SUBMISSION TO THE WELSH GOVERNMENT ON A SEPARATE LEGAL JURISDICTION FOR WALES

SCHOOL OF LAW (*)

COLLEGE OF BUSINESS, ECONOMICS AND LAW

SWANSEA UNIVERSITY

(*) David Daycock LL.B., LL.M., Barrister (former Deputy Chair, Standing Committee on Legal Wales) - I am indebted to Professor John Linarelli (Head of the Swansea University School of Law), Andrew Beale O.B.E. (Deputy Head of the Swansea University School of Law) and Professor Alison Wride (Head of the Swansea University College of Business, Economics and Law) for their support and encouragement in the drafting of this submission.

Introduction:

This submission to the Welsh Government addresses some of the issues raised in the Welsh Government consultation document 'A Separate Legal Jurisdiction for Wales' with particular reference to the ways in which the legal community in Wales, and specifically Welsh Universities can grasp the opportunities arising from and meet the challenges posed by the growth and development of a separate Welsh jurisdiction. It acknowledges that colleagues[1] from our School of Law have made and continue to make valuable contributions to the current legal debate and highlights our commitment to the development of the Legal Wales agenda.

General Submissions:

1. That whereas the development of a separate jurisdiction for Wales may be the next political step in the devolution process, work needs to be done to develop and mould the legal evolution of the Welsh jurisdiction. Particular emphasis needs to be given to the implications of a separate body of criminal law and the administration of criminal justice. There is a need to put in place institutions that support and nurture the Welsh jurisdiction to ensure that it not only meets the needs of Wales but is also able to function on an equal basis with similar established UK and world-wide jurisdictions.

2. That work should be undertaken to analyse the operation of smaller legal jurisdictions, particularly in a UK and European context, to seek the best models for implementation or adoption and learn from their experiences. It is suggested that specific analysis should be undertaken of the Northern Ireland model, as it appears to hold many parallels with Wales, not least a Common Law system with devolved government from Westminster.

3. That there is a need to address the issues of the emerging legal jurisdiction on the basis of what can be termed 'pragmatic idealism'. This is taken to mean that there should be an aspiration to bold, defining but attainable objectives tempered by a careful evaluation and research of the options and cost, and the benefit to Wales in the long term.

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[1] Professor Iwan Davies, Professor Lynn Mainwaring, Professor Timothy Jones, Professor Gwynedd Parry, Jane Williams.

The option of 'wait and see' is not a viable one. The opportunity exists to create a legal jurisdiction that will not only be of benefit to Wales in real and economic terms, but also in terms of its identity and status. It is submitted that this opportunity should not be wasted.

Possible steps to facilitate the development of a separate jurisdiction:

It is submitted that there are a number of clear practical steps which may be taken to support the further development of a Welsh Jurisdiction.

It is accepted that some of these will be easier to achieve than others, and that some may place calls on already scarce public funds. However in the context of the significant and long lasting changes that are likely to take place, any such investment will certainly be justifiable, and would warrant the recalibration of available existing funding to achieve vital long term goals, and provide the 'seed corn' for the developing jurisdiction.

1. New Court System

   That the UK government set up a devolved court system based at least in part on the Northern Ireland model to give Wales a similar jurisdiction as set out in the Justice (Northern Ireland) Act 1978 with a Court of Appeal for Wales, a Lord Chief Justice and a Welsh judge in the UK Supreme Court. The viability of this structure was demonstrated in the response of Sir Roderick Evans and Professor Iwan Davies to the Richard Commission in 2003 ('The implications for the Court and Tribunal System of an Increase in Powers').

   Further work may be necessary to prepare for the setting up of a devolved court system, in particular the structure, cost and location of the Courts (to address issues of access to Justice on an all Wales basis) and the difficult issue of a separate criminal justice system, but the broad need for some separate court structure for Wales seems undeniable.

2. Determining Welsh cases in Wales

   That Practice Direction 54 - Administrative Court Venue should be amended to require claims wholly or mainly relating to Wales to be issued and heard in Wales (Pending this change it would seem sensible that all cases relating to Wales be indexed and identified as such to facilitate the tracking and handling of these cases, and to help research and analysis thereof). This would encourage the growth of the

already developing Welsh public law sector, and be seen as tangible support for the principle of determining Welsh cases in Wales.

3. Judicial Review in Wales

That research be undertaken on the potential for streamlining and making more accessible Judicial Review proceedings in Wales to ascertain the reason for, and eradicate the 'litigation deficit' in public law cases brought in Wales (2% of claims before the Administrative Court originate from Wales which has 5.6% of the combined population of England and Wales).

This deficit may be eroded as a result of the opening of the Administrative Court in Wales, and the small but steady growth of public law practices in Wales, referred to above, and may also go some way to driving down the cost of bringing such cases, not least due to the avoidance of London overheads.

Consideration should also be given to setting up or funding law centres, possibly linked to the Law Schools in Wales, to help disadvantaged citizens access basic public law advice and raise rights awareness.

The opportunity presents itself to enable the general public in Wales to challenge public bodies more easily and cheaply and thereby ultimately improve the quality of public service provision in Wales.

4. Provision of public law services across Wales

That as part of the issue of access to public law remedies in Wales further work is undertaken to research the provision of public law services across Wales, both within the public and private sector, and the amount of work referred outside Wales. This would build on the work already carried out by Professor Iwan Davies and Professor Lynn Mainwaring 'The Provision of Private practice Legal skills in Wales', Wales Journal of Law and Policy 2006.

5. Engagement with Law Schools in Wales

That the Law Schools in Wales should play a key role in both researching the legal issues raised above and also by training and developing current and future lawyers in Wales to enable them to be fully equipped to operate effectively in the new Welsh

jurisdiction, both in terms of training and access to legal materials, whilst maintaining the universal transferrable legal skills necessary to operate in other jurisdictions.

This objective might be achieved by developing practical modules on existing professional courses such as the Legal Practice Course (LPC), the Bar Professional Training Course (BPTC) and the related Graduate Diploma in Law Course (GDL).

The School of Law at Swansea University is monitoring developments in the Legal Education and Training Review (LETR), a joint project of the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and CILEX Professional Standards (IPS). The interests of Wales in the training of lawyers and the administration of justice should be taken into account by the LETR and we are fully supportive of this objective.

Training should also be provide for existing practitioners to attain competency in Welsh law and practice, either as part of continuing professional development programmes, or as specific qualifications such as a diploma or certificate in Welsh law. It is also suggested that this initiative should extend to qualifications with a significant Welsh law/governance element for non-lawyers such as public sector managers or administrators.

6. New Centre for National Legal Excellence

That a new 'Centre for National Legal Excellence' be established which would act as a forum for promoting, deliberating and developing Welsh law and practice, standing on a world stage as a flagship body for Law and Governance in Wales.

This body would be made up of judges, practising lawyers, legal academics, politicians and administrators, and would formalise and build on the work of Legal Wales.

This Centre would have strong links with the Law Schools in Wales and could act as a research co-ordinating forum for the various institutions that currently exist in this field such as the Wales Governance Centre at Cardiff University, the Hywel Dda Institute at Swansea University, the Centre for Welsh Legal Affairs at Aberystwyth University and the Devolution Studies Research Group at Bangor University.

It is submitted that this Centre could also extend its role into publishing books, journals and setting up a Welsh Law Reporting service to improve access to basic legal source material.

Concluding comments:

The School of Law at Swansea University appreciates the opportunity to engage with some of the more critical Consultation questions identified in 'A Separate Legal Jurisdiction for Wales'. We welcome the suggestion of the First Minister of Wales and Counsel General for a further consultation exercise to explore particular issues in more detail.

RESPONSE OF THE BAR COUNCIL
OF ENGLAND AND WALES
TO THE CONSULTATION OF THE WELSH GOVERNMENT
ON A SEPARATE LEGAL JURISDICTION FOR WALES

The Bar Council of England and Wales

1. These are the submissions of the General Management Committee of the Bar Council, which represents over 15,000 barristers in England and Wales.

2. The Bar Council was founded in 1894 to represent the interests of barristers. Its role is to promote and improve the services and functions of the Bar and to represent the interests of the Bar on all matters relating to the profession, whether trade union, disciplinary, public interest or in any way affecting the administration of justice. Its regulatory function is now exercised by the independent Bar Standards Board.

3. The independent Bar is essential to our democratic way of life and to the vitality of the rule of law; our most important constitutional principle. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist and independent advocates, barristers enable people to uphold their legal rights.

4. The Bar makes a vital contribution to the efficient operation of the criminal and civil justice system. It provides a pool of talented men and women from diverse backgrounds from which a significant proportion of the judiciary is drawn.

5. The Bar Council promotes fair access to justice for all and the highest standards of advocacy, ethics, equality and diversity across the profession. It also promotes the development of business opportunities for barristers at home and abroad.

The Bar Council's Response to the Consultation Paper

6. The Bar Council welcomes the opportunity to respond to this very important consultation.

7. We are conscious of the importance to England and Wales of the possibility of responsibility for the administration of justice in Wales being devolved to Welsh Ministers, and of the far reaching effects such a change might have for the administration of justice generally in England and Wales.

8. The principal issues on which the Welsh Government is consulting are:

   a. What is meant by the term "separate Welsh legal jurisdiction";

   b. Whether or not there should be a separate legal jurisdiction for Wales; and

   c. What might be the likely consequences of creating that jurisdiction.

9. The starting point is to recognise that the United Kingdom is not a unitary state. Devolution has transformed it from a unitary state to a quasi-federal state. It has three devolved models: Wales, Scotland, and Northern Ireland. The administration of justice is devolved in Scotland and Northern Ireland, but is not devolved in Wales.

10. Since May 2011, the National Assembly for Wales has had powers to pass primary legislation. This change in the constitutional landscape has brought into focus the issue as to whether or not there should be a separate legal jurisdiction for Wales.

11. This is a political decision, upon which there will no doubt be divergent views.

12. Those in favour of the proposition would point to the fact that there is no Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction. This, of course, is but one of the arguments advanced by those who favour a separate legal jurisdiction for Wales. The strongest constitutional arguments are those identified by Professor Gwynedd Parry in his submission to the Constitutional and Legal Affairs Committee which is conducting a separate inquiry into this issue for the National Assembly for Wales. We have sought to summarise the other key arguments that we have identified in favour of the idea of a separate legal jurisdiction for Wales, in order to inform the debate on this issue, and these are set out at paragraph 35 of this response.

13. We have also sought to summarise some of the potential consequences that may need to be considered in assessing the wider implications of the case for a separate legal jurisdiction for Wales, and these have been summarised at paragraph 36 of this response.

14. Those against the proposition would argue that this is too radical a step to take at this time, as they would argue that the divergence in the laws that apply in England and Wales, as opposed to the laws that apply in Wales only, is not presently that significant to warrant a separate legal jurisdiction for Wales. The response of those in favour of the proposition is that this is a mis-characterisation of the extent of the divergence in the laws that apply only to Wales, as those in favour of a separate legal jurisdiction for Wales would say that the differences are indeed significant already. This is a matter of judgment, with the answer dependent on which side of the argument one is approaching this issue.

15. In order to further inform the debate on these issues we have sought to summarise the key arguments against the idea of a separate jurisdiction for Wales which are set out in paragraph 37 of this response.

16. We recognise that the focus of the consultation paper is on the administration of justice rather than on matters of substantive law which would need to be considered in the event of a decision to establish a separate legal jurisdiction in Wales and it is with reference to the administration of justice that the Bar Council's response is directed. However we wish at this point to mention, without further elaboration in this response, that any review of whether to establish a separate legal jurisdiction would need to give full consideration to the impact (including costs) of such a change. For example, the creation of a separate legal jurisdiction could well add to the complexity and cost of the resolution of disputes arising under contracts of insurance involving a party who is domiciled in one part of the United Kingdom in relation to an event occurring in another part. The benefits of any change would plainly need to be considered alongside the costs as well as potential detriments to consumers in this type of case. As we mention at paragraph 37(a) below, a separate legal jurisdiction would inevitably add to the possibility of an increase in disputes arising as to choice of law and *forum conveniens*. We have also reflected on the problems that would need to be considered, for example, in relation to the law of real property in disputes affecting land situated on both sides of the border and about the issues that might need to be considered about the registration of title of cross-border land. We mention these matters, without further discussion in this response, in order to identify them for possible further consideration at a later stage.

Implication for the Legal Professions

17. The Bar Council is particularly concerned to highlight that there would be a major implication for the legal profession if there were a separate system of entry to the Welsh and English legal professions and barriers to movement between the two.

18. Any attempt to undermine the free movement in legal services between Wales and England would be in breach of EU competition law. Regulation of the legal profession is not devolved, and the Bar Council does not consider that there is currently a case made out for this to happen. It is essential for there to be free movement between legal practitioners in Wales and England, as this is in the interests of both the legal profession and of the public at large. Many members of the Bar, who are also members of the Wales Circuit, have their principal chambers in and practice from London, in courts in London as well as Courts in Wales. There are also considerable benefits which flow in both directions between England as well as Wales from the free movement of professional knowledge and expertise.

19. Were there to be a separate legal jurisdiction and, in due course, a considerable divergence between the laws of Wales and those of England, then it may be necessary to revisit this question; but at this point in time, and looking into the foreseeable future, the Bar Council is strongly of the view that it would not be in the public interest for there to be a separate legal profession in Wales and a separate legal profession in England.

20. In terms of competition law, if a new statutory regime set up a new Welsh Bar Council and/or regulator then its decisions would be subject to a EU competition law challenge. This could arise in a variety of ways which would depend upon how the power to impose the restriction came into

being. If – say – the restriction were imposed by a private or quasi-private body then ordinary competition rules would apply. As such, a restrictive rule could be illegal. If it were imposed by a public body then it would be subject to judicial review and/or any regime specific competition rules laid down in the new legislation.

21. We understand that the only functions which are under consideration for transfer to Welsh Ministers are those of the Ministers of the UK Government concerned with the administration of justice, and not those of the statutory regulators of the professions.

22. The regulators will continue to stipulate what the professional competencies of advocates appearing in the courts in Wales should be. Whether the administration of justice is devolved or not, the need for advocates who are familiar with the differences in the substance of the laws applicable to Wales and, in some more limited circumstances, the ability to represent clients through the medium of the Welsh language, will be precisely the same whether responsibility for the administration of justice is devolved or not.

The Developments in Legal Wales since 1998

23. In assessing the case for and against the idea of a separate legal jurisdiction for Wales, it is right to recognise that significant developments within Wales's legal landscape have already taken place in the wake of devolution since 1998. These have included:

a. Divergence between the body of law which applies in Wales and that which applies in England. This constitutes a growing body of statute law which is unique to Wales. It comprises the Acts of the Welsh Assembly and the Acts of the United Kingdom Parliament which

apply only to Wales. It is recognised that this Welsh system of law is likely to become increasingly separate from the English system of law if further areas of legislative competence are devolved to the Welsh Assembly; and it is further recognised that the responsibility for implementing EU law within newly devolved areas will also fall on the Welsh Government.

b. In 2007, the re-arrangement of the boundaries for the administration of justice in Wales took place which resulted in the annexation of North Wales to Chester for the purpose of administration of justice coming to an end by establishing Her Majesty's Court Services Wales (HMCS Wales). Since 2007, the administration of justice has been administered on an all Wales basis, which has been a significant development for the purposes of administering justice in Wales. The cross-border tribunals are now also administered on this basis, and the devolved tribunals have similarly been administered entirely inside Wales' borders. Responsibility for the administration of tribunals which operate within devolved areas already rests with the Welsh Assembly Government.

c. There are sittings of the Court of Appeal Civil Division[1] in Cardiff and occasional sittings of the Court of Appeal Criminal Division[2] in Cardiff.

d. There are regular sittings of the Employment Appeals Tribunal in Wales.

[1] In 2009, 2010 and 2011 the majority of civil appeals from Wales (but not all interlocutory hearings or renewed applications for permission to appeal) have been heard in Wales.
[2] In 2009 and 2011 the Criminal Division did not sit at all in Cardiff, and in 2010 it sat for only 5 days.

e. In 2008 the Administrative Court in Wales was created. This has meant that most judicial review cases involving decisions of Welsh public authorities, including the National Assembly for Wales, are heard in Wales. This aim is reflected in Practice Direction 54D of the Civil Procedure Rules, which sets out the "general expectation" that proceedings will be administered and determined in the region with which the claimant has the closest connection.

f. The creation of a Mercantile Court in Wales in 2000.[3] When opening the Mercantile Court in Cardiff, Lord Bingham as the then Lord Chief Justice of England and Wales, said:

"This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a proud, distinctive and successful nation."

What is meant by the term "separate legal jurisdiction"

24. Professor Tim Jones and Jane Williams in their 2004 article "Wales as an emerging jurisdiction"[4] defined "jurisdiction" as the power or authority to interpret, apply and decide the law and they argued that it has three commonly accepted characteristics: namely

a. a defined territory;

b. a distinct body of law; and

c. a structure of courts and legal institutions.

[3] The only specialist court within the High Court not currently represented in Wales is the Admiralty Court.

[4] PL 2004, SPR, 78-101.

25. For the purpose of these representations, the Bar Council would respectfully adopt their definition of jurisdiction.[5]

26. As to the first characteristic, Wales is a defined territory. In the context of the question of whether a territory is a necessary element of a jurisdiction, Wales as a territory is precisely defined in section 158 of the Government of Wales Act 2006.

27. The current constitutional arrangements provide that the Westminster Parliament can pass legislation that extends to all three territories – namely (i) England and Wales, (ii) Scotland, and (iii) Northern Ireland – or the Westminster Parliament can pass legislation that extends to one of those territories, or to all three territories, or any combination of them.

28. An Act of Parliament may therefore be for the whole UK or for England and Wales only, or for England and Wales plus Northern Ireland but excluding Scotland, and so on. The Scottish Parliament and Northern Ireland Assembly can legislate only for their own particular territory.

29. As to the second characteristic, there is a divergence between the body of law which applies in Wales and that which applies in England. This constitutes a growing body of statute law which is unique to Wales, or where it parallels similar legislation passed in England, involves significant differences in drafting reflecting Welsh circumstances. We accept that this will become increasingly so as the Assembly continues to make laws.

30. As Lord Justice May stated at para 59 of the working party report on the Administrative Court for Wales:

[5] This definition is also adopted by the Committee of Welsh Judges of the Council of Judges in its submissions to the inquiry being conducted by the Constitutional and Legislative Affairs Committee of the National Assembly for Wales.

"The divergence has probably increased since [2002] as the Assembly has grown in confidence and has gathered more powers in more fields. The divergence will certainly increase after May 2007, when the Assembly makes "Assembly measures" and it would, of course, increase still further if the Assembly acquires primary legislative powers [under part 4]".

31. Those Part 4 powers, which gave the Assembly the ability to pass primary legislation, came into effect in 2011. We understand that the First Minister has announced there will be 20 Bills in the legislative programme for this term of the Assembly.

32. As to the third characteristic, the administration of justice is currently a function of the Ministry of Justice and it is administered by that Department and HMCS Wales. It is not at present a function of the National Assembly for Wales and, it follows, it is not one of the Assembly's fields of responsibilities. The Assembly therefore has no jurisdiction over the administration of justice at present; and that jurisdiction is vested in the Ministry of Justice.

33. If, however, that function and field of responsibility were added to the Assembly's functions via its Ministers, the Assembly would have jurisdiction over the administration of justice in Wales, just as it has jurisdiction today over (amongst other areas) health, and planning and environmental matters.

34. The aspects of the administration of justice to which reference is made when using the expression in this context are the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. We would also include the

authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission.

35. Save for the last of those functions, as previously indicated, they are all presently vested in the Ministry of Justice, the Home Secretary and other Ministers of the UK Government. The mechanism for transferring them and the estates and other assets which they comprise is by a transfer of the function by Order in Council under section 58 and for the Assembly's legislative competence to be enhanced by Order in Council under section 109 (1). The property, rights and liabilities of the Ministers of the Crown from whom the functions are transferred under section 58 to the Welsh Ministers will vest in the latter.[6]

The potential advantages of a separate Welsh legal jurisdiction

36. The potential advantages in favour are:

a. It would make for consistency between the constitutions of Scotland, Northern Ireland and Wales;

b. It would bring justice closer to the people for whom the laws were made;

c. The organisation within Wales of court and tribunal sittings in Wales would be likely to add to the efficiency of those bodies and to the prompt disposal of work;

d. It would make good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration;

[6] See section 88 and schedule 4.

e. The existence of legal institutions within Wales would create work and career structures not presently available in Wales.

What the consequences of having a separate Welsh legal jurisdiction might be

37. The potential consequences might include the need to implement a system for:

a. Determining the choice of jurisdiction between England and Wales (with the likely consequence of an increase in the volume of litigation in connection with choice of forum).

b. Summoning litigants and witnesses.

c. Transferring cases between the two jurisdictions.

d. Recognising and enforcing cross-border judgments.

e. Establishing, in respect of any separation of the criminal law and devolution of criminal justice, a criminal justice system infrastructure, such as a separate Attorney General for Wales[7], a Crown Prosecution Service, a Sentencing Council, and a Prison Service.

f. Establishing new High Court Judges for Wales.

g. Establishing new Court of Appeal Criminal and Civil Division Judges for Wales.

[7] If, as is likely, a separate Attorney General for Wales were to be appointed, his relationship with the Attorney General for England and Wales would have to be decided.

h. Establishing a new Chief Justice for Wales.[8]

i. Establishing a new role for a representative from the Welsh judiciary to sit on the Supreme Court.

j. Establishing in Wales distinct forms of the legal institutions that currently promote the development of English and Welsh law (e.g. the Law Commission), and support for the judiciary (e.g. the Judicial College) and the appointment of judges (e.g. the Judicial Appointments Commission).

The potential disadvantages of a separate Welsh legal jurisdiction

38. The potential disadvantages are:

a. The system of justice in the UK is very well respected internationally. Our judges are independent, of good quality and are already devolution aware. They, and the communities they serve, benefit from the collegiate approach that derives from sharing experience between England and Wales and working across the border. Unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out.[9] There is also a sense that the creation of a separate judiciary in Wales might cause a loss to Wales of its association with a court system that has international standing, which in turn may help attract international business to Wales.

[8] The pool for the appointment of Chief Justice and judges of the Court of Appeal in Wales would be small if it were decided that promotions would only be made from within the Welsh Judiciary.

[9] The contrary view is that there is no suggestion that the quality would not be as good as it is today. This contrary position is developed in the Legal Wales submission which also responds to the argument that having a separate legal jurisdiction for Wales is currently "too radical" to contemplate.

b. Some have raised concerns as to whether there is a sufficient volume of High Court and Court of Appeal cases which arise in Wales that would generate sufficient work for divisions of those courts sitting full time in Wales without requiring its judges to undertake work at a lower level, which may have the consequence of lessening the desirability of Welsh High Court and Court of Appeal positions to potential applicants. In a report prepared in 2006 a working group of the Judicial Executive Board made recommendations for the hearing of High Court and Court of Appeal civil and administrative cases outside London. In relation to the practicalities of hearing cases outside London, the working group expressed concerns of a lack of "back up work for the judge if the list collapses" and the need for administrative centres with capacity to administer and list cases locally who are staffed by people who know sufficiently in advance when appropriate judges will be available.

c. There is further a risk of conflicting authorities across the separate divisions of the courts and chambers of the Upper Tribunal in England and Wales with an increase in the number of appeals and a decrease in legal certainty.

d. Some have also proposed the argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change. Indeed, the primary unifying features of the English and Welsh jurisdiction are the shared common law and system of precedent and a large body of shared statute law.[10]

[10] Those in favour of a separate legal jurisdiction for Wales would say that this will not change. Northern Ireland, which has a separate jurisdiction, is still attached to the common law. In this regard it is worth highlighting that the United Kingdom consists of three legal jurisdictions. Those of England and Wales and Northern Ireland Law are based on common law principles. The other jurisdiction is Scots Law which dates back to the Middle Ages and consists of civil law principles with some common law elements.

Conclusions

39. Whether or not Wales decides to create a separate legal jurisdiction is a political decision. The Bar Council does not seek to express a political view in relation to this issue, but instead seeks to assist in identifying the practical issues relevant to the arguments both for and against this proposition.

40. What the Bar Council is particularly keen to highlight is that, even if a decision were taken to create a separate legal jurisdiction for Wales, there would be no need to create any separate institutions for the legal professions in Wales.

41. It is in the interests of the legal professions, and of the public at large, to ensure that there is free movement of the professions, even if the decision were taken to create a separate legal jurisdiction for Wales.

MICHAEL TODD QC

Chairman of the Bar of England & Wales

19 June 2012

WELSH GOVERNMENT CONSULTATION

"A SEPARATE LEGAL JURISDICTION FOR WALES"

RESPONSE OF THE DESIGNATED CIVIL JUDGE FOR WALES

1. I respond as Designated Civil Judge for Wales. As DCJ for Wales I am responsible as the senior or lead judge for civil work in the 20 county courts throughout Wales, and for administration of civil High Court work at those courts in Wales which are nominated to deal with High Court work ("High Court District Registries); for the 26 district judges and some 10 circuit judges who sit in civil work in Wales; and for judicial liaison with Her Majesty's Courts and Tribunals Service (HMCTS) and oversight of the efficiency and quality of work of those courts. These courts vary from trial centres in Cardiff, Newport and Swansea and two larger court centres in Wrexham and Rhyl to the smaller courts throughout Wales.

2. As a member of the judiciary it is necessary for myself as for other judges to refrain from expressing views on matters of policy or a political nature.

3. I answer particular questions below. However in addressing "a separate jurisdiction" it is critically important to identify the distinction between (i) legislation and the body of law primary and secondary which is individual to Wales (ii) appointment to the judiciary and the framework of judicial responsibility (to whom and to what) (iii) the administration of courts and tribunals.

4. It is not necessary for me to respond to every question in detail.

5. On an overall basis, my views are respectively

(i) There are differences in some areas between the laws of England and Wales; they are modest at present; they will continue to grow; at present and for the foreseeable future they can readily be accommodated within the present administrative and judicial arrangements.

(ii) For proper adjudication of cases it is not necessary now for there to be a separate judiciary for Wales; it is unlikely to be necessary in the foreseeable future; from the perspective purely of proper adjudication upon the law, it is healthy that those who use the courts in Wales are not blessed or saddled with a judiciary confined to those judges appointed in or from Wales.

