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**Inquiry into the establishment of a separate Welsh jurisdiction
Personal Response (Professor R. Gwynedd Parry, LLB, PhD, FRHistS,
Barrister)**

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**Inquiry into the establishment of a separate Welsh
jurisdiction**

**Evidence to the National Assembly for Wales Constitutional and
Legislative Affairs Committee**

by

R. Gwynedd Parry¹
January 2012

PREFACE

1. The evidence here submitted is based on research sponsored by the Coleg Cymraeg Cenedlaethol and will be published as a volume entitled, *Cymru'r Gyfraith: Sylwadau ar Hunaniaeth Gyfreithiol* by University of Wales Press in summer 2012.

TERMS OF REFERENCE

2. The Committee's Terms of Reference are set out in paragraph 8 of the scoping paper.

Evidence is requested on the following matters:

- the meaning of the term “separate Welsh jurisdiction”;

¹ Gwynedd Parry started his career as a barrister in Swansea in 1993, and remains a member of the profession with tenancy in the Temple Chambers. Cardiff. He was appointed Professor of Law and Legal History at Swansea University in 2011, and is the director of the Hywel Dda Research Institute within that university. He is a fellow of the Royal Historical Society (FrHistS).

- 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.

SUMMARY

3. In the evidence here submitted, I shall:

- Define the phrase 'a separate Welsh jurisdiction' by reviewing the historical background and current position of the justice system in Wales.
- Recommend that the establishment of a separate jurisdiction on the Northern Ireland model would require the creation of the following institutions:
 - A High Court in Wales;
 - A 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
- Consider some of the benefits/barriers/costs/implications of a separate Welsh jurisdiction.
- Discuss the development and current position of the Northern Ireland jurisdiction for comparison.
- Recommend that a commission consisting of constitutional and legal experts be established to discuss the matter, similar to the Richard Commission which laid the foundations for legislative devolution to Wales. It should be tasked with gathering and submitting detailed evidence and putting forward options (having considered models in other devolved and/or federal countries around the world) and, where appropriate, making recommendations for legislation.
- Put forward some options for the reform of the justice system in Wales within the current single unified jurisdiction.

Defining “a separate Welsh jurisdiction”

Historical Background

4. The question asked here is what is the meaning of the term “a Welsh jurisdiction”, or, rather, what should it be. In examining the current situation an appreciation of the historical background is also necessary.
5. *Constitutional and Administrative Law*, that text originally written by Professor Owen Hood Phillips², contains a paragraph which sums up the legal status of Wales within the constitution.

‘The Statutum Walliae, passed in 1284 after Edward I had defeated Llewelyn ap Griffith, declared that Wales was incorporated into the Kingdom of England. Henry VIII completed the introduction of the English legal and administrative system into Wales. This union was effected by annexation rather than treaty. The Laws in Wales Act 1536 united Wales with England, and gave to Welshmen all the laws, rights and privileges of Englishmen. Welsh constituencies received representation in the English Parliament. An Act of 1542 covered land tenure, courts and administration of justice. References to “England” in Acts of Parliament passed between 1746 and 1967 include Wales. The judicial systems of England and Wales were amalgamated in 1830.’³

6. The process by which Welsh legal tradition was displaced and Welsh courts incorporated into the administration of the English courts happened gradually. The influence of native laws and legal structures declined following the conquest in 1282, and the Statute of Rhuddlan in 1284, and it could be said that the Tudor reforms in the first half of the sixteenth century were merely one more step in a process which had been ongoing for centuries.⁴
7. The reforms of the nineteenth century, with the abolition of the Court of Great Sessions in 1830, completed the work which had begun with the Statute of Rhuddlan in 1284, and ensured the demise of a Welsh legal identity. Between those two milestones, two important Acts were passed, ‘The Act for Law and Justice to be Ministered in Wales in Like Form as it is in this Realm 1535–36’ and ‘The Act for Certain Ordinances in the King’s Dominion and Principality of Wales 1542–43’.

² Published for the first time in 1952. Owen Hood Phillips (1907-1986) held the Barber Chair in jurisprudence at Birmingham University for a number of years and was the chief authority of his day on constitutional law. It is believed he may have had family roots in Pembrokeshire.

³ See O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, 8th Edition, (London: Sweet & Maxwell, 2001), p. 16.

⁴ See Thomas G. Watkin, *The Legal History of Wales*, (Cardiff, University of Wales Press, 2007), chapter 6.

These are the “acts of union” which established the governance and legal structures which formed the basis of Wales's status within the constitution .⁵

8. In general, it could be said that the principal effect of these reforms was the incorporation of Wales into England. The governance and public administration of the Welsh counties now almost completely mirrored that of English shires. The same was also true of the administration of justice in the courts. The notable exception was the Court of Great Sessions , established by the 1542 Act. The Court of Great Sessions was based on the principality's old law courts established following the conquest of Edward I, and which operated under the presidency of the king's justices. A justice or judge would be appointed to preside on the Great Session circuit, with each circuit comprising of three counties.⁶ The Court of Great Sessions would be sit twice a year in each county, with each sitting lasting about six days. Despite administering English law, the Court of Great Sessions was a Welsh institution with wide jurisdiction over criminal, civil and Chancery cases as well as summonses relating to property.⁷
9. The Court of Great Sessions remained a feature of the distinct system existing in Wales until its abolition in 1830, when it was replaced by the English Assizes.⁸ The Assizes were established in England in the eighteenth century, and each shire had an operational centre for the Assizes (usually the county town) to receive the king's judges.⁹
10. The Court of Quarter Session was introduced in Wales following the 1536 and 1543 Acts of Union,¹⁰ and undertook a variety of legal and administrative functions. Each county had its quarter session court, which would sit four times a year. This court of law dealt with criminal matters as well as operating as the county's administrative forum, with responsibility for local government up until the establishment of county councils in 1888.¹¹ The Quarter Session court was the middle court within the hierarchy of trial courts of the criminal legal system of this period. It was in this forum that those cases which

⁵ For an overview of the Tudor reforms and their legal implications see Watkin, chapters 7 and 8.

⁶ As the thirteenth county, Monmouthshire was included in the Oxford Circuit, thus creating uncertainty, which continued until quite recently, over its Welsh status.

⁷ See Watkin, p. 146.

⁸ See John Davies, *History of Wales*, (London: Penguin, 2007) (Revised Edition)p. 332. The Court of Great Sessions was established following the Tudor reforms as part of the process by which the legal system established under the Edwardian conquest, with its distinction between the courts of the Principality and the legal position in the Marches, was replaced.

⁹ The Court of Great Sessions established under the Acts of Union was abolished in 1830 and replaced with the Assizes, thus incorporating Wales within a centuries-old English system.

¹⁰ See the history of the establishment of the quarter session courts in some areas and counties of Wales in W.

Ogwen Williams, *Calendar of the Caernarvonshire Quarter Sessions Records, Volume 1 1541-1558* (Caernarfon: Caernarvonshire Historical Society, 1956), and Keith Williams Jones, *A Calendar of the Merioneth Quarter Sessions Rolls, Vol I:1733-65* (Dolgellau: Meirionethshire County Council, 1965).

¹¹ Local Government Act 1888. During this period the Court of the Quarter Session would be responsible for supervising the repair of roads and bridges and for all the needs of local government.

merited being tried by jury but were not serious enough to be tried in the Court of Great Sessions and, later, the Assizes, were tried.¹²

11. Below the Quarter Session courts were the magistrate courts (petty sessions). The vast majority of minor criminal cases were heard in the magistrates courts. Lay magistrates administered justice in all cases until the post of stipendiary magistrate was created in the middle of the eighteenth century to replace the corrupt magistrates in London during that period.¹³ Appointed from the ranks of qualified solicitors, the practice of having a stipendiary magistrate spread to populous areas outside London during the nineteenth century. Unlike a lay magistrate, a stipendiary magistrate could hear cases on his own rather than as a member of a bench. Despite this, lay magistrates were the norm in Wales, with only handful of stipendiary magistrates to be found in the industrial areas of south Wales.
12. With the abolition of the Court of Great Sessions in 1830 Wales lost its legal identity almost entirely.¹⁴ Two circuits, the North Wales and Chester circuit and the South Wales circuit, were established during the nineteenth century to serve the Assizes (with Monmouthshire as part of the Oxford circuit). Only as recently as 1945 did the north and south become united as the Wales and Chester Circuit (with the exception of Monmouthshire, which remained part of the Oxford circuit until 1971), and thereby reviving some form of unified Welsh courts administration.¹⁵
13. I say almost entirely. As Professor Thomas Watkin demonstrated in his masterly volume, *The Legal History of Wales*, even during the nineteenth century the particular requirements of Wales, and especially those of the Welsh language, forced the legal system in Wales to operate differently from that in England. There were specific provisions for the appointment of judges proficient in Welsh, and the language was an important catalyst for recognising Wales's legal distinctiveness.

