INQUIRY INTO THE DRAFT WALES BILL

Observations submitted to the Joint Meeting of the Constitutional and Legal Affairs Committee of the National Assembly for Wales and the Welsh Affairs Committee of the House of Commons

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I largely agree with Professor Thomas Watkin's paper, so what follows is just to expand on two issues (one practical and one technical) which may be in danger of getting lost.

1 The New Restrictions and the Courts

My first issue relates to the likely practical impact in the courts of new restrictions on the Assembly's legislative competence, especially in relation to private and criminal law.

The main concerns expressed so far have been about further references by the Attorney General or Counsel General to the Supreme Court prior to a Bill becoming law, similar to those we have already seen since the 2011 referendum.

My concern is broader. It arises from the fact that the question of determining whether an Act of the Assembly is within competence or not can be raised in *any proceedings*, in the same way as can the question of whether an Act of Parliament is compatible with EU law or Convention Rights.

This means that in any private or criminal proceedings, it is possible to challenge rights, obligations, offences etc. created by an Act of the Assembly. The new tests in the new Schedule 7(B) at paragraphs 3 and 4 extend substantially the opportunity to challenge the validity of laws. There is no time limit on this, so an Act of the Assembly may have been in place and functioning very well for years, and still be challenged.

My concerns do not relate to the fact of challenge, but to the grounds on which a challenge might be made, and the practical impact.

In relevant cases involving issues of private law (e.g. landlord and tenant cases) or criminal law (e.g. prosecution for a criminal offence created by an Act of the Assembly) Courts will be asked to determine not merely whether a particular provision is within subject-matter competence, but also whether it satisfies the tests in Schedule 7B para. 3 or 4.

Leaving aside the added complexity which these paragraphs create (for instance what is meant by "effect on the general application of" the private or criminal law?), the first concern is that a Court will be asked to determine whether the legislation meets the tests, including the necessity tests. So what will count is Judges' estimation (for instance) of the necessity of a provision (in the case of 7(B)(3)(a)) or of whether its impact on the "general application of" the private or criminal law goes beyond what is necessary (in the case of 7(B)(3)(b) and 7B(4)(b)). This comes dangerously close to privileging judges' assessment of matters which are properly decisions for elected politicians. "Is this provision necessary?" and "Are we going further than necessary in creating this offence?" seem to me to be questions properly addressed by the legislature, not the judiciary. If these constraints were removed,

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that would not mean carte blanche, of course. The Assembly would still be constrained by its subject matter competence, and by overarching constraints relating to EU and the Convention rights.

The second concern relates to the impact on the administration of justice. If passed, the new restrictions are likely in my view to bring about a substantial increase in litigation. In the criminal sphere in particular (but also in the civil sphere where the interests of sufficiently resourced parties are concerned), it may be possible to derail, lengthen and delay processes by raising arguments that the Assembly legislation being considered is outside competence, because it does not pass the tests in Schedule 7B(3) or 7B(4). The effect on criminal prosecutions in particular could be similar to the impact of the Human Rights Act, but not so benign in its consequences.

2 Jurisdiction and the England and Wales paradox

The Second issue is that of a jurisdiction. I attach an article which I published about this in Click on Wales (the IWA website) in 2013. My thinking has moved on a bit since then and become clearer, but it sets out the core of my views.

By now I think the crux of the problem is not so much about jurisdiction (meaning which courts hear which cases) but addressing the paradox that there is, as a matter of law only one law of England and Wales, but that the laws which **apply** in Wales and England have diverged, not just because of what the Assembly has done in Wales, but also because of what Parliament has done in respect of England. It seems to me that trying to maintain this paradox, and trying to recover what might be perceived from one perspective as lost ground, is at the root of so much of the complexity in this Bill.

Acknowledging that there is a law of Wales and (of course) a law of England, which extend to the respective territories of Wales and England would be a good starting point. That would not require necessarily the devolution of the administration of justice in Wales, nor putting in place separate Welsh institutions (see the passage on jurisdiction in the Wales Governance Centre and Constitution Unit's paper *Delivering a Reserved Powers Model of Devolution For Wales* pp24-27, which can be found here: http://sites.cardiff.ac.uk/wgc/files/2015/09/Devolution-Report-ENG-V4.pdf).

CLICK ON WALES ARTICLE Feb 27th 2013

http://www.clickonwales.org/2013/02/wales-continues-raggedy-devolution-path/

An interesting, if not entirely unexpected, feature of the Welsh Government's evidence to the Silk Commission published last week is that it puts the case for a so-called "reserved powers" model of law-making powers for the Assembly, but shies away from calling for a distinct Welsh legal jurisdiction.