The common law will remain common in experience to those appointed in Wales or in England; primary and secondary legislation in Wales will be accessible to all and judiciable by High Court and Court of Appeal judges. It may prove essential in future to review this in the event that large substantive differences develop between the law in Wales and that in England: there is no sign of this at present.

If a separate judiciary is desired for political reasons this is a matter for democratic determination and is outside the scope of response by judges.

(iii) There is a case (subject to cost) for the administration of courts and tribunals in Wales to be either separate from, or to have significant autonomy from HMCTS as it presently stands. I speak from the standpoint of the civil courts.

Thus it is currently proposed by the United Kingdom Government that there be a unified county court for England and Wales, where work could be transferred between courts throughout Wales and England according to according to demand and pressure on sittings.

First, it is already the case that 'de facto the civil justice system is unified in Wales' (Senior Presiding Judge for Wales, quoted in the Report by Sir Henry Brooke August 2008 "Should the civil courts be unified?"); and there is extensive sitting of High Court cases in Wales by certain circuit judges in Wales.

Second, certain types of proceedings now have to be issued in "national" business centres (Salford and Northampton, located self-evidently in England), and this has been greatly expanded with effect from March 2012. At its higher levels in London HMCTS appears to favour further allocation of work in Wales and England to such centres, the minimising of counter opening hours at local courts uniformly throughout Wales and England, and centralising of sittings in Wales and England more and more to a restricted number of court centres. Such a model may be viable or attractive in large parts of England. In my view such may seriously diminish access to justice in large parts of Wales where distances to court are already long, public transport poor, and centralisation of work will place local courts at risk of becoming unviable and closing.

Third, it will be undesirable for a case which will fall to be decided upon distinctly Welsh law (primary or secondary legislation) to be transferred from Wales for decision by a circuit judge or district judge in England if the judge is wholly unfamiliar with Welsh law; such distinct legal features may not be immediately or readily apparent simply on the face of the papers, and inappropriate transfer to another court is much less likely if there were a unified county court of Wales.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

Yes. Welsh law applies only to territory within the Government of Wales Act 2006.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – "Wales" as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

As I above.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

A distinct body of law is essential to a legally based need for a separate legal jurisdiction. It is a political question whether a separate legal jurisdiction is desired, as it may be, for other reasons.

2.1 When is a body of law distinct enough in this regard?

This cannot be succinctly answered. I adopt my view above that there are differences in some areas between the laws of England and Wales; they are modest at present; they will continue to grow; at present and for the foreseeable future they can readily be accommodated within the present administrative and judicial arrangements.

2.2 Does it matter whether the law in question is statute law or common law?

Logically, No. In practical terms I adopt my view above that the common law will remain common in experience to those appointed in Wales or in England; primary and secondary legislation in Wales will be accessible to all and judiciable by High Court and Court of Appeal judges.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

In practice, it would not be desirable and it might be difficult to have a separate legal jurisdiction piecemeal for one or some, but not all of these.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

I express no view beyond that expressed overall above.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

I consider that there is a risk of confusing the different issues identified at paragraph 3 above. To go straight to the practicalities, I do not consider that it would be necessary to have a separate Court of Appeal for Wales or that there should be High Court judges sitting only in Wales.

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

It is compatible for the foreseeable future. Over time a need may, and almost certainly will, develop for the Judicial Studies Board to cater for the law of Wales in its planning and in its training and modules, just as it plans and caters for specialised jurisdictions of the law exercised within England and Wales at present.

3.3 If there were a separate Welsh courts system, which courts would be affected?

Presumably all courts; moreover most judges sit in more than one jurisdiction of court within the courts of England and Wales at present and are likely to continue to do if there is a separate Welsh courts system.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

As 3.1 above.

3.5 Should Wales continue to share some courts with England, and if so, which ones?

As 3.1 above.

Welsh judges (both High Court judges, and Circuit judges resident in Wales who are authorised to do so under section 9(1) Senior Courts Act 1981) sit in the Administrative Court in Wales and in England and it should be possible for them to continue to do so.

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organisation of those courts?

It is not possible to give a succinct answer. The system has evolved (somewhat tardily, but now successfully) to accommodate the interests of Wales and the devolution changes to date; and so it ought to be possible to do so in future.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

From a legal point of view, No. The question whether to do so is a political one and I can express no view. It might have huge practical ramifications..

4.1 Are there any other subjects of legislative competence that should be devolved in such a case?

This is a political issue upon and I can express no view.

5. How might a unified England and Wales court system work if:
5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:
a. remained, as now, with the ability to expand incrementally, or
b. extended over all matters except for those expressly reserved to the UK Parliament?
5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:
a remained, as now, with the ability to expand incrementally, or

b extended over all matters except for those expressly reserved to the UK Parliament?

This is a question dependent on the degree of increment or evolving difference. I adopt the overall view expressed above: it may prove essential in future to review this in the event that large substantive differences develop between the law in Wales and that in England: there is no sign of this at present.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

See the distinct issues identified at paragraph 3 above.

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

As above.

7. Are there any other essential features of a separate legal jurisdiction?

As above.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

So far as is foreseeable to date, Yes, since it has successfully evolved to date, within the current devolution settlement. Of course it may, but not necessarily will, prove essential in future to review this in the event that large substantive differences develop between the law in Wales and that in England: there is no sign of this at present; and it may prove essential to review it if the devolution settlement is altered. .

9. If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following?
a. The administration of the courts and/or tribunals systems
b. The judiciary (including the magistracy)
c. The legal professions (including their regulation)
d. Education and training in law
e. Accessibility of legislation

As the current Counsel-General has identified, it is essential for Welsh primary and secondary legislation to be accessible and to be disseminated as widely as is possible. There is a need for on-line access to this to be available to the judiciary, the legal profession and members of the public (not necessarily in that order) and for a there to be clearly and easily accessible a register of what is in force. With a "young" legislature there is opportunity to do so with a body of legislation which is presently still manageable in size.

I adopt 3.2 above as to training of judges by the Judicial Studies Board. It will be essential to have some representation in the Judicial Appointments Commission to take account of the evolving legal and/or jurisdictional condition in Wales.

There is no reason why practising lawyers should not continue to practise in Wales and in England.

Beyond this, others are better able to respond.

10. If you consider that the current legal jurisdiction is sustainable then are there any other short-term or long-term changes that should be made?

As above.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

Not appropriate for me to comment.

12. Would such statute law be judicially noticed in those other jurisdictions?

Not appropriate for me to comment.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

Not appropriate for me to comment.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions – e.g. arrest, charge, prosecution, conviction and sentencing?

Not appropriate for me to comment.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

Not appropriate for me to comment.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:
a. essential;
b. desirable;
c. undesirable; or
d. irrelevant?

Not appropriate for me to comment.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

Such would self-evidently depend on the extent of widening of devolution.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

Not appropriate for me to comment.

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Not appropriate for me to comment.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?
a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?
b. Otherwise, and if so how?

Not appropriate for me to comment.

19.2 If you think that there would be such difficulties:
a. what are they?
b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

As above.

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

Under the current devolution settlement, there is no reason why practising lawyers should not continue to practise in Wales and England, even if there were a separate legal jurisdiction in Wales. As stated above, it may, but not necessarily will, prove essential in future to review this in the event that large substantive differences develop between the law in Wales and that in England: there is no sign of this at present; and it may prove essential to review it if the devolution settlement is altered.

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?
a. education and training;
b. qualification;
c. regulation.

Others are better qualified than I am to respond to this..

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

Only if there were a new devolution settlement which was so extensive as to lead to a volume of legislation which practically replaced the common law, or as to lead to codification of the law. Even if there were a new devolution settlement, it seems to me improbable that either result would follow or that there would be insuperable difficulty. Beyond this, it is not appropriate for me to comment.

22. Would your answer be different if there was a separate court system in Wales?

No.

23. Would your answer be different if the Assembly had legislative competence generally over:
a. criminal law;
b. civil law; or
c. any other area of law?

No.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

I suspect that this is a political issue. Not appropriate for me to comment.

24.1 Why would that be desirable, and how would it work in practice?

Not appropriate for me to comment.

24.2 How difficult would that be?

Not appropriate for me to comment.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Not appropriate for me to comment.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

As question 9 above.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

It is not possible to answer this succinctly.

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

As paragraph 1 to 5 above in my introduction.

19 June 2012

19 Mehefin 2012

His Honour Judge Seys Llewellyn, QC
Designated Civil Judge (Wales)

Cardiff Civil Justice Centre,
2 Park Street,
CARDIFF CF10 1ET

[redacted]

Ei Anrhydedd y Barnwr Seys Llewellyn, CF
Barnwr Sifil Dynodedig (Cymru)

Canolfan Cyfiawnder Sifil Caerdydd.
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[redacted]

A Separate Legal Jursidication for Wales

A RESPONSE BY

THE CHARTERED INSTITUTE OF LEGAL EXECUTIVES

DATE: June 2012

1. This response represents the views of The Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the *Legal Services Act 2007* (*the 2007 Act*).

2. CILEx promotes proper standards of conduct and behaviour among members of CILEx. We ensure they are competent and trusted legal practitioners, fully aware of their obligations to clients, colleagues, the courts and the public. We help good practitioners stay good and continuously improve throughout their careers. We ensure the public know the quality of work Chartered Legal Executives can provide.

3. The devolution of legislative power to the National Assembly for Wales *is* a very significant and fundamental change and one that must be considered in the context of how it will benefit the people and organisations of Wales. That said, Wales laid the framework to respond well to working in a devolved environment some time ago. For example, the *Welsh Language Act 1967* gave rights to use the Welsh language in legal proceedings and the support to bilingualism in the justice system. Furthermore, areas of health, education and, social care are devolved and these are areas in which the Welsh courts are already concerned on a daily basis. This is also in keeping with now exclusively Welsh tribunals deciding cases in the devolved areas, such as the Special Educational Needs Tribunal for Wales and Mental Health Review Tribunal for Wales. This response will first consider at a general level the advantages and possibilities of devolution and then the disadvantages and potential problems of devolution. This response also reflects the fact that CILEx represents member lawyers in England and Wales and appreciates that this debate is at its early stages.

Reasons For *a separate legal jurisdiction*

4. It has been observed there may be an increase in the potential for the law of Wales in relation to devolved matters to differ from the law of England. However, this has already begun and there has been no detrimental impact. It is also arguable that this will give Wales more of its own "legal personality" as was suggested by the All Wales Convention Report. In fact, it could be said that given the increasing divergence of laws applicable in Wales, the current single jurisdiction is not sustainable.

5. The law passed in Wales becomes part of a body of law in England and Wales, even if it only affects Wales. It is generally accepted that the law which applies in Wales is already different from that which applies in England, and all the signs are that the differences will increase. Changes have already been made in Wales, for example, Wales established a Mercantile Court in 2000, and the *Administrative Court for Wales in 2008* and the Court of Appeal Civil Division and Criminal Division sits regularly in Cardiff. This could be a natural progression.

6. It should also be borne in mind that divergence is not driven by legislation by the Welsh Assembly only. Increasingly the UK Government is bringing forward in Parliament England-only legislation in areas where Wales has not seen the need to change the law[1].

7. Legislative devolution may also increase opportunities for lawyers in Wales, with increased instruction and workload.

[1] Memorrandum to the Constitutional and Legislative Affairs Committee of the National Assembly's Inquiry into the establishment of a separate Welsh Jurisdication. Cardiff Law School 2011.

Reasons Against a separate legal jurisdiction

8. The following are some of the reasons cited against a separate legal system for Wales:
    - The current unified court system for England and Wales works well as it gives flexibility and choice for clients and lawyers.
    - A separate legal jurisdiction would complicate the Court system. It would restrict where cases can be dealt and indeed who could deal with them, thereby limiting access to justice
    - Law Students would have to choose which body of law to specialise or study both. Relatedly, Lawyers would need additional training or need to re-train. This could result in a huge impact upon education, training, qualifications and regulation.
    - Judges would need to be trained in both jurisdictions or specialise in just one.
    - There would also be administrative complexity in cross-border issues for enforcement of orders – currently they can be enforced in England or Wales.
    - There is a huge disparity in population in England and Wales and many may prefer to remain part of an encompassing legal system.

9. In addition to the above, rules and guidance will be needed to take into account "conflict of laws" to determine which jurisdiction applies. For example, Courts in one jurisdiction could decline to hear a case or would have to consider having an expert on the relevant law in the relevant area to give evidence. This would result in delay and complexity in cross border issues. Lawyers would need to consider which jurisdiction applies before proceeding and which law should apply.

10. The Report of the All Wales Convention describes a jurisdiction as being defined by territory, a distinct body of law, or a separate system of court and legal institutions. Politically and historically, the UK has developed a

number of jurisdictions. For example, Scotland and Northern Ireland have their own jurisdiction and England and Wales form a further jurisdiction. None of these jurisdictions is entirely self-contained or exclusive and there are significant cross-overs between them. An important feature of the Scottish and Northern Irish jurisdictions is that each has its own judicial structures. Since the setup of the Welsh Office in the 1960s there has been potential for the law in Wales to differ from that in England in devolved areas and that potential has increased with the creation of the Welsh Assembly. It is reasonable to assume that areas of difference will increase as the powers and confidence of the Welsh Assembly increases.

CILEx

June 2012

Consultation on a separate legal jurisdiction for Wales

Plaid Cymru – Assembly Group response

Synopsis

The 2011 referendum gave the National Assembly extensive powers to make laws for Wales and it is inevitable that this has prompted a return to the debate on whether a separate Welsh jurisdiction is required. This was foreseen by the work of the All Wales Convention. Establishing a separate jurisdiction for Wales would be a means to ensure a proper legal voice and identity for Wales.

1. **Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?**

1.1 What for the purposes of a separate Welsh legal jurisdiction, might that territory be- "Wales" as defined in the Interpretation Act of 1978 or as defined in the Government of Wales Act 2006?

Yes, a defined geographical territory is an important feature for a separate Welsh legal jurisdiction. We favour the definition set out in the Government of Wales Act 2006 and we believe that it is robust. We need to further devolve the administration of justice to Wales.

We believe the current powers of the Welsh Assembly are sufficient to underpin a jurisdiction, though as a party we obviously favour further devolution towards independence.

The point of course can also be made that the absence of a separate Welsh jurisdiction has been used in the past to justify not giving Wales's parity with Scotland in terms of the devolved settlements.

2. **To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?**

2.1 When is a body of law distinct enough in this regard?

2.2 Does it matter whether the law in question is statute law or common law?

2.3 Does it matter what the nature of the subject –matter of the law is- e.g. criminal, civil, and family?

We believe that this is a feature which has however applied since the 1880s since the Aberdare Education Acts and has slowly devolved over the succeeding years, accelerating since the 1960s.

Since the 2011 referendum Wales now possesses power to legislate in devolved areas without interference of Westminster. We believe that the body of law currently is distinct and distinct enough in our judgement. At the moment it does not matter whether the law in question is statute law or common law.

3. **To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?**

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

3.3 If there were a separate Welsh courts system, which courts would be affected?

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

3.5 Should Wales continue to share some courts with England, and is so, which ones?

3.6 If Wales and England continued to share some courts, what (if any) changes might be needed in the organization of those courts?

Plaid believes that devolution of justice goes hand in hand with a Welsh jurisdiction.

The creation of Legal Wales, establishment of the Administrative Court of Wales and regular sittings of the Court of Appeal (both civil and criminal) are all welcome developments towards this end.

In addition, a law reform commission should be considered to help consolidate, codify and simplify existing legislation. We note evidence to the Constitutional and Legal Affairs committee inquiry from Emyr Lewis and Legal Wales stating that "responsibility for the administration of justice" is a key aspect in creating a separate Welsh jurisdiction.

4. **To what extent (if at all) would it be necessary for the devolved legislature to have general legislature competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was developed?**

4.1 Are there any other subjects of legislature competence that should be devolved in such case?

It is desirable in the long term but not necessary as a first step.

5. **How might a unified England and Wales court system work if:**

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative competence:

a) remained, as now with the ability to expand incrementally, or

b) extended over all matters except for those expressly reserved to the UK parliament?

5.2 The current unified legal jurisdiction of England and Wales continued and the Assembly's legislative competence:

a) remained, as now, with the ability to expand incrementally, or

b) **extended over all matters except for those expressly reserved to the UK parliament?**

6. **When references is made to a "legal jurisdiction" in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland, in its simplest from, that mean?**

6.1 **In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?**

7. **Are there any other essential features of a separate legal jurisdiction?**

Legal jurisdiction is more than merely the existence of a legislature with competence over a geographical territory.

Professor Gwynedd Parry states that creating a Welsh jurisdiction along similar lines to the other UK jurisdictions, especially Northern Ireland, would require the following institutions:

- A permanent court High Court in Wales;
- A permanent Court of Appeal in Wales;
- A Welsh judiciary under a Lord Chief Justice for Wales (to ensure consistency within the British constitution);
- a Welsh legal profession
- National Assembly for Wales control over the police and Prisons in Wales.

We see considerable merit in this argument. However the bare minimum is a legislature, territory and statute book.

8. **Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest if the UK?**

No, it is not. A growing body of Welsh law has far reaching consequences for the legal profession in both England and Wales but the possibilities should be embraced rather than feared.

To be further considered are the benefits from new jobs and career structures; the ability to offer young people the opportunity of employment in fields or at levels in those fields previously unavailable in Wales, and the tailoring of a legal system to the specific demographic, geographic and linguistic needs for Wales.

9. **If you consider that the current legal jurisdiction is sustainable then are there any short-term or long-term changes that should be made to any of the following:**

a) **The administration of the courts and\or tribunals system**
b) **The judiciary (including the magistracy)**
c) **The legal professions (including their regulation)**
d) **Education and training in law**

e) Accessibility of legislation

10. If you consider that the current legal jurisdiction is sustainable then are there other short-term or long-term changes that should be made?

In reply to (9) and (10) we would reply that we do not see the current position as sustainable.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognized as a law in other jurisdictions within the UK?

Yes, in the same way as the corpus of Scottish law which is by now quite extensive, is recognised beyond the Scottish borders.

12. Would such a statute law be judicially noticed in those other jurisdictions?

Such statute law would be judicially noticed in those other jurisdictions because it is common practice for courts to refer to existing law within other jurisdictions in assisting in the process of interpreting the law. Furthermore, in the area of the laws of tort in England and Wales the courts have frequently looked at Canadian, Australian and New Zealand authorities as well as to other common law jurisdictions. It is argued that there references often created the laws of tort as they currently apply in England and Wales.

13. Would such statute law be capable of being the subject of civil proceedings in those other jurisdictions – e.g. for enforcement or through judicial review?

The statute law would be judicially reviewable within its own jurisdiction. Any person aggrieved by such application of the law would register his/her action in the registry in Cardiff and it should be dealt with at all stages in Wales from the first registration and issue through to final judgement in Wales.

As for enforcement it is commonplace for jurisdictions to have cross-jurisdictional protocols and memoranda which allow for judgements in one jurisdiction to be mutually enforceable in another and vice versa.

14. Would such statute law be capable of being the subject of criminal proceedings in those other jurisdictions e.g. arrest, charge, prosecution, conviction and sentencing?

It would have to depend on the seriousness of the offence. Again, there are cross jurisdictional arrangements in place and of course the so-called European Arrest Warrant would/could come in to play.

15. What are the potential applications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

If Wales and England were to have separate jurisdictions each would be a Common Law jurisdiction and the fundamental concepts of the law would be similar. The Legal Wales Standing Committee argues that if the responsibility for the administration of justice were to be devolved to the Assembly, it would have jurisdiction over the administration of justice in Wales.

16. **In the event that Wales moved towards a "reserved powers" form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:**
    a) **Essential**
    b) **Desirable**
    c) **Undesirable; or**
    d) **Irrelevant?**

    Essential

17. **Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?**
18. **If it would be sustainable, which areas of law would need to be reserved to the UK parliament?**

No, it would not be sustainable. It is important to note the emerging body of Welsh law the other factor which makes and England and Wales's jurisdiction unsustainable is the changes being made in England-only law.

19. **Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?**

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?

a) **Upon the basis that any provision made in relation to England would extend to and from part of the law of England?**
b) **Otherwise, and so how?**

19.2 If you think that there would be such difficulties:

a) **What are they?**
b) **Would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?**

Not necessarily. The 2006 Act allows legislation "relating to Wales". This allows for example for legislation relating to the Welsh language.

20. **To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?**

20.1 What are the potential effects (if any) of a separate Welsh legal jurisdiction on the following aspects of the legal professions?

a) **Education and training**
b) **Qualification**
c) **Regulation**

In terms of day-to-day lives of many legal practitioners and their clients, there is already a material difference in many areas between what happens in Wales and what happens in England. Legislative momentum and/or inertia in Cardiff and London are likely to increase the difference.

Plaid Cymru would advocate that there should be a mutual recognition in England and Wales. Law schools would need to reflect in their courses the development of a jurisdiction as should professional development. The needs of examining Welsh language legislation and Welsh language representation should be particularly considered.

Tribunals are part of this development.

Whether a distinct court system is developed or not, lawyers advising clients in Wales, and judges hearing cases in Wales will need to be able to show that they are competent to do so.

There is no reason why Welsh lawyers should not continue to be able to practice in England and to have rights of audience in English courts or why English lawyers should not be in the same situation in Wales. In the longer term and following a new more powerful Government of Wales; Wales should look towards devolving the Crime Prosecution Service, responsibilities for the probation service, prisons and policing; a separate social security system; a legal aid system administered on a Wales-only basis. It may then be appropriate to develop separate qualifications for a Welsh legal profession but these should be interoperable between British jurisdictions.

21. **Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?**
22. **Would your answer be different if there was a separate court system in Wales?**

Questions 20 and 21 will be addressed together. Yes, it most certainly would but these consequences are dependent on decisions by the judiciary, not the legislature. In effect, this is already beginning to occur.

23. **Would your answer be different if the Assembly has legislative competence generally over:**
    a) **Criminal law**
    b) **Civil law; or**
    c) **And other area of law?**

Competence over criminal law would hasten the pace of change and differentiation.

24. **Could there need to be expressed reservations excluding the common (judge-made) law from the legislative competence of the Assembly?**

24.1 Why would that be desirable, and how would it work in practice?
24.2 How difficult would that be?

We do not see such a requirement.

25. Are there any wider economic (including resources) legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

Yes there are many economic and social ramifications. We need a comprehensive Welsh statute book and an online resource of all laws that can apply to Wales along with a legal commentary, possibly by a Welsh law school on Welsh law.

The creation of a distinct Welsh jurisdiction could be an economic driver for Wales. As Elfyn Llwyd MP has pointed out the devolution of justice matters to the Northern Ireland "... has also a real impact on policy formation, allowing the government to consult with relevant organisations and stakeholders so that laws are drafted which meet the priorities of the local population. In the event of the devolution of the justice system to Wales, there would be a great need for engagement with the public and third sector when developing policy...the justice system in Northern Ireland employs roughly 16,000 people, including police and prison officers, probation staff, youth justice and courts services, it is clear to see how the Welsh economy and jobs market could benefit from the establishment of a separate jurisdiction."

We will also see an end to legal cases draining out of Wales to the detriment of the profession. Many court cases start in Wales and then are heard in London. The creation of a distinct Welsh jurisdiction will encourage people to come back to practice in Wales.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

A new Welsh statute book, most likely an online source; would be required in order to bring together Welsh law. A legal commentary should be established by a law school in Welsh law in general. The separate legal jurisdiction would as mentioned above be of economic advantage to Wales, especially since it would create more jobs.

27. In a specifically Welsh context, are there any additional features that would be appropriate for a separate legal jurisdiction to operate effectively?

The expansion of the Welsh language and a bilingual approach to legal material would be essential. The function of reforming the law should be considered. A Welsh Law Reform Commission may be one outcome of such a consideration. Alternatively, this work could be combined with the Statute Book work referred to elsewhere and become part of the work of law schools in Wales.

If a Welsh jurisdiction were created, but under an England and Wales judiciary, consideration would have to be given as to whether there should be a bilingual judge on the Supreme Court. Certainly, over time, the growing significance of a distinct body of Welsh primary law may suggest that there should be a judge with expertise in Welsh law on the Supreme Court.

28. **Would you answer to any of the questions in this consultation paper be different if the approach to the Assembly's legislature competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK parliament?**

Yes, of course, but we are dealing with present devolution settlement.

29. We have asked a number of questions. If you have any other related issues which we have not specifically addressed please tell us about them.

As Plaid Cymru, we want the defendant to have the right to request a court case to be heard in Welsh before a Welsh speaking jury. This outstanding issue is currently unresolved. We believe a Welsh jurisdiction would deal with the principle far more effectively and promptly.

We also want to highlight the need for the devolution of the police to Wales as a minimum requirement.

In recent years, more and more people have joined the ranks of those experts and academics, among them Professor R Gwynedd Parry from the Institute of Hywel Dda, the solicitor Fflur Jones, Winston Roddick QC and His Honour Philip Richards, calling for a just and comprehensive legal system fit for the modern Wales.

Consultation on "A Separate Legal Jurisdiction for Wales"

Submissions of Julie Morgan AM, Assembly Member for Cardiff North and former Member of Parliament for Cardiff North 1997 - 2010

1. The following comments are personal only and are not intended to represent the views of the Assembly Labour Group or Welsh Labour.

2. I have always supported devolution and in 1993 welcomed the late John Smith's commitment to devolution to Wales in the same terms as that proposed for Scotland. I was disappointed when the policy was changed in the lead up to the 1997 general election when a much more limited form of devolution to Wales was adopted. One of the reasons advanced against equality with Scotland at that time was the fact that Wales, unlike Scotland, did not constitute a separate legal jurisdiction. Since that time we have moved on and the people of Wales approved the transfer of primary legislative competence to the Assembly as set out in Schedule 7 of the Government of Wales Act 2006.