¹² The Court of the Quarter Session was abolished in 1971, and incorporated into the Assizes within a unified Crown Court which was created following recommendations by Lord Beeching in his report, *Report of the Royal Commission on Assize and Quarter Sessions, Cmnd 4153 of 1969* (London: HMSO, 1969). Weaknesses identified in the report in respect of the work of the quarter sessions included the fact that they were too local in their organisation, they were overdependent on lay and part-time judges, which therefore resulted in unreasonable delay in dealing with cases, and a lack of consistency in sentencing.

¹³ See, Sir Thomas Skyrme, *History of the Justices of the Peace*, (Chichester: Barry Rose, 1991); also, Peter Seago, Clive Walker and David Wall, 'The Development of the Professional Magistracy in England and Wales', *Criminal Law Review*, [2000], 631-651.

¹⁴ The abolition of the Court of Great Sessions also undermined the Welsh nature of the judiciary in Wales, including the use of Welsh: see Mark Ellis Jones, '“An Invidious Attempt to Accelerate the Extinction of our Language”: the Abolition of the Court of Great Sessions and the Welsh Language', *Welsh History Review*, 19(2) (1998), 226-264.

¹⁵ The way in which a Welsh identity was re-established within the courts system during the seventeenth and twentieth century is analysed in detail by Sir John Thomas, 'Lord Morris of Borth y Gest Lecture 2000 – Legal Wales: Its Modern Origins and Its Role After Devolution: National Identity, the Welsh Language and Parochialism', in Thomas Watkin (ed.), *Legal Wales: Its Past, Its Future* (Cardiff: The Welsh Legal History Society, 2001) pp. 113-165.

14. The unification of the circuit at the end of the second world war came about partly due to the growth of the legal profession in Wales. The Bar had had a permanent presence in Wales since the nineteenth century, when the first chambers were established in Swansea and Cardiff. During the early period there was no more than a handful of practising barristers in any of the chambers. Over the course of the twentieth century, that presence increased gradually and, then dramatically after the government increased legal aid to clients at the end of the 1960's. The development of the legal profession in Wales created an impetus towards establishing its own Welsh organisational structure.
15. It is possibly the reforms at the beginning of the 1970's which revitalised the process whereby some of the Welsh identity in the administration of justice lost in 1830 could be recaptured. This is when the three-tiered system of criminal courts, i.e. the petty sessions, the Quarter Sessions and the Assizes, was abolished and the current system of magistrate courts and Crown Courts was established.¹⁶ The reforms were introduced following the recommendations of a Royal Commission chaired by Lord Beeching.¹⁷ Following the Beeching Report, the Crown Court, as part of the Supreme Court of Justice, displaced the Assizes and the quarter session courts, with the magistrates courts remaining separate.¹⁸ Later on Sir Robin Auld produced his report, which led to the creation of a unified criminal court comprising magistrates courts.¹⁹
16. Beeching's reforms had Welsh implications. In Wales, political pressure and lobbying behind the scenes ensured that the new system would be managed within an administrative unit of the Wales and Chester Circuit (with modifications) with its head office in Cardiff.²⁰ This was an important step as it recognised, to a certain extent, that Wales was a legal unit for the administration of justice. The law now had a Welsh personality, at least in terms of court administration, and Cardiff acted as a head office for that purpose. From now on, circuit committees and meetings would discuss courts policy from a Welsh perspective and give Wales a voice in debates at a wider level. As a result, the idea of Wales as a legal entity could evolve gradually.
17. Further developments in England and Wales were a means, although often indirect, of nurturing the concept of a Welsh legal identity. Following the introduction of the provisions of the

¹⁶ Beeching's recommendations were put into law by the Courts Act 1971.

¹⁷ The Beeching Report, *Report of the Royal Commission on Assize and Quarter Sessions*, (London: HMSO, 1969) (Cmnd 4153), p. 36

¹⁸ The Courts Act 1971, ss. 1 & 4, the Supreme Court Act 1981, s. 1.

¹⁹ The Auld Report, *A Review of the Criminal Courts of England and Wales by the Rt. Hon. Sir Robin Auld, Lord Justice of Appeal*, (London: HMSO, 2001), Chapter 3, paragraph 31.

²⁰ See Sir William Mars-Jones, 'Beeching- Before and After on the Wales and Chester Circuit' 'Beeching- Before and After on the Wales and Chester Circuit', *Cambrian Law Review*, 4 (1973), 81-93.

Administration of Justice Act 1970, the High Court could sit outside London. Over time, Birmingham, Manchester and Cardiff would operate as devolved centres of the High Court. Legal devolution was beginning to take hold as a policy in the administration of justice, which operated the principle of bringing the courts of justice closer to the people.

18. Over time, the Court of Appeal started to sit outside London, and as a result Cardiff became one of its regional centres. Other developments during the last quarter of the twentieth century, to a certain extent, were a further sign of the changed climate. The Lord Chief Justice of England began to refer to himself as the Lord Chief Justice of England and Wales (or Wales and England, as he is described on a wall in Swansea Crown Court), a symbolic development perhaps, but one which brought about a change in attitude towards Wales in legal circles.
19. Later on, a Mercantile Court for Wales was set up, with its head office in Cardiff. During the years before political devolution there was a gradual devolution of the administration of the legal system. The concept of a Welsh administration for the courts and the legal profession grew. While the sum and substance of the law remained English to a large extent, the administration had some influence in making its administration more Welsh.
20. Of course, following the creation of the National Assembly , the creation of Welsh legal structures received a significant boost. The Government of Wales Act 2006, in recognising the National Assembly for Wales as a legislature, raised further questions regarding the administration of justice in Wales. The justice system had to respond and adapt to the new constitution and develop structures in keeping with contemporary Wales. With Wales facing a future where Welsh laws will become increasingly divergent from those in England, the need for the legal system to deal appropriately with this divergence will become apparent.

The Justice System in Wales today

21. The judiciary responded positively and progressively to the development of devolution in Wales, and legal structures and arrangements were adapted so that they could operate appropriately within the bounds of the constitution and the current jurisdiction.²¹

²¹ 'What the judiciary can do, and can legitimately do, in the context of Wales is to respond to the fact of devolution and the changes that have already taken place and are now embedded within the constitution.' Address by Lord Judge, Legal Wales Conference, Cardiff, 9 October 2009.

22. The need for an intrinsically Welsh expression of the legal system in Wales is what lies at the heart of the phrase 'Legal Wales'. The phrase crystallizes the concept of restoring a Welsh legal identity. For Sir Roderick Evans, Legal Wales, in order to reach its full potential, includes these elements:

‘(a) the repatriation to Wales of law making functions; (b) the development in Wales of a system for the administration of justice in all its forms which is designed to serve the social and economic needs of Wales and its people; (c) the development of institutions and professional bodies in Wales which will provide a proper career structure for those who want to follow a career in Wales in law or in related fields; (d) making the law and legal services readily accessible to the people of Wales; (e) the development of a system which can accommodate the use of either the English or Welsh language with equal ease so that in the administration of justice within Wales the English and Welsh languages really are treated on a basis of equality.’²²

23. Following devolution, Wales became an administrative legal unit within the jurisdiction of England and Wales in terms of courts administration. One of the most significant changes in advancing Welsh legal unity was the creation of Her Majesty's Court Service in Wales in 2005. At that juncture, the four Welsh Magistrates' Courts Committees came together with the former Wales and Chester Circuit to form an unified administration. Subsequently, in 2007, Cheshire became part of the Northern Circuit, and administration with Wales ceased. Legal unity had now been achieved insofar as the administration of the courts in Wales was concerned.

24. As a result, the post of Presiding Judge for Wales was created, along with a Welsh judiciary and magistracy. Other Welsh legal institutions have subsequently developed, including the Association of Judges in Wales and the Wales Bench Chairs Forum.²³ Other specific posts were established within the judiciary, such as the Chancery Judge and the Mercantile Judge to oversee the work of the courts in specialist legal fields. The legal profession itself was also responding to the changes by creating national specialist associations such as the Wales Public Law and Human Rights Association, and the Wales

²² Sir Roderick Evans, 'Legal Wales- The Way Ahead', Law Society Lecture, National Eisteddfod of Wales, Swansea, 2006, pp. 3-4.

²³ 'to treat Wales as a unit for the purpose of administering the courts in Wales was a very significant event...treating Wales as an entity for these purposes has provided for the first time for many hundreds of years the opportunity not only to administer the courts in Wales on an all-Wales basis but also to plan for and develop a justice system in Wales suitable for our needs'. Sir Roderick Evans, 'Devolution and the Administration of Justice', The Lord Callaghan Memorial Lecture 2010, Swansea University, 19 February 2010.

