SUBMISSION TO THE COMMISSION ON JUSTICE IN WALES

Professor T. H. Jones

Hillary Rodham Clinton School of Law, Swansea University

Preliminary

I am a party to evidence being submitted to the Commission by Public Law Wales. That organisation's evidence provides detailed responses to several issues raised in the consultation document, drawing upon the experience of public law in Wales under devolution. Here I confine my own response to the specific issue of Wales as a jurisdiction, whether separate or unified with England. This relates primarily to the Commission's questions 2 & 5.

As long ago as 2004 Jane Williams and I published our article, "Wales as a Jurisdiction".[1] We described how Wales was "emerging" as a jurisdiction because of devolution (initially in the Government of Wales Act 1998). In that article we did not emphasise the obvious point that - in the same way as a constitution - a legal jurisdiction must be declared, it will not simply appear.[2] The law of Wales might become more distinct from England as time goes on, with more Welsh law "emerging", but the formal establishment of a jurisdiction would have to be declared (legislated into existence).

That article was written in response to the constitutional developments at the turn of this century and to what we saw as the inadequacy of much of the commentary at the time, which we felt failed to recognise the significance of establishing a legislature in Wales. But the origins lay further back, in the failed devolution of the late 1970s. I had felt before the Act of 1998 that Wales was a kind of "shadow" jurisdiction. The law of Wales was not even then *identical* to that of England: there was legislation that took effect in Wales only, although part of the law of England and Wales. That legislative difference did not then find institutional expression. But it is important to recognise that the devolution arrangements we see today are the outcome of more than a century of legislative activity, recognising that the legislative and policy requirements of Wales may be different from those of England.

Of course, much has changed since 2004 (or 1998). Many commentators then seemed fixated with describing Welsh devolution as "executive" in nature, in contrast to the legislative devolution evidenced in Scotland (and Northern Ireland). We have moved from that rather gloomy starting point, through the establishment of a clearly separate executive and legislature, to the sunny uplands of a reserved powers model, with some powers over

[1] [2004] *Public Law* 78-101, noting that the approach taken there does have its later critics. See, for example, R. Percival, "How to do things with jurisdictions: Wales and the jurisdiction question" [2017] *Public Law* 249-269.

[2] I developed my thinking further in T.H. Jones, "Wales, Devolution and Sovereignty" (2012) 33 *Statute Law Review* 151–162.

taxation. The details of that transition will be familiar to the members of the Commission and are not rehearsed here. And yet the unified legal system of England and Wales appears essentially unchanged. Indeed, Schedule 1 to the Wales Act 2017 inserts a new Schedule 7A into the Wales Act 2006, listing the "Single legal jurisdiction of England Wales" as a General Reservation. That said, the establishment of the Commission demonstrates the contingent nature of that position, that the future form of the legal system in Wales is a matter for debate and decision.

Question 2

The overarching, unified jurisdiction of England and Wales would no doubt be seen by some as a constitutional barrier to the adoption of approaches specific to Wales. (Although – as the evidence of Public Law Wales demonstrates – innovative developments have taken place in Wales even within the unified jurisdiction.) There can be little doubt that the interplay between the familiar notion of a sovereign Westminster Parliament and the unified nature of the legal system of England and Wales has constrained constitutional dialogue. Some indication of this can be seen in the explanation of a previous Secretary of State for Wales (in Select Committee evidence) as to why a reserve model of conferring powers could not be adopted: "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".[3] This last argument is an intriguing one. It might have been thought that the courts are there to provide merely a means to resolve legal disputes.[4] 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. Of course, now we know that the unified legal system did not prevent the adoption of a reserved powers model. Those considerable consequences are awaited.

In any event, that political argument was overdone when one considers the United Kingdom as a constitutional whole. In practice, the United Kingdom lies somewhere between a federal constitution and a unitary one. Clearly the United Kingdom does not manifest a unitary legal order or legal system. 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 has pointed out, "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 …".[5] Walker 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. Legal chaos does not ensue.

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[3] *Government White Paper: Better Governance for Wales*, First Report of Session 2005-06, HC 551, EV 62.

[4] See T.H. Jones, J.H. Turnbull, and J.M. Williams, "The Law of Wales or The Law of England and Wales" (2005) 26 *Statute Law Review* 135, 143.

[5] N. Walker, *Final Appellate Jurisdiction in the Scottish Legal System* (2010) Scottish Government, Edinburgh, p. 38.

Question 5

My answer to this question speaks to the future, rather than being descriptive of past developments. The perennial question is that of the desirability or inevitability of Wales becoming a legal jurisdiction. I suggest that there are four fundamental aspects to a legal jurisdiction:

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 and the arrangements for recognition and enforcement of "foreign" law, judgments and orders (rules about conflict of law).