3. In a significant number of areas the dual or shared responsibilities of the UK and Welsh Governments leave the position confused and unsatisfactory. Two examples in which I have recently been involved are children's policy/youth justice, and animal welfare/crime & disorder/anti-social behaviour. In October 2008 the then Prime Minister, Gordon Brown MP said to the Northern Ireland Assembly *"there is something more vital at stake for your entire society that only completion of devolution can deliver. How can you, as an Assembly, address common criminality, low-level crime and youth disorder when you are responsible for only some of the levers for change; when you have the responsibility for education and health and social development but have to rely on Westminster for policing and justice? The people of Northern Ireland look to you to deal with these matters because to them they are important. Full devolution is the way to deliver better services, tailored to the needs of all communities, regardless of the politics. It is the best way for you to serve them".* I agree wholeheartedly with this statement and I would like to see better services delivered to my constituents through the transfer of criminal law, police and probation to the Welsh Assembly.

4. In due course, I would like to move to a position where the Assembly has general legislative competence save in respect of matters specifically reserved to the UK Parliament and I believe that this would work best alongside Wales being constituted as a separate legal jurisdiction, indeed that such a separate jurisdiction would be essential. As far back as 2007[1] the First Minister (then Counsel-General) drew attention to the problem of more than one legislative body with primary powers operating in the same jurisdiction. He said "If you've got two parliaments which have primary powers, I think it makes it very difficult to have one jurisdiction. I'm not aware of anywhere in the world where you have that." The former Counsel-General, Winston Roddick, QC went even further in 2008 when he said "a devolution settlement by which the Assembly is given full legislative competence but not the responsibility for the administration of justice would be dysfunctional,

[1] Legal Wales Symposium, Cardiff, September 2007

constitutionally unsound and demeaning to Wales' developing constitutional status". I adopt both these views.

5. I do not accept that there are "overwhelming arguments" against a move to a separate jurisdiction. The issues identified such as English court decisions becoming only persuasive rather than binding in Welsh courts, the difficulty of enforcing Welsh judgements against English defendants and the service of Welsh proceedings out of the jurisdiction, are all matters successfully managed by the other UK jurisdictions in Northern Ireland and Scotland. Equally I do not accept that there are obstacles in relation to a separate judiciary and separate legal profession which cannot be overcome. In relation to the former there is much to be said for the cross-over approach commended by Judge David Williams of the Upper Tribunal[2] and in relation to the latter we have the Northern Ireland experience to turn to where there are mutual rights of audience in each jurisdiction of English, Northern Irish and Welsh practitioners. The position of final domestic appeals on points of law seems straight-forward to me. As in Northern Ireland, these would lie to the Supreme Court with a Welsh judge nominated to that court. I feel sure any seeming disadvantages of moving from an England and Wales single jurisdiction can be overcome by sensible reciprocal enforcement arrangements.

6. As Mr Justice Roderick Evans points out[3] the present England & Wales jurisdiction "is wholly London-centric. All its institutions are based in London and Wales is treated for practical purposes just as another circuit of England." The judge goes on to identify a number of "adverse professional, social and economic consequences" which include (i) the way expertise in specialised areas of practice have been inhibited, (ii) the poor distribution of court buildings (and in consequence court services) resulting from the absence of any Welsh body responsible for siting, designing and financing court building in Wales, (iii) the fact many jobs and career structures relating to the administration of justice in Wales are based in London, (iv) the fact that individuals without any knowledge or connection with Wales can be appointed to the judiciary in Wales or judicial posts with responsibility for or influence over Wales, (v) sittings of the High Court and Court of Appeal in Wales are dictated by demands of London for judicial time and (vi) despite the Welsh Language Act and the welcome change in attitude towards the use of the language, the legal system is still fundamentally English oriented and Welsh and its users occupy an inferior position. Mr Justice Roderick Evans also refers to the developing constitutional position of Wales and the difficulties in obtaining appropriate recognition from authorities based in London which "have to be made on an *ad hoc* basis and are met with resistance". I know this to be true simply from my experience of sitting on the House of Commons Justice Committee when an MP. UK Government departments, Executive Agencies and civil servants had to be constantly reminded of the existence of Wales and the impact on Wales of changes which suited England. I fought several battles with the Legal Services Commission which viewed Wales as an outpost.

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[2] Evidence to the Assembly Constitutional & Legislative Affairs Committee, March 2012, CLA WJ 12, in particular para 19

[3] Evidence to the Assembly Constitutional & Legislative Affairs Committee, March 2012, CLA WJ 19, para 3

7. There is already significant divergence between the law in England and the law in Wales. That divergence will substantially increase as the new primary powers are exercised and new responsibilities transferred to the Assembly. There are great benefits to be gained from a separate jurisdiction in the development of knowledge, skills and expertise for judiciary and practitioners alike. A better understanding of "Welsh law" is likely to emerge all round with better decisions by legislators and judiciary alike. A separate jurisdiction could be based on the Northern Ireland model, which is based on a tradition of common law. This is clearly not something which can be accomplished overnight. It is a big task and will take time. A planned move seems essential. It is important to plan ahead, not wait for a critical tip-over point. Primary legislation would be needed and could be brought into force in phases with the way paved by much which can be achieved administratively.

8. I do not consider for one moment that it is necessary or appropriate for this issue to be put to a referendum.

9. That is all I want to say by way of a general statement and I now turn to the specific questions posed in the consultation paper. I will endeavour to answer these as briefly as I can. I will not repeat the questions but simply refer to the relevant number in the consultation paper.

ANSWERS TO CONSULTATION PAPER SPECIFIC QUESTIONS

1. Yes
   1.1. Wales as defined in the Government of Wales Act 2006
2. A distinct body of law forms an important criterion
   2.1. When it significantly diverges from the parent body of law.
   2.2. No. The English common law has been applied and developed in several separate jurisdictions other than England & Wales, e.g. Ireland, Northern Ireland, Canada, New Zealand, Australia.
   2.3. No
3. A separation of administration of justice responsibilities is an essential feature of a separate legal jurisdiction
   3.1. Ultimately incompatible but note the Great Britain wide (England, Scotland & Wales) tribunal jurisdiction and the UK wide Immigration tribunal jurisdiction; a separate legal jurisdiction can accommodate specific and exceptional cross-overs.
   3.2. Incompatible but note the experience between Northern Ireland Social Security Commissioners and Judges of the Upper Tribunal (formerly British Social Security Commissioners); note Mr Justice Roderick Evans' evidence on judges of the English jurisdiction sitting in the Welsh jurisdiction when appropriate;
   3.3. All criminal, civil and family courts. Almost certainly this would need to be phased;
   3.4. Yes
   3.5. Yes, Supreme Court.

3.6. HMCTS would need to be reorganised and a Welsh equivalent established. Equivalent Welsh courts would need to be constituted.

4. This is necessary and would follow from general legislative competence save for matters reserved to the UK Parliament. The criminal law should not be a reserved matter.
   4.1. Police and Probation should also be transferred
5. ..
   5.1. Depending on the pace of expansion, there would come a point when a separate court system would become necessary and if not planned for and phased in the lack of it would be source of major difficulty;
   5.2. It would not function well at all and become and a source of major difficulty
6. A defined territory, a legislative body, a separate body of law (even if there was a substantial overlap with another legal jurisdiction) and a separate court system;
   6.1. No
7. No
8. No
9. N/A – unified jurisdiction not sustainable
10. Ditto 9
11. It is unclear what is meant by "recognised" in this context. Under a separate legal jurisdiction Acts of the Assembly and earlier Measures would be recognised as statute having force in Wales and decisions of Welsh courts on Welsh statutes could be cited as persuasive in the interpretation of similar statutes in other jurisdictions. The provisions of Welsh statutes would only have force within Wales and there would have to be a reciprocal enforcement framework in force across the jurisdictions. The position would be different under a unified E & W jurisdiction
12. Yes;
13. A Welsh judgement would be enforceable but not otherwise open to proceedings in another jurisdiction. Continuation of the ultimate appellate jurisdiction of the Supreme Court on a point of law would be provided for.
14. A statutory framework governing arrest, detention and charge by authorised officers out of the jurisdiction similar to that existing between England & Wales, on the one hand, and Scotland, on the other, would need to be put in place but prosecution, conviction and sentencing would depend on the domestic law of the relevant jurisdiction.
15. Any conflict of law issues would have to be dealt with in the same way as dealt with between the England & Wales, on the one hand, and Scottish or Northern Irish, on the other hand, jurisdictions at the present time
16. Essential
17. No
18. N/A – not sustainable
19. Yes
    19.1. Yes. Retention of the power would be constitutionally anomalous on the grounds of (a) but the removal of the power could be overcome by a statutory

framework applying to all jurisdictions similar to that relating to arrest and charge.

19.2. Ditto 19.1

20. They are not incompatible but ideally we should work towards a separate Welsh legal profession specialising in and building up expertise in a Welsh body of law so a separate legal education system is provided and specialist practice emerges.

20.1. We would need to be mindful in particular of the impact on legal education and training. We would not want to limit the ability of Welsh students being educated in England to return to Wales. But it must be noted that the mere development of a separate body of law will in itself bring its own challenge in any event. I would envisage arrangements analogous to Northern Ireland being put in place in relation to qualification and regulation but these would need to be carefully worked out in consultation with the professional bodies across the jurisdictions. Maximum flexibility would be the aim.

21. Only to the extent that it was varied or abolished by Acts of the Assembly.
22. No
23. No
24. No

24.1. N/A

24.2. N/A

25. There are clearly wider ramifications of the kind mentioned, some of which have been discussed above.
26. An on-line database of Welsh primary and subordinate legislation promptly updated. As the Assembly proceeds to reform Welsh law it should take the opportunity of codifying areas of law, bringing sources together in a simple, convenient and accessible form. Specifically Welsh law works would hopefully emerge in encyclopaedia electronic/loose leaf format and texts. The existing statute and common law inherited by the new legal jurisdiction would presumably continue to be available in its current form unless varied or abolished. Rapid codification would help simplify the situation.
27. I believe all essential features have been covered.
28. No
29. See free standing statement above

Julie Morgan AM
19th June 2012

A SEPARATE LEGAL JURISDICTION FOR WALES

SUBMISSION BY PROFESSOR T. H. JONES, SCHOOL OF LAW, SWANSEA UNIVERSITY.

1. Do you agree that a defined geographical territory would be an essential feature for a separate Welsh legal jurisdiction?

A jurisdiction does not have to be confined to a territory (statute can confer upon the courts of England and Wales extra-territorial jurisdiction). But in the context of devolution, a defined territory would be an essential feature.

1.1 What, for the purposes of a separate Welsh legal jurisdiction, might that territory be – "Wales" as defined in the Interpretation Act 1978 or as defined in the Government of Wales Act 2006?

It should be as defined in the 2006 Act. For constitutional reasons, the jurisdiction of the Welsh courts should coincide with the powers of the Welsh Assembly and Government.

2. To what extent (if any) is a distinct body of law an essential feature for a separate legal jurisdiction?

It is not an essential characteristic, but clearly the development of a body of Welsh (statute) law is an influential factor to the discussion. There are other jurisdictions which share a common body of law with England and Wales; this is unproblematic.

2.1 When is a body of law distinct enough in this regard?

There is no critical point in this regard. The amount of Welsh law will increase, so the (re) creation of a Welsh jurisdiction might be anticipatory. If there is a Welsh jurisdiction, the body of law to service it will increase.

2.2 Does it matter whether the law in question is statute law or common law?

There is no constitutional distinction to be drawn.

2.3 Does it matter what the nature of the subject-matter of the law is – e.g. criminal, civil, family?

No. According to subject matter, the Welsh law will be either more or less distinct to that elsewhere in the United Kingdom. The appropriate subject matter for devolved legislation is a political matter and independent of the existence of a Welsh jurisdiction.

3. To what extent (if any) is the separation of responsibilities (i.e. Wales from England) for the administration of justice an essential feature of a separate legal jurisdiction?

It is not essential, but it is difficult to see the system working effectively without this. It is unclear why the Ministry of Justice (in London) or the Westminster Parliament would wish to have responsibility for a

distinct Welsh jurisdiction. Under devolution in Northern Ireland, the Westminster Parliament has sought to further devolve responsibility for the legal system. But at root this is a political matter.

3.1 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales court system?

It is not; it is difficult to see the point of such a development. The unified structure could continue to accommodate the current structure (if less satisfactorily).

3.2 To what extent (if any) is a separate Welsh legal jurisdiction compatible with a unified England and Wales judiciary?

For the same reason, this would bring practical complexity to the unified system. If there is to be a Welsh jurisdiction, there need to be "Welsh" judges to staff it (of course, suitably qualified judges could be appointed from outside the jurisdiction).

3.3 If there were a separate Welsh courts system, which courts would be affected?

If the model is that of Northern Ireland or Scotland, it would be all courts below the Supreme Court.

3.4 Would there need to be a separate High Court and/or Court of Appeal for Wales?

Yes, although it would be possible to have a "collegiate" Court of Appeal (staffed by High Court judges), which would remove the need for distinctive Court of Appeal judges.

4. To what extent (if at all) would it be necessary for the devolved legislature to have general legislative competence over the criminal law as a separate devolved subject if responsibility for the administration of justice was devolved?

This is not necessary, as the Canadian model of federation shows. The ability to make "local" criminal law in devolved areas would remain, of course.

5. How might a unified England and Wales court system work if:

5.1 There were a separate Welsh legal jurisdiction and the Assembly's legislative

competence:

a. remained, as now, with the ability to expand incrementally, or

b. extended over all matters except for those expressly reserved to the UK Parliament?

For the reason already indicated, this is not regarded as a practical option. There is either a unified court system and jurisdiction or two separate jurisdictions. Any hybrid model would simply add to the complexity of the current model for no apparent benefit.

5.2 The current unified legal jurisdiction of England and Wales continued and the

Assembly's legislative competence:

a remained, as now, with the ability to expand incrementally, or

It would continue to work as at present, but clearly the pressures consequential to an increasingly different body of law in Wales would increase. There would be two "competing" legislatures in areas of public law, which would have to be accommodated by the legal system.

b extended over all matters except for those expressly reserved to theUK Parliament?

This would accentuate the issue of legal difference. In the longer term, the current structure might well become unsustainable. And in basic constitutional terms, it would be problematic to have a fully functioning legislature and government, but no local judiciary to offer a check and balance.

6. When reference is made to a 'legal jurisdiction' in the sense of England and Wales being a legal jurisdiction separate from, for example, Scotland what, in its simplest form, does that mean?

Territory; law; legal system; rules about conflict of law (relationship to other jurisdictions)

6.1 In this context does legal jurisdiction just mean the territory over which the legislature (or executive) has power to legislate?

Both are aspects of a legal jurisdiction.

7. Are there any other essential features of a separate legal jurisdiction?

In many ways, the key feature lies in the rules governing the relationship to other legal systems. If the courts of England and Scotland were to regard Welsh law as foreign (by virtue of legislation, of course), that would mean that there was a Welsh jurisdiction.

8. Is the single legal jurisdiction of England and Wales sustainable in the long term given the potentially increasing divergence of the laws applicable in Wales compared with those applicable in England and the rest of the UK?

There are two answers to this question. In constitutional terms, the answer should be "no"; for the reason already given, ideally a government and legislature should be accompanied by a judiciary. But

equally, in purely practical terms, the answer could be "yes". The legal system and judges could cope with whatever is asked of them.

11. Would statute law that only extends to a separate Welsh legal jurisdiction be recognised as a law in other jurisdictions within the UK?

Yes, this would be essential, but requires an Act of Parliament.

12. Would such statute law be judicially noticed in those other jurisdictions?

Yes, but this would require an Act of Parliament.

15. What are the potential implications of a separate Welsh legal jurisdiction in terms of private international law (or "conflict of laws") between Wales and the rest of the UK?

Welsh law would be treated in the same way as Scottish or Northern Irish law in the courts of England. All legislation governing these matters would need amendment to accommodate the Welsh jurisdiction.

16. In the event that Wales moved towards a 'reserved powers' form of devolution, like Scotland's, do you think a separate Welsh legal jurisdiction would be:

a. essential;

b. desirable;

c. undesirable; or

d. irrelevant?

Arguably essential for the constitutional reasons (outlined above), but at least desirable.

17. Would the shared England and Wales jurisdiction be sustainable if Welsh devolution were widened?

In practical terms, probably yes; but the problems of two competing legislatures in areas of public policy within one jurisdiction would remain and get worse.

18. If it would be sustainable, which areas of law would need to be reserved to the UK Parliament?

The list of reserved areas would need to be amended to more closely match that in Scotland. For example, the Armed Forces might need to be added to the areas reserved to Westminster (under GOWA 2006 this is not).

19. Would the emergence of a separate Welsh legal jurisdiction require the removal of the Assembly's power that enables it in certain circumstances to make laws applying in England?

Yes, in the same as the Scotland Act 1998 limits the legislative competence of the Scottish Parliament to Scotland, although some transitional arrangement might be possible.

19.1 Would there be any legal, constitutional or practical difficulty in the Assembly retaining such a power?

a. upon the basis that any provision made in relation to England would extend to and from part of the law of England?

Yes. It is difficult to see how this would continue to be acceptable in constitutional terms, any more than for the Scottish Parliament to make the law of England.

19.2 If you think that there would be such difficulties:

a. what are they?

b. would those difficulties be any different to the current situation where the Assembly already has the power to make provision applicable in England?

The current situation is clearly exceptional, with the National Assembly able to make law applicable within England. This is probably only sustainable under a unified legal system with laws extending throughout England and Wales, irrespective of the legislative source (National Assembly or Parliament).

20. To what extent (if any) is the concept of a separate Welsh legal jurisdiction compatible with the unified England and Wales legal professions?

If the model is that of Northern Ireland or Scotland, then there would be a separate legal profession. However, the regulatory function could be delegated to the SRA/Bar Council if required. In the long term, it might be difficult to have the legal profession regulated from a different jurisdiction.

21. Would the common law that has evolved as part of the unified jurisdiction of England and Wales be affected by the creation of a separate Welsh legal jurisdiction?

The effect would not be great, any more than the impact from Northern Ireland upon the common law. The common law would be applied by the courts in Wales, subject to the supervision of the Supreme Court.

22. Would your answer be different if there was a separate court system in Wales?

No. There would be possibility of a Welsh court reaching a different decision to an English one, but the effect of this on the development of the law will be marginal (and the Welsh decision might be the "correct " one or better suited to national conditions).

23. Would your answer be different if the Assembly had legislative competence generally over:

a. criminal law;

b. civil law; or

c. any other area of law?

Yes, to the extent that there would then be legislative competence in Wales to consolidate the common law in statutory form or to change its effect.

24. Could there need to be express reservations excluding the common (judge-made) law from the legislative competence of the Assembly?

This would not be in accord with the constitutional traditions of the United Kingdom, as they have developed. It would be almost impossible to define the scope of the common law in this way. To the extent that legislative competence applies to an area of common law, the legislature must have the power to enact legislation in that area. This is already the case in respect of the National Assembly, but its impact is limited by the areas that have been devolved to it.

24.1 Why would that be desirable, and how would it work in practice?

It would not be desirable and could not work in practice.

24.2 How difficult would that be?

It would be extremely difficult, for the reasons outlined above.

25. Are there any wider economic (including resources), legal, political, linguistic or social ramifications of a move to a separate Welsh legal jurisdiction?

It would reflect a constitutional maturity on the part of Wales, with a judiciary to complement the government and legislature. It would ensure that the legal personality of Wales is more fully reflected in the constitutional arrangements.

26. Given the numerous sources from which law applicable in Wales can originate, what systems would need to be in place in order to ensure that the law of a separate Welsh legal jurisdiction was readily accessible to the people of Wales and other interested parties?

Consolidation of the Welsh statute book would be one possible step. It would be possible to bring together in one statute on given matter all the relevant statutory provisions (or at least those that are subject to the legislative competence of the National Assembly).

28. Would your answers to any of the questions in this consultation paper be different if the approach to the Assembly's legislative competence was the same as that of the Scottish Parliament – i.e. if the Assembly had competence over all matters except those expressly reserved to the UK Parliament?

No, but that would simply accentuate the arguments made here.

29. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed please tell us about them.

The key argument, perhaps, is that the issue should be seen as a constitutional one. It is not just a matter of different law or a different territory. The constitutional arrangements in Wales are not balanced, without a local judiciary alongside a government and legislature.

A copy of a recent article touching upon issues pertinent to this consultation exercise is enclosed.

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Wales, Devolution and Sovereignty

TIMOTHY H. JONES*

This article explores a number of features of the devolution process in Wales, in the context of the concepts of jurisdiction and sovereignty. It describes the increasing recognition of a legal personality for Wales, distinct from that of England and Wales.[1] It considers the way in which the interplay between the doctrine that asserts the sovereignty of the Westminster Parliament and the unified nature of the legal system of England and Wales has constrained constitutional dialogue. There is an examination of the implications of the theoretical considerations for that legal system. The question of how the latter might develop to accommodate the legislative arrangements under the Government of Wales Act 2006 ('the 2006 Act') is discussed.

Sovereignty

There is no attempt here to re-examine in detail the traditional, legal approach to the sovereignty of the Parliament of the United Kingdom. According to that doctrine, of course, there are no limits to what an Act of Parliament can accomplish.[2] In particular, of course, it would be argued that there can be no legal restrictions on the capacity of a Parliament to amend or repeal the legislation of an earlier one. Thus, the Parliament of the United Kingdom would retain the right to legislate in matters devolved to the National Assembly for Wales.[3] The scheme of devolved powers in the 2006 Act thus would remain vulnerable to the future will of Parliament, without the latter seeking the consent either of the National

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1 See, generally, National Assembly for Wales Constitutional and Legislative Affairs Committee, *A Welsh Jurisdiction*, Scoping Paper (December 2011).

2 AV Dicey *The Law of the Constitution* (ECS Wade, ed, 10th edn 1959) Macmillan and Company Ltd, London, 39–40. Dicey himself appears to have believed that Wales was part of England. See AV Dicey *A Leap in the Dark. A Criticism of the Principles of Home Rule as Illustrated by the Bill of 1893* (2nd edn 1911) John Murray, London, 129–30, where he identifies as undesirable, 'severing Wales from the rest of England'. Dicey seems to have taken too much from the fact that most legislation emanating from Westminster was intended to have effect in both England and Wales. In fact, Parliament has continually passed legislation taking effect only in Wales. See TH Jones and JM Williams, 'Wales as a Jurisdiction' 2004 PL 78, 82–4.

3 There are also some reserve powers for UK Government ministers to interfere in matters of devolved competence.

Assembly or of the constituents that it represents. In contrast, the starting point for the present discussion is a rather different one: the scheme of devolved legislative powers under the 2006 Act, underpinned by the constitutional referendum[4] of 4 March 2011, undermines the approach adopted conventionally by constitutional lawyers.[5] That is the simple model of a sovereign Parliament in Westminster devolving or transferring powers to the National Assembly for Wales.[6] Accordingly, devolution was described in the Kilbrandon Report as 'the delegation of central government powers without the relinquishment of sovereignty'.[7] It is not premised upon either a division of sovereignty or any form of constitutional guarantee of how legislative competence is to be shared.[8] It is clearly one founded in a unitary view of the constitution, far removed from any idea of federalism. Under a federal constitution, of course, one would find a division in legal authority that cannot be changed unilaterally. In contrast, the United Kingdom seems to lie somewhere between a federal and a unitary constitution. On the one hand, the assertion that the United Kingdom possesses a unitary legal order or legal system would be incorrect. There are three separate legal orders (England and Wales, Scotland and Northern Ireland), each supported by a separate legal system and court structure. On the other hand, as Neil Walker concludes, 'nor can the United Kingdom be said to have a formally dual system as there is no UK "federal law" and no "UK court" hierarchy . . .'.[9] He instead suggests that the United Kingdom is a unique instance of internal pluralism. This manifests itself most obviously in the way that an Act of the Westminster Parliament is open to the possibility of different judicial interpretation in the three legal systems.

It is arguable that the traditional, Anglocentric approach has become sufficiently removed from reality as to no longer provide a coherent conceptual framework for constitutional analysis in the Welsh context. Indeed, adherence to it prevents a proper understanding of constitutional arrangements under devolution. It has long been appreciated that there is a different 'take' on the sovereignty of the Westminster Parliament in Scotland.[10] It should not therefore be surprising to find a similarly different approach developing in Wales. If there is such a Welsh perspective, its origins will not be found in a historical argument

[4] For general discussion, see S Tierney 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72 MLR 360.

[5] The same point is made by N Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (2010) Scottish Government, Edinburgh, 14: 'Furthermore, the political circumstances that precipitated and have continued to accompany these grants of power—namely broad and settled support for at least some measure of political autonomy on part of the peoples and constituent nations of the United Kingdom—mean that in practice their reversal or modification could hardly be contemplated absent the consent of the constituent parts themselves'.

[6] R Rawlings *Delineating Wales. Constitutional, Legal and Administrative Aspects of National Devolution* (2006) University of Wales Press, Cardiff, 314, observes: 'in terms of the hierarchy of norms in the British Constitution, the devolution statutes for Scotland and Northern Ireland can themselves be read as conferring delegated legislative power, and so under the traditional (Anglocentric) doctrine of parliamentary sovereignty as embodying very wide Henry VIII clauses'.

[7] Royal Commission on the Constitution 1969–73, vol 1, Report (Cm. 5460), para. 543.

[8] Rawlings, above n 6 at 2.

[9] Walker, above n 5 at 38.

[10] JD Ford 'The Legal Provisions in the Acts of Union' (2007) 66 CLJ 106.

about the nature of the Union between England and Wales, which was not even theoretically based upon the consent of the Welsh.[11] It would instead be an autochthonous development, a response to devolution, which recognizes that the form of government in and of Wales is a matter of popular sovereignty. Brigid Hadfield makes the point: 'devolution marks a clear movement from the formal doctrine of parliamentary sovereignty standing alone (which ultimately concerns nothing other than the status in law of an Act of Parliament) to its combination with a process . . . whereby the holding of a referendum on any fundamental change to devolution (itself based on the "will of the people") is not a matter of concession . . . but a nascent right. Devolution is not simply a gift from the Westminster Parliament but a reflection of an autochthonous movement which continues to develop'.[12]

From the viewpoint of the Westminster Parliament, nothing in the 2006 Act affects the continuing sovereignty of that body. All the legislative powers conferred on the National Assembly depend upon the Act for their legal effect. They derive from the will of Parliament expressed in the Act. Thus, the 2006 Act provides that the legislative competence of the National Assembly 'does not affect the power of the Parliament of the United Kingdom to make laws for Wales'.[13] The National Assembly is a devolved legislature with limited powers. It may legislate only to the extent that it has been given power by Westminster to do so under the 2006 Act (or any future legislation). From its own perspective, of course, there is no restriction upon the Westminster Parliament amending or even repealing the 2006 Act: it would not be bound by the Act of its predecessors and could, in theory, withdraw any or all the National Assembly's devolved powers. (And of course devolution was suspended in Northern Ireland for some years following a breakdown in the peace process, until being restored in 2007.[14]) However, what is legally possible may not be constitutionally or practically achievable. And if Parliament did legislate for Wales in a devolved area, such as health or education, the legitimacy of its doing so would be questioned.