Commercial Law Association. In the meantime, laws at Westminster had also created legal and quasi-legal posts specifically for Wales.²⁴

25. The establishment of the Administrative Court in Cardiff in 1998 was possibly one of the most significant early developments in promoting Wales's legal needs following devolution. Thereafter, it would be possible for judicial reviews relating to the actions of the Welsh Assembly to be resolved in Wales. This court was established without the need for legislation – it was a wholly administrative decision. The establishment of the Administrative Court in Wales happened in response to the argument that cases challenging administrative or political decisions taken in Wales should, wherever possible, be handled and heard in Wales, that enabling the people of Wales to hold their Government to account in their own country. More recently, the Administrative Court itself confirmed and supported the importance of ensuring that legal cases relating to Wales were heard in Wales on a regular basis.²⁵
26. However, when the Administrative Court in Wales was set up, it did not include an office in Wales to manage and administer the business of the court. This meant that there was no Welsh office to ensure that Welsh cases were processed and listed in Wales, and heard in the Welsh Administrative Court. Documentation was discussed and managed from an office in London, which significantly undermined the effectiveness of the Welsh Administrative Court. However, in due course, the problem was resolved. In April 2009, a permanent administrative office was established in Cardiff for the Administrative Court. One prominent judge concluded: 'one of the lessons to be learned from this experience is that the decentralisation of a court can not succeed unless it is accompanied by the necessary infrastructure to ensure its proper functioning.'²⁶
27. The Administrative Court was not the only legal forum to suffer from the lack of an appropriate organisational structure in Wales. However encouraging the visits of the Court of Appeal (the civil and criminal division) to Wales since 1998 were, in promoting the aim of legal devolution, it did not have an office in Wales to ensure that the court's work was arranged and managed effectively. Appeals are sent to London for processing, and the administration there is not sufficiently conscientious in trying to ensure that the Court of Appeal, when sitting in Wales, hears appeals from Wales (the whole purpose of legal devolution!). The same can be said of the High Court. Administration is still centred in London and this hampers the

²⁴ See: Children's Commissioner for Wales Act 2001; Public Services Ombudsman (Wales) Act 2005; Commissioner for Older People (Wales) Act 2006.

²⁵ See *National Assembly for Wales v. Condon* (2006) EWCA Civ 1573; also, *R (Deepdock Limited & others) v Welsh Ministers* (2007) EWCH 3347 (Admin).

²⁶ Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

effectiveness of the system and impinges on the principle of ensuring that Welsh cases and appeals are determined in Wales.²⁷

28. As Sir Roderick Evans noted:

‘If sittings of the Court of Appeal and Administrative Court in Wales are to be efficient, arrangements for the running of these courts must be strengthened. At the very least the arrangements for identifying cases from Wales and listing them in Wales must be improved but this is unlikely to be sufficient. What are needed, in my view, are offices in Cardiff to support the work of these courts. These would not only ensure the efficient disposal of work from Wales in Wales but also create in Wales the jobs and career structures connected with this work.’²⁸

29. Specifically Welsh tribunals were established, such as the Special Educational Needs Tribunal for Wales and the Mental Health Review Tribunal for Wales, developments which derived directly from the devolved powers of the Welsh Assembly. The need to ensure the independence of the Welsh tribunals by guaranteeing an arms length relationship between them and the Assembly Government and its departments is often emphasised.²⁹ Since it is governmental decisions in Cardiff which are being challenged before these tribunals, it must be ensured that the tribunals are independent and appear to be free from any political interference. It is also essential to create independent and transparent processes for the appointment to devolved tribunals.

30. There has been some concern regarding the administration of Welsh tribunals, with a patchwork of different tribunals and devolved tribunals being administered by various departments of the Welsh Assembly Government and local authorities, and non-devolved tribunals administered by the UK Tribunals Service or departments of the UK Government. The UK Tribunals Service does not treat Wales as an administrative unit, which is inconsistent with the general pattern of court administration.

31. Indeed, this need reinforces the argument for the establishment of a unified, independent, wholly Welsh system for the administration of justice.³⁰ By creating a unified administration for the courts and tribunals, it will be possible to develop a more integrated and effective

²⁷ ‘Is it acceptable that only a small proportion of Wales’ appellate work is heard in Wales and that all the administration of those cases together with the jobs, career structures and economic benefits arising from it are centred in London?’, Sir Roderick Evans, ‘Devolution and the Administration of Justice’, above.

²⁸ Sir Roderick Evans, ‘Legal Wales- The Way Ahead’, above, p. 11.

²⁹ See Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales* (Law Society Lecture, National Eisteddfod of Wales, Blaenau Gwent a Heads of the Valleys 2010), pp. 18-19.

³⁰ ‘There should be further decentralisation of the institutions of the law to Wales in recognition of Wales’ constitutional position and its position in the present jurisdiction.’ Sir Roderick Evans, ‘Devolution and the Administration of Justice’, above.

system in terms of administration and use of resources. Hand in hand with this it would be necessary to establish a Judicial Appointments Commission specifically for Wales to ensure the independence and credibility of the system of judicial appointments.³¹ Indeed, the debate on the administration of justice in Wales raises wider questions with regard to the administration of Wales in general, including the civil service.

32. It is important to remember the context of this debate. The referendum on the 3rd March 2011 confirmed and developed the role of the National Assembly for Wales as a primary law maker, or legislature, for Wales. Other provisions of the Government of Wales Act 2006 had already ensured the constitutional separation of the Welsh Government and the National Assembly.
33. Referring to the legal implications of devolution, Carwyn Jones noted, This has resulted in the need for justice institutions that are managed locally, respond to the needs of Wales and which are familiar with the law as it applies to Wales. The Welsh Assembly Government would welcome further steps in this direction.³²
34. Political devolution in Wales has stimulated a debate within the legal community on how the justice system should respond to constitutional change. There hasn't been such a debate for centuries, and it is a recognition of the importance of the constitutional changes and the legal nature and implications of that change. Above all, devolution has democratised Welsh governance and lawmaking. Following on from that it was entirely natural and sensible to recognise the need for appropriate legal systems and institutions to support the democratic process.
35. The meaning of a 'Welsh jurisdiction' may be summed up as follows: in a democratic constitution, where there is constitutional separation (however formal or informal) between the legislature and the government (or the administration), the judiciary has a function within the constitution. This is the third estate of the constitution. This holds true even in Britain, with its principle of parliamentary sovereignty, and where there is no official separation of power.³³
36. Unlike Scotland and Northern Ireland, Wales does not have its own jurisdiction, despite having its own government and legislature.³⁴ In other words, Wales does not have its own legal system or judiciary. The Government of Wales Act 2006 contained no provisions for the creation of a Welsh justice system, at the same time as conferring

³¹ See Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

³² Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

³³ See, O. Hood Phillips & Jackson, *Constitutional and Administrative Law*, pp. 26-28.

³⁴ See comments by Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales*, above, p. 3.

additional legislative powers to the National Assembly. Wales remains part of the unified jurisdiction of England and Wales. As such, the development of the constitution in Wales is incomplete and inconsistent with the rest of the United Kingdom.

37. It is sometimes said that Wales is an emerging jurisdiction.³⁵ What exactly is a jurisdiction? Many have attempted to offer an academic definition of the principal characteristics of a jurisdiction when considering the Welsh position.³⁶ It could be said that the concept of 'jurisdiction' is not something definite or uniform, and jurisdictions may vary depending on specific circumstances. However among the expected characteristics the following are said to be the most obvious: a defined territory; a body of native law; legal institutions and a courts system. The first two characteristics don't require too much elaboration. The territorial boundaries of Wales are clear and Wales has its own legislature creating primary laws. What, then, of the legal institutions and the courts system? What further changes would be required before it could be said that Wales is a jurisdiction?

38. Creating a Welsh jurisdiction along similar lines to the other UK jurisdictions, especially Northern Ireland, would require the following institutions:

- A permanent 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

Benefits/barriers/costs/practical implications

Barriers?

39. The outcome of the March 2011 referendum did not effect any underlying difference to the administration of justice in Wales, since the administration of justice is not, to date, a devolved matter. The Government of Wales Act 2006 contained no provisions for the creation of a Welsh justice system, at the same time as conferring additional legislative powers to the National Assembly. The Assembly, of course, can seek more powers, on a step-by-step basis, over

³⁵ Timothy H. Jones and Jane M. Williams, 'Wales as a Jurisdiction', *Public Law*, [2004], 78 -101, on p. 101. The phrase, 'emerging jurisdiction' is used by them.

³⁶ See T. H. Jones and Jane M. Williams, above; also Sir Roderick Evans and Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Submission to the Richard Commission, 2003).

aspects of the justice system. However, put simply, Wales remains part of the single unified jurisdiction of England and Wales.

