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Getting the balance right? The constitutional implications of the Welsh Tax Acts etc. (Power to Modify) Bill

The Welsh Tax Acts etc. (Power to Modify) Bill is perhaps one of the more boringly-named prospective pieces of primary legislation to have been introduced by the Welsh Government, but in its three and a quarter pages it raises some fundamental questions about constitutional power, the rule of law and democracy in Wales. If it becomes an Act, it will give the Welsh Government far-reaching powers to change tax law in Wales, including making retrospective changes, with reduced Senedd scrutiny.

The substance of the Bill is about the details of tax law. There are however broader principles at stake about where the line is drawn in Wales between (on the one hand) Senedd control over what laws are made, how far they go and how they are scrutinised, and (on the other) empowering the Government by giving it the flexibility to amend Senedd Acts in the interest of speed or efficiency.

Taxation, the constitution and the separation of powers

The question of who has the power to impose a tax on the people is one of the core issues which has shaped the UK's constitutional arrangements and in particular the separation of powers. The Bill of Rights of 1689 created a clear dividing line by providing that it was illegal for the government to raise taxes except to the extent that Parliament had granted it the power to do so. In other words, the power to decide whether and to what extent people should be taxed lay with the representatives of the people (or at any rate in those days the people eligible to return MPs), not those of the Crown.

If we fast-forward to twenty-first century Wales, we find this principle reflected in the provisions about taxation in Wales' constitutional arrangements, as set out in the Government of Wales Act 2006, as it has been amended. Under that Act, it is the Welsh Parliament, Senedd Cymru, which has the power to decide whether and to what extent people should be subject to devolved taxes. That Act of the UK Parliament does not give any powers to the Welsh Government (aka Welsh Ministers) to make such a decision.

The aim of the Bill, delegated legislation and Henry VIII clauses

The aim of the Bill is fairly simply stated: if it becomes law, it will give the Welsh Ministers the power to amend three Acts of Senedd Cymru, together referred to as the Welsh Tax Acts[1]. Between them, these Acts put a framework in place for collecting and managing devolved taxes (including setting up the Welsh Revenue Authority) and deal in detail with two of those taxes, namely the Land Transaction Tax (LTT) and the Landfill Disposals Tax (LDT).

In other words, the Senedd (the legislature) would give the power to the Welsh Government (the executive) to make its own laws which would change legislation made by the Senedd itself.

[1] The Tax Collection and Management (Wales) Act 2016; the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and the Landfill Disposals Tax (Wales) Act 2017.

It is of course very common for legislatures to delegate to the executive the power to make laws. Indeed, for the past two years, our daily lives have been governed in minute detail through such laws made by the Welsh Government using powers granted to them by UK Acts of Parliament (enabling Acts). This has been necessary in order to deal with the urgent need to take steps to protect public health because of the coronavirus pandemic. These laws have included ones that temporarily amended Acts of the UK Parliament and Acts of the Senedd in order to enable essential services such as education and health to continue. This could be done because the Enabling Acts included specific provisions giving government ministers the power to amend primary legislation.

Such powers given to Ministers to amend primary legislation (sometimes referred to as Henry VIII powers) require particular attention when it comes to scrutinising Bills. The danger is of what Sir Jack Beatson has called 'a shift by stealth in the balance of constitutional power towards the executive at the expense of the legislature'.[2] This is not only a question of determining whether an Act is necessary or desirable as a matter of policy, and then whether the provisions proposed are appropriate in order to achieve that policy. Neither is it only a question of whether it is appropriate to delegate law-making powers. There is also the core question of whether, as a matter of principle, the legislature should allow its own primary legislation to be amended by Ministers. In other words, where does the boundary lie between the territory where the legislature exercises its sovereign power (for want of a better phrase) over its own laws on an exclusive basis, and the territory where the executive can also exercise power?