The paradox, however, is that the traditional approach reflected in the 2006 Act is undermined by the Act's own reliance upon the constitutional referendum to secure the endorsement of the Welsh electorate. The use of the referendum emphasizes the sovereignty of the people in determining the legislative powers of the National Assembly. In fact, there have been three such referendums in Wales. The first, in 1979, sought approval for the scheme of devolution contained in the

[11] No agreement lay behind the acquisition, through conquest, of Wales by the English Crown. P Roberts 'Tudor Wales, national identity and the British inheritance' in B Bradshaw (ed) *British Consciousness and Identity: The Making of Britain, 1522–1707* (1998) Cambridge University Press, Cambridge, 10, writes of Wales's 'Act of Union' that 'the imperial sovereignty it envisaged had not entirely lost its associations with suzerainty'. See, further, TG Watkin *The Legal History of Wales* (2007) University of Wales Press, Cardiff, ch. 7.

[12] B Hadfield, 'Devolution: A National Conversation?' in J Jowell and D Oliver (eds), *The Changing Constitution* (7th edn, 2011) Oxford University Press, Oxford, ch. 8, 233.

[13] S 107(5), Government of Wales Act 2006.

[14] See, generally, C McCrudden, 'Northern Ireland and the British Constitution since the Belfast Agreement' in J Jowell and D Oliver (eds), *The Changing Constitution* (6th edn, 2007) Oxford University Press, Oxford, ch. 10.

Table 1: Results of the three referendums

1. Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?					
4 March 2011	Yes 517,132	% 63.5	No 297,380	% 36.5	Turnout (%) 35.2
2. I agree that there should be a Welsh Assembly.					
18 September 1997	Agree 559,419	% 50.3	Disagree 552,698	% 49.7	Turnout (%) 50.1
3. Do you want the provisions of the Wales Act 1978 to be put into effect?					
1 March 1979	Yes 243,048	% 20.3	No 956,330	% 79.7	Turnout (%) 58.8

Wales Act 1978. It was rejected overwhelmingly. Latterly, the Government of Wales Act 1998 followed the referendum of September 1997, where there was narrow approval of the idea to establish a National Assembly. And in March 2011, there was overwhelming approval of a move to 'full' legislative devolution, under Part 4 of the Government of Wales Act 2006. The results of the three referendums were given in Table 1.

The most striking feature of these figures is the disappearance (by 2011) of a substantial proportion of the electorate who in the past chose to vote 'No' to devolution proposals. Although in 2011 the turnout was significantly lower than in 1997, almost the same number voted 'Yes'. There is no remaining question about the acceptance of the devolution of legislative powers within Wales. There were those who questioned the necessity to hold the most recent referendum, on what was seen as a 'technical' question. This was always a wrong perception. It was important to secure the endorsement of the electorate for a move away from had started as a form of executive devolution under the Government of Wales Act 1998 to clearly legislative devolution under Part 4 of the 2006 Act. It confirms too that the form of government in Wales is one to be approved or rejected by the electorate in Wales.

Legislative Competence

It is the Government of Wales Act 2006 (replacing that of 1998) that provides what might be regarded as the written constitution for the system of devolved government in Wales. The White Paper, *Better Governance for Wales*,[15] which preceded the Act, put forward a three-stage increase in the legislative powers of the National Assembly. The first stage was the conferral of wider powers on the

[15] Cm. 6582. For discussion, see R Rawlings, 'Hastening Slowly: The Next Phase of Welsh Devolution' [2005] PL 824.

Assembly to make subordinate legislation. The White Paper noted that this proposal would not require legislative authorization in advance of a specific Act and there is no provision to this effect in the 2006 Act.[16] It remains open to the Westminster Parliament, of course, to continue to confer such 'framework' powers on the National Assembly. The second stage was the provision of an Order in Council Mechanism to allow Parliament to confer enhanced legislative powers on the Assembly in relation to a specified subject matter within a devolved field (i.e. a field in which an Assembly Minister had an executive function).[17] The Order in Council would enable the Assembly to pass its own legislation within the scope of the powers delegated to it by Parliament. Part 3 of the 2006 Act introduced the mechanism by which legislative competence was conferred on the Assembly, with Parliament's approval, in respect of the specified matters set out in Schedule 5 as amended by Orders in Council. The main function of these 'Legislative Competence Orders' was to provide a means by which 'matters' could be added to Schedule 5. Where the Assembly wished to legislate in respect of a matter contained in Schedule 5, the instrument by which it did so was known as an Assembly Measure. Fortunately, it is not necessary to dwell upon the rather unhappy history of the Legislative Competence Order/Assembly Measure period.[18] Suffice it to say, that the procedure was cumbersome, time and resource intensive, and put the National Assembly in a rather unfortunate position vis-à-vis the Westminster Parliament.

The third phase of development identified in the White Paper was that, following a referendum, the Assembly would be authorized to make law on all the matters within its devolved fields of competence, without further recourse to the Westminster Parliament. The 2006 Act provided that these 'Assembly Act provisions' could only be brought into force following approval by the electorate in Wales by referendum (triggered by votes in both Houses of Parliament and two thirds of all Assembly members). This process of approval was completed by the referendum of March 2011.

It is Part 4 of the 2006 Act, together with Schedule 7, which makes provision for this 'primary' legislative competence, specifying the subject matter on which the Assembly is able to legislate without further recourse to Parliament. There is no need for the National Assembly to request powers from Westminster on a case-by-case basis, as was previously the case under Part 3 of the 2006 Act. The Assembly is now able to make laws in the form of Acts, in the full range of devolved policy areas.[19] This is a power to make 'Acts' which can do anything (with a few exceptions) within devolved fields that the Westminster Parliament could do. The twenty areas of devolved legislative competence are set out in

[16] The first example of a 'framework' provision of this kind was legislated in the NHS Redress Act 2006. See, further, TH Jones and JM Williams, 'The Legislative Future of Wales' (2005) 68 MLR 642, 650.

[17] *Better Government for Wales*, Cm. 6582 (2005), para. 3.16.

[18] See, e.g. House of Lords Constitution Committee, The Proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009, HL 159.

[19] s 107(1): 'The Assembly may make laws, to be known as Acts of the National Assembly for Wales or *Deddfau Cynulliad Cenedlaethol Cymru* (referred to in this Act as "Acts of the Assembly")'.

Schedule 7 to the 2006 Act,[20] although the Assembly is not able to legislate in all aspects of these: there are a number of exceptions laid down.[21]

These legislative arrangements do not, of course, override the continuing right of the Westminster Parliament to make legislation for Wales. In this respect, of course, there is the Sewell Convention,[22] under which UK legislation affecting devolved matters should 'normally' require the consent of the devolved legislature.[23] In traditional constitutional language, the 2006 Act is therefore a transferring statute: it specifies in some detail the powers to be transferred to the National Assembly. In this regard, it departs from the model to be found in the Scotland Act 1998. There is a significance difference in the way that the Assembly's legislative competence is delineated compared to the arrangements for the Scottish Parliament. Under the Scotland Act 1998, the principal legislative powers to be devolved are not listed; it is rather a retaining statute. It contains a list of subjects upon which the Scottish Parliament cannot legislate, known as 'reserved matters'. The general approach in the 2006 Act is the reverse of this: as noted, it lists the 20 fields in which the Assembly can legislate, together with exceptions. Although this typology captures the basic difference between Scottish and Welsh devolution, the 2006 Act also—of course—specifies some reserved matters.[24]

What is the explanation for the approach taken in the 2006 Act? Some indication is given in a memorandum submitted by the Secretary of State for Wales to the Welsh Affairs Committee.[25] He gave two practical reasons: (i) that the list of reserved matters would be very long and (ii) that a list of devolved fields is easier to create with accuracy since it derives from the existing executive functions carried out in Wales. However, the main reason was claimed to be a constitutional one: 'If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable'.[26] This last argument is of considerable interest. It might have been thought that the courts are there to provide merely a

[20] As amended by The National Assembly for Wales (Legislative Competence) (Amendment to Schedule 7 to the Government of Wales Act 2006) Order 2010, SI 2007/2143. The text of the Schedule is available at http://www.legislation.gov.uk/ukpga/2006/32/schedule/7.

[21] S 108 provides, *inter alia*, that an 'Act of the Assembly is not law so far as any provision of the Act is outside the Assembly's legislative competence' and that a 'provision of an Act of the Assembly is within the Assembly's legislative competence only if . . . it relates to one or more of the subjects listed under any of the headings in Part 1 of Schedule 7 and does not fall within any of the exceptions specified in that Part of that Schedule (whether or not under that heading or any of those headings)'. And to complicate matters further, in respect of some of the exceptions listed in the Schedule, there are 'carve outs' which (re)confer legislative competence upon the National Assembly.

[22] See CMG Himsworth and CM O'Neill, *Scotland's Constitution: Law and Practice* (2nd edn, 2009) Bloomsbury Professional, Hayward's Heath, para. 5.22.

[23] See *Devolution Guidance Note 9 on Post Devolution Primary Legislation Affecting Wales*. The only example to date of Legislative Consent motion being rejected is in the National Assembly, in respect of proposals in the Police Reform and Social Responsibility Act 2011, relating to elected Police Commissioners and the establishment of Police and Crime Panels.

[24] See s 108 and Schedule 7, Government of Wales Act 2006.

[25] *Government White Paper: Better Governance for Wales*, First Report of Session 2005–06, HC 551.

[26] Ibid, EV 62.

means to resolves legal disputes.[27] In the context of England and Wales, however, the unified jurisdiction is being elevated to a foundation of the constitution, which dictates the nature and scope of devolution.

Jurisdiction

In simple terms, four fundamental aspects to a jurisdiction can be identified:

1. a defined territorial area,
2. its own distinct body of law,
3. its own legal system, and
4. a body of rules to determine the bases of local jurisdiction (i.e. the relevant connecting factors) and the arrangements for recognition and enforcement of 'foreign' law, judgments and orders (i.e. rules about conflict of law).[28]

Within the United Kingdom, of course, there are three such jurisdictions: England and Wales, Northern Ireland and Scotland. Wales undoubtedly satisfies the first two tests, but not the third (with the fourth a necessary consequence of the third).

From the preceding discussion, it is clear that there is a profound link between the concept of sovereignty and the overarching legal jurisdiction of England and Wales. The expectation might be that the transformation of the unitary political system should be accompanied by change to the unified legal system of England and Wales. Neil Walker makes the comparative point: 'A state which has an institutional model based upon some form of decentralized distribution of authority, whether or not properly federal so called, will typically have a court system and appellate structure which reflects such decentralization'.[29] There is a legislature and government in Wales, but no separate legal system. It has been argued on an earlier occasion that[30]

> some of the elements of a Welsh jurisdiction were already present before devolution. A focus upon the all-encompassing legal system of England and Wales has led many to miss how different Wales has always been. . . . Although Wales may form part of the unitary legal system of England and Wales, this does not mean that the law of Wales is, or has ever been, identical to that of England. The unity of the legal system in England and Wales should not be taken to indicate the existence of a unified body of law.

[27] See TH Jones, JH Turnbull, and JM Williams, 'The Law of Wales or The Law of England and Wales' (2005) 26 *Statute Law Review* 135, 143.

[28] This builds upon Jones and Williams, above n 2.

[29] Walker, above n 5 at 36.

[30] Jones and Williams, above n 2 at 79, 80.

The argument as to the desirability or otherwise of Wales becoming a jurisdiction is not, however, dependent solely upon the degree of difference between the laws of Wales and England (although that is clearly a significant factor). The reality is that—even were there to be a formal separation of legal systems—a union of substantive law would continue. The number of Assembly Acts will grow over time, but it is inevitable that much of the legislation in effect in Wales will continue to be to that which is also in effect in England. The common law of England is the common law of Wales. This is also the position in Northern Ireland, of course, which is recognized as a separate jurisdiction within the United Kingdom, alongside Scotland and England and Wales. Within the United Kingdom, one finds 'the co-existence of different jurisdictions reflecting different levels of political community'.[31]

From a legislative perspective, the origin of the current jurisdictional arrangements is to be found in the Laws in Wales Act of 1536 (commonly known as the 'Act of Union'[32]), which provided that England and Wales were united and that Englishmen and Welshmen were to be subject to the same laws. The proclaimed intention of Henry VIII's, 'Act for Laws and Justice to be administered in Wales in like form as it is in this realm', was to incorporate Wales into England. Justice was to be administered according to the law of England and the Welsh language was abolished in all courts. The declared intention of the Act was 'utterly to extirpate and singular the sinister usages and customs in Wales'. It subjected the Welsh people for the first time to the same laws and the same language as the English. It was followed by a second 'Act of Union' in 1543.[33] It would be a historical mistake, of course, to regard these legislative assertions of the incorporation of Wales into England as conclusive. They seem to have been propaganda, rather than reality. Wales continued to enjoy a certain distinctiveness of legal and administrative arrangements. The incorporation of Wales into the English legal system took centuries to achieve. Indeed, in the second Act of Union ('An Act for Certain Ordinances in the King's Majesty's Dominions and Principality of Wales'), just seven years after the first, provision was made for a system of superior courts in Wales, substantially independent from those in England. The Courts of Great Session, which had both civil and criminal jurisdiction, were to continue in existence for almost three centuries. They administered the common law of England and equity (as developed by the Chancery Courts) in Wales. The Courts gave Wales a uniform legal identity related to, but distinct from, England until their abolition in 1830,[34] when complete procedural assimilation led to the two countries becoming one unified jurisdiction.

The contemporary tension is between the fact of devolved legislative power, with a National Assembly empowered to 'make any provision that could be

[31] Walker, above n 5, 69.

[32] It has been suggested that 'Act of Assimilation' might be a more appropriate title; see, e.g., G Williams, *Renewal and Reformation. Wales c.1415–1642* (1993) Oxford University Press, Oxford, 273.

[33] Both statutes have been fully repealed; see Welsh Language Act 1993, sch.2.

[34] This was under The Law Terms Act 1830.

made by an Act of Parliament',[35] and the traditional conception of a single system of law in England and Wales, which in turn underpins the unified jurisdiction of England and Wales. The All Wales Convention, for one, was clear that 'a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence for the National Assembly for Wales'.[36] That is no doubt correct. It was not necessary for there to be a separate jurisdiction for the legislative competence conferred under Part 4 of the 2006 Act to be implemented. It does not follow that because there are different Acts to be applied on each side of the border, there needs to be a separate court system because of those differences alone. The 2006 Act does not overtly disrupt the unity of the legal system of England and Wales. It appears to perpetuate the view that, in terms of territorial extent, England and Wales should not be distinguished since they both form part of a single, unified jurisdiction. Acts of the National Assembly therefore extend to England and Wales and the courts throughout that jurisdiction have the authority to enforce them. Chris Himsworth has explained the 'sleight of hand' that this entails:

> There is no general power to legislate beyond Wales. But there is a power to engage the courts of a jurisdiction that which does extend beyond Wales for the purpose of enforcement and this may indeed square the jurisdictional circle.[37]

At present, of course, there are no courts established in Wales that have jurisdiction over legislation that extends to Wales only. If an issue arises in a court in England where it is established that the matter is covered by an Act of the Assembly, the latter can be applied without the proofing process that usually follows when the law of another jurisdiction (as in the case of Northern Ireland and Scotland) comes into the matter. This approach is based on the conventional understanding of Parliamentary draftsmen that the effect and extent of a legislative provision are distinguishable. This in turns depends upon the idea that a statutory provision having effect only in Wales should extend beyond Wales.[38] Whatever the merit or otherwise of that argument, it must be the case that the fact that the National Assembly now has full legislative competence within those areas devolved to it, combined with the growth of a body of law exclusive to Wales, will lead to an intensification of the debate as to the desirability or otherwise of Wales becoming a jurisdiction in its own right.[39] These considerations have led to the issue becoming a significant one on the political agenda in Wales. Thus, the First Minister has noted:

[35] Government of Wales Act 2006, s 108(1).

[36] All Wales Convention, Report (2009), para. 3.9.22.

[37] CMG Himsworth, 'Devolution and its Jurisdictional Asymmetries' (2007) 70 *Modern Law Review* 31, 43.

[38] For critical discussion, see Jones, Turnbull and Williams, n 27, above.

[39] See House of Lords Select Committee on the Constitution, 15th Report of Session 2003–04, *Devolution: Its Effect on the Practice of Legislation at Westminster*, para. 17.

> Nowhere in the world are there two legislatures operating in the same jurisdiction and both responsible for the same policy area. It is inevitable, now that the Assembly has primary law-making powers, that we must move in this direction and if so what would we need to do to achieve it? What would the benefits be?[40]

The first question posed by the First Minister can be answered shortly. The two principal legal steps necessary for Wales to become a jurisdiction are relatively straightforward to identify. First, there would have to be a statement (in an Act of Parliament) of what constituted the law of Wales at the time of the jurisdiction coming into being. Presumably, this would be the common law of England and Wales and those Acts of Parliament applicable to England and Wales (except for those provisions taking effect in England alone). Substantial parts of the law of Wales would, therefore, remain the same as that of England. In respect of excepted and reserved matters, legislative authority would remain that of the Westminster Parliament. Second, there would need to be the introduction of appropriate conflict of law rules. As noted above, the law of England and Wales, which includes Acts of the Assembly, can be applied by courts throughout both countries. Judgments and orders, wherever made, are enforceable in any of those courts. Statutes, judgments, and orders from the other jurisdictions within the United Kingdom (Northern Ireland and Scotland) constitute foreign law. Absent specific legislative authority, they will not be recognized or enforced by the courts of England and Wales. Thus, on the creation of a Welsh jurisdiction, English law would become foreign law in Wales, as that of Wales would become foreign law in England. That said, Parliament has enacted a wide range of statutes that govern recognition and enforcement between the three current jurisdictions of the United Kingdom.[41] All that is necessary is for all such provisions to be amended to make equivalent arrangements for Wales. There might also be the need for some amendment of substantive law, to take account of the application to Wales of general conflict of law rules pertaining to jurisdiction.[42]

Beyond those two matters of principle to be legislated by Parliament, there would follow a whole series of more practical questions. Indeed, the arguments that are made against Wales becoming a jurisdiction tend to be practical, rather than constitutional. Thus, the former Lord Chancellor and Secretary of State for Justice stated:

> No one should underestimate the enormous practical implications. Would decisions of the English courts become merely persuasive in Welsh cases, rather than binding, for example? Would a separate legal profession need to develop, with its own systems of professional regulation? Could Welsh

[40] The Right Honourable Carwyn Jones, AM, 'Government, Law and the Courts in the Evolving Welsh Consitution', Speech at the Legal Wales Conference, 7 October 2011. The First Minister announced a public debate, to be initiated with a Green Paper in 2012. I am grateful to Professor Keith Patchett for helping to answer the first of the questions.

[41] See, e.g. Civil Jurisdiction and Judgments Act 1982, s 18; Insolvency Act 1986, s 426.

[42] Thus, there might be separate registration of companies having their registered office in Wales. See Companies Act 2006, Part 2.

judgments be enforced against English defendants, or Welsh proceedings served in England?[43]

These practical issues are not insurmountable. They would presumably become matters within the legislative competence of the National Assembly. This would include, *inter alia*, the structure of the courts, rules about practice and procedure, regulation of the legal profession, and so forth. These would become matters to be resolved in Wales.

An alternative to a Welsh jurisdiction could be a reformed England and Wales jurisdiction. This would see the creation, within the unitary legal system, of more identifiably Welsh institutions. In effect, Wales would become a part-jurisdiction, within the jurisdiction of England and Wales. The Administrative Court in Wales provides a precedent. In respect of that court, there are rules as to where cases should be heard.[44] There is no absolute rule that Welsh judicial review cases should be heard in Wales, but there is a policy of judicial transfer to ensure that Welsh cases are heard in Wales. Similar arrangements could be put in place for other courts, including, for example, a Welsh division of the High Court, which would make available in Wales the full jurisdiction of the court. This could be accompanied by a similar development within the Court of Appeal. These kinds of change could be brought about by executive action; they may therefore be thought more likely than those requiring primary legislation. Such arrangements would not, of course, place Wales in the same position as the other jurisdictions with devolved governments. They might not be considered to reflect fully the constitutional maturity of Wales.[45]

Conclusion

The boundaries of the jurisdiction of England and Wales are not aligned to the boundaries of the devolved government in Wales.[46] The Government of Wales Act confers legislative competence in respect of one (territorial) half of the jurisdiction of England and Wales. That competence is limited to the territory of Wales but is at the same time subject to the authority of the courts of England and Wales. One solution might be to realign the jurisdictional boundary to match the governmental boundary, that is, to reconstitute England and Wales as two separate jurisdictions. This would liberate constitutional discussion of Wales

[43] The Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice, 'Administration of Justice in Wales', speech of 3 December 2009. http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/news/speech031209a.htm.

[44] Practice Direction 54D ('Administrative Court (Venue)'). See, further, *R (Deepdock Ltd and others)* v. *The Welsh Ministers* [2007] EWHC 3347.

[45] W Roddick, QC, 'Devolving Justice', Bevan Foundation Rev (Summer 2010), 4, states: 'full legislative competence without responsibility for justice would be a piecemeal reform, would perpetuate the asymmetrical nature of devolution in the United Kingdom and would be demeaning to Wales'.

[46] Himsworth, above n 37 at 33

from what Richard Rawlings has called the 'uniquely powerful geo-political concept'[47] that the unified legal system represents. The restricting nature of this idea should not be underestimated. It seemed absurd for the former Lord Chancellor and Secretary of State for Justice to assert that a proposal to establish a Welsh jurisdiction was such a substantial constitutional step that it would need approval in a referendum.[48] But it does demonstrate the centralizing force of the unified jurisdiction, particularly when linked to the traditional view that sees devolution in terms of Parliamentary, not popular, sovereignty. The discussion is about more than the organization of the courts. It goes to the heart of the constitutional relationship between England and Wales and the nature of the constitutional status of Wales within the United Kingdom. The argument that is being made increasingly is that Wales needs devolved legal institutions, both to reflect its constitutional identity and to accommodate the legislative competence of the National Assembly for Wales. It is a constitutional prerequisite that there be legal accountability for the activities of both the legislature (National Assembly) and the executive (Welsh Government), with appropriate courts available within Wales. No doubt the courts of England and Wales, sitting in England perhaps, are fully competent to consider cases involving either the law of Wales only or the law of England and Wales. But it is inevitable that as Welsh Acts become more numerous, the case for a separate jurisdiction will strengthen.[49] If what supports the common jurisdiction is a body of law in common, that will come under increasing stress. The model that may be closest to the longer term future of the legal system in Wales is provided by Northern Ireland, which constitutes a separate jurisdiction within the United Kingdom, but in practice operates close to a parallel system to England and Wales. The law is very similar and there is easy transfer for practitioners between the two jurisdictions. Primary legislation would, of course, be necessary to establish a devolved legal system of this type. But it should not be thought that there is any inevitably about Wales becoming a separate jurisdiction. A jurisdiction, no more than a constitution, cannot simply emerge; it has to be declared.

[47] Rawlings, above n 15 at 825.

[48] Straw, above n 43: 'Such a large and ambitious project would certainly require primary legislation, and there would inevitably be an expectation for it to be approved by a referendum'.

[49] See the observations of The Right Honourable Carwyn Jones, AM, First Minister before the Committee for the Scrutiny of the First Minister, Tuesday, 22 March 2011. http://www.assemblywales.org/bus-home/bus-third-assembly/bus-committees/bus-committees-other-committees/bus-committees-third-sfm-home-/bus-committees-third-sfm-agendas.htm.

A SEPARATE LEGAL JURISDICTION FOR WALES

WELSH GOVERNMENT CONSULTATION WG–15109

Evidence submitted to the Welsh Government

Thomas Glyn Watkin[1]

Introduction

This paper is written in response to the Welsh Government's Consultation Document *A Separate Jurisdiction for Wales* (No. WG–15109) issued on 27 March 2012. It examines the question of the essential elements of jurisdiction and the conclusions to be drawn therefrom with regard to there being a separate Welsh jurisdiction. It builds on previous written evidence submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales' *Inquiry into the Establishment of a Separate Welsh Jurisdiction* as well as upon oral testimony given to that Inquiry on Monday, 18 June 2012.

The Meaning of Jurisdiction

The *Oxford English Dictionary* gives four meanings for the English word, *jurisdiction*, one of which is a metaphorical use of the word in non-legal contexts, but the other three of which are pertinent to this inquiry. These three meanings are:

- Administration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power. (1267; 1380; **1386**))
- The extent or range of judicial or administrative power; the territory over which such power extends. (1380; 1474; **1555**)
- A judicial organization; a judicature; a court, or series of courts, of justice. (**1765**)

These three meanings might be characterized as:

- Jurisdiction as the activity or function of a court;
- Jurisdiction as the area or territory over which or within which that function is performed, and
- Jurisdiction as the manner in which the courts are organized in order to carry out that function.

The meanings are interrelated, but the first recorded use of the word with each of those meanings according to the *OED* reveals that each comes from a quite distinct historical period.

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Jurisdiction as a Function

The first meaning, *jurisdiction* as the function of a court, the exercise of judicial authority, is stated to be present in the Statute of Marlborough, 1267, although the statute itself is recorded in Latin. The context is the separation of the cases which may be heard by the king's justices (the common law courts) from those which should be dealt with by the sheriff (the shire court). Those which were heard by the king's justices were to be heard according to the common custom of the realm (the emerging common law of England), while those heard by the sheriff would be adjudicated according to the custom of the shire. The distinction therefore was one of which body of law to apply, and the jurisdiction of the different courts was the exercise of the power to apply that body of law. By the end of the fourteenth century, this meaning had become the meaning of a word in the newly emerging English language, where it is used of the several jurisdictions then existing in England, each served by a court or courts administering a distinct body of law. These included:

- the common law of the king's courts;
- the 'equity' (as it would later be called) of the Chancellor's court;
- the canon law of the ecclesiastical courts;
- the local customs of the shire, hundred and manorial courts;
- the international commercial law of the Admiral's court – which could be chosen by the merchants;[2]
- the commercial rules of the courts which regulated individual markets and fairs.