40. The Report of the All Wales Convention concluded that the creation of a Welsh jurisdiction was not a prerequisite before moving to part 4 of the Government of Wales Act 2006, and the creation of a full legislature.³⁷ In other words, the creation of a jurisdiction was not a condition of additional legislative powers for the National Assembly. On the other hand, a jurisdiction is not necessarily dependent upon the existence of a legislative – after all, Scotland was a jurisdiction for centuries before the restoration of its parliament in 1999. Northern Ireland remained a jurisdiction during the period 1972–1999 after the first parliament had been abolished.
41. The principal arguments put forward against the establishment of a Welsh jurisdiction may be summed up by referring to them as technical legal arguments, the gradualism argument, the geographical and demographic argument and the historical argument. Jack Straw, as Lord Chancellor, may be said to have set out the arguments against the creation of a Welsh jurisdiction in a lecture to the Law Society in Cardiff some years ago.³⁸
42. The technical legal arguments are numerous and raise technical difficulties enough to frighten a lay person without a legal background. For example, questions as to what would be the status of court judgements in England on Welsh courts, if Wales was a separate jurisdiction and vice-versa. In other words, how would such a change affect the way the principle of precedent operated, for example? As Straw asked: ‘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 judgements be enforced against English defendants, or Welsh proceedings served in England?’³⁹
43. We will consider the validity of these concerns shortly by referring to another jurisdiction within the United Kingdom. However it should be noted that the Supreme Court of the United Kingdom is the highest Court of Appeal for all UK jurisdictions, and it is here, normally, that complex legal questions which give rise to new and important legal precedent is determined. The Welsh jurisdiction would follow precedents set by the Supreme Court, and even if decisions of the English Court of Appeal become merely persuasive in Wales, that would not lead to any legal crisis. It is certainly true that Welsh judges would give due and proper consideration to English judgments, and follow them where they serve the interests of justice. That is the

³⁷ See the *Report of the All Wales Convention* (Crown Copyright, 2009).

³⁸ The Lord Chancellor and Justice Secretary, the Right Honourable Jack Straw MP, ‘Administration of Justice in Wales’, Cardiff Law Society Lecture, 3 December 2009.

³⁹ Ibid.

current practice within the jurisdictions of the UK, namely giving due and proper consideration to cross-jurisdictional judgements that offer a suitable precedent under the circumstances.

44. The straightforward response to many of these questions is that technical matters, including cross-jurisdictional enforcement of judgments, would be resolved in the same way as happens now between the jurisdictions of England (and Wales), Scotland and Northern Ireland. It would be possible to draw up an appropriate and suitable solution for Wales and its relationship with the other jurisdictions within the British state.
45. In addition to the technical concerns, Straw stressed the benefits of gradualism rather than trying to move too quickly. At the heart of this argument is constitutional pragmatism, i.e. that processes should be allowed to evolve naturally in response to the situation obtaining at that time. This argument encourages 'organic development of greater autonomy of the Welsh system, building on what has already happened over the past 10 years, but within a common jurisdiction.'⁴⁰ Such an attitude can of course be criticised for being essentially reactive and responding to change rather than offering a progressive vision and preparing for the future. As the evolution of Welsh democracy is certain to continue, and devolution is journey which will not be reversed, a model for the administration of justice in Wales should be developed that looks to the future rather than merely responding to the present.
46. Another argument made against a Welsh jurisdiction is the geographical and demographic one. At the heart of this argument is the geographical and social proximity of Wales to England, and the nature of the Welsh landscape and demography. The people of north Wales are in close proximity to the cities of the North-west of England and have regular dealings with them. The people of mid Wales tend to turn to the towns and cities of the English Midlands for the purposes of commerce and shopping. Due to the size of the cities of south Wales, there is no similar tendency to turn to England, although there is quite a strong connection between the people of south Wales and the city of Bristol. Similarly, because of geographical reasons, people from north Wales do not have as much contact with the cities and people of south Wales. The border between Wales and England has been a political and cultural one, possibly, but not an economic one nor, to any great extent, a social one. This pattern is different from, say, Scotland, where there is an extensive, sparsely-populated area either side of the border between Scotland and England, and over a hundred miles separating the main population centres of the North of England and the central belt of Scotland.⁴¹

⁴⁰ Ibid.

⁴¹ Ibid.

47. Of all the arguments put forward for treating Wales differently from Scotland and Northern Ireland, the historical argument has the greatest prominence. When referring to the position of Scotland, Jack Straw noted, 'It is because the history of relationships and developments in and between Wales and England are so profoundly different than those between Scotland and England that parallels with Scotland are unlikely to be appropriate. The most important difference is that the Scottish judicial system never became part of the English system, even after the Act of Union in 1707. Its judicial institutions and professions, along with many other aspects of its national life, stayed completely distinct. For reasons everybody understands, that has not been the case in Wales.'⁴²

48. This argument emphasises a lack of tradition and a lack of legal history. Another argument put forward is that of sustainability: i.e. that Wales is too small to be a separate jurisdiction from England. With regard to the arguments that Wales has insufficient legal tradition and institutions or population to support a Welsh jurisdiction, Sir Malcolm Pill made some interesting observations about Cardiff's ability to serve as a capital city and centre for any Welsh jurisdiction:

'It is a city that has developed comparatively recently and has neither the population nor prestige, nor the legal traditions of Edinburgh or Belfast. Meeting with Scots and Northern Ireland lawyers makes one aware of our comparative lack of pedigree and experience in this field...a tradition of judicial separateness, and of dealing with a devolved administration, requires skills which cannot, however, be acquired in a moment'.⁴³

49. While accepting the accuracy of the statement that Scotland has a legal culture and native legal system which survived the Act of Union 1707, and therefore, that the historical argument has some validity in comparing Wales and Scotland, is that really the case when comparing Wales and Northern Ireland?

Northern Ireland

50. In order to consider the validity of some of the arguments against a Welsh jurisdiction, and determine what a Welsh jurisdiction would offer to Welsh public life, one must consider the legal structures found in the other devolved nations of the United Kingdom. Scotland and Northern Ireland both have the legal structures and institutions

⁴² Ibid.

⁴³ See the address by Sir Malcolm Pill, Legal Wales Conference, Cardiff, 9 October 2009.

associated with the concept of a jurisdiction. Do they offer models for the needs of a prospective Welsh jurisdiction?

51. Northern Ireland provides an interesting comparison on a number of levels. Firstly, its size: Northern Ireland has a population of approximately 1.7 million, while Wales has a population of approximately 3 million. More people live within the boundaries of the old Glamorganshire and Monmouthshire than in the whole of Northern Ireland. From a historical perspective, Northern Ireland was not a jurisdiction with indigenous legal institutions before 1920. Indeed, Northern Ireland did not exist as a political entity before 1920 and, in terms of the administration of justice, the nine counties of Ulster were merely an area of the Irish jurisdiction within the United Kingdom.
52. Northern Ireland was created in response to a political crisis between 1920 and 1925 as a compromise between the nationalist aspirations of the (Catholic) majority of Irish people and the minority (usually Protestant) desire to remain as part of the United Kingdom.⁴⁴
53. The campaign by a unionist minority for separation of Ulster was in response to the majority support in Ireland for self government.⁴⁵ It was possibly in 1916 that it was first suggested that the six counties of the province of Ulster might be exempt from the arrangements for the rest of Ireland – initially the idea was that they would be governed directly from London.⁴⁶ At the time the long-term future of the excluded six counties had not been decided. In the aftermath of the First World War, when the Irish situation once again reached the top of the political agenda, a plan was put forward whereby the whole of Ireland would have some form of self-rule, but split into two areas with two separate legislatures. It was during this key period between 1918 and 1920, which led to the Government of Ireland Act 1920, that the essential elements of the new constitution were created.⁴⁷
54. The Government of Ireland Act 1920 created two jurisdictions with considerable self-government – Southern Ireland in the south (in 1922, this entity was superseded by the creation of the Irish Free State following the ceasefire at the end of the Irish Civil War), and Northern Ireland in the north-east. The six counties were to form the Protestant province in Ulster. Northern Ireland was to get a bicameral legislature (two houses, a house of commons and a senate, similar to Britain) and its own government. In February 1920, the unionists there insisted that they should have a separate jurisdiction with their own judges,

⁴⁴ The history of the creation of Northern Ireland can be found in Jonathan Bardon's *A History of Ulster* (Belfast: Blackstaff Press, 1992), pp. 466-509.

⁴⁵ See D. George Boyce, 'Northern Ireland: The Origins of the State', in Peter Catterall and Sean McDougall, *The Northern Ireland Question in British Politics* (London: MacMillan, 1996), pp. 11-28.

⁴⁶ *Ibid*, p. 14

⁴⁷ An analysis of the 1920 constitution can be found in A. G. Donaldson's 'The Constitution of Northern Ireland: its Origins and Development', *University of Toronto Law Journal*, 11(1) (1955), 1-42.

which is what came to pass.⁴⁸ What had been established was a form of devolution: 'the scheme of the Act of 1920 was to place matters that pertained only to Northern Ireland within the legislative competence of the new Parliament and to reserve matters which concerned the United Kingdom as a whole.'⁴⁹

55. The original aim was to establish a council for the whole of Ireland to discuss all-Ireland matters, and that this council would engender a spirit of unity and co-operation within Ireland. It was hoped that the council would pave the way for an united Ireland under a single parliament and jurisdiction in due course. In addition, there would be Irish representation at Westminster, as the 1920 model was a form of devolution rather than actual self-government, and political sovereignty would remain in London. Therefore, the constitutional vision underpinning the Government of Ireland Act 1920 was that of two Irelands as devolved regions of the United Kingdom and part of its empire, with officers of the crown, under the leadership of the Lord Lieutenant of Ireland, operating from Dublin Castle. However, as a political solution the 1920 Act was deficient as Free Ireland rejected British interference and Northern Ireland had no desire for self-government or Dublin interference.