This question was addressed to a certain extent following the Welsh Government's original policy consultation about the Bill, which proposed 'an extremely broad power that was intended to be used where Welsh Ministers considered it expedient in the public interest' as the Finance Minister Rebecca Evans MS put it in her evidence to the Senedd's Finance Committee.[3] Ms Evans added: 'the consultation process itself did raise concerns on the broad and open-ended nature of this power'[4]. In response to those concerns, the Government has, in the Bill, restricted the scope of the power to four sets of circumstances. In doing so, however, the Government has also removed a significant safeguard against potential abuse of broad power, namely what was termed the 'Senedd lock'. Under the arrangement proposed, the broad power could only be used if the Senedd resolved to authorise its use as a preliminary matter.

The purposes and procedure for exercising Henry VIII powers under the Bill

Under the Bill as introduced, the Welsh Ministers would have the power under section 1 to amend the Welsh Tax Acts (and any regulations made under them) if they considered that the modifications were necessary or appropriate for or in connection with:

> (a) ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations;

[2] Jack Beatson, *The Rule of Law and the Separation of Powers* (Hart 2021) 71

[3] The proposed power was modelled on a rather narrower power in Section 109 of the Finance Act 2003 which gave the UK Treasury the power to amend the part of that Act which relates to SDLT "in its application to land transactions of any description". Regulations made using that power lapse if not approved by UK Parliament before the end of 28 days. There is no express power to legislate retrospectively.

[4] A transcript of the evidence session can be found here: https://record.assembly.wales/Committee/12539#A69208

(b) protecting against tax avoidance in relation to LTT or LDT;

(c) responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of 15 Wales Act 2006;

(d) responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts.

These changes to the Welsh Tax Acts would be made by Regulations approved by a resolution of the Senedd, save that Welsh Ministers will have the power to make the Regulations without approval if they are of the opinion that, by reason of urgency, it is necessary to do so (Clause 4(2)) using the so-called 'made affirmative' procedure. Under that procedure, Regulations made will lapse unless approved by the Senedd within 60 days, and they will (in effect) be treated as if they had not been made (clause 5).

There are some things which the Welsh Ministers cannot do using these powers, including changing the rates of LTT and LDT.

The power to make regulations with retrospective effect

A striking aspect of the Bill is that clause 2(1)(c) enables the Welsh Ministers to make Regulations which have retrospective effect. In other words, they can change the law in the past as well as the future. While they can do this (at least in theory) to impose a retrospective liability to pay tax, they cannot do so in order to impose a retrospective penalty on someone. Retrospective laws are problematic. It is a fundamental component of the Rule of Law that the law should be certain. If the law can be changed retrospectively, then it means that something which was lawful at the time it was done can be made unlawful, and someone can suffer consequences which they would not have expected to suffer. That makes for uncertainty in the law.

Applied to the field of taxation, the principle of certainty means that people should be able to ascertain clearly at any moment in time what tax they must pay, how much they must pay and when they must pay it. If the rules can be changed after the event so that, at that moment in time, people were in fact obliged to pay more tax, or to pay it sooner than they did, then that makes the law uncertain. This does not necessarily mean that all use of retrospective legislation is invalid - it may or may not be depending on the circumstances and who made it[5] - and carefully handled it can be a useful tool to deal with aggressive tax avoidance posing significant risk to public funds. The potential for unfairness and oppressive behaviour however makes it another area where the closest democratic scrutiny is essential, as is the utmost clarity about the kind of circumstances in which it will be used.

A review of the Clause 1 'purposes'

What of the four purposes for which the Bill would empower Welsh Ministers to amend the Welsh Tax Acts? Does it make sense for the Welsh Ministers to have the power to legislate for those

[5] So for instance in a case involving Stamp Duty Land Tax, the Court of Appeal held that it was not contrary to Article 1 of the First Protocol to the European Convention on human rights in the circumstances of the case for an Act of Parliament to close a *potential* tax loophole with retrospective effect (R (on the application of APVCO Limited and others v Her Majesty's Treasury [2015] EWCA Civ 648)

purposes? Are they sufficiently precisely drafted? Is there a case for allowing these powers to be exercised retrospectively? These questions are now considered in respect of each purpose in turn.

(a) ensuring that LTT or LDT is not imposed where to do so would be incompatible with any international obligations;

This is the most straightforward of the purposes. Section 116A(3) of the Government of Wales Act 2006 states 'A devolved tax may not be imposed where to do so would be incompatible with any international obligations.'