Not all of these jurisdictions were primarily territorial; some related to the status of persons, the performance of an activity or the existence of a relationship. Thus, the ecclesiastical courts claimed jurisdiction over all baptized persons, feudal courts over their lords' tenants and the king's courts over his free subjects.

This earliest English meaning of *jurisdiction* continues to be used and is arguably the root meaning of the word, 'the power to declare and apply the law'. Jurisdiction in this sense is a function or activity and the word need not be preceded by either the definite or indefinite article. A court has jurisdiction, indeed must have jurisdiction, and for any law to apply, there must be a person or body with the authority to administer it. One cannot sensibly have law without the power to administer it; one cannot sensibly have a power to administer it without a law to administer. This connection has proved significant in debates about the legal status of Wales.

It is interesting to recall that this is the meaning given to jurisdiction in what may be the only statute to date which has terminated within Wales the jurisdiction of courts previously exercising jurisdiction throughout England and Wales. Section 3(1) of the Welsh Church Act 1914 provides:

> As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law.[3]

[2] The three main customs employed were those of Barcelona, Oléron and Wisby which usually – but not necessarily – dealt respectively with trade in the Mediterrancan, along the Atlantic seaboard and in the Baltic.

[3] The meaning of the last limb might be more clearly expressed today as 'the ecclesiastical law of the Church shall cease to exist as law in Wales', the Church being the Church of England and the title Church in Wales not having become the name of an institution at the time of the passing of the Act. It is also worth noting that the

Jurisdiction in this statute is something which is exercised, that is a power or function, and that is treated separately from the territory within which it is exercised (Wales and Monmouthshire) and the judicial system which exercises it (ecclesiastical courts and persons). Moreover, the provision makes the essential link between a body of law and jurisdiction, for the termination of jurisdiction also ends the existence of ecclesiastical law in Wales.

The use of the word *jurisdiction* in its original sense can also be seen in the relevant provisions of the Government of Ireland Act 1920.

The essential element of jurisdiction may therefore be said to be the existence of a body of law which needs to be administered. The power to administer law is the essence of jurisdiction.

Jurisdiction as territory

The territorial dimension to the meaning of jurisdiction is first recorded in written English according to the *OED* towards the end of the fourteenth century and during the fifteenth century, but always in relation to the jurisdiction of ecclesiastical persons. Its first recorded usage in a secular context comes from the middle years of the sixteenth century, which is significant as this is the age during which rulers, including Henry VIII of England, sought to consolidate their political power within their respective realms, thus creating the modern concept of the nation state. In England this involved the king asserting authority over the Church within his realm, so that the ecclesiastical jurisdiction became a further royal jurisdiction, and also by incorporating Wales and the Marches within the jurisdiction of the common law courts. Although the several jurisdictions of the common law, the Chancery and the ecclesiastical courts remained separate – as they would until the reforms of the nineteenth century, all were now courts with an authority literally coterminous with that of the kingdom.

Jurisdiction as a judicial system

In so far as the jurisdictions of these several royal courts remained separate, it would be difficult indeed anachronistic to describe them as a judicial system in the singular. It was the reform of the legal system during the 1870s which achieved this. The Judicature Acts of 1873–75 abolished the courts of common law, the Chancery, the Admiral's court and the recently-created Probate and Divorce Courts, and transferred their jurisdictions, without amalgamation, to the new Supreme Court of Judicature.[4] England and Wales had, for the first time, a unified judicial system. It was a jurisdiction in the third, organizational meaning of the term.

The first use of this latest meaning of the word is recorded by the *OED* as being in 1765, in the first volume of Blackstone's *Commentaries on the Laws of England* published in that year. That this usage should emerge at that time is significant, given that the eighteenth century was an age which saw a number of developments geared to centralizing and systematizing governmental authority in what began as the separate kingdoms of England,

meaning of *Wales* in this context is different from both its Interpretation Act and Government of Wales Act meanings.

[4] Now renamed the Senior Courts of England and Wales due to the creation of a Supreme Court of the United Kingdom.

Scotland and Ireland, and ended as the United Kingdom, having passed through the stage of being Great Britain. It saw:

- the abolition of a separate Scottish parliament – 1707 (Great Britain created);
- the House of Lords asserting power to review decisions of the Court of Session in civil matters;
- the King's Bench asserting concomitant jurisdiction with the Great Sessions in Wales;
- the differing inheritance customs of the provinces of Canterbury and York and the City of London abolished;
- attempts to govern the American Colonies from the mother country leading to armed revolt;
- the existence of the Great Sessions subjected to attack;
- regular bills to reform the Court of Session on the model of the English common law courts;
- the separate Irish parliament abolished – 1800 (the United Kingdom created).

Words do not acquire their meanings in a vacuum, but rather through use to express the perspective of the age in which they are being used. The English word *jurisdiction* acquired its connection with territory in the period when political and legal authority became synonymous with nation states and acquired its connection with judicial organization and system in an age which emphasized the centralization and unification of such authority within a ruler's territories. In England and Wales, this culminated in the judicial reforms of the 1870s.

The phenomenon was not however a purely British one; it affected much of mainland Europe and is principally associated with France, where the Enlightenment emphasis on reason led to the idea of producing a rational body of law which would suit any society at any time together with a rational mode for its administration. The outcome was the codifications of Napoleon, which following introduction in France were forcibly exported to countries which fell victim to his conquering armies.

Whatever the virtues of the rational laws themselves, resentment at conquest led to the rejection of Napoleon's codifications after the yoke of French domination was removed. Indeed, as part of the intellectual reaction to the rationalism of the eighteenth century, there developed the idea that laws had to express in addition to reason something of the spirit and culture of the people they governed, an idea which was developed by the German Historical School of jurisprudence. A tension therefore developed between the centralizing rationalist tendencies of the eighteenth century and the 'romantic', nationalist ideals of the nineteenth. By the second half of the nineteenth century in relation to Wales this tendency found expression in campaigns for laws which would be law in Wales alone, campaigns which bore fruit in the immediate aftermath of the creation of the new, highly-centralized Supreme Court of Judicature.

Separate Welsh laws and jurisdiction

Proposals to make legislation for Wales which would be law in Wales but not in England produced opposition on the ground that either this could not or should not be done. The opposition was based on the view that Wales and England were territorially one law district served by one set of courts, that is one jurisdiction. As Wales was not a territory served by a

distinct set of courts, it could not have a body of law of its own.[5] The argument was unsuccessful, but it is instructive that those who employed it saw a clear link between having a body of law and having jurisdiction to administer it, albeit they saw the latter in terms of territory and judicial organization. Unsurprisingly, those who recalled that Wales had had its own law courts, the Great Sessions, until a generation or so earlier when the centralizing tendency had led to their abolition in 1830, reacted by giving serious thought to whether similar arrangements should not be reinstated. In the aftermath of the First World War, with the political map of Europe and of the British Isles being redrawn, a Speaker's Conference on Devolution established a sub-committee to consider the case for each of the several parts of the newly-delineated United Kingdom – Northern Ireland, Scotland, Wales and England – each having its own separate judicial system. This time, those who were opposed emphasized that Wales could not have its own judicial system because it lacked its own distinct body of law, the converse of the opposition argument in 1880.[6] Once more, therefore, a link was recognized between having a body of law and a separate judicial system. One recommendation from the inquiry was that Wales should not have a separate judicial system until it had its own legislature and that it was such a body that should make the request, albeit that it was also recommended that any devolution statute should include provision in express terms that a separate judicial system should be given to Wales upon application for one to the UK parliament by a devolved Welsh legislature.[7] Once more, therefore, the prospect of a separate judicial system was linked with the creation of a separate body of law.

It is worth noting that the remnant of the argument that Wales cannot have its own laws because it lacks its own judicial system remains in the notion that laws which apply only to Wales have to extend to England and Wales. Likewise, the argument that Wales cannot have its own judicial system because it lacks its own body of law has, in the wake of the creation of such a body of law, transmuted to the demand that there has to be a *sufficient* body of law, a movement of the goal posts which changes the question from one to which a clear affirmative or negative answer can be given to one upon which opinions may differ. One cannot deny that one law would not constitute a body and that therefore someone must decide whether a sufficient body has developed. The Speaker's Conference believed that that judgement should be made by a Welsh legislature.

Jurisdiction and competence

The essence of jurisdiction therefore is the authority of a court to administer a body of law. In evidence to the National Assembly for Wales' Constitutional and Legislative Affairs Committee inquiry into this subject, I have argued that there are sound reasons for holding that courts in Wales should have exclusive jurisdiction over those laws which apply only in Wales regardless of by whom they have been made, and that there are sound reasons also for maintaining that the courts which have exclusive jurisdiction over the laws which apply only in Wales should also have exclusive competence over cases involving the body of law which applies in both England and Wales but which, in accordance with defined principles, ought

[5] It was made forcibly in the debates on the Sunday Closing (Wales) Bill by the Conservative member for Bridport, Edward Warton MP : *Parl. Deb (HC)* (Series 3) vol. 253, cols., 1167–1181 (30 June 1880).

[6] A view reiterated in opposition to the request in 1944 from the entire Parliamentary representation from Wales in the House of Commons to have a Secretary of State for Wales on the Scottish model:
"Precise parity with Scotland would of course involve a separate judicial system... There is of course the not unimportant consideration that in Scotland the actual law, quite apart from the machinery dispensing it, is different from that in England, which in Wales it is not": letter from Sir Alan Barlow to Sir Claud Schuster (12/04/44): National Archives, LCO 2/3214 (Registered file 3217/3).

[7] National Archives, LC 2/507 (draft report, paras. 11 & 22).

ordinarily to be heard in Wales.[8] In relation to the second category of cases which should be heard by the courts in Wales, I can see no reason to distinguish between different bodies of law – civil/criminal; public/private – provided that the defined principles are relevant and apply to them. Such principles would include the location of property forming the subject of the action, the usual place of residence of the parties or one of them, and the possibility that the parties or witnesses will require the trial or parts of it to be conducted in Welsh.

From this perspective, only courts in Wales (other than in permitted exceptional circumstances) would have jurisdiction over cases to be tried under the laws applicable to Wales. How the competence of those courts should then be allocated would be a matter for the National Assembly and the bodies charged with the organization and administration of the courts. Questions regarding territorial, subject-matter and functional allocation of work should be answered according to the needs of Wales.[9] For instance, at the time of the inquiry under the auspices of the Speaker's Devolution Conference in 1920, suggestions included having only one tier of competence for first instance civil cases (amalgamating the competence of the county court and the High Court) and possibly having a collegiate, second-instance court to hear appeals composed of judges who were of equal status to those sitting at first instance and who would be taking cases at first instance when not engaged on appeal work.[10] Final appeal on points of law would continue to lie to the Supreme Court of the United Kingdom, which would ensure a consistent application of the law in relation to that portion of the Welsh courts' work which involved the law applying to England and Wales. As such final appeals would be on points of law only, a change of language should not be a difficulty given that only counsel would be heard. The avoidance of a change of language at second instance militates in favour of retaining competence over second–instance hearings within Wales.

Such an allocation of business to courts in Wales would mean that it would be the courts themselves who would cope with the gradual increase of laws applying only to Wales and the concomitant decrease in that proportion of laws which applied to England and Wales. The Welsh judiciary would apply the appropriate body of law and no further change to the court structure would thereafter be needed.

Legal education and the needs of the professions

Given that there is no suggestion that the prevailing legal culture of the system would change – that is it would remain within the common law family of legal systems, it is unlikely that there would be any need to make substantial changes to the nature or indeed the content of legal education nor to the requirements for legal qualification. The core professional skills would remain the same, other than that it would be easier to require at least a trained awareness of the differences with regard to statutory interpretation that arise from working within a bilingual system. The knowledge base, as exemplified by the core subjects required to be studied as the foundations of legal knowledge, would be unaffected as they do not

[8] For convenience, the evidence submitted to the Assembly Committee is attached as an Appendix.

[9] In answering such questions about competence, practical considerations would tend to be prominent, while in answering the question about jurisdiction, constitutional principles should prevail. The fact that in English the word *jurisdiction* can be used in a broader, looser sense to mean competence can result in the belief that all questions regarding jurisdiction can properly be answered on the basis of practical convenience to the exclusion of constitutional principle.

[10] See, for instance, the evidence of Lord Justice Bankes to the Speaker's Devolution Conference's sub-committee (11/02/20) and the letter from His Hon. Judge Rowland Rowlands to Sir Claud Schuster (29/02/20): National Archives, LC 2/507.

include detailed study of any of the current devolved areas. Only when a core area came to be devolved, or a devolved area became part of the core, would some specific further qualification become necessary for transfer between Wales and England. Knowledge of the devolution settlement itself would remain a part of the core subject of public law, although on past experience it may be doubted that much attention will be paid to the terms of the settlement in public law courses outside of Wales.

While bilingualism would continue to be an advantage for legal professionals at all levels, it would be unrealistic to expect to achieve a bilingual profession in the short to medium term. This would give rise to the need for those not possessing bilingual skills to be able to access expert advice with regard to the interpretation of legal texts – both legislation and private documents such as wills and conveyances – and could well see the growth of a paralegal profession of lawyer/linguists and the need for their training. Not all judges would be in a position to deal with questions of bilingual interpretation and with regard to legislation this might be resolved by allowing first instance judges to remit points of interpretation where they felt this to be necessary to an appropriately-constituted second instance court for determination ahead of giving judgement. Such an arrangement would be better for ensuring consistent interpretation than introducing paralegal, lawyer/linguist wingmen to assist judges in the courts.

The possibility of remitting points of law requiring determination to an appropriate second-instance court ahead of judgement might also be used to deal with issues which involved an application of laws applying only in England in cases in Wales and *vice versa*. This would obviate the necessity for dealing with such issues as questions of fact using conflict of laws rules or insisting that separate proceedings on the point in question be brought in the other jurisdiction. The model might usefully have wider application within the United Kingdom.

Conclusions

The formation of a separate judicial system with jurisdiction over the law applicable in Wales would in my view in and of itself raise awareness of the difference which now exists and will increase between the law applicable in England and that in Wales. Lack of awareness of that difference has in my view militated against the development both within and outside Wales of features that are needed in the wake of legislative and executive devolution. These include the growth of a literature on Welsh law, adequate coverage of the laws of Wales on legal information websites, due respect for research on Welsh law within the academic community and among research bodies, and due regard from the professional regulators for the differences between Wales and England. As long as Wales and England remain united in a single judicial system, the law of Wales will be seen as being 'the same as that of England but with some differences' rather than being seen as 'different albeit with considerable similarities'. This difference of perspective is important if a knowledge of the laws of Wales is ever to be viewed as anything more than a 'bolt on' or footnote – and possibility an inconvenient one at that – to professional knowledge of English law. Only such a change of perspective will bring about the change in professional habits and outlook which will ensure efficient and reliable legal services for the citizen.

CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN
(THE ASSOCIATION OF LONDON WELSH LAWYERS)
Inaugurated on the 17th February 2011 by the The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales

Patron: The Rt Hon Lord Morris of Aberavon KG QC

The Constitutional Policy Team

Welsh Government

4th Floor

Cathays Park 2

Cardiff

CF10 3NQ

26 June 2012

Dear Sir,

I have pleasure in attaching the response of the Association of London Welsh Lawyers ("**the Association**") to the consultation paper on a separate legal jurisdiction for Wales.

We are grateful for the extension of time that has been granted to the Association, which has enabled us to fully consult all of our members on the attached response.

Yours sincerely,

Hefin Rees

Chairman

CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN
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Inaugurated on the 17th February 2011 by the The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales

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The Response of the Association of London Welsh Lawyers to the Consultation of the Welsh Government on a Separate Legal Jurisdiction for Wales

The Association

1. The Association of London Welsh Lawyers ("**the Association**") has 125 members. Our membership includes judges, barristers, solicitors, legal executives and academics. The objects of the Association are as follows –

   a. to encourage and facilitate an understanding of the development of the law in Wales, of legal practice in Wales and of the constitutional developments of Wales;

   b. to encourage and assist professional relationships between members of the Association and other members of the legal profession who have connections with or who are interested in Wales;

   c. to assist the development of the legal profession in or relating to Wales by any appropriate means, including mutual exchanges, placement and training programmes, the supply of information and equipment, or holding lectures and seminars;

   d. to participate in consultation exercises and to respond to them if required to do so.

The consultation undertaken by the Association of its membership

2. The Association has widely consulted its membership in order to prepare this response. This consultation has included:

a. Distributing the consultation paper to all the Association's membership and inviting written submissions from the membership;

b. Hosting a debate held in a Committee Room in the House of Lords[1] which was addressed by:

i. Hefin Rees FCIArb (Chairman and a Founding Member of the Association);

ii. Rt Hon. Lord Morris of Aberavon, KG, QC (Patron of the Association);

iii. Winston Roddick CB QC (a Founding Member of the Association and member of its Executive Committee);

iv. Rt Hon. Elfyn Llwyd MP (a Member of the Association).

c. Forming a sub-committee of the Association for the purposes of debating the issues raised in this consultation paper and for drafting this response. This sub-committee has met on 3 occasions, and has included the following people:

i. Hefin Rees FCIArb (Chairman of the Association and a barrister at Thirty Nine Essex Street Chambers, London);

ii. Winston Roddick CB QC (former Counsel General for the Welsh Assembly, former Leader of the Wales Circuit, and Honorary Recorder of Caernarfon);

iii. Gerard Forlin QC (barrister at Cornerstone Chambers, London);

iv. Carys Owen (barrister at 18 Red Lion Court Chambers, London and member of the Association's Executive Committee);

v. Bleddyn Phillips (partner at Clifford Chance LLP, London);

vi. Jonathan Haydn-Williams FCIArb (solicitor, Senior Counsel at Goodman Derrick LLP, London).

d. Distributing a draft of this response to all of the Association's membership in order to seek everybody's views and to then incorporate those views into the final draft of the response.

[1] Please see the minutes of the meeting held in the House of Lords at **Appendix 2**, and the speech of Winston Roddick CB QC at **Appendix 3**, the speech of Rt Hon Lord Morris of Aberavon at **Appendix 4**.

3. Wales' constitutional development is of the greatest importance to all Welsh men and women, no matter where they live for the time being. As an Association, we welcome the opportunity to contribute to this very important debate.

4. This consultation raises a number of interesting and challenging issues. It is inevitable that there will be a divergence of opinion in the membership of the Association to those issues. As a sub-committee drafting this response on behalf of the whole membership of the Association we are conscious of this fact and have sought to reflect the divergence of opinions.

5. Many of these diverse points of view were identified in the debate that was held by the Association in the House of Lords, and the minutes of that meeting which are attached at **Appendix 2** should be read in conjunction with this response in order to see the divergence of views of our membership.

6. We would wish to clarify that this response does not purport to represent the views of the judicial members of the Association[2], and there may be other members who would take a different view to that adopted in this response. That is to be expected in a consultation with such wide-ranging and important consequences.

The principal questions being asked in this consultation

7. We have endeavoured to answer each of the specific questions posed in the consultation document, and these answers can be found in **Appendix 1** to this response, but by way of introduction to those answers we here set out

[2] For these, see the response of the Council of Judges for Wales (the Council of Judges) to the Assembly's Constitutional Affairs Committee Inquiry

our views on what we perceive to be the three principal questions on which the Welsh Government is consulting, namely:

a. What is meant by the term separate Welsh legal jurisdiction;

b. Whether or not there should be a separate legal jurisdiction for Wales;

c. What might the likely consequences be of creating that jurisdiction[3].

A summary of the Association's position

8. The Association's approach to this consultation is on the basis that it is primarily concerned not with the substance of our laws but with the structures by which justice is administered in Wales.

9. The views of the Association's membership can be broadly categorised into 3 responses:

a. The first category includes those who are, in principle, in favour of a separate legal jurisdiction for Wales and believe that this should be delivered in the short to medium term, i.e. the next 3 to 5 years once there has been an analysis of the responses to the consultation, preparation of the Green Paper, consultation on the Green Paper, drawing up of the necessary legislative instruments, Parliamentary time for dealing with those instruments, setting up of the Welsh machinery of justice and the activation of it ("**the Today Group**");

b. The secondary category includes those who are, in principle, in favour of a separate legal jurisdiction for Wales, but believe that the timing is not yet right, and consider that this should be delivered in the medium to long term, i.e. in the next 10 years when there is a greater

[3] See the sixth paragraph of the Forward to the consultation Document and the four purposes of the consultation as described on pages 1 and 2 of that document

divergence between Welsh law and the laws of England and Wales to justify such a significant constitutional step ("**the Tomorrow Group**");

c. The third category includes those who are, in principle, against the idea of a separate legal jurisdiction for Wales and do not think it should ever be brought into existence as it would be against the best interests of Wales ("**the Never Group**").

10. The difference between those who hold the views in sub-paragraphs (a) and (b) above is the timing for delivering this policy. What unites them is the principle that they believe it is a good idea. The majority in the Association fall into these first two categories.

11. Those members who are, in principle, in favour point to the fact that Wales already meets many of the characteristics of having its own legal jurisdiction – such as a defined territory, a distinct body of law, a legislature - and the only characteristic missing is for the administration of justice to be devolved. Those who take this view consider that there are genuine advantages for Wales to have its own separate legal jurisdiction. We have sought to identify what those advantages may be in paragraphs 33 - 38 of our response. We have also sought to identify what the potential consequences might be of a separate legal jurisdiction for Wales in paragraph 60 of our response.

12. Others in our membership take a contrary view and fall into the Never Group. They consider that the case for a separate legal jurisdiction for Wales is not made out. They point to the fact that the legal jurisdiction of England and Wales is internationally respected, and consider that Wales would be disadvantaged by not being a part of that wider jurisdiction. They point to the additional costs that would be involved in establishing a separate legal jurisdiction for Wales and consider that it would not be a good idea for the people of Wales or those practising law in Wales. We

have sought to identify what those disadvantages may be in paragraphs 39 - 59 of our response.

13. One member of the sub-committee has expressed the view that, instead of going the whole way to the devolution of the administration of justice to Wales, an alternative that merits consideration is to plan for a quasi-federal arrangement. This would involve the creation of separate courts to deal with devolved Welsh law and matters within the competence of the National Assembly for Wales. This proposal would be akin to the state courts in the USA or the court system in Canada. Matters of a non-devolved nature would remain within the competence of the "federal" courts – i.e. those of England and Wales. There may, of course, be many practical considerations to be taken into account before creating a separate court system to deal with devolved matters; but the drafting Sub-Committee nevertheless include this idea as one of many of the divergent views that have been received.

14. There are two things on which all the membership in the Association appear to be fully in agreement with, namely:

a. Even if a separate legal jurisdiction for Wales were to be implemented, there should be no barriers established to the legal professions which would act as an impediment to lawyers in Wales working in England, or vice versa. Any such barriers would, in our view, be damaging to the legal professions in both Wales and England and would not be in the public interest.

b. Measures should continue to be implemented to ensure that more cases with a devolved law element should be dealt with in Wales and cases with a close connection with Wales should also be dealt with in courts in Wales. The further steps for enhancing "legal Wales" described by the Lord Chief Justice in the WCJC submission to the Constitutional Affairs Committee are strongly supported by the Association and we

are strongly of the view that they should be implemented without delay.

The definition of Jurisdiction

15. Jurisdiction has been defined as the power or authority to interpret, apply and decide the law, and that there are three commonly accepted characteristics of a jurisdiction, namely:

    a. a defined territory,

    b. a distinct body of law, and

    c. a structure of courts and legal institutions[4].

16. As to the first characteristic, Wales already has a defined territory. This definition is contained within section 158 of the Government of Wales Act 2006. In the context of the functions and responsibilities of the Assembly and the Welsh Ministers, the definition of jurisdiction is the territory or sphere of activity over which their legal authority extends.

17. That said, in terms of defining what is meant by the term "jurisdiction", which is not a term of art, we do not consider it is a necessary pre-condition for the existence of a separate legal jurisdiction for the law in the territory to be wholly distinct from that in other jurisdictions. For instance, the separate states of the EU are separate legal jurisdictions which share a common body of EU law, and the states of the USA have their own state laws as well as sharing a common body of federal law.

18. As to the second characteristic, Wales has a distinct body of law. This constitutes a growing body of statute law, comprising Acts of the Welsh Assembly and Acts of the United Kingdom Parliament which apply only

[4] This is the definition provided by Professor Tim Jones and Jane Williams in "Wales as a Jurisdiction" PL2004 SPR 78

to Wales. The extent of this body of law is inevitably going to increase in the future. For instance, we understand that the First Minister for Wales has announced there will be 20 Bills in the legislative programme for this term of the Assembly. The distinctiveness of this Welsh law will be a reflection of the different political influences at work in the National Assembly for Wales, as opposed to in the Westminster Parliament.

19. As to the third characteristic, this is what we consider to be the principal focus of this consultation.

20. In the context of the question as to whether or not there should be a separate legal jurisdiction for Wales, the term jurisdiction can therefore be more narrowly defined as the responsibility for the administration of justice in Wales; which essentially is what the second principal question that is being asked in this consultation is all about (as set out in paragraph 7 hereinabove). That is the sense in which the expression "jurisdiction" is used from now on in this consultation response.

The administration of justice

21. The administration of justice is not currently a function of the Welsh Government. It, therefore, has no jurisdiction at present over the administration of justice.

22. As we see it, the main purpose of this consultation is to consider whether or not it is a good idea to have the administration of justice in Wales devolved to Wales.

23. The current powers over the administration of justice in Wales are vested in the Ministry of Justice, the Home Secretary and other Ministers of the UK Government

24. The aspects of the 'administration of justice' to which we refer when using that expression are:

a. the Crown Court;
b. the High Court;
c. the Criminal and Civil Divisions of the Court of Appeal;
d. the Prosecution Service;
e. the Probation Service;
f. all Tribunals;
g. the Magistrates Courts Service;
h. the Prison Service;
i. the civil service responsible for the administration of justice in Wales;
j. the Police Service;
k. We also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission[5].

