge.

⁷⁹ TNA. LCO 2/507: Précis of Lord Bankes's evidence, 11th February 1920

⁸⁰ TNA. LCO 2/507: Précis of Sir John Sankey's evidence, 10th March 1920

⁸¹ As mentioned earlier, Bulpitt contended that the centre's approach to territorial reform, what he described as its 'operational code' was defined by a desire to preserve its sovereignty over matters of high politics (Bulpitt, *Territory and Power*, pp. 20, 50, 65). While this meant that territorial modernisation was, according to Bulpitt, in general a conservative process, it also led, on occasion, to the centre delegating matters of 'low politics' to institutions and/or agents in the 'periphery' (Bulpitt, *Territory and Power*, pp. 99, 160). This arrangement, what Bulpitt termed a 'dual polity', enabled the centre to preserve its autonomy over high politics and was largely a reaction to the emergence of critical junctures whereby governability and security crises threaten the political order and the centre's control over high politics (Bulpitt, *Territory and Power*, pp. 99, 160).

⁸² TNA. LCO 2/507: Letter from Rowlands to Schuster, 29th February 2011

⁸³ TNA. LCO 2/507: Précis of Lord Justice Bankes's evidence, 11th February 1920; Conference on Devolution, p. 24

While Bulpitt's *Territory and Power* may help us understand the varying degrees of conservatism displayed by Schuster, Bankes, Sankey and Rowlands, there still remains the question of why, even after such fierce opposition from the Lord Chancellor's Office, the sub-committee recommended that a Welsh judiciary should be created if requested by a Welsh legislature. One answer might be that there was strong demand for devolution by the Welsh legal profession. Watkin, in his discussion of the judiciary sub-committee, claims that "there was a lot of support for the idea of a separate judicial system for Wales among the country's lawyers, especially amongst the judiciary and the bar in south Wales."⁸⁴

The evidence provided for this suggestion is Rowlands' letter to Schuster on 24th February 1920, which talked of a "powerful backing" in Wales for a separate judiciary.⁸⁵ The scale of this backing, however, is left vague by Rowlands in his correspondence with Schuster. For example, in a letter dated 10th March 1920, Rowlands argued that "national sentiment is no doubt largely responsible for the desire for complete severance between England and Wales."⁸⁶ In neither letter, however, does Rowlands provide further evidence by including the names of Welsh legal professionals to justify these claims.

Nevertheless, it is worth recalling that the sub-committee report itself referred to a "strong sentiment" in Wales for a "re-establishment in some form of a separate judiciary for Wales."⁸⁷ It would appear that the messenger of this "strong sentiment" was the sole Welsh member of the sub-committee, J. Hugh Edwards, a coalition Liberal MP for Neath, 1918-22,

⁸⁴ Watkin, *Devious debates and devolution*

⁸⁵ TNA. LCO 2/507. Letter from Rowlands to Schuster, 24th February 1920

⁸⁶ *Ibid.*

⁸⁷ *Conference on Devolution*, p. 23

who had previously been the Liberal member for Mid Glamorgan between December 1910 and 1918. Certainly Edwards had political credentials that would imply support for devolution and a Welsh judiciary. During the 1890s he had been an active member of the Liberal Home Rule movement, *Cymru Fydd*, representing Cardiganshire at the famous South Wales Liberal Federation meeting in 1896 that proved ultimately fatal to the movement.⁸⁸ Crucially during the earlier mentioned Commons debate which led to the establishment of the Conference on Devolution, Edwards was a leading critic of the way in which Wales had been treated by the resolution's movers, Macdonald and Wood. Not only did Edward speak up in that debate to "put in a plea for Wales", he bemoaned Macdonald and Wood's "absolute silence" on the subject of Welsh devolution.⁸⁹

However, national sentiment was not the sole reason why the sub-committee, despite Schuster's best efforts, recommended that a Welsh judiciary should be in the gift of a Welsh legislature. An alternative explanation for this decision is more structural in nature and relates to the terms of reference of both the Conference on Devolution and the sub-committee on the judiciary. The Conference's remit, as earlier mentioned, was to deliver a scheme of devolution (not to decide whether it should or should not happen at all).⁹⁰ As such, it is not surprising that when the judiciary sub-committee was established, it too was charged with recommending the changes required for the judiciary to adapt to "a scheme of Devolution

⁸⁸ G, Charmley, 'Edwards, John Hugh (1869–1945)', *Oxford Dictionary of National Biography* [online], 2011, <http://www.oxforddnb.com/view/article/58643>, accessed: 12th October 2014

⁸⁹ Edwards, *HC Debates* (5th Series) 4th June 1919 Vol. 116 col.2123

⁹⁰ James Lowther, Chairman's Letter to the Prime Minister, in Conference on Devolution, Letter from Mr. Speaker to the Prime Minister (with Appendices). Cmd. 692 (London 1920), p. 3

which creates subordinate local legislatures in the several parts of the United Kingdom” and, crucially, to the schedule of powers agreed by the Conference.⁹¹

This schedule of powers⁹² provided for equal administrative and legislative devolution, at least in terms of powers,⁹³ for the devolved territories.⁹⁴ Having conceded, by the time the sub-committee was in progress, a Welsh national legislature with powers equal to those elsewhere in the United Kingdom, it would have been highly unlikely (particularly in light of the terms of reference for both the conference and the sub-committee) that the sub-committee could ever have acquiesced to Schuster’s demands.

