Introduction

On the whole, I believe the Draft Wales Bill to deliver on the promises made in the St.Davids’s Day Agreement of March 2015. It provides the transferal of powers over areas such as Energy, Transport and Elections, promises that were made in the St.David’s Day Agreement. However, I am concerned that this bill would also curb the power of the Welsh Assembly Government as there are too many technical challenges that a piece of new legislation will face when a Government wishes to push it through. Furthermore, I believe that this bill doesn’t resolve the issues of ambiguity regarding where the Welsh Assembly Government is allowed to legislate, and if anything exacerbates the matter. I feel that there are areas of the bill that fail to deliver on the movement towards a reserved powers model from a conferred powers model, reinforcing the Westminster Model rather than offering the change that Welsh devolution needs.

The Welsh Secretary Stephen Crabb has expressed his desire to end disputes over competency between the Welsh and UK Governments going to court. We’ve seen in recent years matters of competency go to the Supreme Court, costing the tax payer a great deal of money and causing unnecessary tension between the Welsh Assembly Government and the UK Government. For example, the issue over farmer’s wages that reared its head in July 2014 (which the Welsh Assembly Government eventually won) cost the tax payer tens of thousands of pounds in legal fees, and I fear that we will head down the same road in the next Welsh Assembly if areas of this bill are not amended. The ambiguity in sections of the Bill could be highly damaging to devolution in Wales.

Back in 2011, even after a clear and emphatic ‘Yes’ vote to give the Welsh Assembly Government Primary Law making powers, there was controversy. The first primary law that the Assembly

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Government wanted to pass over Local Government Byelaws was subject to a challenge from the UK Government over whether it was within the Welsh Assembly Government’s competency to make such laws. I fear that we are going to be in the same situation, if not worse, come the next Welsh parliament if this bill is not amended due to the ambiguity and subjectivity of sections of the bill. We simply do not see situations like this arise in Northern Ireland and Scotland, where this a clear understanding of where their administrations have power and do not have power.

**The challenge of Devolution to the Westminster Model**

The failures in this bill are ultimately part of a wider issue that Welsh devolution is failing to gain the autonomy it deserves due to its failure to break down the Westminster model that dictates that Westminster is sovereign. The bill is indicative of top-down devolution that ultimately reinforces the power of central government. For example, there are sections of this bill which give Westminster more control than it need have. Whilst Wales has been offered devolution in more areas in this bill, the bill also gives politicians in Westminster the control to veto legislation within the Assembly’s devolved function if it comes under a UK minister’s function as well. This is a prime example of how this bill ultimately keeps power at the centre in an elitist fashion. Elements of the bill such as this makes one wonder whether real devolution is indeed possible if sovereignty lies in Westminster, maintaining control over certain areas and deciding where the Welsh Assembly is allowed to have power.

**Issues with Section 7A and 7B**

My fundamental issue with the draft bill is the amount of technical proceedings a piece of legislation will have to go through in order to be implemented, and also the amount of scope the UK government has over deciding whether an issue is within the Welsh Assembly Government’s competence, reinforcing the Westminster model. This will not only lead to the work of government

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becoming painfully slow, but will also create an unnecessary power struggle between Cardiff and Westminster. It is only natural for MP’s to cling on to power over certain areas, and if they have the power to do this, they could potentially do so. Furthermore, if there are two different parties in power at Westminster and Cardiff respectively, it increases the likelihood that power going to Cardiff will be blocked. This undermines the 2011 referendum in which the people of Wales gave a clear indication that they wanted Welsh ministers to have the say on Welsh matters, rather than MP’s at Westminster. We do not wish to return to the days of the mid-noughties, where the Welsh Assembly had to ask for permission off the UK Government to pass any piece of legislation. Not only was this a painstakingly slow process, but also an insult to the autonomy of a democratically elected Assembly Government. We must not return to the dark ages. This only served to reinforce the British political tradition where power lies in Westminster. Not only does this result in ineffective government in Cardiff Bay but also leads to a disillusionment with politics on the part of the Welsh people. Devolution is meant to reconnect Welsh people with politics rather than disillusion them further. On a side note, this raises another issue about whether there needs to be a reduction in the number of Welsh MP’s and increase in the number of Assembly Members as the MP’s workload decreases and that of the Assembly Member increases. However, this a debate for another day.

Fundamentally, I fear there will be conflict over whether a piece of legislation impinges upon a reserved matter or not. The Welsh Assembly Government may wish to change legislation in a devolved area that will then come into conflict with a reserved matter. We have seen this occur as recently as July 2014 when the Welsh Government wished to change legislation regarding farmer’s wages. This could be interpreted as falling within the Welsh Government’s competency as it was a matter relating to agriculture which is within the Assembly’s purview. However, the UK government felt that the Welsh Government had overstepped the mark as it was a matter of employment law, not a matter within the Welsh Government’s competency. This resulted in a costly and lengthy legal

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battle, the like of which we are going to see again, if not more often if section 7B of the draft bill is not amended. The draft bill curtails the power of the Welsh Government to change laws that are ancillary to devolved matters. This could well lead to more legal disputes. If civil law and civil procedure are one of the areas that is reserved, this will mean the Welsh Government will not be able to pass a great deal of legislation. This draft bill fails to understand that the ability to create legislation that will effect civil law or procedure is a vital mechanism in order for Governments to work. For example, the recent Renting Homes Wales Bill made significant changes to the law between landlord and tenants. This bill requires the Welsh Assembly Government to make changes to civil law that are ancillary to the legislation. Under this proposed bill, this legislation probably wouldn’t be passed. This is an obstacle that the Assembly’s counterparts in Scotland and Northern Ireland do not face. Due to the fact that both these countries have separate legal jurisdictions, arguments such as this do not take place. One of the ways in which this problem could be solved therefore is for Wales to have a separate legal jurisdictions, which I will cover later.

