Submission to the Commission for Justice in Wales:

Welsh Legal Jurisdiction

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This submission summarises the argument of a draft research paper. My focus is Wales' jurisdictional arrangements. The jurisdiction debate has steadily risen in prominence over the last several years. Since 1998, devolution to Wales has changed in *form* - from executive beginnings, through conferred legislative powers, to the reserved powers model instantiated by the Wales Act 2017 – as well as in *scope* - increasingly broad powers have been bestowed on Welsh institutions. Against this expansive trend, the survival of the unified England & Wales jurisdiction appears increasingly anomalous. The lack of a Welsh legal jurisdiction, together with consequential reservation of legislative powers over ancillary matters, sets Wales apart from both Scotland and Northern Ireland. In this submission I shall first suggest a framework within which the jurisdictional debate ought to be conducted. Second, I shall outline how justifications of jurisdictional reform operate within that framework.

1. A Framework for Discussion

Even within the ongoing debate, jurisdiction means different things to different people. In this Section of the submission I shall do two things. First, I shall endorse a minimal conception of 'jurisdiction'. Second, I shall suggest that the minimal conception of jurisdiction constitutes one of several separable institutional reforms that are unhelpfully bundled together in the jurisdiction debate.

1.1. The Minimal Meaning of Jurisdiction

For Richard Percival, a legal jurisdiction comprises 'three sets of legal rules: rules creating a court; rules providing a court with a judiciary; and finally rules setting out the reach of the court.'[1] In my view, the only necessary condition of legal jurisdiction is what Percival calls 'reach rules'. These rules, whether statutory, common law, or customary, define the limits of a body of law. The reach rules of a Welsh jurisdiction might, for example, be something like: 'all primary and secondary legislation enacted by Welsh institutions, all primary and

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[1] R. Percival, 'How to do things with jurisdictions: Wales and the jurisdiction question' [2017] *Public Law* 249-269, 250-51.

secondary legislation enacted by UK institutions insofar as it applies in Wales, and all of the common law of the former England & Wales jurisdiction.' (Naturally any statutory definition would have to be far more precise.) Such reach rules constrain courts of law. All courts are limited to applying some bodies of law and not others. They also guide courts of law as to the limits of the law they may apply. In other words, reach rules clarify the remit of the courts they apply to. I disagree with Percival that rules establishing courts and appointing judiciaries are elements of the concept of jurisdiction. In my view, these institutions are conceptually separable.

Two important conclusions derive from the fact that it is that it is possible for a jurisdiction to exist without a parallel court system.[2] First, in the present context, it is possible to dismantle the currently unified legal jurisdiction without dismantling the unified courts and judiciaries. Second, for a Welsh jurisdiction to be established, the minimum reform is to enact reach rules recognising discrete bodies of Welsh law and English law.

1.2. An Unhelpful Binary: 'Distinct' and 'Separate'

If the minimum reform is establishing Welsh reach rules, what is the maximum reform? The jurisdiction debate is not (nor should it be) constrained to the purely conceptual understanding of jurisdiction. And so, the jurisdiction debate has so far covered a vast range of possible institutional reforms. It is regrettable, in my view, that many commentators have adopted a binary distinction between 'distinct' and 'separate' models of jurisdiction.[3] This binary is ambiguous and oversimplified. Not only do the descriptions carry virtually the same meaning in ordinary usage, the terms have no fixed technical meaning. All that is certain is 'distinct' jurisdiction means something less separate than 'separate' jurisdiction. For example, Percival takes 'distinct' jurisdiction to describe the minimal reform outlined above: the mere establishment of a discrete body of Welsh law.[4] The Welsh Government's conception of 'distinct' jurisdiction additionally envisages separate courts, but retains a

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[2] Ibid.

[3] See, for example: Percival (n 1); R. Rawlings, 'The Strange Reconstitution of Wales' [2018] *Public Law* 62-83; Wales Governance Centre, 'Challenge and Opportunity: The Draft Wales Bill 2015' (February 2016) < http://sites.cardiff.ac.uk/wgc/files/2016/01/Challenge-and-Opportunity-The-Draft-Wales-Bill-2015.pdf> accessed 10th July 2018; Welsh Government, 'Government and Law in Wales Draft Bill: Explanatory Summary' (March 2016) < http://www.assembly.wales/ministerial%20statements%20documents/government-laws-wales-draft-bill/explanatory%20summary%20for%20government%20laws%20in%20wales%20bill%20english%20website%20version.pdf> accessed 10th July 2018.

