

INQUIRY INTO THE ESTABLISHMENT OF A SEPARATE WELSH JURISDICTION

Evidence submitted to the Constitutional and Legal Affairs Committee of the National Assembly for Wales

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Summary

1. This paper addresses the first of the issues raised in the Committee's call for evidence, namely what is meant by the term "separate Welsh jurisdiction".
2. It argues that by applying a strict interpretation of the concept of jurisdiction, based on the way the term is used in some of the civil law countries of mainland Europe, the current position and needs of Wales as a distinct law district become clearer.
3. The argument reflects and develops views expressed by the author in his contribution to the discussion organized by the Law Society (Wales) on the issue of a Welsh jurisdiction at the National Eisteddfod at Wrexham in August, 2011. The other contributors to that discussion were Professor Richard Wyn Jones and Mr. Emyr Lewis.

The term 'Jurisdiction'

4. The Committee's scoping paper refers to a definition of jurisdiction as "the territory or sphere of activity over which the legal authority of a court or other institution extends". It also states that England and Wales currently form a single jurisdiction.
5. The word *jurisdiction* in English is used less strictly than equivalent terms in other European languages – at least in doctrinal legal writings in those languages, even though it is derived from the same linguistic root as those other terms.
6. Whereas the focus of the term in English, as defined in ¶4 above, is the extent of the authority of courts, in other parts of Europe the focus is on what that authority is actually for, from which one then determines its appropriate extent. The looser English usage has, in the past, enabled the concept to be used as a reason, or as an excuse, to block or attempt to block legal developments, such as distinct legal provision for Wales (1880–1) or creating an office of Secretary of State for Wales (late 1930s/40s).

Jurisdiction as 'legal authority'

7. The English word *jurisdiction*, like its counterparts in other languages, is derived from the Latin *juris dictio*, meaning 'a stating (*dicere*) of the law (*ius*)', that is *law* in the sense of 'what is lawful or just' (*ius*) rather than law as 'what is enacted' (*lex*). This distinction in the meaning of *law* is to be found in most modern European languages, but not in English. Jurisdiction in this sense is the authority to state what the law is – the *Oxford English Dictionary*'s 'power of declaring or administering law or justice'.

Jurisdiction as 'the legal authority of a court'

8. In doctrinal writing on the law in several European countries, the word *jurisdiction* is used to describe the authority of a court in doing what courts are established to do,

namely administer a body of law regarding a particular legal subject. Wherever a body of law (*corpus iuris*) exists, there must be a court or courts with the authority to administer it, in the sense of stating it, applying it and, when necessary, interpreting it, in individual cases. Rules of law are expressed at a general level; it is for the courts to apply those general rules to particular cases, in so doing state how the general rule applies to the particular case and, where necessary for its application, interpret the rule in order to apply it.

Jurisdiction as ‘the legal authority of ... other institution(s)’

9. It is not only courts that state the law (*ius dicere*). Tribunals also rightly fall within the definition. It may however be thought that legislatures also fit the definition in that they also state the law. Herein, however, lies a possible source of confusion. In most European languages and legal systems, legislatures would not be described as having jurisdiction, for they do not make law in the sense of *ius*, but rather law in the sense of *lex* – ‘what is enacted’ not ‘what is just or right’. Courts declare law in the latter sense, albeit in accordance with legislation as a source of that law. Even in English, this distinction is recognized as courts are said to administer *justice*, not merely law, for they state the law as it applies to a particular case, so as to achieve a *just* result in accordance with the law.
10. The territorial and subject-matter competence of a legislature – in the case of Wales the Assembly’s competence to legislate in relation to Wales (territorial competence) in relation to the subjects listed in Part 1 of Schedule 7 (subject-matter competence) – is also a different matter from the territorial and subject-matter competence of the courts which declare and administer the laws it makes (discussed below – ¶13–¶18), although concurrence between the territorial and subject-matter competence of a legislature on the one hand and the jurisdiction of the courts which declare and administer its enactments on the other arguably makes for a more understandable legal arrangement than that currently afforded by the extent/applicability distinction (discussed below – ¶21–¶24).