It makes sense to enable the Welsh Tax Acts to be amended swiftly if the reason for the incompatibility with international obligations lies in those Acts. It also makes sense that the power should be capable of being exercised retrospectively. While the Welsh coffers would have to pay back any tax collected, it would have been an unlawfully imposed tax in the first place. Nobody will lose out.

(b) protecting against tax avoidance in relation to LTT or LDT;

Tax avoidance is not unlawful. It involves doing or arranging things in such a way as to minimise the impact of tax. In posher terms, it is tax planning. It frequently involves taking advantage of so-called 'loopholes' in taxation law, and has a bad name because of the industry that has grown around putting elaborate and frequently artificial schemes in place which largely benefit very rich people and corporations, giving rise to a battle of wits between legislators and tax advisers.

Part 3A of the Tax Collection and Management (Wales) Act 2016 (a Wales Tax Act) already contains a broad general anti-avoidance rule. This applies where someone enters into an arrangement for the main or sole purpose of obtaining a tax advantage, and that arrangement is an artificial one when measured by reference to certain statutory criteria. In such a case, the Welsh Revenue Authority (WRA) can start a process which can lead to tax adjustments against the taxpayer. If the matter comes to be determined before a court or tribunal, it is for the WRA to prove both that there is an artificial tax avoidance arrangement, and that the adjustments are reasonable (Section 81H).

This type of broad rule makes it more difficult for taxpayers to avoid paying tax through finding loopholes in the law, because even if there is a loophole, it must be one whose use stands up to scrutiny when the artificiality criteria are applied to it. If it does stand up to scrutiny, it is not artificial and while there may have been tax avoidance, there can be no adjustment.

In her evidence to the Finance Committee Rebecca Evans justified this particular purpose in a way which suggests that the aim is to enable ministers to nip prospective avoidance activity in the bud by closing potential loopholes quickly, so that questions of artificiality do not even arise.

If the purpose were drafted as simply a loophole-closing provision, that would be fine (assuming that it is agreed to be in principle acceptable to enable Ministers by regulations to close loopholes in primary legislation), but the drafting is much broader than that. It enables

any amendments to be made to protect against tax avoidance. There is nothing in the Bill, for instance, which would prevent Ministers from amending Section 81H so that the burden of proof is reversed, requiring the taxpayer to demonstrate that an arrangement is not artificial and that an adjustment is not reasonable. Another possibility is that the power could be used to amend the definition of artificiality. It is suggested that these are issues which would be better dealt with by the Senedd.

If the power to legislate for this purpose is capable of being used retrospectively, then it could in theory impose a liability to tax where none was otherwise payable. Leaving aside the question of whether it is appropriate for such an outcome to be in the hands of Ministers rather than the Senedd, there is also the possibility (as the Minister in her evidence has correctly identified) that this could give rise to issues of compatibility with Article 1 of Protocol 1 of the Convention Rights.

Paragraph 3.26 of the Explanatory Memorandum helpfully explains:

where liabilities are increased by retrospection, and taxpayers could have reasonably expected retrospective changes to be introduced, the Welsh Ministers may make regulations that increase a taxpayer's liability. For example, where tax avoidance is identified, Ministers may announce that the scheme will be closed down through future regulations from the date of that announcement.

Such clear signalling of future legislative intent by announcement makes the retrospective effect of regulations less unfair, since citizens will know that they continue at their peril with any avoidance arrangements. The Act does not, however, place any such condition or constraint on the use of the power to legislate retrospectively.

(c) responding to a change to a predecessor tax that affects, or may affect, the amounts paid into the Welsh Consolidated Fund under section 118(1) of the Government of 15 Wales Act 2006

The Welsh Consolidated Fund is the money that pays for the devolved governance of Wales. Its main component is the annual block grant received from the UK Government. Under the arrangements agreed between the UK and Welsh Governments, the block grant is adjusted if the UK Government changes an UK government tax which is the equivalent of a devolved tax. So if the UK Government increases the rate of SDLT (the equivalent to LTT), the block grant is reduced, and vice versa.[6] Where the block grant is reduced in this way, the Welsh Government needs to find the additional revenue or cut its spending. The straightforward way of finding the additional revenue is by making an equivalent change to the devolved tax.