56. In the meantime, in 1921, some control over the police in the province was placed in the hands of the Northern Irish government. Control of the police in the province was a contentious subject, particularly the behaviour of the 'Specials', a force of Protestant volunteers established in 1920 to keep the peace and counter the Irish Republican Army, which was waging a war of rebellion against the 1920 constitution. In March 1922, when the Irish Royal Constabulary was abolished,⁵⁰ the Royal Ulster Constabulary was created.⁵¹

57. By 1922, the divide between Northern Ireland and the rest of Ireland was deepening as dissatisfaction with the 1920 constitution among Irish republicans led to war. A number of politicians in Southern Ireland opposed the 1920 constitution, which they felt kept too much authority in the hands of the British parliament and government. The Council of Ireland never came into being, and the original plan of cooperation between the two regions disintegrated.

58. In 1922, a new agreement between Britain and Ireland created the Free Irish State, ensuring that the six counties in the north-east could remove themselves from the provisions of the new state and remain a part of the United Kingdom. Under this constitution the Irish Free State was given dominion status, which meant it was now

⁴⁸ See, D. George Boyce, 'Northern Ireland: The Origins of the State', p. 19.

⁴⁹ See Lord MacDermott, 'The Supreme Court of Northern Ireland- two Unusual Jurisdictions', *Journal of the Society of Public Teachers of Law*, 2 (1952), 201-213, on p. 202.

⁵⁰ See Constabulary (Ireland) Act 1922.

⁵¹ See Constabulary (Northern Ireland) Act 1922

seceding from the United Kingdom. It had similar status to Canada, Australia, New Zealand and would have no representation in Parliament. However, Northern Ireland remained a part of the United Kingdom, with its parliament subject to the Westminster parliament. The post of Lord Lieutenant was abolished and a Governor General for Northern Ireland was appointed. The terms of this treaty had far-reaching significance for the future of Ireland. According to one expert, 'The Government of Ireland Act envisaged an eventual untied Ireland within the United Kingdom; but the Treaty resulted in the secession of the Irish Free State from the United Kingdom and, from a Unionist perspective, in the artificial partition of the British Isles'.⁵² By 1925, Northern Ireland was an entirely separate constitutional entity from the rest of Ireland– the divide was a constitutional reality with long-term implications.

59. What legal institutions did Belfast, an important industrial city and provincial centre, have prior to 1920? Belfast had grown quickly as an important industrial city during the nineteenth century. The population doubled from 87,000 to 175,000 between 1851 and 1871.⁵³ By the turn of the twentieth century, it had public institutions and a borough government in keeping with its status.⁵⁴ By 1911, the population had grown to 400,000. However, in terms of its legal institutions, Belfast was no more than a regional centre for the North Eastern circuit. It had solicitors and barristers just like any other large city in the Kingdom. It was comparable in size to Cardiff. However, at the turn of this century Cardiff had many more national and legal institutions and structures to sustain a jurisdiction than Belfast did in 1920.
60. On 25 August 1921, it was announced that the Supreme Court of Judicature of Northern Ireland would come into existence on 1 October 1921. The Supreme Court had a Court of Appeal and a High Court of Justice, and in July 1921 a head of the Supreme Court, the Lord Chief Justice of Northern Ireland, was appointed.⁵⁵
61. Following the establishment of the courts machinery, other institutions normally associated with a full, independent and self-contained jurisdiction gradually developed. Since the sixteenth century, Irish barristers had been based in Dublin, at King's Inn. King's Inn was established following the abolition of one of the city's monasteries, when the crown gave a lease of land and buildings in the north of the city to the Chief Justice of Ireland. From then on, it was possible for Irish barristers to complete their training and be received by the profession without having to join the Inns of Court in London.

⁵² See Thomas Hennessey, *A History of Northern Ireland 1920-1996* (Basingstoke: Macmillan, 1997), p. 22.

⁵³ Jonathan Bardon, *A History of Ulster*, p. 326.

⁵⁴ Jonathan Bardon, *A History of Ulster*, pp.386-400.

⁵⁵ See David Harkness, *Northern Ireland since 1920* (Dublin: Helicon, 1983), p. 18

62. With the creation of the Northern Ireland jurisdiction in 1920 the north-east of Ireland now formed a separate jurisdiction from the rest of Ireland, and, therefore the status and identity of the province's barristers had to be considered, and provision made for their regulation and representation. Initially an agreement was drawn up with the King's Inns authorities in Dublin that a committee of Bar leaders in Belfast would be responsible for the education and discipline of the profession there. Prospective Northern Irish barristers would now receive their training in Belfast. Following the opening of the new courts in Belfast in October 1921, they were called to the bar in Belfast rather than Dublin. Despite this, barristers trained in either Dublin or Belfast had the right to appear in courts throughout Ireland.⁵⁶
63. This agreement between the barristers of Belfast and Dublin continued up to 1926. when it was decided that an entirely independent centre for barristers in Northern Ireland, the 'Inn of Court of Northern Ireland' would be established. Rooms were obtained in Belfast for this inn of court, and a legal library was bought by Sir Denis Henry, the first Law Chief Justice, who died in 1925.⁵⁷ Similarly, the Law Society of Northern Ireland was established in 1922 for the governance of the solicitors' profession within the province. The Law Society set up its own law school for training and preparing students who wished to join the profession.
64. In addition, there was an academic response to the new constitutional and legal situation which came into being in 1920. There had been a legal department at Queen's University, Belfast since its establishment in 1848. It was an academic faculty and it was stated that 'the aim of the teaching in the Faculty is to give students, through the reading of law subjects, what can truly be called a university education'⁵⁸ Despite this, the academic department had a key role to play in providing training and education to the province's prospective lawyers and barristers, and a close partnership developed between the Faculty and the Inn of Barristers and the Law Society to facilitate this. In 1973, following the Armitage Report on legal education and training in the province, an Institute for Professional Legal Studies was established at Queen's University to provide vocational education for students wishing to practise the law. Students would attend the Institute after completing their degree (LLB usually), and the academic part of their education.⁵⁹

⁵⁶ The account is given by J. Ritchie, 'The Inn of Court of Northern Ireland: Its Foundation, Development and Functioning', *Northern Ireland Legal Quarterly*, 15 (1964), 463-469; also, J. A. L. MacLean, 'The Honourable Society of the Inn of Court of Northern Ireland', 23(1) (1972), *Northern Ireland Legal Quarterly*, 90-94.

⁵⁷ Ritchie, *ibid*, t. 466.

⁵⁸ J. L. Montrose, 'Legal Education in Northern Ireland', *Journal of Legal Education*, 5 (1952), 18-25, on p. 22.

⁵⁹ See J. H. S. Elliott, 'The Queen's University of Belfast: The New Institute of Professional Legal Studies', *International Bar Journal*, 9 (1978), 63-67.

65. A unified course was offered to prospective solicitors and barristers, but with some variation to reflect the differing training needs of the two branches of the profession. This is significant and highlights a difference between the situation in Northern Ireland and that of England and Wales, where vocational education for the two branches of the profession is separate. The comparatively small numbers in the legal profession in Northern Ireland, together with limited resources, meant that a joint vocational course was the most sensible way of providing vocational legal education.
66. In England and Wales, separate provision remains for those who wish to become solicitors and those who wish to practise at the Bar. With training contracts and pupillages in short supply, the Northern Ireland model may offer greater flexibility and ensure that doors are not shut too early for students, so that they have the option of becoming a solicitor or a barrister upon completing their vocational education.
67. In 1936 the *Northern Ireland Legal Quarterly*, an academic legal magazine, was established by academics at Queen's University, Belfast. The first edition explained why such a publication was necessary: 'Since the constitutional changes in 1920 there has been a marked divergence in the law and practice in Northern Ireland from that of England and the Irish Free State...the profession in Northern Ireland is faced with the fact that there is a considerable and growing volume of law and practice in regard to which resort to existing textbooks and other legal literature is no longer helpful...this journal will in an appreciable degree helps its readers to keep in touch with legal developments peculiar to Northern Ireland.'⁶⁰
68. The need to provide a source of information and commentary on Northern Irish laws was important. However, there was also a need for a wider approach, and there was an recognition of the importance of maintaining past connections and avoiding complete separation: '...the profession in Northern Ireland is bound by many ties and traditions to that wider community with which it formerly had closer association, and that although a progressive divergence must be anticipated in the respective legal systems, yet there is in these systems an underlying unity so great that it is appropriate and important that constant touch should be kept with the developments in law and practice in the wider community, and with the ideas inspiring such developments'⁶¹
69. The Government of Ireland Act 1920, which had defined the constitutional position of Northern Ireland for over seventy years, was repealed when the Northern Ireland Act 1998 (which implements the terms of the Good Friday agreement) came into force. The 1998 Act was passed with the aim of promoting peace. Its main provision was

⁶⁰ See editorial, *Northern Ireland Legal Quarterly*, 1 (1936), p. 4.