[4] Percival (n 1)

shared judiciary.[5] The Wales Governance Centre articulates three different models of 'distinct' jurisdiction, with each of those three models capable of further permutations.[6]

Another framework would improve the precision of the ongoing debate. We should reframe the discussion around several distinguishable institutional reforms. I suggest that these include the establishment of:

1. Separate Bodies of Law (i.e. Reach Rules)
2. Separate Courts
3. Separate Judiciaries
4. Separate Legal Professions
5. Devolved Political Powers over Court Infrastructure and Funding
6. Devolved Political Powers over Wider Administration of Justice

The framework for discussion should acknowledge the wide spectrum of possible reforms, encompassing various degrees of separation in relation to various different institutions. It should be noted that such a spectrum is often recognised, even in commentary that insists on the distinct/separate binary. A slightly more complex framework is appropriate, given the complex array of models for reform.

The proposed list may of course be incomplete, and even the six narrower categories contain potentially contentious elisions. For example, it may be preferred to separate some courts, but not all. Powers relating to administration of justice include responsibility for the police, prisons, prosecution service, probation service, legal aid, and more. It would be possible to devolve control over multifarious combinations of these subjects.

2. JUSTIFYING JURISDICTIONAL REFORM IN WALES

It is frequently said that the process of devolution has subordinated constitutional principle to political expediency. That assessment is particularly apt in the Welsh context. Future reform should aim to break with this tradition. If the Commission is to propose reform of Wales' jurisdictional arrangements, such reform must be justified in principle. In this section, I shall briefly discuss three arguments pertinent to the jurisdiction debate. First, I shall sketch some of the arguments against reform. Second, I shall outline justifications for reform based on

[5] Government and Laws in Wales Bill (March 2016) < https://gov.wales/docs/cabinetstatements/2016/160307governmentlawsinwalesen1.pdf> accessed 10th July 2018; Welsh Government (n 3)

[6] Wales Governance Centre (n 3)

considerations of efficiency and practicality. Third, I shall sketch an argument in favour of separating Welsh courts and judiciary, derived from an understanding of the judicial function.

2.1. Against Jurisdictional Reform

Why should we not dismantle the unified jurisdiction? The passage of the Wales Act 2017 demonstrates that the UK government is hostile to the proposal,[7] but what are the underlying reasons? One reason is that separating the law applicable in Wales from the Law applicable in England might create confusing legal divergence. Another is that jurisdictional reform inevitably demands resources, and use of resources for jurisdictional reform would be wasteful. Other concerns include perceptions that Wales is too small a nation to become a legal jurisdiction, or lacking in necessary professional expertise. These reasons against jurisdictional reform are negative. They do not point to anything of value in the unified jurisdiction, but only to perceived harms of reform. Moreover, these identified harms are, in the main, relatively trivial.

The time to prevent confusing legal divergence between England and Wales was 1998, before political powers were devolved to the Welsh Assembly. The Assembly now has broad legislative powers and the Welsh government extensive executive powers. Legal divergence has occurred and does not appear to have caused widespread or substantial harm. There is little reason to expect jurisdictional reform to cause more substantial harm.

Jurisdictional reform will, naturally, require resources. But so too will adapting the structure of the unified jurisdiction to cope with the growing bodies of Welsh (but not English) and English (but not Welsh) law. Most courts in England & Wales are organised to permit specialisation in different areas of law (e.g. the three divisions of the High Court). This specialisation is itself a response to complexity. Since Welsh law and English law are increasingly different, specialism will no doubt be required at some point. That specialism will inevitably require significant infrastructure and resources.

The arguments that Wales is too small or legally inexpert to become a jurisdiction seem entirely bogus. There are nations with smaller populations than Wales that are legal jurisdictions, notably including Northern Ireland. The Welsh legal professions will need to adapt to any reform, but there is, first, no requirement that they do so overnight, especially as any jurisdiction would be unlikely to wholly exclude English practitioners. Second, the

[7] Rawlings (n 3)

suggestion that a new jurisdiction would create a new legal hub in Wales is plausible, with relocation of some legal practice that would otherwise be based in London.