Jurisdiction as the legal authority of a court over a ‘sphere of activity’

11. *Jurisdiction* as used in civil law countries, as opposed to those of the common law tradition, refers to the authority of a court or courts to declare and apply a particular body of law. Thus, where there is a distinct body of criminal law, it follows that there must be courts charged with applying that law to particular cases. These courts are those with criminal jurisdiction. Where there is a distinct body of commercial law dealing with mercantile matters, there will have to be courts with the authority to declare and apply that body of law – courts with commercial jurisdiction. Wherever a distinct body of law exists, there has to be a court or courts with authority to declare and administer it – that is, with jurisdiction over it. The existence of a distinct body of law necessitates the existence of jurisdiction over it – over that ‘sphere of activity’. One cannot have one without the other. *Jurisdiction* in this sense is a necessary concomitant of the existence of a distinct body of law. This remains true even when a court has jurisdiction over more than one body of law.
12. Viewed thus – *jurisdiction* as a sphere of activity, as authority over a particular body of law – the question relating to the legal status of Wales is not whether there *ought to be* or *can be* a Welsh jurisdiction but whether there *is* a Welsh jurisdiction. If there is a separate body of law relating to Wales, it follows that there must be courts with jurisdiction to administer it by applying it to particular cases and, in so doing, declaring it and, when

necessary, interpreting it in order to apply it. The existence of such a jurisdiction is a matter of fact not of choice. The choice relates to what is done in recognition of that fact.

Jurisdiction and Competence

13. A strict distinction is also made in civil law countries between the jurisdiction of a court and its competence. In English, the term *jurisdiction* is sometimes used where a civil lawyer would use the term competence. While the definition in ¶4 correctly reflects one use of the term in English, it also illustrates the confusion in English between these two concepts – *jurisdiction* and *competence*, for competence also relates to the extent of a court's legal authority, regarding both territory and spheres of activity – but differently.
14. For the civil lawyer, the jurisdiction of a court relates solely to the question of what body or bodies of law it administers. Courts can have, for instance, criminal, commercial, constitutional, civil or administrative law jurisdiction.
15. Courts must also have competence. Their competence relates to three things: the territory within which they may exercise their jurisdiction, the subject-matter regarding which they may exercise their jurisdiction, and the level of adjudication which they are entitled to perform.
16. The territorial competence of a court relates to the geographical area in which it has authority to exercise its jurisdiction. Thus, for instance, a magistrates court may have criminal jurisdiction but only be competent to hear and determine cases arising within its own locality.
17. The same is true of subject-matter competence. A magistrates court with criminal jurisdiction can hear criminal cases but its competence is limited to minor offences. The Crown Court, likewise with criminal jurisdiction, has competence to try serious crimes. In the civil jurisdiction, the subject-matter competence of the county court is limited, but that of the High Court is not. Here again, the definition in ¶4 may confuse two concepts, for the words 'sphere of activity' could mean either a body of law the court administers (its jurisdiction) or the subject-matter over which it has competence – or indeed both.
18. Finally, some courts – exercising a particular jurisdiction – will only be entitled to hear cases which are being tried for the first time – first instance competence, while others will be allowed to hear appeals from the decisions of lower courts. The functional competence of courts within their jurisdiction is therefore also distinguished, with some having first instance competence, some competence to hear appeals and at least one with competence to conduct a final review of decisions on points of law only. In the United Kingdom, this last is the Supreme Court of the United Kingdom with functional competence as the final review court and territorial competence throughout the UK across several jurisdictions in the sense used here – criminal, civil, etc. Even in civil law countries, the court of final review frequently has jurisdiction over several bodies of law, although there are sometimes separate chambers corresponding to the several jurisdictions exercised. The words 'sphere of activity' could also be taken to cover functional competence.

Competence and Administrative Practice

19. Until the 1970s, the legal system of England and Wales was highly centralised, with, in civil matters, the High Court and the Court of Appeal based in London. Today, both the High Court and the Court of Appeal can and do sit in other centres, including locations in

Wales. In addition, some specialist courts – such as the Administrative Court – also now sit in Wales to hear cases involving Wales.