This section of the bill will only result in frustration, and potentially see another Wales bill being drafted in few years’ time. I appreciate that this is an extremely difficult issue to resolve, and one that is not black and white. It is important that the Welsh Government is given more power to reflect its growing maturity. However, once the areas of power in which the Welsh Assembly Government are decided, then it must be ensured that it does not overstep the mark. I feel that this is an area of the bill that is too rigid, failing to recognise the complexities that the Welsh Assembly Government faces when trying to pass legislation without its own jurisdiction. The principle that legislation being passed in a matter of the Welsh Assembly Government’s competence should not have a “greater effect than is necessary” on a reserved matter that may be ancillary to the legislation is confusing. This is an entirely subjective turn of phrase, lacking the clarity that a bill should defeat over powers to set wages for farmers’ 9th July 2014. http://www.walesonline.co.uk/news/wales-news/agriculture-wages-bill-uk-government-7394743 accessed on 10/11/2015

embody, and open to abuse by the UK Government, especially if there are conflicting parties in the Welsh and UK Government respectively. This is an example of the UK government trying to cling on to power to the detriment of the Welsh people. I believe that this will once again result in more court cases, as the Welsh Government and the UK Government disagree over competency.

On the whole, this bill fails to provide the settlement that is best for the people of Wales, and this would surely be helped by a shorter list of reserved matters and less stipulations attached to them. Most importantly though, I feel that Civil Law and Civil Procedure being a reserved matter in the bill will result in the Welsh Government passing less legislation, failing to govern in a proper manner for the people of Wales.

**A separate Welsh Legal Jurisdiction?**

One way of solving the issues raised above would be to create a single Welsh legal jurisdiction. At the moment, Wales has two legislatures under one jurisdiction. Wales is one of the few countries in the world that this applies to, and naturally causes a great deal of tension when deciding whether the Welsh Government is able to legislate on a certain matter. Whilst I appreciate that I am submitting evidence for scrutiny on whether the draft Wales Bill delivers on the promises of the St. David’s Day process, I feel that the bill has thrown up the issue of legal jurisdiction and this cannot be ignored when discussing whether this bill is progressive for Welsh devolution. Many of the issues I have raised thus far regarding disputes between the Welsh Government and the UK Government over competency have occurred due to their being two legislatures but one jurisdiction in relation to Welsh matters. This lack of legal boundaries has led to both legislatures claiming they have competency over certain issues. I am not advocating a separate legal jurisdiction, but there does need to be some sort of distinction. Both Northern Ireland and Scotland have separate legal jurisdictions and do not witness the same level of disputes over competency. I appreciate there is a great deal more cross-border activity between Wales and England, and this is why I advocate a distinction in jurisdiction rather than separation.
I find Alan Trench’s views to be most helpful in discussing the issue of a distinct Welsh jurisdiction. At the moment, there is little political appetite for a separate Welsh jurisdiction due to the huge financial implications. However, as Sir Roderick Evans has pointed out, there would be a great deal of economic benefits for Wales once the jurisdiction is setup, such as new jobs. Trench is also wary that it is still beneficial for the Welsh jurisdiction to have ties with England in order to have access to specialist expertise and resources. Therefore, he advocates an initial distinction of the jurisdiction rather than a separation to solve the problems of legal entanglement that have occurred in recent years. This would not only give politicians a better understanding of what lies within their purview, but would also give a disillusioned Welsh public an understanding of what the Welsh Assembly is responsible for, providing greater accountability. At the moment there are blurred lines and lack of clarity. If politicians are even unsure of where power lies, how are the Welsh public expected to know? We have a situation where currently the Welsh people do not know what their government is responsible for and it is simply not good enough. This draft Wales Bill does nothing to rectify this issue, and if anything, exacerbates the situation. I feel that a distinction in the legal jurisdiction is the only way that Welsh Devolution can progress. It would better create a feeling of autonomy that Scottish devolution has been able to create for the people of Scotland, allowing the Welsh people to have more affinity with the National Assembly. At the moment, the singular legal jurisdiction is acting like a glass ceiling.

Conclusion

To conclude, this draft Wales Bill does deliver on the promises of the St. David’s Day agreement in that it gives power to the Welsh Government over Energy, Transport and Elections. However, it also curbs the power of the of the Welsh assembly by producing a list of reserved matters that is far too

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long, places too many technical proceedings in the legislative process, and gives the UK Government a chance to veto legislation if it believes it impinges too much upon a reserved matter. I believe this to be indicative of a mind-set within Westminster that fails to treat Welsh Devolution with the reverence that it accords with Scottish and Northern Irish devolution. Ultimately, this bill reinforces the British political tradition, meaning that the UK Government has autonomy over Welsh matters. This draft bill will simply lead to further disputes over competency, and does little to progress Welsh devolution. I suggest that the solution to such issues would be to setup a distinct Welsh legal jurisdiction. I believe that this would help the Welsh Assembly Government, and importantly the Welsh people, to understand what the Assembly has to power to legislate over and what it is there for.

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