None of these reasons against reform is able to identify goods that would be lost by dismantling the unified jurisdiction, none of them is principled, and all or most of them are of little persuasive merit.

2.2. For Jurisdictional Reform 1: Practicality & Efficiency

Considerations of efficiency and practicality are prominent in debates around devolution generally. It is therefore unsurprising that they are often cited in favour of jurisdictional reform.

Under one version of this argument, devolution of political power to Wales and consequent divergence from the law of England renders jurisdictional reform a practical necessity. The Wales Governance Centre posits that where two different legal standards exist within a single body of law, and where the range of territorial application of those legal standards is not clear-cut, there is scope for legal uncertainty.[8] By illustration, imagine a Welsh law seeking to regulate meat slaughtered in Welsh abattoirs. In order to do so the law must apply to farms in England that use Welsh abattoirs. Separating the English and Welsh bodies of law might increase certainty, since the relatively clear rules of private international law would govern cross-border disputes.

This first argument is limited in two ways. First, it can only offer a principled justification for separation English and Welsh bodies of law (reform 1 in the list at 1.2 above). This argument is no rationale for reform of the courts, judiciary, justice system, and so on. Second, it is not altogether clear that the mischief reform would avert is especially mischievous. If this form of legal uncertainty is not a widespread problem, the argument is susceptible to rebuttal, despite the weakness of the arguments against reform are quite weak (see 2.1 above).

A second version of the practicality argument suggests that jurisdictional reform is necessary to facilitate future devolution of political powers over the law and justice system. In 2016, the Welsh Government said the following about the Bill that would become the Wales Act 2017:

[8] Wales Governance Centre, 'Delivering a Reserved Powers Model of Devolution for Wales' (September 2015) < http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-ENG-V4.pdf> accessed 10th July 2018.

> 'the UK Government sought to justify the imposition of new, significant and impractical constraints on the Assembly's legislative competence by reference to the need to protect this jurisdiction [of England & Wales]'[9]

The result, the Welsh Government notes elsewhere, is 'a confusing and very limited system of devolved government.'[10] It concludes that 'the essential requirement not to constrain the Welsh legislature in this way, makes the creation of a distinct Welsh jurisdiction essential.'[11] Although these constraints are less extensive in the Act than in the Bill, there are nevertheless substantial restrictions on what the Assembly may do in relation to the justice system.

This version of the argument is also limited. First, the argument draws its entire persuasive force from a prior commitment to further devolution of political powers over law and the justice system. Inevitably, the appropriate extent of devolution is a matter on which people may reasonably disagree. The present argument is compelling to those who already perceive a need for further devolution. An opponent to further devolution of law-related powers will not be persuaded of the need for jurisdictional reform.

Second, as with the first version of the argument, the ramifications of this justification are not very extensive. Of course, the premise for this justification of reform is the need to devolve powers over the justice system (reform 6 in the list at 1.2). That reform must be proposed in order for any further reform to be justified on this basis. But the extent of that further reform is not very broad. Formal separation of Welsh and English bodies of law would be justified (reform 1 in the list at 1.2). As the law applying in England and in Wales diverges, complexity increases. As long as divergent standards are both part of the unified law of England and Wales, citizens, lawyers, and the courts are obliged to disentangle each law's application. Separating the body of law reduces this complexity by making clear which standards apply in which territory.

Offsetting complexity is a good reason for establishing separate bodies of law, but does future divergence necessitate separate courts and judiciaries too? Arguably, separating bodies of law just changes the *type* of complexity. Courts would no longer be disentangling the law, but struggling to cope with vast quantities of diverging substantive law. Divergence may then require judicial specialisation. Such specialisation does not, however, necessitate separate courts or judiciaries. Again, specialisation designed to cope with legal complexity

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[9] Welsh Government (n 3)

[10] Welsh Goernment, 'Coherent, stable and long-lasting devolution for Wales' (2015) < https://gov.wales/docs/caecd/publications/160526-wales-bill-explanatory-en.odp> accessed 10th July 2018.