⁶¹ Ibid.

the creation of the Northern Ireland Assembly, thus restoring the legislature abolished in 1972 when the Northern Ireland Parliament was adjourned and direct rule from London imposed. There have been further Acts subsequently, such as the Northern Ireland Act 2006, to develop the current constitution, and also acts dealing with the administration of the courts. There were further reforms to the jurisdiction with the Justice (Northern Ireland) Act 2002. However, the model established in 1920 remains in effect the basis for the jurisdiction of Northern Ireland in terms of administration.

70. The courts of Northern Ireland are administered by the Northern Ireland Court Service established in 1979 under the Justice (Northern Ireland) Act 1978. The Court Service operates as a dedicated civil service for Northern Ireland and provides administrative support for the province's courts, tribunals and judiciary. It is also responsible for overseeing the enforcement of court judgements through a central enforcement service provided by the Enforcement of Judgements Office. It provides support to the Secretary of State for Northern Ireland and other ministers of the Crown, in complying with their statutory duties with regard to the administration of justice in Northern Ireland.
71. The Constitutional Reform Act (United Kingdom) of 2005 created the Supreme Court of the United Kingdom as the highest Court of Appeal for the courts of Northern Ireland. The Supreme Court took over the former function of the Appeal Committee of the House of Lords, which, since the 1920 Act, had been the main court of appeal for the province. Following these changes in London the title of the jurisdiction of Northern Ireland had to be altered somewhat, and it was known as the Supreme Court of Judicature up until 1 October 2009. It is now called the Court of Judicature of Northern Ireland.
72. Northern Ireland is represented on the Supreme Court of the United Kingdom by virtue of its status as a jurisdiction. The current member is Lord Kerr, the former Lord Chief Justice of Northern Ireland.
73. The current constitution of the jurisdiction in Northern Ireland was finally settled by the Justice (Northern Ireland) Act 1978. The Court of Judicature of Northern Ireland consists of the Court of Appeal, which sits in the Royal Courts of Justice in Belfast. The Court of Appeal comprises the Lord Chief Justice, who is the Presiding Officer of the Court of Appeal, and three Lord Justices of Appeal. High Court Judges are also entitled to hear appeals relating to criminal matters. The Court of Appeal hears criminal appeals from the Crown Court and civil matters from the High Court (including Judicial Reviews). The Court of Appeal may also hear appeals on points of law from county courts, magistrate courts and some tribunals.

74. The High Court also sits in the Royal Courts of Justice in Belfast. It is made up of the Lord Chief Justice (the Presiding Officer of the High Court), three Lord Justices of Appeal together with ten High Court Judges and two part-time High Court Judges. The High Court has three divisions, the Chancery Division, the Queen's Bench Division and the Family Division, to deal with the wide range of matters that come before it.
75. Of the other courts, the Crown Court has complete authority over indictable offences. These are serious criminal offences. The Lord Chief Justice is the Presiding Officer of the Crown Court and Lord Justices of Appeal, High Court Judges and County Court Judges are entitled to sit in the Crown Court. The Crown Court sits throughout Northern Ireland. The County Courts hear civil cases involving damages claims of less than £15,000. There are 17 county court judges and four district judges hearing cases in these courts. They have extensive powers to hear cases dealing with marital property or compensation for criminal damage. The magistrates courts, which include salaried judges and lay members, hear less serious criminal cases, young offender cases and some cases involving family matters. The Coroner's Court is led by a High Court Judge, together with a Senior Coroner and two other Coroners. Other quasi-legal officers include Social Security Commissioners and Child Support Commissioners.
76. As part of the responsibilities of the Northern Ireland jurisdiction, the province's police and prisons come under the authority of the Northern Ireland Assembly. The former Royal Ulster Constabulary was abolished to all intents and purposes in November 2001 when the Police Service of Northern Ireland was established in accordance with the Good Friday agreement. The Northern Ireland Policing Board ensures independent oversight of the police.⁶² The Northern Ireland Prison Service is an agency within the UK Department of Justice, and was established in 1995. It is responsible for the province's prisons, and forms a network of agencies with responsibility for criminal justice in the province. The Secretary of State for Northern Ireland is responsible for the service, which is administered by a Director General.
77. This therefore is the historical background and current position of the jurisdiction of Northern Ireland. How is the history and experience of Northern Ireland useful to Wales? Every situation is different, and it is futile searching for a firm precedent to be replicated exactly. However, the example of Northern Ireland suggests that a jurisdiction is sustainable in circumstances where the population is comparatively small. It is not necessary to look to Northern Ireland even in order to confirm the truth of that statement – the Isle of Man, for example, where the population is far less, proves the point

⁶² See: <http://www.psni.police.uk/>

(although the constitutional position of the Isle of Man differs as it is not part of the United Kingdom).

78. Northern Ireland provides a useful comparison due to its tradition of common law. It does not possess the same degree of separateness in terms of principles and legal tradition as seen in Scotland. If Wales became a jurisdiction it too would continue the common law tradition in the same way.
79. In their response to the Richard Commission in 2003, Sir Roderick Evans and Professor Iwan Davies demonstrated that Wales produces enough legal work compared with Northern Ireland to justify the need for a Welsh courts structure, and in particular a high court and a court of appeal.⁶³ Therefore, there is no valid argument against a Welsh jurisdiction in terms of demography. The Northern Ireland example also demonstrates how history is often manipulated to deny Wales its own legal structures.
80. Belfast and Northern Ireland did not have legal centres of any significance prior to the 1920 constitutional settlement. A new jurisdiction was created overnight. The creation of the Northern Ireland jurisdiction in 1920 was essentially an act of political will. The experience in Northern Ireland also shows that a jurisdiction can be a strong symbol of identity, and that a legal identity is a prerequisite for democratic identity to prosper.
81. In addition, the experience of the province is proof of the fact that creating a new jurisdiction does not mean a complete divorce from the former jurisdiction, and that it does not necessarily lead to isolation in terms of the administration of justice. As Carwyn Jones noted in a lecture some years ago: In terms of the legal profession, I believe it is important that there is ease of movement between Wales and England. It's quite possible we can learn lessons from how the system operates in Northern Ireland. There, any member of the profession can apply to practise in England and Wales.⁶⁴ The creation of a Welsh jurisdiction would not deprive the legal profession in Wales of opportunities to work in England.
82. Even following the establishment of a Welsh jurisdiction, there would be a close relationship between it and the English jurisdiction and the other UK jurisdictions. Appropriate legal principles would be adopted across the jurisdictions, in response to the need for cooperation on a state level on some legal matters, which would ensure that the establishment of a Welsh jurisdiction would not be an act of isolation nor entail complete separation.

⁶³ Sir Roderick Evans and Iwan Davies, 'The Implications for the Court and Tribunal System of an Increase in Powers' (Submission to the Richard Commission, 2003).

⁶⁴ See Carwyn Jones, *Law in Wales: The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 15.

Benefits

The Constitutional Argument

83. Following the development of the role of the National Assembly as a legislature, divergence between Welsh and English law is bound to increase.⁶⁵ This will require a Welsh judiciary and legal profession specialising in Welsh law and capable of providing accurate and intelligent legal solutions.⁶⁶ As the Lord Chief Justice, Lord Judge, said, the fundamental question to be asked of a legal jurisdiction or system is: 'does the citizen have the ability to hold the executive of the day, or any of the large and weightier authorities to account before an independent judge who will give the relief or redress which the law permits, or to require them to act lawfully?'⁶⁷

84. In considering the argument for a Welsh jurisdiction, Winston Roddick asked, 'What are the arguments for devolving the administration of justice?' His answer:

'In my opinion, the principal argument is that including responsibility for the administration of justice as part of a devolution settlement which devolves full law making powers 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? Secondly, it would be internally logical, consistent and coherent. Thirdly, it would make for consistency between the constitutions of Scotland, Northern Ireland and Wales and fourthly it would bring justice closer to the people for whom the laws were made.'⁶⁸

85. There is a mature argument for the creation of a separate jurisdiction because it is necessary if Wales is to operate in a way that is constitutionally valid, and consistent with the pattern generally found within the British state. Indeed, this pattern of having a legal jurisdiction and regional legislature is seen in devolved and federal countries throughout the world, such as Australia and Canada. I would call it the constitutional argument.

⁶⁵ See Timothy H. Jones, John H. Turnbull and Jane M. Williams, 'The Law of Wales or The Law of England and Wales', *Statute Law Review*, 26(3) (2005), 135-145.

⁶⁶ Timothy H. Jones and Jane M. Williams, 'Wales as a Jurisdiction', p. 101.

⁶⁷ An Address by Lord Judge, Legal Wales Conference, Cardiff, 9 October 2009.

⁶⁸ Winston Roddick, *The Development of Devolution and Legal Wales* (Annual Lecture of the Welsh Legal Affairs Centre, Aberystwyth University, 28 November 2008), p. 16.