Wales undoubtedly satisfies the first two tests, but not the third (with the fourth a necessary consequence of the third). A comparative constitutional lawyer would no doubt find it surprising that the transformation of the unitary political system of England and Wales has not been accompanied by change to the unified legal system. Neil Walker makes the 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."[6] There are a legislature and a government in Wales, but not a (separate) court system. Of course, the unity of the legal system in England and Wales does not mean that there is a unified body of law.

I suggest that the argument as to the desirability or otherwise of Wales becoming a jurisdiction cannot be dependent solely upon the degree of difference between the laws of Wales and England (although that is clearly a significant factor). The difficulty with founding the jurisdictional argument upon legal difference is that it is always open to the response that the law of Wales is "not yet" sufficiently different to justify the establishment of a Welsh jurisdiction. This achieves its *reductio* in the evidence to the Commission of the Solicitors Regulation Authority rejecting the need for any particular consideration of Wales in examining arrangements, where there seems to have been an attempt to quantify the difference in private law (with a predictable result). 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".[7]

[6] Walker, above n. 5. at 36.
[7] Walker, above n. 5 at 69.

There is a constitutional tension between the fact of devolved legislative power, with a National Assembly empowered to make any provision that could be made by an Act of Parliament, 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. We do know that a separate Welsh jurisdiction has not been a precondition for increasing the legislative competence of the National Assembly. The Acts of 2006 and 2017 do not overtly disrupt the unity of the legal system of England and Wales. In terms of territorial extent, England and Wales are not 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 enforcement and this may indeed square the jurisdictional circle."[8]

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.[9] 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 intensifies the jurisdictional debate.

What are the principal legal steps necessary for Wales to become a jurisdiction? 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). As previously noted, substantial parts of the law of Wales would, therefore, remain the same as that of England. In respect of reserved matters, the position would be unchanged and legislative authority would remain that of the Westminster Parliament. Second, there would need to be the introduction of appropriate conflict of law rules. Upon the establishment of a Welsh legal jurisdiction, English law would become foreign law in Wales, as that of Wales would become foreign law in England. Such a position is normal within the United Kingdom. Parliament has enacted a wide range of statutes that govern recognition and enforcement between the three current jurisdictions of the United Kingdom. All such provisions would need to be amended to make equivalent arrangements for Wales. There might also be the

[8] C.M.G. Himsworth, "Devolution and its Jurisdictional Asymmetries" (2007) 70 *Modern Law Review* 31, 43.
[9] See Jones, Turnbull and Williams, n. 4, above.

need for some amendment of substantive law, to take account of the application to Wales of general conflict of law rules pertaining to jurisdiction.

Beyond those two matters of principle to be legislated by Parliament, there would follow a whole series of more practical questions (in respect of which legislative competence would no longer be reserved to Westminster). Indeed, the arguments that are made against Wales becoming a jurisdiction tend to be practical, rather than constitutional (and principled). Thus, a 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 judgments be enforced against English defendants, or Welsh proceedings served in England?"[10]

No doubt the Commission will be reaching its own view about these practical issues. But when one looks elsewhere in the United Kingdom, they do not seem insurmountable.

Concluding Observations

My focus here has been on constitutional arguments of principle. There are two reasons for this. First, it is my area of professional expertise. Second, the practical arguments are second-order ones. The first order question is the constitutional one. The pragmatic resolution of practical issues would follow the determination of the constitutional question. There will always be arguments of the "not yet" variety, with no attempt to quantify how different the law would need to be to lead to a different conclusion. Does it have to be as different as Scotland? As Northern Ireland? As Jersey?

The boundaries of the jurisdiction of England and Wales are not aligned to the boundaries of the devolved government in Wales.[11] Devolution legislation 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. What is proposed is 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 from what Richard Rawlings has called the "uniquely powerful geo-political concept"[12] that the unified legal system represents. That idea impacts on the constitutional relationship between England and Wales and the constitutional status of Wales within the United Kingdom. The constitutional argument is that Wales needs devolved legal institutions, to reflect its constitutional identity and to accommodate the legislative competence of the National Assembly. It is a constitutional prerequisite that

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

[11] Himsworth, above n. 8, 33.

[12] R. Rawlings, "Hastening Slowly: The Next Phase of Welsh Devolution" [2005] *Public Law* 824, 825.

there be legal accountability for the activities of both the legislature (National Assembly) and the executive (Welsh Government), with appropriate courts available within Wales. The courts of England and Wales, sitting in England perhaps, *could* no doubt determine a case involving the law of Wales, but whether that *should* be so is a different issue.

One model for 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, which is a vital consideration in Wales, for those in legal practice and in legal education.