[11] Welsh Government (n 3), 19.

exists within the shared court system. The High Court, for example, is organised into three divisions, with further specialist subdivisions. Judges and courts also specialise by territory. Circuit judges are allocated to one of seven regions, one of which is 'Wales'. Steps have been taken to regionalise parts of the High Court's jurisdiction.[12] There is no reason why further, regional specialisation should not be possible if substantive divergence creates sufficient complexity.

Of course, just as political power over the wider justice system should be devolved, if justified, so too should the courts, judges, and political powers over their organisation. But it cannot suffice to assert that the courts and judiciaries should be separated, just so that Welsh political institutions can have devolved power over them. The devolution of political power must be justified. Such justification must identify the value of a differently functioning court system or differently constituted judiciary. I will now suggest one possible justification.

2.3. For Jurisdictional Reform 2: Legitimacy and the Judicial Function

Whether Wales ought to have separate courts and judiciary turns on the nature of the judicial function. The precise judicial function varies between jurisdictions. Judges in some jurisdictions may do things that judges in other jurisdictions may not. But there are universal features of the judicial function. Judges everywhere make legally authoritative decisions in cases that come before them. In doing so they must identify, interpret, and apply the law of their jurisdiction(s).

How might the judicial function compel the establishment of a separate Welsh judicial and court system? On one view, it will not. If a judge's role is to take clear legal rules and apply them to facts to reach a decision inexorably determined by those rules and facts, then we have little reason to care whether judges deciding Welsh cases are embedded in Wales. But this understanding of judging is unrealistic, existing only (if at all) as an ideal.[13] This formalist view of judging would require a perfectly clear and comprehensive legal code, something well beyond the capability of any human legislator.

A more realistic view of the judicial function recognises that judges do more than straightforwardly apply clear rules to facts. Accounts differ on the precise nature of the judicial function, but most recognise that judges have recourse to *something more* than the

[12] S. Nason and M. Sunkin, 'The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Specialisation of Legal Services in Public Law' (2013) 76(2) *Modern Law Review* 223-253.

[13] As invited by early legal positivists like Bentham, an invitation taken up with some glee by rule-sceptics. On Bentham's view of the judicial role, see: G. J. Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1989)

legal rules in their decision-making. For H.L.A. Hart, for example, judges apply valid rules of the legal system in most cases, but in 'every legal system a large and important field is left open for the exercise of discretion by courts'.[14] Where uncertainty arises with regard to the meaning or application of the rules, judges must exercise discretion in deciding the case before them. This discretion is not unlimited, but subject to 'many constraints narrowing [the judge's] choice'.[15] For Hart and his proponents, judges are expected to exercise their discretion in accordance with techniques of legal reasoning.[16] They reason by analogy, having recourse to underlying 'considerations of political morality' in 'cases in which source-based laws are indeterminate or where they conflict.'[17] On this view of the judicial function, judges *usually* apply clear legal rules in cases. But *sometimes* they exercise a discretionary law-making function. Their decisions are guided not by clear-cut legal rules, but by considerations of principle and political morality.[18]

The theory that a judge's outlook influences their decision-making receives support from the '*X* Judgments Project' genre.[19] Judgments on real cases are written from a specific outlook, but conform to the legal and practical constraints that applied to the original judges. They illustrate how the reasoning and outcomes in judgments are contingent. This illustrative value received endorsement from the current President of the UK Supreme Court. Lady Hale told the House of Lords Constitution Committee that: 'the Feminist Judgments Project [… demonstrates] with varying degrees of success that where you start from can have an effect on where you end up.'[20]

The importance of political morality in judicial decision-making is also reflected in the European Court of Human Rights' (ECtHR) margin of appreciation doctrine. When the margin of appreciation is invoked, ECtHR refrains from reaching a concrete decision. Instead it defers to domestic authorities, including courts. In *Handyside*,[21] the ECtHR rationalised the doctrine:

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[14] H.L.A. Hart, *The Concept of Law* (3rd Edn, OUP 2012), 136
[15] ibid, 273 (original emphasis omitted)
[16] Ibid, 274-75; J. Gardner, *Law as a Leap of Faith* (OUP 2012), 37-42
[17] J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1995), 223
[18] The narrow point that judges do not *just* apply clear, determinative legal rules to facts is not a uniquely positivist viewpoint.
[19] See, for example: R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Hart 2010); H. Stalford, K. Hollingsworth, S. Gilmore (eds.), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017)
[20] House of Lords Select Committee on the Constitution, *Judicial Appointments* (HL 2012) 272
[21] *Handyside v United Kingdom* (1979-80) 1 EHRR 737