86. This is possibly the most important argument. The core of the argument is that for democracy in Wales to mature and operate in accordance with democratic and constitutional standards seen in devolved regions and nations world-wide, Wales's own legal structures need to be consistent with those standards. The main role of the jurisdiction and its judges would be to allow the individual to hold the executive and legislature to account and provide remedies where the law is not upheld. The important constitutional role of the judiciary is to provide oversight of the actions of the legislature and government, in order to ensure that it behaves in accordance with international law and human rights standards. This has now become one of the most important constitutional roles of the judiciary within the British constitution.⁶⁹
87. Of course, it may be possible to provide a legal remedy where there is a failure to uphold the law within the current system, and some would insist that the current unified jurisdiction is quite capable of dealing with judicial reviews of decisions of the Welsh Assembly and Government. However this is not in keeping with the purpose and spirit of devolution, which aims to bring government and justice closer to the people.
88. In transferring government and legislative powers from London to Cardiff, devolution has established a different pattern of governance for Wales. If justice in Wales is controlled by processes and systems centred mainly in London, i.e. retaining the same system which existed prior to devolution, this runs counter to the aims of devolution and appears to disregard the message of devolution. Some might regard it as English interference in Welsh democracy and legislative autonomy, which would ultimately undermine confidence in the legal system.
89. On the other hand, in establishing a Welsh jurisdiction, the constitution would be more holistic from a Welsh and British perspective. In recognising a Welsh jurisdiction a constitutional situation would arise whereby a Welsh judiciary would hold the National Assembly and the Welsh Government to account. After all, that is the case in Northern Ireland and Scotland.

The Efficiency Argument

90. Divergence between Welsh and English legislation will undoubtedly grow in the coming years, which will heighten the need

⁶⁹ Bogdanor quotes Dicey as follows: 'In his *Introduction to the Study of the Law of the Constitution*, Dicey detected "three leading characteristics of completely developed federalism- the supremacy of the constitution- the distribution among bodies with limited and co-ordinate authority of the different powers of government- the authority of the courts to act as interpreters of the constitution".' Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford: Oxford University Press, 1999). p. 294. The role of the courts as an interpreter of the constitution is crucial in a democracy.

for a separate justice system. After all, if there is a body of law which is different for Wales, then there must be a legal system which can cope with that specifically Welsh context.⁷⁰ As Carwyn Jones noted:

When considering the need to locate more justice institutions in Wales, the Welsh Assembly Government is of the opinion that that has to be done within the context of increasing divergence between Welsh and English law, and also with reference to the bilingual nature of the legislation made by the Welsh Assembly Government and the National Assembly for Wales.⁷¹

91. A Welsh jurisdiction would obviously be able to plan for the legal needs of Wales in a comprehensive manner. The way has already been paved by the establishment of a unified administration for the courts in Wales. The culture change within the legal community means there is now an expectation that justice policy should be drawn up on a Wales-only basis.⁷² The call for a prison in North Wales was an example of this culture change, and a recognition of the particular needs of Welsh-speaking prisoners who face prejudice in English prisons.⁷³
92. Wales is the only country in the United Kingdom which has no control over criminal justice (again, unlike Northern Ireland and Scotland, and, indeed, the Isle of Man and the Channel Islands which are under British protection). *One Wales*, which set out governmental policy between 2007–11, expressed the Welsh Government's desire to see the devolution of the criminal justice system. In the short term, parts of the criminal justice system will undoubtedly be devolved. Welsh Ministers are already operating in some areas of the criminal justice system. This includes the police, young offenders, drugs-related crime, and health and education services for prisoners. There is a strong possibility that Welsh Ministers will take responsibility for policing and the Offender Management Service, including prisons. Indeed, the Government in Cardiff Bay may become responsible for the funding of HM Courts Service in Wales in the near future, which would be an crucial step towards advancing the needs of Wales in providing Welsh policies for Welsh courts.

⁷⁰ As Sir Roderick Evans noted, 'There can be no doubt that if the Assembly were to acquire the increased powers available under Part 4 of the act there would be an increase in Welsh legislation and an increase in the potential for the law in Wales in relation to devolved matters to differ from the law in England.': see Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

⁷¹ Carwyn Jones, *Law in Wales – The Next Ten Years* (Law Society Lecture, Cardiff and District National Eisteddfod of Wales 2008), p. 12.

⁷² 'we need a justice system which serves the whole of Wales – a system which provides a service which is reasonably accessible wherever you live in Wales and which is available to you in either Welsh or English. The system should be tailored to meet the needs of Wales and should be capable of providing work and good career structures in Wales for those who work in it.' See Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

⁷³ Sir Roderick Evans, 'Legal Wales- Possibilities for the Future', A Lecture at Bangor University, 22 February 2008, p. 18-21.

93. However, these matters could only be administered within an entirely Welsh structure under a full jurisdiction. By creating a High Court, a Court of Appeal and a Welsh High Court, under a Lord Chief Justice for Wales, focus and leadership would be provided for the legal system. It would also facilitate communication between the legal profession, the judiciary and the National Assembly as a legislature, which would reinforce the legal authority of the entire profession in Wales.

The Economic Argument

94. The scoping paper invites comments on the cost of establishing a Welsh jurisdiction. While I am not in a position to offer evidence on this, I would like to make some comments on the economic potential associated with creating a separate jurisdiction.
95. The establishment of a Welsh jurisdiction would allow the legal profession in Wales to develop its professional identity, possibly providing it with an economic boost. The development of this legal separateness has potential in terms of the development of legal expertise and skills to meet the needs of the constitution.⁷⁴
96. Research by Swansea University has indicated that there is a lack of legal skills within the legal profession in Wales. There is an overdependence on traditional legal work in crime and family law work, which are highly dependent on state legal aid, while not enough work is being generated by the private sector. The lack of skills and range of legal expertise is particularly acute north of the M4 corridor.⁷⁵
97. One harmful side-effect of this skills crisis is that substantial amounts of Welsh legal work is being exported to legal firms in England. Undoubtedly, remedying this deficiency, by developing the capacity of Welsh lawyers to provide high quality legal services, is essential if the profession is to contribute to the economic regeneration of Wales and to operate effectively within the devolved legislative context. A Welsh strategy for the legal profession, which tackles the skills crisis while recognising the constitutional, demographic, linguistic and social context of Wales, is greatly needed. These matters require Welsh solutions, and the development of a Welsh jurisdiction may provide a means of paving the way towards a prosperous future for the profession. The development of a Welsh jurisdiction could therefore be regarded as an economic opportunity for the legal profession. It would challenge the profession to develop

⁷⁴ Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

⁷⁵ See Iwan Davies and Lynn Mainwaring, 'The Provision of Private-practice Legal Skills in Wales', *Wales Journal of Law and Policy*, 4(3) (2006), 290-98.

expertise in new areas based on Welsh legislation.⁷⁶ The economic opportunity is key to the debate, and, as has been noted, ‘the contribution to the economy of Wales which a fully developed legal system would make would be substantial’.⁷⁷

98. Welsh Government support for the legal profession in Wales is important to the debate. By creating panels of Queen's Counsel and junior counsel to undertake advocacy and advisory work on behalf of the Welsh Government, the then Counsel General was aware of the importance of supporting the local profession. His message was warmly received: the Welsh Assembly Government wishes the legal profession in Wales to be aware that, whenever circumstances allow, it prefers to instruct local Counsel.⁷⁸
99. There is also an opportunity for education and training providers and legal scholarship in Wales to contribute to the task of developing a Welsh jurisdiction, ensuring that there is expertise in Wales to meet the needs of the new jurisdiction.
100. The Bar in Wales could possibly set up a professional presence in the capital in keeping with its presence elsewhere in the United Kingdom? Before long we could see the day when the Bar has a centre in Wales?

The cultural-linguistic argument

101. It is not necessary to go into too much detail on the important relationship between the Welsh language and the administration of justice in Wales.⁷⁹ As the right to use Welsh in legal proceedings is confined to Wales,⁸⁰ this linguistic dimension is an additional element to the argument in favour of a Welsh jurisdiction.⁸¹ According to Sir Roderick Evans:

⁷⁶ ‘If Welsh lawyers sympathetic to the continuing process of devolution have learnt anything thus far, it is the need for them to make a greater contribution to the constitutional development of Wales’: see Timothy H. Jones and Jane M. Williams, ‘Wales as a Jurisdiction’, pp.78-101, and on p.1.

⁷⁷ Sir Roderick Evans, ‘Legal Wales- Possibilities for the Future’, A Lecture at Bangor University, 22 February 2008, p. 1.

⁷⁸ Carwyn Jones, *Law in Wales – The Next Ten Years*, p.13.

⁷⁹ For an insight into the legal system's positive attitude towards the Welsh language, see, Lord Judge, ‘The Welsh Language: Some Reflections on its History’, Inaugural Lecture of the Hywel Dda Institute, Swansea University, 21 June 2011.

⁸⁰ See *Williams v Cowell* [2000]1 W.L.R. 187

⁸¹ ‘Our linguistic make up is fundamentally different from that of England. We have two official languages and court proceedings in Wales are conducted in Welsh and English on a daily basis – often with both languages being used in the same case. Traditionally, it is in the more rural areas of Wales that the Welsh language has been at its strongest and unfortunately it is often in these areas that the local courts have been closed either because they are regarded as too small or the cost of maintaining them regarded as too high.’: see Sir Roderick Evans, ‘Devolution and the Administration of Justice’, above.