The sub-committee’s recommendations were thus incorporated into the Conference’s report, with no trace of the controversy that had surrounded the sub-committee’s deliberations on a Welsh judiciary. Instead, the Conference would be defined by the divisions that surrounded their proceedings on the question of how the devolved legislatures should be constituted. On this matter, the Conference found itself irrevocably split, with half of the Conference’s membership endorsing a scheme of intra-Parliamentary devolution proposed by the Speaker, James Lowther and the other half endorsing Murray Macdonald’s plan for directly-elected devolved legislatures.⁹⁵ Facing this stalemate, the Speaker could claim little more than that

⁹¹ TNA. LCO 2/507. Instructions to Judiciary Sub-Committee.

⁹² For the full list of the schedule of powers see: Conference on Devolution, pp.16-18 and for a discussion of the Conference’s deliberations in this area see: Evans, *An Interlude of Consensus*

⁹³ While the Conference was committed to an equal distribution of administrative and legislative powers, this did not mean that the institutional face of devolution had to be the same in England, Scotland and Wales (Add. MS 46104: Resolutions provisionally agreed to, Thursday, 11th December). In this light the sub-committee’s recommendations, which would have seen a slightly weaker model of judicial devolution for Wales in terms of judicial appointment, was in keeping not only with the schedule of powers, but other resolutions passed by the Conference on Devolution more generally.

⁹⁴ Conference on Devolution, pp. 16-18

⁹⁵ Conference on Devolution, pp.12, 15

the Conference had “thrown new light upon the problem [of devolution]”⁹⁶ and while *The Times* and a bloc of devolutionists led by Murray Macdonald sought to keep the issue alive, the Conference report and the issue of federal devolution slipped swiftly into the footnote status which it has enjoyed to the current day.⁹⁷

Conclusion

It might be thought that the judiciary sub-committee was a rather uncontroversial and tame chapter in the story of the Conference on Devolution. After all, the summary of the committee provided in the Speaker’s letter to the prime minister suggests that it was a relatively straightforward and uneventful event,⁹⁸ particularly when compared to the divisions and difficulties that had dogged the Conference’s deliberations on whether devolution should be on national or regional grounds and on the composition of the devolved legislatures.⁹⁹ However, as this article has demonstrated, there was much more to the judiciary sub-committee than these perspectives would imply. In particular this episode of the Conference on Devolution can be seen as providing the clearest illustration of the ambiguities that surrounded Wales’ claims to nationhood and thus the legacy of Wales’ annexation to England. This legacy was a constant undercurrent during the judiciary sub-committee’s deliberations and proved influential in shaping the evidence submitted to the committee from figures such as Bankes and Sankey and, ultimately, shaped the tone and form of the committee’s recommendations for a Welsh judiciary.

⁹⁶ Lowther, Chairman’s Letter to the Prime Minister, p.7

⁹⁷ *The Times*. (13th May 1920). Devolution, *The Times*, p.17; *The Times*. (2nd July 1920). Political Notes: Federal Devolution Prospects, *The Times*, p.14; The Parliamentary Archives. Lloyd George Papers. LG/F/255/5/2-(11). (16th December 1920). Federal Devolution Deputation; Kettle, Ireland and the Federal Solution, p.223

⁹⁸ *Ibid.*, p. 5

⁹⁹ For more details, see: Lowther, Chairman’s Letter to the Prime Minister; Chiao, Devolution in Great Britain and Evans, An Interlude of Consensus

This article has also revealed the key role played by Sir Claud Schuster of the Lord Chancellor's Office in attempting to dissuade the committee from recommending a Welsh judiciary. In no other area of the Conference on Devolution can one find a similar external effort to influence the conference's deliberations, yet this story has been almost entirely overlooked by academics. Here too the national peculiarities of Wales played a key role, intertwining with departmental interests as Schuster sought to avoid a reform that would reduce the power and territorial scope of the Lord Chancellor's Office. While the question of Wales's status lacked certainty during the devolution debates of the late-Nineteenth and early-twentieth century, Schuster's view was clear: for Wales, see England.