25. In relation to this latter point, and the need for an independent judicial appointments commission, there are two cardinal constitutional principles that need to be given effect to, namely (i) the separation of powers and (ii) the rule of law, and it is of the utmost importance that if a separate Welsh jurisdiction is to be implemented these two constitutional principles are honoured. The appointment of judges at all levels should be independent of the executive. We would respectfully point out to the Assembly that its present system for appointing members to the Tribunals for which it is responsible is contrary to these principles.

26. The mechanism for transferring the powers for the administration of justice, and the estates and other assets which they comprise, is set out in sections 58, 95 and 109 and schedules 3, 4, 5 and 7 of the Government of Wales Act 2006.

27. If those functions were added to the Assembly's legislative competence, that would enable the Assembly/Welsh Ministers to have jurisdiction over the administration of justice in Wales, just as they have jurisdiction today over, for instance, health matters and planning and environmental matters.

[5] This is a wider definition than that adopted in the response of the Council of judges referred to in footnote 2 above

Wales would become a jurisdiction and the administration of justice in Wales would thereby cease to be part of a unified system with England.

Whether or not there should be a separate legal jurisdiction for Wales

28. Whilst there is a divergence of opinion amongst the membership of the Association, so far as we are able to assess we consider the majority are in favour of devolving the administration of justice in Wales to the Assembly.

29. As part of the background in assessing whether or not it is a good idea for there to be a separate legal jurisdiction for Wales, we have taken into account the significant constitutional changes which have occurred to the UK generally, and to Wales in particular, under the Blair Government. Those developments demonstrate that:

> *"...the break-up of the unitary political system brought about by the devolution statutes have been accompanied by at least a loosening of the unified legal system of England and Wales"*[6].

30. We accept that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is not entirely attributable to devolution, in that the process of change began much earlier with the passing of the Welsh Courts Act 1942. Further advances came with the Welsh Language Acts of 1967 and 1993, and then most significantly the Government of Wales Acts of 1998 and 2006.

31. It is inevitable, we believe, that the differences will become more pronounced, and more significant constitutionally, as the process of devolution continues; especially now that the Assembly has acquired increased legislative competence.

[6] See "Wales as a Jurisdiction"

32. Even in 2004, on the basis of legislation made up to December 2002 (which is four years before the second devolution settlement and some ten years before it acquired full legislative competence) Wales was described as an "emerging jurisdiction"[7].

The arguments for jurisdictional devolution

33. Amongst the advantages it could bring to Wales are the following

a. The administration of justice in Wales and its institutions would become closer to the people of Wales.

b. It would make good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. The following rhetorical question has been posed by many during the course of this debate:

> Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction?

c. The organisation within Wales of court and tribunal sittings in Wales would in all likelihood add to the efficiency of those bodies and to the prompt disposal of work;

d. The economic benefits which flow from the existence of a legal system in society may become available within Wales. For example, employment in support industries, the generation of fee-earning work in related professions;

[7] See "Wales as a Jurisdiction" Professor Tim Jones and Jane Williams.

e. The existence of legal institutions within Wales would create work and career structures not presently available in Wales;

f. It would assist in the further development of expertise amongst the legal profession in Wales;

g. It would make for consistency between the constitutions of Scotland, Northern Ireland and Wales.

34. Professor Gwynedd Parry, Professor of Law and History at Swansea University, says of these arguments that they provide very strong support for jurisdictional devolution today.

35. As to the likely consequences of devolving the function of administering justice to the Assembly, those members of the Association who fall into the Today or Tomorrow Group are largely of the view that they do not consider that it would create a significant upheaval.

36. From their perspective, it could be done seamlessly, result in savings, be of benefit to the Welsh economy, and provide significant career opportunities within Wales. They would point to the fact that all the necessary experiences and qualifications in the administration of justice are already present. They argue it would require very little additional, if any, new office space and what it would require would be reflected in the saving of office space and expenses in England.

37. As devolving responsibility for administering justice - as we defined that expression earlier[8] - would not require further primary legislation those in the Today and Tomorrow Group say there would be no need to find time for it in Westminster's long legislative queue.

[8] See paragraph 12 above

38. In terms of the economic situation, those in favour of the idea say that the way the administration of justice is structured and run in Wales could be so arranged as to make a potential contribution to the Welsh economy. We do not know what the position is in the changed economic climate of this period, but until recently legal services (apart from administration of justice) in Wales contributed 1% to Wales' GDP. Agriculture contributes a little more (about 0.5% more), and those in favour of the idea of a separate legal jurisdiction for Wales consider there is considerable scope for increasing the contribution of the former.[9] There is, therefore, potentially more than just a constitutional case for devolving this function.

The arguments against jurisdictional devolution

39. A number of arguments have been advanced (not necessarily by members of the sub-committee) against devolving responsibility for the administration of justice to the Assembly, and these include the following:

a. The creation of a separate legal jurisdiction for Wales is appropriate if Wales became an independent state with a wholly devolved government and legislature. However, that is not on the horizon at present.

b. There would be additional costs, and these would need to be carefully estimated before any final decision was taken as to whether or not to proceed with implementing the devolution of the administration of justice to Wales.

c. The potential economic benefits for the Welsh economy are unclear and such benefits as may arise would only likely to arise in an increase in administrative jobs which would have to be funded out of the public purse.

[9] See the Report of the All Wales Convention which explains the vital importance of legal services to the Welsh economy.

d. Wales would suffer by no longer being part of one of the leading legal jurisdictions in the world, namely that of England and Wales.

e. If Wales had an entirely separate court system, contracts with parties from England and Wales (or further afield) would be likely to specify that the English courts, rather than those of Wales, would have exclusive jurisdiction over any dispute arising.

"The too radical argument"

40. Some would say that devolving responsibility for the administration of justice is too radical a change at this time ("**the too radical argument**").

41. This argument needs to be measured against the fundamental changes to the British Constitution which have taken place very recently. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales, each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament.

42. Other significant changes were (i) the Human Rights Act 1998, by which the European Convention on Human Rights became incorporated into the domestic law of the UK; (ii) Freedom of Information Act 2000, which aims to make government more open and less secretive; (iii) the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber; and (iv) the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European Parliament.

43. Professors Jowell and Oliver describe these changes as 'hammer blows' to our established constitutional principles. The late Professor Sir David

Williams described the Welsh devolution settlements as having brought about "an astonishing burst of constitutionalism".

44. Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century "have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... [and] even an established democracy needs constantly to be reviewed and renewed" (Jowell and Oliver).

45. The momentum for fundamental reforms is a continuing one. The current Coalition Government's proposed reforms include (i) the introduction of fixed term parliaments, (ii) reforming the voting system, and (iii) further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state.

46. There were many reasons which drove devolution, but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively, or meeting the demands of democracy of the latter half of the 20th century, not to mention those of the 21st century.

47. Accordingly, devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home nations, between the state and the citizen, and between citizen and citizen.

48. Staying with the argument that it would be "too radical" to devolve the administration of justice, we need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and

Northern Ireland have their own systems for administrating justice. It is the case that Scotland always did have its own distinct legal system, but Northern Ireland's separate justice system is the product of relatively recent legislation. Only Wales and England are administered jointly for these purposes, but that was not even always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters" (Professor John Davies, "A History of Wales").

"The quality argument"

49. Another argument against giving jurisdiction to Wales over the administration of justice is that the system of justice in England and Wales is very well respected internationally. Our judges are independent and of outstanding quality. The argument often developed is that unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out (**"the quality argument"**).

50. In considering this argument, we think that devolving responsibility for the administration of justice would not dilute the quality of judges in Wales. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The central questions on which the Welsh Government are consulting are concerned only with the structures by which the administration of justice is administered; and there is no reason to believe that the quality of the judiciary would be in any way reduced in the event that the administration of justice were to be devolved to the National Assembly for Wales.

"The devolution by evolution argument"

51. A third argument is that we should leave devolution of the administration of justice to evolve and see where we get to. The proponents of this argument would point to the fact that evolutionary changes in the administration of justice in Wales have occurred even though justice is not a devolved field; and whilst it might be doubtful that they would have occurred to the extent they have, were it not for devolution, they have occurred without justice being a devolved field ("**the devolution by evolution argument**").

52. However, the Richard Commission criticised devolution by evolution as devolution of a kind which did not follow any discernible or comprehensible policy. It is preferable, in our view, to have a policy which is well thought out, and upon which detailed consultation has been sought from all participants and interested parties in the administration of justice in Wales.

"The tomorrow, maybe, but not today argument"

53. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility for the administration of justice today confuses our present needs with what our needs might be in the future, if there were further evolutionary changes or "spontaneous adjustments"[10] in the field of the administration of justice. The argument is premised on the basis that we are confusing present needs with possible future needs ("**the tomorrow, maybe, but not today argument**").

54. We accept that the arguments for devolving the justice function will become stronger in the future as the effects of devolution continue to evolve; but we consider that the case we have described for doing so now

[10] See paragraph 12 above

in relation to devolution for the administration of justice is one that can be sustained at present.

"The piecemeal reform argument"

55. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory ("**the piecemeal reform argument**").

56. The following academics provide persuasive arguments against piecemeal reform:

a. Vernon Bogdanor, Professor of Government at Oxford University, in his book *The New British Constitution* states: *"it is difficult to deny that .... devolution has led to a system of amazing untidiness .... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other".*

b. Rodney Brazier, Professor of Constitutional Law at the University of Manchester, in his book *Constitutional Reform* states: *[The Labour Government's preference for allowing institutions to develop pragmatically may] "explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory".*

c. Larry Siedentop, Emeritus Fellow at Keble College Oxford, in the Financial Times on 31 May 2010 stated: *"Asymmetrical devolution – different degrees of power devolved to Scotland and Wales – amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing*

piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice"

"The laws in England are no different to the laws of England argument"

57. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change ("**the laws in Wales are no different to the laws of England argument**").

58. The differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which we consider gives rise to the question of whether jurisdiction over the administration of justice should be devolved to the Assembly, and not the difference between the substances of our laws when compared to those of England.

59. In any event, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales and the content of which is different to the law in England. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government's legislative programme of no less than 20 Bills during the next four/five years and Westminster will also continue to make Wales-only legislation in the non-devolved fields.

Conclusions

60. If it is decided to proceed further with the idea of a separate legal jurisdiction for Wales, we consider that it would be helpful to look in more detail at the need to implement a system for:

a. Determining the choice of jurisdiction between England and Wales;

b. Transferring cases between the two jurisdictions;

c. Recognising and enforcing cross-border judgments;

d. Establishing in respect of any separation of the criminal law and devolution of criminal justice, a criminal justice infrastructure, such as a separate Attorney General for Wales, a Crown Prosecution Service, a Sentencing Council, and a Prison Service;

e. Establishing a new Court of Appeal Criminal and Civil Division for Wales;

f. Establishing a new role for a representative from the Welsh judiciary to sit on the Supreme Court of England and Wales.

61. As an Association, we are strongly of the view that there should be no barriers to the free movement of the professions as between Wales and England, and vice versa. It is in the interests of the legal professions, and of the public at large, to ensure that there are no restrictions to the professions being able to operate in both jurisdictions.

62. We now turn to the specific questions that have been set out in the consultation paper, for which are answers are contained in **Appendix 1**.

HEFIN REES
CHAIRMAN OF THE ASSOCIATION OF LONDON WELSH LAWYERS
26 JUNE 2012

APPENDIX 1

The Association's responses to the specific questions raised in the consultation paper are as follows:

Response to Question 1

1.1 In the context of the question of whether a territory is a necessary element of a jurisdiction, Wales as a territory is precisely defined in the Government of Wales Act 2006.

1.2 Please see the responses provided in paragraphs 10 to 14 hereinabove.

Response to Question 2

2.1 We accept what is stated by Jones and Williams, which is that a characteristic of a jurisdiction (as they define it) is a distinct body of law. Jurisdiction in the sense used in this consultation is about responsibility for administering the function. See paragraphs 10 to 14 hereinabove.

2.2 In relation to Question 2.1, we consider that there is in Wales a sufficient body of law which is sufficiently distinct from the Laws of England to satisfy this requirement of jurisdiction. It comprises the laws made during the three periods described by Jones and Williams (1536 – 1868; 1868 – 1998; 1998 to the present day[11].

2.3 A body of law is distinct in this sense if it "is unique to Wales or where it parallels similar legislation passed in England, involves significant differences in drafting reflecting Welsh circumstances"[12].

2.4 What matters is the breadth of the legislation, and not whether it is primary or secondary. Under the unwritten constitution, the distinction between primary and secondary legislative powers can be illusory. Much of that which can be achieved by primary legislation can also be done by secondary legislation. It is purely a question of the breadth of the powers conferred upon the Assembly.

[11] Jones and Williams at pages 83 to 100

[12] See Jones and Williams page 90 quoting the Counsel General's evidence to the Richard Commission

2.6 The National Assembly is a legislature because it is empowered to make law applicable within Wales. The fact that this power was more circumscribed than that of the Scottish Parliament does not undermine this basic point.

2.7 As to Question 2.2, what matters is whether there is a distinct body of law and not what kind of law it is: statute or other law. It can even be procedural law. So long as it is distinct, and there is a requirement to follow it, that is sufficient.

2.8 As to Question 2.3, please see the answer above.

Response to Question 3

3.1 A separation of the responsibility for the administration of justice in Wales from that in England is necessary if the Assembly is to have jurisdiction over that function in Wales.

3.2 As to Questions 3.1 to 3.6, please see the Association's response in paragraphs 10 to 14 hereinabove. We envisage very little change in the way courts would work if the Assembly had responsibility for their administration.

Response to Question 4

4.1 The issues are primarily to do with the machinery by which justice is administered, rather than the legislative competence of the Assembly. Please see page 7 of the consultation document for examples of the legislative competence in a field of law being reposed other than in the body exercising responsibility for the administration of justice.

4.2 As to Question 4.1, the functions which need to be devolved if the Assembly is to have jurisdiction over the 'administration of justice', as we define that expression, are described in paragraph 13 hereinabove. If those functions were transferred, the Assembly would have legislative competence in those fields of responsibility.

Response to Question 5

5.1 If 'jurisdiction' over the 'administration of justice', as we define those expressions in paragraph 13, were devolved to the Assembly, there would not be a 'unified' court system.

5.2 Furthermore, the Assembly's legislative competence would thereby include competence in the field of administration of justice. See the answer to question 4.1 above.

5.3 On page 8 of the consultation document the following sentences appears: "There appears to be no single method or process for the creation or emergence of a separate legal jurisdiction .....so that legislation extends to Wales". We do not accept that the assertions/views expressed in those sentences correctly state the law.

Response to Question 6

6.1 See paragraphs 10 to 14 hereinabove for our interpretation of the word "jurisdiction" in the context of this consultation. To answer the question raised here in relation to the present unified system, the definition provided in that paragraph in relation to Wales may be modified so that it reads:

> "In the context of the functions and responsibilities of the Minister of Justice and other Minsters of the Crown with responsibility for the administration of justices in England and Wales generally, the definition of jurisdiction is the territory and or sphere of activity over which their legal authority extends."

6.2 As to Question 6.1, please see paragraph 10 to 14 hereinabove and the last preceding answer.

Response to Question 7

7.1 We do not think so.

7.2 In the context of the present consultation and that of the three essential questions which we have identified in paragraph 4 of our main response, the essential element of the jurisdiction of the Assembly over the administration of justice is the statutory authority to exercise that jurisdiction in the territory defined in the Government of Wales Act 2006.

Response to Question 8

8.1 The laws are different today and there will be more laws in the future which will be different, but the case for devolving responsibility for the administration of justice to the Welsh Government at this time does not

depend simply on different laws. It depends also on the wider constitutional arguments summarised in paragraph 19 hereinabove

Response to Question 9

9.1 This question is concerned with whether the present position with regard to the administration of justice in England and Wales is sustainable or not.

9.2 In our view, whether it is sustainable or not is not to the point.

9.3 The case for and against devolving that function to the Assembly depends primarily on (1) The fact that Wales already has two of the essential characteristics of a jurisdiction at present, (2) it is a legislature with primary legislative capacity, and (3) its continued tie to England for the purposes of the administration of justice is inconsistent with the constitutional settlement made for the other devolved nations of the UK.

Response to Question 10

10.1 Please see the response to Question 9.

Response to Question 15

15.1 Private International Law ("PIL") is concerned with cases with a "foreign" element At present there are no PIL rules relating to cases that have features only concerning England and Wales.

15.2 Were England and Wales to become separate legal jurisdictions, PIL would be introduced, probably based on the PIL rules applicable to cases arising between the present three legal jurisdictions of the UK (which are "foreign" to each other for these purposes). This would add a layer of complexity to English-Welsh cases.

15.3 At present, in cases where both parties are in England and Wales, the claimant may exercise choice as to where in the jurisdiction to issue court proceedings and the defendant may then apply for a transfer to another court. E.g. to adopt the example on page 6 of the Consultation Document, if a claimant issued a claim in Norwich County Court over a walking accident on Snowdon's footpaths, the case could be transferred to a court in Wales if *"it would be more convenient or fair"* or due to *"the availability of a judge specialising in the type of claim in question"*[14]. Judicial specialisation in Welsh law can thus already be a reason to transfer a case to Wales.

[14] Civil Procedure Rules 30.3(2)(b) and (c).

It would take only some simple rule changes to add a presumption that cases with a significant element of devolved Welsh law should be heard in Welsh courts.

15.4 Going further, a specialist Welsh division of the High Court could be established to hear Welsh law cases. The challenge would not be drafting the rules/legislation (which would not involve any complexities of PIL), but providing the judicial, administrative and physical resources.

15.5 The creation of a Welsh legal jurisdiction would not ensure that cases with a Welsh law element would be dealt with by Welsh courts. The PIL jurisdiction rules currently applicable within the three UK jurisdictions would apply as between the four legal jurisdictions. The jurisdiction of a UK court in an intra-UK civil or commercial case is not determined by the issue of which country's law applies to the dispute. The jurisdiction rules[14] provide that a defendant in one of the UK legal jurisdictions shall be sued in that legal jurisdiction, subject to several exceptions which do not include the law applicable to the dispute. However, the court in which proceedings are commenced has a discretion to decline to deal with the case if there is another legal jurisdiction which has power under the PIL jurisdiction rules to hear the case and one of the factors which may be taken into account in exercising that discretion is the applicable law. E.g. if a walker from Norwich were sued in the courts of England for causing damage to footpaths on Snowdon, the English court could (but would not have to) decline to hear the case because (a) the case could have been commenced in Wales as the place where the harmful event occurred[15] and (b) the applicability of Welsh law would be a factor that the English court would be entitled to take into account.

15.6 Accordingly, in English-Welsh cases, the creation of a separate Welsh legal jurisdiction would not be likely to increase the chances of Welsh law cases being dealt with by Welsh courts and could even reduce it. Such an increase could be readily achieved within a short timeframe by rule changes well short of the creation of a separate legal jurisdiction for Wales.

15.7 In Welsh-Scottish or Welsh-Northern Irish cases, the creation of a separate Welsh jurisdiction would have no significant effect from the PIL angle.

15.8 Parties to a contract may specify that any dispute arising in the future shall be dealt with by the courts of a specified country and/or under the law of a specified country. Currently, in English-Welsh contracts there is no need to specify either matter, as the contract is wholly internal to England and Wales. However, if England and Wales became separate jurisdictions, parties would probably begin to do so, with an English

[14] Set out in Schedule 4 to the Civil Jurisdiction and Judgements Act 1982.
[15] One of the exceptions to the rule that a defendant must be sued in the place of domicile

party wanting English law and English courts and the Welsh party wanting Welsh law and Welsh courts. Which party prevailed would depend on the negotiations, but one can see that often the negotiating power would lie on the English side and that international corporations with UK subsidiaries would be likely to be more comfortable with English law and courts than those of Wales. Thus, in this respect, the creation of a separate Welsh legal jurisdiction could result in more Welsh parties finding themselves subject to English law and the English courts.

15.9 Whilst courts will apply the procedural rules applicable in their jurisdiction, they will not in every case apply the substantive law of that jurisdiction. If parties to a contract have not specified which country's law is to apply to the contract, it will be determined at present in England and Wales by the Contracts (Applicable Law) Act 1990[16]. The presumption is that the law of the contract will be that of the country that is the residence of the party who is to effect the performance that is "characteristic" of the contract, which will usually be not the payment of money but the performance for which payment is due. Hence, if a Welsh purchaser of goods from an English supplier failed to pay on delivery, then, if a separate Welsh legal jurisdiction existed, the proceedings would have to be commenced in Wales, but the case would be decided according to English law.

15.10 In the case of negligence (one of the "torts" or civil wrongs), the applicable law is determined according to the Private International Law (Miscellaneous Provisions) Act 1995. The general rule is that the applicable law is that of the country in which the relevant events occurred, unless there are sufficient factors connecting the matter with another country. Thus, if a Welsh walker on Scafell Pike (England's highest mountain in Cumbria) negligently dislodged a rock which injured an English walker, who sued in the courts of a separate Welsh jurisdiction, the Welsh courts would probably apply English law, whereas if both walkers were Welsh, the Welsh court might apply Welsh law. Similarly, if two English walkers were on Snowdon and one injured the other, the action could be brought in Wales and the Welsh court would have to decide whether to apply Welsh or English law.

15.11 Paragraphs (vii) and (viii) are concerned with PIL "choice of law" rules, which would have to be applied if England and Wales became separate jurisdictions. Currently, under the unitary jurisdiction of England and Wales, courts are not concerned with such rules and will apply local laws and by-laws as necessary, for example just as there might be local laws as to footpaths on Snowdon, local authorities in Cumbria might have by-laws as to footpaths on Scafell Pike.

[16] Enacted in order to comply with the EEC Convention on the Law Applicable to Contractual Obligations ("the Rome Convention").

Response to Question 16:

16.1 None of the four options is an appropriate response.

16.2 Reserved powers devolution would not necessarily require an entirely separate legal jurisdiction. Assuming, for instance, that commercial law were reserved, the creation of an entirely separate Welsh legal jurisdiction would result in divergent case law. On the other hand, adequate provision would need to be made for specialist Welsh judicial decision making, e.g. a separate Welsh division of the High Court. In effect, one would be in a quasi-federal system, where state courts would decide on state law or matters and federal courts on UK law. Consideration of the delineation between the two sets of courts could usefully involve study of federal models such as USA and Germany.

Response to Question 17

Yes – please see our response to Question 16.

Response to Question 18

Without giving a complete list: company and commercial law, partnership, family, trusts and probate, land law (real property), chattels, intellectual property, ...

Response to Question 19

19. Yes.

19.1 and 2. It is hard to see why a Wales Assembly legislature, elected by Welsh electors, should have any power to make laws that take effect upon those outside Wales, who have not elected those law makers. That is so whether there is or is not a separate Welsh legal jurisdiction. The present position appears anomalous and unconstitutional, and it would be more so if there were a separate Welsh jurisdiction. In the example given, if English authorities were to have power to assist the enforcement in England of Welsh Assembly laws, that should be by legislation by the law makers elected by English voters. It might be said that where there is express delegation of law making powers to the Welsh Assembly, the English legislature has exercised the power by way of delegation. But when one moves to a reserved powers model, that argument does not hold much water. We should not seek to "have our cake and eat it", as the expression goes.

Response to Question 20

20.1 The short answer to 20 and 20.1 is that it depends on the answers to the other issues; but in essence in terms of education and training, qualification (including post-qualification accreditation) and regulation, even if Wales had a

separate legal jurisdiction, these issues should for the time being be left to the various Regulatory bodies to regulate.

20.2 For instance, the England and Wales Law Society and General Council of the Bar of England and Wales should retain responsibility for the issues relating to qualification and regulation. They would, of course, have to continue working alongside the various universities and legal professional providers.

20.3 There is no need for a separate call or admission to Wales at this stage. Many other jurisdictions, such as Australia, are moving towards a more harmonised system of admission and laws and this represents arguably a modern trend. In fact it may potentially have the effect of deterring international and national law firms setting up in Wales.

20.4 However, it can be envisaged that at a time when as more Welsh legal differences develop, for instance in planning and consumer law, the need for a separate examination on Law and, possibly, procedure will need to be organised. At the moment, there are already differences such as the Welsh Language Act 1993 and the Rights of Children and Young Persons (Wales) Measures 2011. As more divergence occurs, the argument for a complete new apparatus (including admission) becomes more relevant.

20.5 If one also looks at Question 25, depending on what is meant, there would initially be additional expense but in the middle and long term this does not necessarily need to be the case. For instance, the buildings, Judges, civil services etc are already in situ and no increased expense necessarily needs to be incurred. The short term could trigger higher expenditure, for instance in signage, letterheads, publicity, notification etc., but down the line, the additional expenditure would tend to fall way.

Response to Question 21

21.1 In essence it would have to be regulated but eventually previous England and Wales decisions would not be persuasive and the Welsh Court cases be made binding. This, of course, would require Legislative intervention.

21.2 The other issue would be whether the final Court of Appeal would continue to be the Supreme Court/Privy Council. If it were then this would create fewer logistical and legal problems. If, however, it was decided that there should be a Supreme Court of Wales, then in the early years this would arguably create

many difficult legal issues especially in relation to the issues of *stare decidis* and the entire system of common law precedents.

21.3 In relation to different types of Law this raises a dilemma. For instance, consumer protection legislation such as Health and Safety has similar laws across the UK but Scotland has different procedural rules. The same applies to Employment law. There is therefore no real long term problem with this if Wales was to have a separate jurisdiction. Interestingly, a leading case on "Risk", namely R v Porter [2003] ICR 1259 is a Welsh case, where the conviction was quashed by the English Court of Appeal.

21.4 In terms of criminal or family law, Scotland has its own legal system (and procedure) and applies its laws inside Scotland. There is, therefore, no reason why Wales could not devolve this in a similar way as Scotland.

Response to Question 25

25.1 There are several points to consider.

25.2 Before assessing any wider ramifications, there probably needs to be a concerted effort to ensure, through focused and effective communication (across all relevant media sources), an informed debate. Popular perceptions can often be misconceptions and the true benefits (or dis-benefits) misunderstood.

25.3 In a social context, for example, a separate Welsh legal jurisdiction might encourage a greater degree of national (Welsh) self-confidence and reinforce a (Welsh) sense of identity. Though in each case, one would hope, not in any extreme sense.