Some commentators have raised the question of whether it is possible to have the one without the other. Indeed, in the run-up to passing the Government of Wales Act 2006, in a joint Memorandum to the Welsh Affairs Committee, Rhodri Morgan and Peter Hain explained that a "conferred powers" as opposed to a "reserved powers" model of legislative devolution is appropriate to Wales because England and Wales is (and implicitly should remain) a single jurisdiction.

The link between separate laws and a separate jurisdiction is made explicit in that Memorandum in the following passage:

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. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions.

The problem with this analysis is that basic principles of law and rules of general application are not immune from being changed within the conferred powers model. Indeed, adopting the arguments applied here: http://www.clickonwales.org/2012/10/the-assemblys-legislative-limbo-land/ , they may be susceptible to more radical treatment in certain contexts under the conferred powers model. The law in England has diverged, and will continue to diverge, from that in Wales, as much by the UK Parliament legislating differently for England as by the Welsh Assembly legislating differently for Wales.

Jurisdiction means different things to different people. For many academics, the distinguishing features of a separate jurisdiction are a distinct body of laws, a distinct territory and a distinct system of courts and legal institutions. Wales already has the first two, and in many respects has the third, so how come we can't say that Wales doesn't already have a distinct jurisdiction?

The reason is rather obvious, if we use the word "jurisdiction" in the practical sense in which it is used in the UK constitutional arrangements, i.e. a system of courts which has exclusive power to determine cases arising within a particular territory. So there are 3 UK Jurisdictions - Scotland, Northern Ireland and "England and Wales". Each has its own judges and court system. Such a system of courts with exclusive powers to determine cases on a territorial basis (and having no, or only limited, reach outside their territory) cannot "emerge" from nowhere. It needs to be recognised and accepted in law. In the context of Wales, that would mean an Act of Parliament creating such a system, and delineating its powers and institutions, in much the same way as was done for Northern Ireland in the early years of the last century.

It seems that the Welsh Government's line is that it is not yet the right time to put such a system in place, but this should not hold back the reserved powers model (although, since the Welsh Government does not envisage a reserved powers model from being in place for eight years, things might change).

So how would Wales cope with a reserved powers model but no separate jurisdiction? One imagines that it would do so, at least to begin with, pretty much as it has done under the present arrangements. The Government of Wales Act 2006 squares the circle by providing that while Assembly Acts can relate only to Wales, they can extend only to England and Wales. This rather opaque formulation means (among other things) that Assembly Acts can be enforced in England. As a result courts in England can hear cases which involve questions of Welsh law only. So if (for instance) the Assembly legislated to ban the smacking of children (ie remove the defence of reasonable chastisement), a parent being tried in Nottingham on a charge of assaulting his or her child while on holiday in Aberystwyth would not be able to raise the defence of reasonable chastisement, even though he could do so if the incident had occurred in Nottingham. It is of course unlikely that Nottingham magistrates would end up hearing the case described above. Most likely it would be heard in Aberystwyth. Nevertheless, it is totally conceivable that other types of cases arising from Wales and involving questions of Welsh law would be heard in England.

That anomalous situation existed before the 2011 referendum, exists now and would still exist after a reserved powers model were put in place, unless something were done.

One answer (my preference) would be to establish by Act of Parliament a distinct jurisdiction for Wales, putting Wales on the same footing as Scotland and Northern Ireland. However that is not the only solution. Another proposal would be to remove the "extend to England and Wales" wording for the purposes of which courts can hear which cases, and give the courts in Wales exclusive power to determine Welsh cases at first instance without necessarily formally creating a distinct jurisdiction. This is (on a broader scale) much like how things used to be when only local courts had the power to hear cases relating to their territory (from Pontlotyn Magistrates in recent times to the Court of Great Sessions, abolished in 1830 which for almost 300 years had exclusive power to hear certain cases in Wales). In other words, the England and Wales system of courts can have (and has had) some courts within it which are the only ones allowed to hear certain types of cases, geographically defined. So the England and Wales jurisdiction would remain, in formal terms.

Even if this were not done, however, it seems probable that such a system would develop informally over time, building on the foundations of legal practice which already exist. After a few years, this might become a true distinct legal jurisdiction (through statute), much as the Assembly itself evolved from de facto separation of powers within a single body to true separation of powers. It's the raggedy way things happen for Wales. If so, we must hope that it happens on the basis of rational planning, rather than ad hoc reaction to changing circumstances.