> 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements'[22]

Political morality differs between places and times. For the ECtHR, it follows that local authorities, including courts, which are embedded in a community and its political morality, are better placed to answer some difficult legal questions.[23]

If judges decide some cases by reference to political morality, then judicial legitimacy is determined, in part, by judges' ability to adequately identify and apply the political morality that applies in the relevant legal system. For Joseph Raz, the legitimacy of law's authority derives from its capacity to serve those it purports to govern.[24] Authorities are legitimate if they do a better job of guiding their subjects than the subjects themselves could do. That means authorities must be capable of accessing and competently weighing the various reasons for action that apply to their subjects, if they are to be legitimate. The relevant reasons will include local political morality.

How does the theory apply to the jurisdiction debate? Courts make claims to legitimate authority. They decide cases by reference to legal rules, but also, in harder cases, according to the political morality underlying those legal rules. Courts are legitimate – they will do a better job of guiding their subjects than the subjects themselves – only if they understand the relevant political morality. It follows that if Welsh political morality differs sufficiently from English political morality, Welsh legal disputes should be resolved by

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[22] ibid, [48]

[23] The margin of appreciation is not solely justified by 'the relative disadvantage suffered by an international court in the task of evaluating local needs and conditions. It has a close affinity with a municipal doctrine: the margin of discretion, or deference […] which our courts will pay to the judgment of public decision-makers' (*SRM Global Fund LLP v Commissioners of HM Treasury* [2009] EWCA 788 at [59] per Laws LJ). So there are democratic considerations as well. Some judges have suggested that the margin of appreciation should be mirrored in domestic courts' deference to political decision-makers (see, for example, the judgment of Sales J in *R (S) v Secretary of State for Justice* [2012] EWHC 1810 (Admin)). Under the present argument, Sales J is mistaken and Laws LJ's approach is to be preferred.

[24] J. Raz, *The Morality of Freedom* (OUP 1988), Chapter 3.

judges cognisant of Welsh political morality. Such knowledge results from embeddedness in the community, and would in turn necessitate Welsh courts.

The obvious question is: does Welsh political morality differ sufficiently from English political morality? Divergence in political morality is not binary, nor is it obviously quantifiable. It is a matter of judgement, and one that I am poorly equipped to make. But I will suggest three considerations that should be taken into account. First, it would be mistaken to summarily dismiss this justification on the basis of a shared recent history and similar political landscape. Membership of the United Kingdom does not rule out the existence of differences in political morality. Second, the political morality of Wales self-evidently differs from England. Devolution has permitted divergence in policy. This divergence necessarily results from differences in political morality. The view that Welsh political morality is distinctive has received high-level judicial endorsement. For Lord Thomas, legislation imposing healthcare costs on negligent employers:

> 'can […] be seen as reflecting choices of social and economic policy and of social justice in Wales which may be different to the views of social and economic policy and social justice reasonably held in other parts of the United Kingdom'.[25]

In other words, the policy reflected a distinctive Welsh political morality. Of course, the question remains whether differences in political morality are sufficient to imperil the legitimacy of the unified court and judicial system. Third, it is less harmful to separate courts and judiciaries too hastily than too tardily. Where, within an existing legal system, there is some divergence between one territory and another, but not enough to justify separation, little harm is caused by premature separation. There may be some disruption or waste, but nothing catastrophic. Meanwhile, if divergence is sufficient to justify separation, failure to separate will cause substantial harm. In these circumstances, a territory is subject to law that does not fully reflect its values. To that extent, the law lacks legitimacy.

3. CONCLUSION

I have outlined some possible justifications for jurisdictional reform. Irrespective of whether the specific arguments outlined are persuasive, there are two broader points to emphasise. First, any reform of the current jurisdiction must be justified. It is not enough that reform is

[25] *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3, [107]

desired, reform must be desired for persuasive and principled reasons. Second, the fact that some reform may be justified does not entail that any and all putative reform is justified. The model for a future Welsh jurisdiction must derive from the reasons justifying its establishment. If valid reasons for reform mandate only some of the institutional reforms listed above, only those reforms ought to be pursued.