25.4 Politically, much the same could be said. A distinct political 'will' is likely to emanate from the knowledge that a separate and distinct machinery for the administration of justice exists in Wales. But one must guard against 'over-cooking' it.

25.5 The reinforcement and strengthening of the Welsh language should be a natural consequence - though here again one needs to guard against on 'over-emphasis' on the linguistic benefits which might risk alienating people from using or relying on any such machinery. In short a truly bilingual Ministry of Justice.

25.6 The economic impact is in some ways the most difficult to assess. On the one hand it could lead to a strengthening and improvement in the Welsh economic landscape. On the other, if taken too far, it could militate against people using the newly established machinery in Wales and electing instead to go to e.g. London or another regional centre in England.

Response to Question 26

26.1 This has at least three elements to be considered:

26.2 Communication: Ensuring as widespread (and cost effective) communication as possible is achieved. This entails not only traditional means of disseminating information, but crucially of having up to date websites which are constructed in as user friendly a manner as possible. Such communication, once established, needs to underscore the benefits etc of using an independent legal framework in Wales.

26.3 Cost: offering any independent Welsh legal framework in as cost effective a manner as possible. There should be inherent economic advantages (in going to a local 'centre' rather than say London) but underlining this through a competitive pricing structure (e.g. the administrative cost of filing a claim) should also ensure a more readily accessible (and financially attractive) system.

26.4 Complexity (lack of!): As simple and straightforward a system as possible should encourage people to use it. Ensuring that people who may be intimidated by the prospect of pursuing claims or other matters in England by offering a very expeditious and locally based means of 'going to justice' really must be at the heart of ensuring accessibility.

Response to Question 27

27.1 Additional features for a separate legal jurisdiction to operate effectively - in a specifically Welsh context.

27.2 Structure: how regional/local should a separate legal jurisdiction go? Is it simply a question of having a central office or 'HQ' in say Cardiff (or Caernarfon?) with e.g. 7 'regional' centres in North Wales, Mid-Wales, South West Wales, South East Wales ('the Valleys') and each of the three major urban conurbations (Cardiff, Swansea and Newport)? Or should any administration be even more 'local'. There are clearly cost/efficiency questions tied in here also.

27.3 One might wish to look at the leading economic indicators for revenue generation in Wales Tourism, for instance, and the influx of people from elsewhere in the UK and further afield, might present its own unique challenges in terms of addressing how best to respond to any legal issues arising (speed and simplicity of redress for (or against) 'host' entities (such as hotels). But there may undoubtedly be other areas (agriculture?) which again

might require special attention if only because, relative to Wales, they form such an important part of its economy.

Response to Question 28

Of course! The very fundamental premise is different and a totally different range of issues and questions arise.

Response to Question 29

29.1 One comes readily to mind - education.

29.2 If there is to be an independent MOJ for Wales and a distinct means of administering justice, how is that to be achieved? How will the 'administrators' themselves know what to do and how to do it? One is not talking here of course of distinct university courses specifically designed to teach the administration of justice in Wales! Rather, a more informal, but well structured, means of ensuring that to be administered in what will be its own unique way and manner, a cadre of civil servants will presumably want to understand precisely what it is they are administering - and how.

APPENDIX 2

CYMDEITHAS CYFREITHWYR CYMRY LLUNDAIN
(THE ASSOCIATION OF LONDON WELSH LAWYERS)
Inaugurated on the 17th February 2011 by the The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales

Patron. The Rt Hon Lord Morris of Aberavon KG QC

Minutes of a Speakers Meeting
"A Separate Legal Jurisdiction for Wales"
Committee Room 3, House of Lords
23 May 2012

I. Introduction:

By Hefin Rees: The aim of the evening is to introduce the issues involved in this consultation paper and to hear the speakers address those issues and to invite comments and debate from the membership of the Association.

II. Expert panellists:

Rt Hon Lord Morris of Aberavon KG QC

Winston Roddick CB QC

Rt Hon Elfyn Llwyd MP

III. **Winston Roddick CB QC** (for full notes of address see **Appendix 3**)

Former Counsel General to the Welsh Assembly and Honorary Recorder of Caernarfon, with a practice at the Bar in public law and constitutional law (*inter alia*).

IV. **The Rt Hon Lord Morris of Aberavon KG QC (for full notes of address see Appendix 4)**

Former Attorney-General of England & Wales and Northern Ireland. Former Secretary of State for Wales.

V. **Rt. Hon. Elfyn Llwyd PC**

Barrister and Member of Parliament for Plaid Cymru since 1992; formerly representing Meriomydd Nant Conwy latterly, since 2010, Dwyfor Meirionydd.
Member of the Privy Council since 2011.

"Wales is maturing as a nation. Our development grows in confidence. The structure of our justice system must grow to encase that. Wales has a legislature but no jurisdiction of its own. There are few practical impediments to addressing this discrepancy, NI and Scotland have done so.
Theodore Huckle QC has insisted that separate jurisdictions can co-exist in UK.
The debate is impeded by the relatively weak devolution settlement in Wales, as compared with NI and Scotland.
The Welsh Government consultation is a testament to how essential and urgent this debate is becoming.
2010 – office opened in Cardiff dealing with Administrative cases. 9 out of 10 cases are now heard in Wales. We now have a registry in Wales.
2011 referendum – majority believe Cardiff not Westminster should be the centre of decisions governing Wales.
2007 Wales and Chester disbanded
LCJ -- Eng and Wales – Bingham added Wales.
Family lawyers must have a thorough knowledge of corpus of Welsh law to practice in Wales.
What is required?
Jurisdiction - legal distinct body of law supported by own court structure and legal institutions.
Local Govt Act 1972 – Wales own defined territory. Has own body of law.
WA should base transfer of Scottish powers

Crime is not devolved but is evolving. Examples – fines on shop owners not charging for plastic bags, smoking areas etc.

Separate Welsh jurisdiction – precondition for greater legislative powers or does it provide enhanced legal powers?

Government of Wales Act 2006 should devolve the Administration of Justice to the Welsh Assembly. There should be a separating prosecuting service for Wales, separate Welsh judicial appointments system and welsh legal aid system

It is foolhardy to suggest that there are no barriers to overcome. Consensus will have to be reached regarding whether only Welsh qualification to practice in Wales would be permitted and whether a dualistic body of law could work. There's the question of cross-border practitioners to consider.

Refers to NI, where there are arrangements for qualification and rights of audience to practitioners from England and Wales. In NI there is no automatic right to practice in England.

The devolution of justice matters. Laws ought to be drafted to meet the priorities of the local population. Legal Wales will impact on the whole of society not just the Justice system.

VI. Questions from the floor

Q1. Gerard Forlin QC

Australia – moved from state by state into harmonised/federalised system

Could foreign law firms be put off by separate legal jurisdiction?

Q2. Jonathan Haydn-Williams

How would it assist Welsh business?

England and Welsh law is recognised globally – why would we wish to remove ourselves from the standard law for commerce?

Responses:

Lord Morris

We should look at the number of cases arising in Wales.

It would be helpful to business, lawyers and the public if there is a presumption of sending cases down to Cardiff.

JHW – that can be done without a separate legal jurisdiction.

WRQC – it would not be bad for business – it would be better for business. It would do a great deal for Wales.

The economic advantages are so obvious.

The question confuses the content of the law and the machinery by which the law is exercised.

Nobody is going to be removed from the body of law in England and Wales.

Contributions

Lord Elystan MORGAN

I think there are 2 ends of the telescope.

One is the inevitability of devolution began in 1964 with the appointment of 1st Minister of Wales

When one considers the developments of the last 15 years of Chancery Mercantile courts etc it points to a movement that is inevitable. It is utterly natural. There is no legislature that does not have it's own means of administering it.

Other end of the telescope…

We are not a region, we are a nation. A nation is a nation is a nation.

I don't take the point that the essential choice is a fully-fledged Welsh judiciary and an independent Wales. There is not going to be an independent Wales. It doesn't connote independence as such. A community to have faith in its future without that all-important institution of its own judicial institution.

There is one other factor

The police. 44 years ago I was Police Minster. Even then there was talk about reducing police forces from 43.

If that takes place there might well be a movement to have one police force for Wales and that would be very dangerous. It would raise an issue re the ID of Wales.

John Roberts (Goodman Derrick LLP)

Concentrating on the administration of justice rather more than the legal system generally.

I've been a lawyer for 40 years and never set foot inside a courtroom other than as a witness.

I come from a branch of the law where it has been a perceived benefit to harmonise laws. I am therefore sceptical about creating differences. I am a devolutionist

I heard it said it is to the benefit of lawyers in Wales.

What about the public interest?

Submissions have concentrated on the legal professions – not entirely synonymous with the public at large.

Is a separate legal jurisdiction for the benefit of commercial lawyers in Wales?

Internationally, contracts are governed by the Laws of England and Wales. It attracts a great deal of work to this country. London is not best and work can be done very well anywhere in the UK but we cannot immunise ourselves from competition. That would be a bad thing.

A New York businessman would be likely to chose the law of England rather than the law of Wales and England. That worries me as I deal a lot with Scottish banks.

The laws of Scotland have now changed; that has meant a drift of lawyers from Edinburgh to London.

I genuinely worry whether this will be a benefit to lawyers in Wales.

WRQC

There are two matters to consider:

1. There is a difference in the law in Wales. It is an inevitable consequence of devolution. Carwen Jones says his legislative programme consisting of 30 Bills in Westminster will make Wales-only Bills.

2 The public interest, the arguments place public interest much higher than the interest of lawyers. Concerns for lawyers in Cardiff have never driven the considerations before the Welsh Assembly. It is essentially a constitutional argument which brings law closer to the people. Many of the lawyers in Cardiff are against it.

Elfyn Llwyd

There is a broader economic point; we could harmonise laws in Wales and England.

Malcolm Bishop QC

I am concerned about the restricted practice of lawyers in Wales. There is a lack of self confidence in Wales. I regard it as a scandal that there has not been a Welsh Law Lord in the Supreme Court.

APPENDIX 3

Speaker's Notes provided by Winston Roddick CB QC

For a meeting of members of the

Association of London Welsh Lawyers

to discuss

"A Separate Legal Jurisdiction for Wales"

House of Lords, Wednesday 23 May 2012

1. The matter we are here to discuss is one of importance to all London Welshmen and women and especially those involved in the legal profession and the administration of justice. Wales' constitutional development is of the greatest importance to all Welshmen and women no matter where they live for the time being. The London Welsh community is in a position to observe Wales from a different perspective from that which I occupy. The First Minister will therefore be informed by your views. You may express those views personally but the Association would like you to do so through the Association for the obvious reason that they will be

perceived to be the views of the London Welsh community rather than those of individuals.

The question on which are views are sought

2. Despite the complicated nature of the consultation document, the real question on which the First Minister is consulting is what our views are about responsibility for the administration of justice being devolved to Wales. That is what he said at the Legal Wales Annual Conference last year he proposed to consult on. Since then we have had this rather complicated consultation document but if we start from an understanding that that is the central question, we will not be distracted by those unnecessary complications.

3. The consultation is concerned therefore not with the substance of our laws or the Assembly's legislative competence but with the structures by which justice is administered in Wales and only about that.

4. The two principal questions posed by the consultation document poses are "what is meant by the term 'separate Welsh legal jurisdiction' and "whether or not there should be a separate legal jurisdiction for Wales" [17]

5. In the context of this consultation, the meaning of "jurisdiction" is driven by the terms of that second question and by the answer to that second question. What that second question comes to in simple terms is whether responsibility for the administration of justice in Wales should be devolved to the National Assembly for Wales. That being the context in which we are asked to define jurisdiction, the definition of "jurisdiction" for these purposes therefore is 'the territory or sphere of activity over which the legal authority of the Assembly extends.' The administration of justice as a function is that of the Ministry of justice and it is administered by that department and Her Majesty's Courts and Tribunals Service. It is not a function of the Assembly and, it follows, it is not one of the Assembly's fields of responsibilities. The Assembly therefore has no jurisdiction over the administration of justice at

[17] See the Forward

present; that jurisdiction is vested in the Ministry of Justice. If however that function and field of responsibly were added to the Assembly's functions via its Ministers, the Assembly would have jurisdiction over the administration of justice in Wales just as it has jurisdiction today over health matters and planning and environmental matters.

6. However, the pursuit of a definition of "jurisdiction" or "separate jurisdiction" is in danger of overcomplicating the consultation and distracting its focus which in its essence is concerned with the question whether responsibility for administrating justice in Wales should be devolved to the Assembly. In that context, "jurisdiction" simply means 'responsibility for the administration of justice'. That is the sense in which I use the expression in this address. The question 'what is meant by separate Welsh Jurisdiction' adds nothing to the question should responsibility for the administrator of justice in Wales be devolved to the Assembly.

7. The aspects of the administration of justice to which I refer when using the expression administration of justice are the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. I also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission. Save for the last of those functions, they are all presently vested in the Ministry of Justice, the Home Secretary and other minsters of the UK Government. The mechanism for transferring them and the estates and other assets which they comprise is set out in sections 58, 95 and 109 and schedules 3, 4, 5 and 7 of the Government of Wales Act 2006.

Background

8. Significant developments within Wales's legal landscape have taken place already in the wake of devolution. One such development was the creation of 'Legal Wales' or 'Cymru'r Gyfraith'. The Government of Wales Act 1998 had ushered in significant constitutional changes and it was of the highest importance that Wales' legal 'constituencies' should come together to form a civic society to engage with the new order and that is what Legal Wales is, a new civic society. It has a representative

committee the members of which are drawn from every constituency of law in Wales including barristers, solicitors, judges, the law schools of the universities of Wales, lawyers in local government, Assembly lawyers, the Institute of Legal Executives, the tribunals and the specialist law associations of Wales.[18] In 2000, the Mercantile Court for Wales was established in Cardiff. The Court of Appeal Civil Division now sits regularly in Cardiff as does the Court of Appeal Criminal Division. In 2008, there was established the Administrative Court for Wales. Most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are now heard in Wales; Employment Appeals Tribunals now sit regularly in Wales. There has been a Chancery Court in Wales exercising High Court Jurisdiction for a number of years before devolution. A significant post-devolution change was the rearrangement in April 2007 of the boundaries for the administration of justice in Wales. The administrative region ceased to be Wales and Cheshire and became HMCS Wales. Henceforth, the court services in Wales will be administered on an all Wales basis. As recently as 2010, there was established the Association of the Judges of Wales which is an association of District Judges, and judges of the Circuit Bench, High Court, Court of Appeal and House of Lords and the Supreme Court. And in April 2010, there was established the Wales Bench Chairmen's Forum.

9. Specialization, too, is strong in South Wales. It has been so since the early seventies but is now in an expansive phase. It is developing, hand in hand, with the specialist courts which have been established in Wales in recent years and with the National Assembly's expanding responsibilities. With specialization and devolution of government came opportunities and challenges. The legal profession in Wales is up to the challenge and has seized the opportunities. Since devolution, there have been established four specialist associations – the Wales Public Law and Human Rights Association, the Wales Commercial Law Association, the Wales Personal Injuries Law Association and the Wales Parliamentary Bar Association

10. These developments were spontaneous responses to devolution. They are the signs of Wales' emerging legal jurisdiction. "Wales is emerging as a separate jurisdiction which needs to be separately recognised" (Professor Tim Jones and Jane

[18] See footnote 1

Williams 'Wales as a Jurisdiction'). They are the evidence of what Lord Carlile QC described as 'the evolution of devolution'.

11. As these examples demonstrate, the break-up of the unitary political system brought about by the devolution statutes has been accompanied by at least a loosening of the unified legal system of England and Wales. The differences are likely to become more pronounced and more significant constitutionally as the process of devolution continues and especially now that the Assembly has acquired increased legislative competence. The description of Wales as an "emerging jurisdiction" exudes energy and promise.

The arguments for jurisdictional devolution

12. It should not be thought that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is to be attributed entirely to devolution. The process of change began much earlier. It has been taking place albeit very gradually for about 63 years. The Welsh Courts Act, 1942 might have been the smallest possible step forward but it began a process of change to which momentum was added by the Welsh Language Acts of 1967 and 1993 and the pace of which quickened following the passing of the Government of Wales Act 1998. Since 1942, therefore, the scope for doing it differently in the practice and the teaching of the law and the administration of justice in Wales in Wales has increased.

13. But those are the historical arguments. What are the constitutional arguments of today for devolving to the Assembly the function of administering justice in Wales? The principal arguments, I believe, are (i) that it would be internally logical, consistent and coherent, (ii) it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales,(iii) it would bring justice closer to the people for whom the laws were made and (iv) it makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction? Professor Gwynedd Parry (FRHistS) Professor of Law and History at Swansea

University, says of these argument that they provide very strong support for jurisdictional devolution

The arguments against jurisdictional devolution

14. A number of substantial arguments have been advanced against devolving responsibility for the administration of justice to the Assembly. I have selected those which are advanced most often. Not in any order of strength, they are as follows

15. Firstly, that devolving responsibility for the administration of justice would be too radical a change at this time (the too radical argument.).

16. This argument needs to be measured against the fundamental changes to the British Constitution which have taken place very recently. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament. Those changes did not happen alone. Other significant changes were the Human Rights Act 1998 by which the European Convention on Human Rights became incorporated into the domestic law of the UK; Freedom of Information Act 2000 which aims to make government more open and less secretive; the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber and the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European parliament. Professors Jowell and Oliver have described these changes as hammer blows to our established constitutional principles. The late Professor Sir David Williams described the Welsh devolution settlements as having brought about "an astonishing burst of constitutionalism". Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century "have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... even an

established democracy needs constantly to be reviewed and renewed" (Jowell and Oliver).

17. The momentum for fundamental reforms is a continuing one. The Coalition Government's proposed reforms include the introduction of fixed term parliaments, reforming the voting system and further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state. There were many reasons which drove devolution but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively or meeting the demands of democracy of the latter half of the 20th century not to mention those of the 21st century. Devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home countries; between the state and the citizen and between citizen and citizen.

18. Staying with the argument that t would be too radical, we need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and Northern Ireland have their own systems for administrating justice. It is the case that Scotland always did have its own distinct legal system but Northern Ireland's separate justice system is the product of recent legislation. Only Wales and England are administered jointly for these purposes but that was not always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters".(Professor John Davies, A History of Wales).

19. There are sound constitutional reasons why the judiciary cannot involve themselves with the question of whether responsibility for the administration of justice in Wales should be devolved or not; that is a political matter. Nevertheless, the judiciary at every level including the magistracy and HMCTS Wales, the HM Government Department responsible for administrating Justice in Wales, have demonstrated a strong awareness and understanding of Wales' developing distinct identity in legal matters and of the importance of the Welsh language in the

Administration of Justice in Wales. When opening the Mercantile Court in Cardiff, Lord Bingham as Lord Chief Justice of England and Wales, said

> "This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a proud, distinctive and successful nation."

20. The second argument against is that the system of justice in the UK is the envy of the whole civilised world. Our judges are independent, of outstanding quality and are devolution aware. Unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out (the quality argument).

21. Devolving responsibility for the administration of justice would not dilute these strengths one bit. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The question is concerned only with the structures by which the administration of justice is administered.

22 A third argument is that we should leave devolution to evolve and see where we get to. The evolutionary changes in the administration of justice in Wales (which I described earlier when describing the background against which this consultation is taking place (in paragraphs 8, 9 and 10) have occurred even though justice is not a devolved field and whilst it might be doubtful that they would have occurred to the extent they have were it not for devolution they have occurred without justice being a devolved field (devolution by evolution argument).

23. This is an aspect of the argument described by Lord Carlisle QC as devolution by evolution. The Richard Commission criticised it as devolution of a kind which did not follow any discernible or comprehensible policy.

24. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility today confuses our present needs with what our needs might be in the future if there were further evolutionary changes or "spontaneous adjustments"[19] in the field of administration of justice. The case for change cannot be sustained at present. (the argument that we are confusing present needs with possible future needs) Tomorrow, maybe, but not today

25. I have sought to draw a clear distinction between the past and present on the one hand (paragraphs 12 and 13 above) and the future on the other (paragraph 11 above). You will recall that I said earlier that the arguments for change will strengthen in the future. And you will recall what Professor Gwynedd Parry's said as to the strength of the present constitutional arguments for devolving justice. That is a case that can be sustained at present.

26. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory (the piecemeal reform argument).

27. Let me cite some very persuasive authorities on this piecemeal argument.

Vernon Bogdanor, Professor of Government, Oxford University in his book The New British Constitution

> *"it is difficult to deny that .....devolution has led to a system of amazing untidiness.... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other".*

Rodney Brazier, Professor of Constitutional Law, University of Manchester in his book, Constitutional Reform.

> *[The Labour Government's preference for allowing institutions to develop pragmatically may] "explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory"*

[19] See paragraph 10 above

Larry Siedentop, emeritus fellow, Keble College Oxford, Financial Times, 31 May 2010.

> *"Asymmetrical devolution – different degrees of power devolved to Scotland and Wales - amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice"*

28. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change (the laws in Wales are no different to the laws of England argument)

29. The differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which gives rise to the question of whether jurisdiction over the administration of justice should be devolved to the Assembly and not the difference between the substances of our laws when compared to those of England. *[have set out constitutional arguments for the change in paragraphs 12 and 13 above.]*

30. In any event, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government's legislative programme of no less than 20 Bills during the next four/five years and Westminster will continue to make Wales only legislation in the non-devolved fields.

Winston Roddick

APPENDIX 4

1. I am grateful for the opportunity to make my observations to the Constitutional and Legislative Affairs Committee of the Welsh Assembly.

2. My starting point is that I am a devolutionist which, short of considerable argumentation, means that I wish to bring government closer to the people in Wales. At first blush a separate Welsh (legal) jurisdiction is not a governmental activity, although one of the consequences of the considerable development in powers for the Welsh Assembly since my first proposals in 1976 is that there is a new corpus of law emanating from the Assembly, both before and after the new powers recently granted to it.

3. I would say in passing that in any negotiation between the Assembly and the Westminster Government for further powers there are matters of governmental activity which should have a high priority, such as accountability for Welsh broadcasting, the police, aspects of energy production and perhaps a re-appraisal of how to achieve greater democratic accountability, possibly jointly, of the responsibilities of the Environmental Agency in Wales. I deliberately do not traverse what might be termed "the financial relationship with Westminster", a re-appraisal of which is long overdue.

4. The Secretary of State for Wales had few powers in the beginning. Under governments of both persuasions, those powers were substantially increased, particularly during the period of my stewardship of the office from 1974-79. The driving force for the negotiation for new powers, which occurred simultaneously with the presentation of devolution proposals, was the need to create administrative experience in the Welsh Office in new fields which could serve as the building blocks for the powers of the future Assembly. Without such acquisition the new Assembly would have an even steeper learning curve. I deal with this aspect of my work in some detail in my book *"Fifty Years in Politics and the Law"* chapters 16 and 17.

5. I mention these matters since politics is "the art of the possible". Wise politicians might wish to prioritise more transfers of political decision making, which this proposal is not, however desirable it may be

6. Let me welcome the administrative decisions which have been taken by a wise judiciary to ensure that the sittings of various important courts now take place in Wales. As enumerated none of these, I surmise, would have unintended political devolutionary consequences.

7. Not having practised as a lawyer in Wales since my very young days I have no experience of the consequences of devolution on practitioners in Wales. I surmise that a lawyer in the civil – possibly criminal field, advising a client on matters in Wales would have to ensure that he checked both the effect of Westminster laws, and laws emanating from Cardiff, both before and after the granting recently of "law-making" powers to the National Assembly. These matters might have to be judicially determined wherever the case was set down.

8 I am, however, unclear as to what a separate jurisdiction entails. I am not alone in this as the first question the Committee asks is the meaning of the term "Separate Welsh Jurisdiction". Short of Wales becoming an independent state nothing can really be wholly

separate. Even the devolution proposals which I proposed and now adopted in subsequent legislation envisaged the judicial determination of disputes between the Assembly and Westminster by the Supreme Court in London.

At least we have a clear answer to one part of the question. A "Separate Welsh Jurisdiction" cannot mean the undermining of this.

9. On the assumption that a more limited "Separate Welsh Jurisdiction" is contemplated in the question it must mean higher and lower courts operating separately from the courts of England. Judges, I presume, would be appointed specifically to the courts in Wales. This hearkens back to the courts of the Great Session in Wales (abolished in 1830) to which judges were specifically appointed and I think I am right in my recollection, could still practice as counsel in the courts at Westminster nonetheless.

10. In one of the arguments that used to be put to me when I was working out my proposals for devolution was that Wales, unlike Scotland, did not have a separate legal system with its legal corpus quite distinct from the English Common Law. My reply was "so be it: what does it matter?" The repatriation of democratic decision-making was a different issue and independent of a legal jurisdiction and was no bar to devolution, in our case in Wales.

11 I note that in civil matters there is an appeal from the Scottish Courts direct to the Supreme Court and I surmise if Scotland achieved independence this would be discontinued.

12. However, it is for the proposers of a "Separate Welsh Jurisdiction" to set out what they mean by it, and not for consultees to guess. Does it mean a separate court of appeal in Wales?

13 I have, however, a limited experience of the courts in Northern Ireland as I held the office of Attorney General there, concurrent with being the A G. for England and Wales. My main responsibilities were for the criminal law with my own Director of Public Prosecutions for the Province whom I supervised and discussed cases of difficulty. The A.G's responsibilities were, of course, wider. In addition, and it is not an exhaustive list but the Attorney was the guardian of the public interest. I had a responsibility for commencing contempt cases, for charities and determining whether a Nolle should be entered in prosecutions. This is not an exhaustive list. I have no recollection of any difficulty arising from the fact that Northern Ireland had a separate jurisdiction. I had appropriate relations with the judiciary in the course of my regular visits. I was honoured to be called to the Bar of Northern Ireland.

14. My most onerous responsibility was taking decisions on a very frequent basis, though not as frequent as some of my predecessors, as to whether a defendant should have a jury trial for an indictable offence, or be tried by "The Diplock Courts" without a jury. As a life-long jury man in criminal trials and one of its defenders, I admired the stewardship of the judiciary in their exercise of their probably unwelcome jurisdiction.

15. I understood, because of the small size of the judiciary, both of the High Court and the Court of Appeal, there could be practical difficulties in ensuring that the availability of judges who had not already been "contaminated" by previous knowledge of other stages of a case. My understanding was that any such problems could be and were overcome.