The example frequently cited by the Welsh Government (see for instance the Explanatory Memorandum and the July 2020 consultation document 'Tax Devolution in Wales – Enabling changes to the Welsh Tax Acts') is when the UK Government introduced a higher rate of Stamp Duty Land Tax for additional residential properties (2nd, 3rd etc. homes). It was able do this with immediate effect by securing a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968, pending the relevant provisions being included in an

[6] See paragraphs 25 to 33 of the December 2016 agreement between the Welsh Government and the United Kingdom Government on the Welsh Government's fiscal framework

Act of Parliament. This would have led to a large negative block grant adjustment. To deal with this, the Welsh Government had to amend the Bill dealing with LTT which was going through the Senedd and introduce a similar higher rate of tax for second homes (etc.) in Wales. Had it not done so, there would have been a large block grant adjustment and no compensating tax revenue to compensate for it.

The policy need for a mechanism that enables quick action in these sorts of circumstances is clear. It is also clear that it makes sense for the change to have effect from the same date as the UK change, and if that date is in the past for the legislation to be retrospective to that extent.

What is curious about this example, however, is that it involved introducing a new rate of tax. The Bill would prevent the regulation-making powers from being used to increase bands and rates of tax, but not it seems from being used to introduce new rates for special categories in special circumstances. A decision to do so is arguably a significant policy decision which would need Senedd approval up front rather than after the event. It is not clear why the problem could not be dealt with by legislating for a Senedd resolution to have a similar effect to a resolution of the House of Commons under the Provisional Collection of Taxes Act 1968. With suitable inter-governmental liaison, it should be possible for the resolution to be passed on the same day as a corresponding resolution is passed in Westminster.[7]

(d) responding to a decision of a court or tribunal that affects, or may affect, the operation of any of the Welsh Tax Acts or regulations made under any of those Acts.

As in the case of the anti-avoidance purpose, this is a very broadly drawn provision. It allows the Welsh Ministers to change the Welsh Tax Acts in response to an external challenge to the way in which they operate. The difference in this case, however, is that the amendment will not be made in order to forestall the use of a loophole, but rather to respond to a decision of a court of law, including undoing the effect of that decision. It is not uncommon for the law to be changed in response to a decision of a court. Where the law in question is primary legislation, that would normally be done by further primary legislation, unless the power to do so is given to the executive, such as for example under section 10 of the Human Rights Act 1998.

[7] In support of giving the Welsh Ministers the power to amend tax legislation including with retrospective effect, the Explanatory Memorandum states that the UK Government already has such powers under the Provisional Collection of Taxes Act 1968 (see paras 7.8 and 8.34). The Minister also referred to this Act several times in her evidence to the Committee. It is questionable however, whether this is an appropriate comparison to what the Bill envisages. The mechanism in the Act is a power of the House of Commons, not of the UK Government, and is a piece of legal glue enabling changes announced by the Chancellor of the Exchequer to come into force quickly. It also ensures that taxes do not lapse. It does not give the Chancellor or any other Minister the power to make changes to primary legislation through regulations, let alone ones which have retrospective effect. In other words, it respects the primacy of Parliament over legislation relating to tax.

The difficulty with this purpose in the Bill is that it is so very broad. It could in theory apply to any provision in the Welsh Tax Acts, apart from those that set up and govern the WRA.[8] (Interestingly, unlike the other purposes for which the power to amend can be used it is not confined to instances relating to LTT and DLT, so could be used in connection with other devolved taxes in future.)

The Explanatory Memorandum states at para 3.3, in respect of all the purposes for which regulations can be made:

The regulation making power will not be used to achieve routine policy changes to the devolved taxes. For such changes the Welsh Government will use powers that already exist in the Welsh Tax Acts or, where necessary, will introduce primary legislation. It is clear that the more significant the change is, the greater the need to make those changes in consultation with Welsh citizens and interested stakeholder groups, and in all cases with appropriate Senedd scrutiny.