I think...it is appropriate that the rights of Welsh speakers be confined to Wales. The political decision to so confine them, however, has an important consequence. If the right to use the language is to be meaningful, and if Welsh and English are to be treated on the basis of equality there must exist within the geographic area within which the statutory right applies all those institutions of the law in which legal proceedings take place and in which a Welsh speaker may want to exercise his statutory right to use the Welsh language.⁸²

102. These comments are also an important reflection of the importance of Welsh nationhood to the debate, in particular its most significant national characteristic, its language. What is striking is the current composition of the judiciary in Wales, with a number of them able to speak Welsh and possessing a deep understanding of the social and legal needs of Wales. The fact that twelve circuit judges, ten district judges, fifteen deputy district judges and thirteen recorders can conduct cases in Welsh is a sign of respect towards the language and its speakers within the legal system.⁸³

CONCLUSIONS AND OPTIONS

103. On the 3rd March 2011, a democratic mandate for the new constitution set up by the Government of Wales Act 2006 was achieved, and the National Assembly now operates as a legislature with primary law making powers within devolved subjects. This was an important step towards achieving greater constitutional concordance within the devolved nations of the United Kingdom. This is the context of this debate.
104. The arguments put forward in favour of the development of a Welsh jurisdiction do not stem from criticism of the current justice system, but rather from the need for an appropriate structural response within the legal system in Wales to the decision made by the people of Wales in March 2011.
105. On the other hand, it must also be acknowledged that legal bonds which have existed for centuries should not be severed lightly. As Rawlings said, 'a centuries-long process of legal, political and administrative assimilation with a powerful neighbour cannot be wished away'.⁸⁴

⁸² Sir Roderick Evans, 'Legal Wales- The Way Ahead', p. 7.

⁸³ See Sir David Lloyd Jones, *The Machinery of Justice in a Changing Wales*, p. 21.

⁸⁴ See Richard Rawlings, 'Say not the Struggle naught Availeth': *The Richard Commission and After*, Annual Lecture of the Welsh Legal Affairs Centre, Aberystwyth University, 2004, p. 23.

106. However, the argument for a legal jurisdiction is based primarily on the need to normalise the constitution in Wales by ensuring that there are Welsh legal institutions and structures that can operate within the constitutional context. In addition, such a development offers a democratic, legal, social and economic opportunity. Although the creation of a separate jurisdiction was not one of the conditions of the referendum vote in March 2011, the establishment of a jurisdiction is a sensible way forward and in keeping with the development of devolution in Wales today.

107. In a public lecture in 2006, Carwyn Jones recognised that the argument for a separate jurisdiction would intensify following an affirmative referendum vote in favour of a legislature. The development of a separate jurisdiction for Wales was recognised openly and publicly as one of the implications of such a decision. He said

I recognise that there is nothing within the Government of Wales Act 2006 in itself which creates a separate Welsh jurisdiction within the United Kingdom, and in my view there is currently no case for a separate jurisdiction. Nevertheless, if a situation arises whereby the Assembly has primary law making powers, it is inevitable, in my opinion, that we will have to have a debate on whether or not to retain a single unified jurisdiction for England and Wales. I'm not aware of anywhere else in the world which has a legislature with law making powers but no corresponding territorial jurisdiction.⁸⁵

108. Of course, the development of a Welsh jurisdiction, and the exact nature of that jurisdiction, may depend on the way the present unified jurisdiction successfully meets the demands of the new constitution.⁸⁶ As Sir Roderick Evans said, 'the ultimate decision may be heavily influenced by how responsive the present jurisdiction proves to be to the legitimate expectations of Wales.'⁸⁷

109. Whether Westminster legislation will be required will also depend on the answer to the question of how radical the next step towards creating a separate justice system for Wales will be? If a decision is taken to create a jurisdiction on the Northern Ireland model, with immediate effect, then the need for legislation would be

⁸⁵ Carwyn Jones, *Law in Wales – The Next Ten Years*, pp. 14-15.

⁸⁶ 'One factor which might prove influential in deciding whether Wales develops a separate structure from that in England will be the degree to which the present institutions of England and Wales are prepared to accommodate within an England and Wales jurisdictional structure the development in Wales of institutions, bodies and organizations which meet the developing needs of Legal Wales. A lack of flexibility in this respect on the part of England and Wales institutions and a failure or refusal to respond positively to the legitimate expectations of Wales are likely to result in hastening the creation of a freestanding legal system in Wales along the lines of those which exist in Northern Ireland and Scotland rather than prevent it.'; see Sir Roderick Evans, 'Legal Wales- Possibilities for the Future', p. 8.

⁸⁷ Sir Roderick Evans, 'Devolution and the Administration of Justice', above.

more apparent. Of course, that depends on just how substantial the changes introduced are. Legislation would not be required to create minor structural changes to court administration. To date, no primary legislation has been required to devolve or reorganise the justice system in Wales, as in the case of the Administrative Court and the boundaries of the Circuit.

110. Would another referendum be required? Jack Straw was of the opinion, that ‘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.’⁸⁸
111. However I am of the opinion that a referendum would not be required. A referendum was required to approve the role of the National Assembly as a legislature as that affected the law itself, the content of the law, and how and where primary legislation was made. But management of the legal system is an administrative and structural matter. The creation of a separate Welsh jurisdiction would not be enough to warrant a referendum. The argument over a separate jurisdiction is essentially an argument over the creation of new structures.
112. Therefore the development of a separate jurisdiction should be regarded as a by-product of the decision to create a legislature, as a necessary step to support the role of the legislature within the constitution, and in the context of the need for great concordance within the UK constitution. A further referendum will not be required to achieve this, and elected members in London and Cardiff might be expected to take the appropriate steps to establish the necessary legal structures. After all, was there a referendum prior to the establishment of the European Court of Justice or the International Criminal Court, developments which created important international legal jurisdictions? I am not aware of any precedent where a referendum has been held purely to establish a legal jurisdiction.
113. Before any legislation could be introduced to establish a Welsh jurisdiction on the Northern Ireland model, there would need to be clarity about legal, constitutional and economic implications. I believe that holding a comprehensive inquiry into the issue by means of a commission (such as the Richard Commission which laid the foundations for legislative devolution to Wales) would be beneficial. Such a commission could include constitutional and legal experts with a remit to gather detailed evidence and provide options and, where appropriate, recommendations for legislation. On the other hand, bearing in mind that the Silk Commission is currently examining constitutional arrangements in the wake of devolution, it may be in the

⁸⁸ The Lord Chancellor and Justice Secretary, the Right Honourable Jack Straw MP, ‘Administration of Justice in Wales’, above.

competence of this commission to consider the argument for a separate jurisdiction as part of its remit.

114. As an alternative to developing an entirely separate jurisdiction, gradual improvements and changes to the administration of the current system not requiring legislation could be considered while at the same time retaining a single unified jurisdiction. For example, rather than establishing an entirely separate judiciary for Wales under a Lord Chief Justice, the post of Presiding Judge for Wales could be upgraded and designated as a Deputy Lord Chief Justice (Wales). The term of the office could be extended and more responsibilities for the courts and judiciary in Wales delegated. This suggestion was made by Lord Dafydd Elis-Thomas in his lecture at the National Eisteddfod some years ago. He suggested that the Presiding Judge for Wales should serve for a term of six years rather than four, as is currently the case, and that he should be referred to as The Lord President of the Courts in Wales.⁸⁹
115. However it should be remembered that these comments were made before the constitutional developments following the March 2011 referendum. Such an idea may now no longer be ambitious enough to address the situation in Wales. Rather, an independent judiciary within a separate jurisdiction may provide the way forward.
116. If it is decided to adapt the single unified jurisdiction, at the very least permanent offices for the High Court and the Court of Appeal in Wales could be secured to deal with appeals from Wales and to ensure that they are heard in Wales.
117. The Welsh legal profession is gradually adapting to the constitutional changes, and the Law Society has its office in Cardiff. The Standing Committee of Legal Wales is a further example of the legal profession's response to the new constitutional context. Professional devolution should be encouraged and supported in order to ensure a presence in Wales. In addition, the establishment of a Legal Education Council for Wales would be a means of promoting legal scholarship within the universities which would provide due and proper consideration of Welsh law and the legal implications of devolution within the curriculum. The Education Minister in Cardiff is in a position to facilitate this development.
118. Ultimately, it is for elected members in Cardiff and London to decide to what extent, in what way and at what pace the legal system in Wales should be modified to meet the constitutional needs of Wales. While the support of the legal profession for any changes introduced is desirable, there is a duty on the legal community to fulfil the wishes of the people of Wales as expressed by democratic processes and elected representatives.

⁸⁹ Dafydd Elis Thomas, in his lecture, 'Wales's New Constitution, National Eisteddfod of Wales, Bala, 2009.