16. This leads me to a conclusion that before the Committee proceeds any further it might wish to canvass the practical implications of whatever is on the table by taking advice from judges, lawyers and others experienced in the work of the Courts of both Northern Ireland and Scotland.

17. Since preparing my evidence I have had the advantage of consulting with the Rt Hon the Lord Carswell, a former Lord of Appeal in Ordinary and Lord Chief Justice of Northern Ireland. I have, with his consent, attached his analysis in a separate and independent factual note.

18. It is not at this stage possible to estimate the cost of creating an "Independent Jurisdiction". I surmise they would be considerable. The Committee might want to consider this as a priority.

19. It is self-evident that the pool for the appointment of Chief Justice and judges of the Court of Appeal in Wales would be small if it were decided that promotions would only be made from within the Welsh Judiciary. If, as is likely, a separate Attorney General for Wales were to be appointed, his relationship with the Attorney General for England and Wales would have to be decided. In Northern Ireland the England & Wales Attorney General is still the Advocate General I believe.

20. I am told that in Dublin the model adopted is a judge-led system, which must be demanding on judicial time. In Northern Ireland there is a Director of the Court Service who consults where appropriate with the Lord Chief Justice. If this were the model adopted for Wales, a Director of the Court Service would be required. Other issues to be determined would be family courts and responsibility for magistracy.

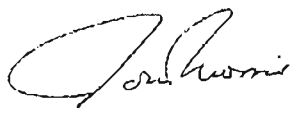
21. It may be that it would be more fruitful for the Committee to inquire how the recent developments of court sittings in Wales might be extended and consolidated. I do not know what proportion of Welsh court work is involved in the "Regular Sittings" of the Court of Appeal Division, or indeed the other courts. A presumption that "Welsh work" should be set down for hearing in Wales I surmise would be welcomed.

It may be that a way forward is to delineate that part of the Ministry of Justice and the administrative machinery of the courts further to Wales. It would mean a recognition of the need for special provision for Wales given that the Assembly has law-making powers, as opposed to the present unitary jurisdiction. I am not competent to advise on such policies. If the political will is there some practical progress could be achieved without incurring significant expenditure.

22. I do not think there is any further assistance I can give.

Note:
The acknowledged legal historian for Northern Ireland is Sir Anthony Hart, a retired High Court Judge and Professor Desmond Greer has written extensively and authoritatively in this field.

Note on "Requirements of a Legal Jurisdiction" is attached.



Lord Morris of Aberavon
27/3/2012

WELSH GOVERNMENT CONSULTATION

RESPONSE OF THE STANDING COMMITTEE FOR LEGAL WALES

1. The Standing Committee for Legal Wales (SCLW) is broadly representative of the legal community within Wales, comprising members of the judiciary, the Law Society, the Bar, ILEX, CPS and legal academics. The committee's terms of reference are,

> " ... to provide a forum for the discussion and formulation of views and proposals for action on issues affecting the administration of justice, the teaching of law and the provision of legal services as they affect Wales and, in particular :
>
> (a) to co-ordinate responses to consultations on such matters by the National Assembly for Wales or the United Kingdom Government;
>
> (b) where the Committee think it appropriate to make representations on such matters to the National Assembly for Wales, the United Kingdom Government or any other relevant body.
>
> (c) To promote the interests of the legal community in Wales."

2. It is inevitable, given the committee's make up and diverse views, that a single response to the questions posed will prove to be almost impossible. It is understood that separate submissions from individuals/organisations from within SCLW will be made to the government consultation independently. The purpose of this paper is to provide, in so far as possible, a broad, generalised response which reflects the views and submissions of the SCLW. It should be emphasised that this response does not in any way purport to represent the individual views of judicial members of the Standing Committee on policy or political matters.

BACKGROUND

3. On the 19th February 2012, the SCLW prepared a paper for the Constitutional and Legislative Affairs Committee entitled 'Submissions of the Legal Wales Standing Committee on Jurisdictional Devolution' (annexed hereto). Its purpose was to outline the committee's views and proposals in respect of a separate legal jurisdiction for Wales. A number of the issues raised in the current consultation were addressed in this paper and it is not proposed to repeat these submissions, save and except to emphasise that the committee's stance remains more or less unaltered.

4. As was submitted to the Richard Commission (2004) on behalf of SCLW 'the devolution of primary law making powers will lead to a more coherent, accessible and identifiable body of Welsh law. A further effect of such a transfer will be to strengthen the argument for devolving the administration of justice in Wales.'

5. This, it seems, following the result of the referendum, would be the next logical step. There is a clear view shared, albeit not unanimous, amongst the current SCLW that in principle the idea or concept of a separate legal jurisdiction for Wales is attractive and that the only real questions which need to be addressed are firstly, when this might be appropriate and secondly, the practical and financial considerations of such a fundamental restructure.

6. A separate legal jurisdiction for Wales would, it is submitted, amount to the responsibility for the administration of justice in Wales. The Administration of Justice would include the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Crown Prosecution Service in Wales, the Probation Service in Wales, all of Her Majesty's Tribunals, the Magistrates' Court, the Prison Service and the civil service responsible for the administration of justice in Wales.

7. In so far as the first question posed, namely when this concept might be appropriate, it is submitted that following this consultation, and provided the responses are mainly positive, then there is no reason why the assembly should not pursue this concept straightaway. It will not be something which would happen overnight; there would need to be a bill drafted; fully debated before the House of Parliament and the assembly; and if passed, gradually implemented. On any view this would take a number of years. As to the practical considerations, there would need to be guaranteed adequate training for all lawyers affected; adequate and comparable resources and funding for all practitioners, judges, tribunals and staff. It would be vital to maintain the independence of the judiciary. Judges could continue to be appointed on an England and Wales basis thus ensuring that they remain part of a larger judicial college. However, the ability to continue to assign judges to sit on cases within the Welsh courts will ensure that judges with the appropriate experience and background hear such cases. For example, all cases which originate from Wales, which apply welsh law should be heard in Wales, before a Welsh appointed judge, with solicitors and/or barristers who have received appropriate training. This would apply in the Magistrates' court, Tribunals, Crown Court, High Court and the Court of Appeal.

8. It is submitted, given that there have been significant constitutional changes already implemented following devolution, in the fields of health, planning and the environment, that the framework for change is already in place. In reality, the type of work undertaken by the individuals affected would not change materially; they would continue to administer justice, albeit from within Wales rather than part of the unified legal system of England and Wales. In that sense it could potentially cost very little and arguably result in significant savings; for example local justice should be dealt with locally, rather than the need, as has been the case in the past of travelling to London or other large metropolitan cities to hear welsh cases. Solicitors, the Bar, Tribunals, Magistrates, Judges and the court service would continue to administer

justice from the same buildings, using the same equipment under a devolved system and as such any change would be cost neutral.

9. There is much more than just a constitutional case for devolving the administration of justice. Amongst the advantages it would bring to Wales are:

(i) the administration of justice in Wales and its institutions would become closer to the people of Wales;

(ii) the organisation within Wales of court and tribunal sittings in Wales is likely to add to the efficiency of those bodies and to the prompt disposal of work;

(iii) the economic benefits which flow from the existence within Wales. For example, employment in support industries, the generation of fee-earning work in related professions, construction of new courts and offices to manage the system from Wales;

(iv) the existence of legal institutions within Wales would create work and career structures not presently available in Wales;

(v) the development of expertise amongst the legal professions in Wales;

(vi) the geographical limitations on the right to use the Welsh language in the administration of justice would be recognised and accommodated; and

(vii) access to the courts in Wales by solicitors, barristers and other eligible advocates would not become restricted.

10. The SCLW is aware that there are a number of arguments advanced against any devolution of the administration of justice. There are arguments advanced that any such change would be too radical; that there would be no guarantee that the quality of the legal services currently enjoyed by Wales would be maintained; and that no change is necessary, the laws of England and Wales are the same and that we should simply allow the devolution of the administration of justice to happen naturally, in piecemeal fashion, as has been the case since the assembly came into being. It is understood that these arguments are advanced in more detail in other

papers submitted to the assembly and as such the arguments for and against are not addressed in any great depth in this paper.

THE SPECIFIC QUESTIONS RAISED IN THE CONSULTATION DOCUMENT

Question 1 (pages 4-6)

In the context of the question of whether a territory is a necessary element of a jurisdiction, Wales as a territory is precisely defined in the Government of Wales Act 2006 (the Act).

Question 2

Jurisdiction in the sense used in this consultation is about responsibility for administering the function.. In that sense, a distinct body of law is not a necessary prerequisite but it is generally accepted that it is one of the essential characteristics of a jurisdiction in the sense in which that word is defined by Professor Tim Jones and Jane Williams.

Question 3.

A separation of the responsibility for the administration of justice in Wales from that in England is very obviously necessary if the Assembly is to have jurisdiction over that function in Wales.

Questions 3.1 to 3.6.

See paragraph 4 above. We envisage very little change in the way courts would work if the Assembly had responsibility for their administration.

Question 4.

The consultation is primarily concerned not with the substance of our laws or the Assembly's legislative competence but with the structures by which justice is administered in Wales. The issues are to do with the machinery by which justice is administered and not with the legislative competence of thee Assembly.

Question 4.1

The functions which need to be devolved if the Welsh Ministers/Assembly/Wales is to have jurisdiction over the 'administration of justice' as we define that expression are described in paragraph 6 above. If those functions were transferred, the Assembly would have legislative competence in those fields of responsibility.

Question 5. If 'jurisdiction' over the 'administration of justice' as we define those expressions above were devolved to the Assembly, there would not be a 'unified' court system. Furthermore, the Assembly's legislative competence would thereby include competence in the field of administration of justice.

Question 6.

To answer the question raised here in relation to the present unified system, the definition provided in that paragraph in relation to Wales may be modified so that it reads

"In the context of the functions and responsibilities of the Minister of Justice and other Minsters of the Crown with responsibility for the administration of justices in England and Wales generally, the definition of jurisdiction is the territory and or sphere of activity over which their legal authority extends"

Question 7

We do not think so. In the context of the present consultation and that of the three essential questions (i) what is meant by the term 'separate Welsh Legal Jurisdiction'?; (ii) whether or not there should be a separate legal jurisdiction for Wales?; and (iii) what might the likely consequences be of creating that jurisdiction?, the essential element of the jurisdiction of the Assembly over the administration of justice is the statutory authority to exercise that jurisdiction in the territory defined in the Act.

Question 8.

The laws are different today and there will be more in the future but the case for devolving responsibility for the administration of justice to the Assembly at this time does not depend simply on different laws. It depends additionally and primarily on the wider constitutional arguments.

Question 9.

These are concerned with whether the present position with regard to the administration of justice in England Wales is sustainable or not. In our view, the case for and against devolving that function to the Assembly is not to do with whether the present system is sustainable or not but whether the present system is in keeping with the other constitutional changes which have been made to the constitution of the UK and in particular with the devolution settlements of Scotland and Northern Ireland.

Submissions of the Legal Wales Standing Committee
on
Jurisdictional Devolution
to
The Constitutional and Legislative Affairs Committee
National Assembly for Wales
19 February 2012

Legal Wales Standing Committee and a summary of its submissions

1. This is the submission on behalf of the Legal Wales Standing Committee which comprises barristers, solicitors, legal executives, judges, members of tribunals, the CPS and legal academics.[1]

[1] As the principal question for the inquiry is whether the law should be changed (by adding a new field or responsibility to the Assembly's existing fields of responsibility), the exercise is entirely political (See IRC V Yorkshire Agricultural Society [1928] 1KB 61 Senior Assembly Civil Servants and the Counsel General are therefore unable to associate themselves with these submissions. Judicial members may not express views on matters of policy.

In summary, these submissions set out what the standing committee believes to be the constitutional and other arguments in favour of devolving responsibility for the administration of justice in Wales to the National Assembly for Wales (the Assembly). We deal also with the principal arguments against devolving that field of responsibility.

Introduction

2. The administration of justice is a field of responsibility which is presently administered on an England and Wales basis by the Ministry of Justice, and Her Majesty's Courts and Tribunal Service (HMCTS). At the Legal Wales Annual Conference in October 2011, the First Minister announced that he proposed to initiate a public debate on the question whether that responsibility should be devolved to the Assembly and that it was his government's intention to issue a Green Paper to seek the views of the people of Wales. On the 9th December 2011, the Constitutional and Legislative Affairs Committee of the Assembly (the committee) under the chairmanship of Mr. David Melding AM announced that it proposed to carry out an inquiry into the establishment of a 'separate Welsh jurisdiction'. The terms of reference of the inquiry are described on page 6 of the scoping paper. These are

> "The committee has no wish to pre-empt the wide-ranging public debate promised by the First Minister. The objective of the inquiry ..... is for the Committee to contribute to the public debate on the need for a separate Welsh jurisdiction by taking expert evidence on
>
> - the meaning of the term "separate Welsh jurisdiction";
> - the potential benefits, barriers and costs of introducing a separate Welsh jurisdiction;
> - the practical implications of a separate jurisdiction for the legal profession and the public;
> - the operation of other small jurisdictions in the UK, particularly those, such as Northern Ireland, that use a common law system.

About the terms of reference

3. These submissions address the terms of reference as set out in the scoping paper and the letter of the 9th December.

4. The aspects of the administration of justice to which we refer in these submissions are the Crown Court, the High Court, the criminal and civil divisions of the Court of Appeal, the Prosecution Service, all Tribunals, the Magistrates Courts Service, the prison service, the Civil Service responsible for the administration of justice in Wales, and the police service. We also include the authority to appoint judges subject, however, to the supervision of an independent judicial appointments commission.

5. Articles in the press may be taken to suggest that the inquiry is limited to fields already devolved. That would involve two justice systems in Wales, one to administer justice in relation to devolved responsibilities and the other dealing with the non-devolved responsibilities, and is not considered to be practicable. Moreover, the inquiry is not concerned with the substance of our laws or the authority to make laws; it is concerned only with the structures by which the justice system is administered in Wales[2]. The courts of Scotland administer the criminal law in relation to drugs, firearms and abortions and its civil courts and tribunals exercise jurisdiction in relation to

[2] We return to this in paragraph X

employment law even though the making of laws in those fields has not been devolved to the Scottish Parliament.[3]

"What we mean by jurisdiction"[4]

7. We are here concerned with the jurisdiction of the National Assembly for Wales (the Assembly) and not that of a court of law. Therefore, the relevant definition of "jurisdiction" is the territory or sphere of activity over which the legal authority of the Assembly extends. However, the pursuit of a definition of "jurisdiction" or "separate jurisdiction" is in danger of overcomplicating the inquiry and distracting its focus which in its essence is concerned with the question whether responsibility for administrating justice in Wales should be devolved to the Assembly or not. In that context, "jurisdiction" simply means 'responsibility for the administration of justice'. That is the sense in which the expression is used in this submission. If responsibility for the administration of justice were to be devolved to the Assembly, it would have jurisdiction over the administration of justice in Wales.

Background

8. Significant developments within Wales's legal landscape have taken place already in the wake of devolution. One such development was the creation of 'Legal Wales' or 'Cymru'r Gyfraith'. The Government of Wales Act 1998 had ushered in significant constitutional changes and it was of the highest importance that Wales' legal 'constituencies' should come together to form a civic society to engage with the new order and that is what Legal Wales is, a new civic society. It has a representative committee the members of which are drawn from every constituency of law in Wales including barristers, solicitors, judges, the law schools of the universities of Wales, lawyers in local government, Assembly lawyers, the Institute of Legal Executives, the tribunals and the specialist law associations of Wales.[5] In 2000, the Mercantile Court for Wales was established in Cardiff. The Court of Appeal Civil Division now sits regularly in Cardiff as does the Court of Appeal Criminal Division. In 2008, there was established the Administrative Court for Wales. Most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are now heard in Wales; Employment Appeals Tribunals now sit regularly in Wales. There has been a Chancery Court in Wales exercising High Court Jurisdiction for a number of years before devolution. A significant change was the rearrangement in April 2007 of the boundaries for the administration of justice in Wales. The administrative region ceased to be Wales and Cheshire and became HMCS Wales. Henceforth, the court services in Wales will be administered on an all Wales basis. As recently as 2010, there was established the Association of the Judges of Wales which is an association of District Judges, and judges of the Circuit Bench, High Court, Court of Appeal and House of Lords and the Supreme Court. And in April 2010, there was established the Wales Bench Chairmen's Forum.

9. Specialization, too, is strong in South Wales. It has been so since the early seventies but is now in an expansive phase. It is developing, hand in hand, with the specialist courts which have been

[3] We mention those areas of law because they are the examples which are cited by the First Minister (see paragraph 5 of the scoping paper).

[4] See First Minster's address as Counsel General which is quoted in paragraph 5 of the scoping paper.

[5] See footnote 1

established in Wales in recent years and with the National Assembly's expanding responsibilities. With specialization and devolution of government came opportunities and challenges. The legal profession in Wales is up to the challenge and has seized the opportunities. Since devolution, there have been established four specialist associations – the Wales Public Law and Human Rights Association, the Wales Commercial Law Association, the Wales Personal Injuries Law Association and the Wales Parliamentary Bar Association

10. These developments were spontaneous responses to devolution. They are the signs of Wales' emerging legal jurisdiction. "Wales is emerging as a separate jurisdiction which needs to be separately recognised" (Professor Tim Jones and Jane Williams 'Wales as a Jurisdiction'). They are the evidence of what Lord Carlile QC described as 'the evolution of devolution'.

11. As these examples demonstrate, the break-up of the unitary political system brought about by the devolution statutes has been accompanied by at least a loosening of the unified legal system of England and Wales. The differences are likely to become more pronounced and more significant constitutionally as the process of devolution continues and especially now that the Assembly has acquired increased legislative competence. The description of Wales as an "emerging jurisdiction" exudes energy and promise.

The arguments for jurisdictional devolution

12. It should not be thought that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is to be attributed entirely to devolution. The process of change began much earlier. It has been taking place albeit very gradually for about 63 years. The Welsh Courts Act, 1942 might have been the smallest possible step forward but it began a process of change to which momentum was added by the Welsh Language Acts of 1967 and 1993 and the pace of which quickened following the passing of the Government of Wales Act 1998. Since 1942, therefore, the scope for doing it differently in the practice and the teaching of the law and the administration of justice in Wales in Wales has increased. Once we come to understand the significance of Legal Wales and the significance of the fact that Wales is an emerging jurisdiction, once we acknowledge these significant developments, the case for devolving justice becomes a very persuasive constitutional argument.

13. But these are the historical arguments. What are the constitutional arguments? The principal arguments, we believe, are (i) that it would be internally logical, consistent and coherent, (ii) it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales,(iii) it would bring justice closer to the people for whom the laws were made and (iv) it makes good constitutional sense if the institution which is responsible for making the laws were also to have the responsibility and the accountability for their administration. Is there an Assembly or Parliament enjoying full legislative competence which does not also have responsibility for the administration of justice within its territorial jurisdiction?

The arguments against jurisdictional devolution

14. There are substantial arguments against devolving responsibility for the administration of justice. We set these out below but not in any order of importance or strength.

15. Firstly, that devolving responsibility for the administration of justice would be too radical a change at this time (the too radical argument.).

16. This argument needs to be measured against the fundamental changes to the British Constitution which took place in the closing years of the last century.. The devolution statutes of 1998 created a Parliament for Scotland and Assemblies for Northern Ireland and Wales each of which, to different extents, has power to exercise legislative and executive functions previously exercised by the Westminster Parliament. They made Britain quasi-federal and diluted one of our fundamental constitutional principles, the sovereignty of Parliament. Those changes did not happen alone. Other significant changes were the Human Rights Act 1998 by which the European Convention on Human Rights became incorporated into the domestic law of the UK; Freedom of Information Act 2000 which aims to make government more open and less secretive; the reform of the House of Lords, which aims to reduce the number of hereditary peers as members of the second chamber and the reforms in our system of voting which have been introduced for elections to some of our democratic institutions such as the Assemblies and the European parliament. Professors Jowell and Oliver have described these changes as hammer blows to our established constitutional principles. The late Professor Sir David Williams described the Welsh devolution settlements as having brought about "an astonishing burst of constitutionalism". Not only were these changes recent, the extent and rapidity of them have been astonishing. Constitutional principles which had become established for a century "have come under pressure as constitutional arrangements in the UK respond to changing political, economic, social and international circumstances and to changing conceptions of the values and institutions which should support a modern constitutional democracy .... even an established democracy needs constantly to be reviewed and renewed" (Jowell and Oliver).

17. The momentum for fundamental reforms is a continuing one. The Coalition Government's proposed reforms include the introduction of fixed term parliaments, reforming the voting system and further changes to the House of Lords. In this period in our history, it would appear that our constitution is in a near fluid state. There were many reasons which drove devolution but perhaps the strongest reason of all lies in the quality of democracy itself. The unitary system which had been in place for a number of centuries was perceived as no longer capable of performing effectively or meeting the demands of democracy of the latter half of the 20th century not to mention those of the 21st century. Devolution is but a part of a much wider process of change in the relationships between Westminster and each of the other home countries; between the state and the citizen and between citizen and citizen.

18. We need also to keep in mind that the administration of justice in the United Kingdom has never been administered centrally on either a British or UK basis. Both Scotland and Northern Ireland have their own systems for administrating justice. It is the case that Scotland always did have its own distinct legal system but Northern Ireland's separate justice system is the product of recent legislation. Only Wales and England are administered jointly for these purposes but that was not always the case. For some three hundred years up to 1830, the administration of justice in Wales, civil and criminal, was administered by the Court of Great Sessions. It was the abolition of that court in 1830 which caused "Wales to be wholly absorbed into England in legal and administrative matters".(Professor John Davies, A History of Wales).

19. There are sound constitutional reasons why the judiciary cannot involve themselves with the question of whether responsibility for the administration of justice in Wales should be devolved or not; that is a political matter. Nevertheless, the judiciary at every level including the magistracy and HMCTS Wales, the HM Government Department responsible for administrating Justice in Wales, have demonstrated a strong awareness and understanding of Wales' developing distinct identity in legal matters and of the importance of the Welsh language in the Administration of Justice in Wales. When opening the Mercantile Court in Cardiff, Lord Bingham as Lord Chief Justice of England and Wales, said

> "This court represents the long overdue recognition of the need for the Principality of Wales to have its own indigenous institutions operating locally and meeting the needs of its citizens here. This court is another step towards recognising Wales as a proud, distinctive and successful nation."

20. A second argument against is that the system of justice in the UK is the envy of the whole civilised world. Our judges are independent, of outstanding quality and are devolution aware. Unless a devolved justice system is at least as good in terms of quality as the justice system presently enjoyed in Wales, the case for change is not made out (the quality argument).

21. Devolving responsibility for the administration of justice would not dilute these strengths one bit. The Judges would continue to be independent and they would continue to be appointed from the ranks of barristers, solicitors and legal executives. The question is concerned only with the structures by which the administration of justice is administered.

22 A third argument is that the evolutionary changes in the administration of justice in Wales (which we describe in paragraphs 8, 9 and 10) have occurred even though justice is not a devolved field and whilst it might be doubtful that they would have occurred to the extent they have were it not for devolution they have occurred without justice being a devolved field (devolution by evolution argument).

23. This is an aspect of the argument described by Lord Carlisle QC as devolution by evolution. The Richard Commission criticised it as devolution of a kind which did not follow any discernible or comprehensible policy.

24. Fourthly, it can be argued that the proposal to devolve jurisdictional responsibility today confuses our present needs with what our needs might be in the future if there were further evolutionary changes or "spontaneous adjustments"[6] in the field of administration of justice. The case for change cannot be sustained at present. (the argument that we are confusing present needs with possible future needs) Tomorrow, maybe, but not today

25. We have drawn a clear distinction between the past and present on the one hand (paragraphs 12 and 13 above) and the future on the other (paragraph 11 above). Paragraph 11 expressly states that the arguments for change will strengthen in the future. The case in paragraph 13 is one that can be sustained at present. Gwynedd Parry (FRHistS) Professor of Law and History at Swansea University, says of the argument at paragraph 13 that it is probably the strongest argument of all for jurisdictional devolution.

[6] See paragraph 10 above

26. A fifth argument against is that the pragmatic approach of piecemeal reform in response to changing circumstances is to be preferred to comprehensive changes dictated by constitutional theory (the piecemeal reform argument).

27. We would submit that the following arguments against piecemeal reform are very persuasive.

> *"it is difficult to deny that .....devolution has led to a system of amazing untidiness.... a Kingdom of four parts, of three Secretaries of State, each with different powers, of two Assemblies and one Parliament, each different in composition and powers from the other".* Vernon Bogdanor, Professor of Government, Oxford University in his book The New British Constitution
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> .
>
> *[The Labour Government's preference for allowing institutions to develop pragmatically may] "explain in part [its] disinclination to present its constitutional reform programme as a related whole, driven by constitutional theory"* Rodney Brazier, Professor of Constitutional Law, University of Manchester in his book, Constitutional Reform
>
> *"Asymmetrical devolution – different degrees of power devolved to Scotland and Wales – amounts to a parody of the assumption that piecemeal reform is always enough ..... This mindset grew out of a parliamentary tradition prizing piecemeal reform. For more than two centuries that was our political virtue. It is now in danger of becoming our vice"* Larry Siedentop, emeritus fellow, Keble College Oxford, Financial Times, 31 May 2010.

28. Finally, there is an argument that as the laws in Wales are the laws of England and Wales, there is no need or justification for the change (the laws in Wales are no different to the laws of England argument)

29. However, the differences or the absence of differences between the substantive laws applicable to Wales on the one hand and to England on the other is not as relevant as is the constitutional framework in which Wales has been placed as a consequence of the devolution statutes. It is this new constitutional framework which gives rise to the question of whether responsibility for the administration of justice should be devolved to the Assembly and not the difference between the substances of our laws when compared to those of England. We have set out constitutional arguments for the change in paragraphs 12 and 13 above.

30. Moreover, the argument is only partly correct. Since the devolution settlement of 1998 there has emerged a substantial body of law the territorial extent of which is limited to Wales. This is certain to increase following the referendum and the extended legislative competence now enjoyed by the Assembly. The rate of production is about to increase very substantially. The First Minister recently announced the Welsh Government's legislative programme of no less than 20 Bills during the next four/five years and Westminster will continue to make Wales only legislation in the non-devolved fields.