The difficulty is that, as in the case of the anti-avoidance provision, the drafting of the Bill does not reflect this approach. Rather it gives the Welsh Ministers the power, should they choose to do so, to achieve routine policy changes, significant or otherwise, and to overturn decisions made in a court of law. In other words, the power to decide who legislates about what, who makes the decision whether a matter should be dealt with by primary or secondary legislation, lies with the Government. Unlike the proposals in the original policy consultation, there will be no up-front 'Senedd lock' that would act as a constraint to prevent the powers being used too broadly and would ensure that the decision about who legislates in such a case is made by the Senedd.

The use of the power to legislate retrospectively in this case presents serious potential challenges to the Rule of Law. Once a court or tribunal has made its decision, then that is the law. If the law is changed so that it is different in future, all well and good, but to change the law retrospectively could have the effect in certain cases of depriving the citizen of an effective remedy. What would be the point of challenging or defending proceedings brought in connection with devolved taxes if the Welsh Ministers were capable through regulations of not only overturning the court's decision for the future, but also invalidating that decision by changing the law in the past? Such an assault on the Rule of Law is unlikely to be regarded by the Courts as reasonable. Since these regulations would be secondary legislation, they would (unlike Acts of the Senedd itself) be open to challenge by judicial review on the grounds that they are unreasonable. Rather than leave it chance, however, it would be preferable (if legislating retrospectively for this purpose is to be permitted at all) that it were made clear on the fact of the Act that this cannot be done with effect from a date which is before the date of the Government announcing that it will change the law in the light of the relevant court or tribunal decision.

[8] It may be worth noting that clause 3(2) prohibits amendment of regulations made under certain provisions of the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and Landfill Disposals Tax (Wales) Act 2017, but does not prevent the amendment of those provisions themselves.

Draft Statement of Policy on retrospective legislation

Clause 3 of the Bill requires the Welsh Ministers to publish a statement of their policy with respect to the exercise of the power to make regulations retrospective. Such a statement is of course helpful as a counterbalance to the uncertainty which the possibility of retrospective legislation creates. If the government were to make regulations with retrospective effect in a manner which is contrary to the policy statement, then those regulations would be at risk of being struck down by a court.

A draft policy statement was published when the Bill was introduced. The document is called 'Statement of policy with respect to the exercise of the power to make retrospective legislation within the Welsh Tax Acts etc. (Power to Modify) Act 20XX', but the draft statement contains several statements of intent by the Government which appear to be general in nature, rather than confined to retrospective legislation.

Part 2 of the document is the only part of the document which is clearly intended to come within the ambit of clause 3, since it is headed 'The Statement – Retrospective Legislation'.

This states that the power will be used in exceptional circumstances only, with consideration given on a case-by-case basis and sets out a non-exhaustive list of examples of situations where the Welsh Ministers might consider making regulations with retrospective effect.

Two of these examples are related to the purpose of responding to a change made by UK government that has immediate effect. It is understandable why it would be beneficial, if a corresponding change were to be made in Wales, for it to take effect from the same day as the UK change (but see the observations above).

Another is 'where avoidance needs to be halted', but there is no wording equivalent to the passage from the Explanatory Memorandum quoted above which limits retrospective effect back to the date of an announcement.

Another is where a 'court decision means the legislation may not be interpreted as intended by the Senedd when it was enacted'. This bald statement offers no real justification for retrospective effect. It is also a rather odd formulation. In interpreting legislation, courts establish the intent of the legislator. In cases of this sort, by definition, there is no 'intent' of the Senedd other than what a court determines. If the Senedd thinks that the court has got it wrong, it can change the law to reflect what it really 'intended'. It seems peculiar that the government should be able to substitute its view of the Senedd's intent for that of a court, and to do so retrospectively.

The other parts of the draft statutory statement of policy cover broader issues and make more general declarations of intent. They include the following which echoes the statement quoted from the Explanatory Memorandum above

The regulation making powers will not be used to achieve routine policy changes to the devolved taxes. For such changes the Welsh Government will use powers that already exist in the Welsh Tax Acts or, where necessary, primary legislation.

