



Regional AMs and Representative Democracy

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Synopsis

In the 2016 elections to the National Assembly Wales (NAW) Dafydd Elis-Thomas and Mark Reckless were returned as Assembly members (AMs) – Elis-Thomas as a constituency AM and Reckless as a regional AM. Each represented a political party but subsequently left the party and continued to sit as an AM. This paper (which is not about the individuals) suggests that the legal implications arising are different between each type of AM and that there are ramifications for representative democracy.

The stock argument

When a political representative (P) elected on behalf of a party leaves that party during P's term of office, the common argument that flows can be distilled as follows:

P was elected as a representative of political party A and has ceased to represent that party. Therefore, as electors voted for P as a representative of political party A, P should stand down.

That argument has moral force but does it have legal force? In the case of an AM it is suggested the answer is different depending on whether the person is a constituency or a regional AM.

Constituency AMs

Constituency AMs are elected under the simple majority system (or 'first past the post') - an elector is entitled to a vote for a 'candidate'¹ and the candidate with the most votes is elected as a constituency member to the NAW.² The basis of the system is the election of the person. There is no legal qualification requiring that P's term of office is subject to continuing to be a representative of political party A. The legal position is, therefore, clear.

Regional AMs

In addition to a vote for a constituency candidate, NAW electors have a second vote to elect regional members. Although individual candidates can stand, the choice offered most of the

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¹ Government of Wales Act 2006, s 6(2).

² Government of Wales Act 2006, s 6(4).

time will be between registered political parties who have submitted a list of candidates - and a vote cast in those cases is for the registered political party, and not a named candidate.³

That distinction about who the vote is for is also reflected in the legal basis for the return of an NAW member. Consistent with a vote for a person, a constituency candidate is directly returned as a member. But for a regional member elected from a list, and consistent with a vote for a registered political party, a seat is 'allocated' to a party⁴ and the seat is then 'filled' by a candidate from that party's list.⁵ The logic from this is that where a regional member ceases to represent a party, a vacancy arises - because the seat is allocated to the party, and the seat has become 'unfilled'.

But does a vacancy arise in law? Section 11 of the Government of Wales Act 2006 applies if a regional seat is vacant. A vacancy arises if an AM is disqualified from being an AM⁶, but a disqualification does not arise where a regional AM ceases to represent a party⁷. The legislation is otherwise silent about how a vacancy arises. A vacancy arising because of death or resignation as AM is obvious.

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It has been argued that a vacancy does arise in law because the seat has been 'unfilled'. Support for this view can be found in section 11. Where a vacancy arises, it is to be filled by the next person on the list of the registered political party (if there is one). However, where the person is not a member of that party, the party can prevent the seat being filled by the person⁸. By logical extension a party should have the right to replace a regional member who ceases to represent the party. Of course, while this is an arguable position, it could only be definitively resolved by a court ruling.

Furthermore, if a regional AM leaving a party creates a vacancy, it also follows that expelling a regional member from the party can achieve the same outcome.

Issues arising

Surely it is unsatisfactory for the law to be unclear on a point which has real practical application. The position could be put beyond doubt by amendment to the Government of Wales Act 2006. But that begs the question about how the law should be amended - to decide whether a vacancy arises where a regional AM ceases to represent a party. This paper, for two main reasons, argues that in that situation a vacancy should not arise.

First, it seems wrong in principle that, despite the difference in arrangements between the election of constituency and regional AMs, there should be a distinction in the consequences of ceasing to represent the party on whose behalf an AM was elected. Second, and this is a more fundamental objection, if a vacancy does arise in those circumstances there are implications for representative democracy.

3 A vote may be given 'for a registered political party which has submitted a list of candidates...': Government of Wales Act 2006, s 6(3)(a).

4 Government of Wales Act 2006, s 9(1)&(2).

5 Government of Wales Act 2006, s 9(5).

6 Government of Wales Act 2006, s 18(1).

7 Government of Wales Act 2006, s 16.

8 Government of Wales Act 2006, s 11(3)&(4).

If the vacancy does arise, this effectively places the regional AM as a delegate, i.e., a person who is there to act within the scope of authority or under instruction given by a party. Yes, a whip system seeks to achieve this outcome in practice but a constituency AM is free to disagree and not put her or his continued AM status at risk other than through the ballot box. This allows greater opportunity for principled responses and effective scrutiny to executive proposals. That position should be the same for regional AMs and be put beyond doubt.

Conclusion

The analysis concerning the legal scheme of things about regional AMs is, of course, untested and, no doubt, counter-argument can be mustered. But there is an arguable case for the view taken and, for the reasons given, there needs to be certainty.

Some questions

Should an NAW regional seat become vacant if an AM ceases to be a representative of the registered political party for who he or she holds the seat?

If so:

- What are the implications for representative democracy?
- What is the basis for the distinction in the return of constituency and regional AMs?

References

Government of Wales Act 2006.

Biography

Huw Evans is lecturer in law at Cardiff Metropolitan University having previously worked as a solicitor in private practice, the Crown Prosecution Service, the Welsh Office and the National Assembly for Wales. Additionally, he is a PhD candidate and his thesis concerns the Trading Standards service and consumer protection in Wales. He remains a solicitor (although non-practising) and is a Gorwel board member.