This may give some comfort to those who fear that the statutory purposes are too broadly drafted, but it should be emphasised that this is just a policy statement. It is not law, and like all policy statements is capable of being changed.

The Government has also published a separate document called 'Policy intent for subordinate legislation to be made under this Bill' which is intended to assist the Committee during the scrutiny of

the Bill. While it covers similar ground to part two of the draft statutory statement of policy described above, it does not fully align with it.

But doesn't the Senedd get to vote anyway?

It may be objected that it does not matter that changes to the law will be made by Welsh Ministers, because to have full effect they must be approved by the Senedd, either before they are made, or in an emergency within 60 days.

That is factually correct, but the end point of that reasoning is that there is no need for any laws to be made by the Senedd, so long as the Senedd has power of approval over secondary legislation. It is unlikely that such a laid-back approach would find favour with most Senedd members.

As has been powerfully pointed out by many members of the House of Lords who participated in this month's debate about so-called 'skeleton bills', the better the scrutiny, the better the legislation, and delegated legislation usually receives far less scrutiny and democratic attention than do Acts. This is also an argument that the Welsh Government has itself advanced (or at least approved of) in the context of expanding the size of the Senedd.

The principal purpose of proceeding by way of regulations rather than an Act of the Senedd appears to be the need to move quickly. The Senedd standing orders do allow the Government to introduce emergency Bills and provide a fast-track procedure for them. The Minister in evidence suggested that using that procedure would mean less Senedd scrutiny than proceeding by way of regulations. That is correct in the case of urgent regulations which come into force before they are laid before the Senedd, and which are subject to the 'made affirmative' procedure, but it is not clear why that should be so for regulations which require Senedd approval before they come into force.

Getting the balance right

It is a question of finding the right balance in relation to where the boundaries of the executive's legislative powers should lie and what should be the preserve of the legislature, of defining them clearly and of ensuring that safeguards are in place to prevent regulatory creep beyond those boundaries.

The following are suggested safeguards that might help in the case of this Act (some of these are suggested as alternatives):

- remove the ability to legislate retrospectively in the case of anti-avoidance or in response to a court or tribunal decisions, respecting the primacy of the Senedd
- reintroduce the Senedd Lock (so respecting democratic primacy over the decision about who gets to legislate), either in all cases, or at least in the case of the broadly-defined powers and/or where the use of retrospective powers would impose an additional burden or liability on citizens
- define more narrowly the types of change that may be made under the anti-avoidance purpose
- set out legally binding limits on the use of the power to legislate retrospectively – e.g. in the case of anti-avoidance, no further back than the date on which the Government announced in the Senedd its intention to legislate; in the case of responding to a UK Government tax change, no further back than the effective date of that change.

- consider the possibility of a 'provisional resolution' mechanism as an alternative to, or in conjunction with, the use of secondary legislation.

To sum up, the Bill is a rather mixed bag.

On the one hand, the case for empowering the executive to act has been clearly made out in relation to compliance with international law and to the impact on the block grant of changes to predecessor UK taxes. In both cases, the statutory purposes seem sufficiently precisely drafted to avoid unintended broader use of the delegated power to legislate. In both cases, the need for retrospective effect is clear, but in the case of responding to UK tax changes it is less clear why an alternative method of achieving such changes simultaneously and which respects the Senedd's primacy over taxation could not be introduced, paving the way for primary legislation in due course.

On the other hand, the case for empowering the executive to act has not been so clearly made out in relation to the anti-avoidance purpose or to the purpose of responding to a court or tribunal decision. In each case, the scope of the purpose as drafted is very broad and encroaches on territory which may be regarded as more properly that of the Senedd than of the Government. In the case of the anti-avoidance purpose, its scope is potentially far greater than that suggested by the Government. There are no clear constraints in the Bill on the use of the power retrospectively for these purposes. The potential impact on the rule of law of retrospective use is significant. The breadth of these purposes as drafted suggests that they may be being sought as 'just in case' powers, which goes against the grain of the apparent principle that it is the representatives of the people rather than those of the Crown who decide whether and to what extent people should be taxed.