20. Whether a case is listed to be heard in Wales or elsewhere depends upon the administrative practices of the courts rather than, in other countries, rules of law delimiting the competence of the courts with regard to the territory from which litigation may come before them as well as the subject matter of the litigation.

Applicability and Extent

21. Currently, there is a body of law in existence which applies only to Wales. This body of law emanates from a number of sources, including enactments of the UK parliament, enactments of the National Assembly and legislation made by the Welsh Ministers.
22. This body of law is a distinct part of the law of England and Wales, which law now consists – in terms of its applicability – of three distinct parts: the law of England and Wales that applies to both England and Wales; the law of England and Wales that applies only to England, and the law of England and Wales that applies only to Wales. The last two bodies of law are set to increase in size, while it is likely that the first-mentioned will decrease.
23. All three bodies of law *extend* to England and Wales, even though some laws apply only to England and some apply only to Wales. This means that jurisdiction over all three bodies is shared by the same courts. A court in Newcastle or Penzance has jurisdiction over the law applicable only to Wales and a court sitting in Haverfordwest has jurisdiction over the law applicable only in England.
24. The likelihood of problems arising in consequence of this is probably slight. Cases dealing with the law applicable only to Wales are likely to be commenced or listed to be heard in Wales. Nevertheless, it needs to be asked whether it is time for the jurisdiction or the competence of the courts of England and Wales to be legally defined as opposed to administratively regulated so as to ensure that Welsh cases are heard in Wales. Reasons for doing so exist.

An existing distinction

25. Returning to the geographical scenarios above, there is an existing difference between the trial of a case in Haverfordwest and the trial of a case in Newcastle. The former trial could be conducted in Welsh, while in the latter there would be no right for the parties to use that language during the course of the trial.
26. The right to use Welsh before the courts is limited to the territory of Wales. In effect, therefore, a territorial distinction already exists between courts which otherwise have the same jurisdiction. If this territorial distinction regarding the linguistic rights of litigants were formally recognized as a rule determining the courts' own territorial competence – so that cases arising in Wales or relating to Wales could only be tried by courts in Wales – it would prevent persons losing that linguistic right for reasons of administrative convenience.
27. It needs to be emphasized that this is not something which flows from the existence of a body of law applicable only to Wales; it applies to the adjudication of all bodies of law

which apply in Wales. In the strict sense, therefore, this point goes to competence not jurisdiction.

28. The existence of a body of law applicable only to Wales does however introduce a further dimension regarding the need for such a rule of territorial competence and arguably, because a distinct body of law is involved, a formal jurisdictional separation with regard to the administration of the bodies of law that apply in England and in Wales respectively.

A distinct body of law

29. That portion of the law of England and Wales which applies only to Wales is distinct from the other two portions in another important respect. Much of the legislation within that portion is distinct from the remainder of the statute law of England and Wales in that it is made bilingually. Further, the Welsh and English versions of such bilingual legislation are by statute to be treated as of equal standing for all purposes. They are therefore to be of equal standing when it comes to applying their provisions, including any interpretation of those provisions which their application may require. Courts with jurisdiction over that distinct body of law must therefore treat the two versions as of equal standing when interpreting the law, which will certainly mean that in some cases, the meaning of the versions taken together will fall for consideration, and arguably, for safety's sake, requires such consideration whenever a point of interpretation arises.
30. If courts throughout England and Wales have jurisdiction over this body of law, then courts in Newcastle or Penzance, as much as Cardiff or Caernarfon, must be expected to deal with this bilingual legislation with equal ability. If that cannot be done, then the notion that they can have legal authority over this sphere of their activity is compromised. Given that courts sitting in England as opposed to those sitting in Wales are not expected to try cases or hear litigants in the Welsh language, they can hardly be expected to declare and interpret laws which have been made in that language as well as in English if both versions are, as statute requires, to be treated as of equal standing. At the very least, therefore, a rule of competence is needed by which, as with Welsh language or bilingual hearings, hearings which could involve laws made bilingually must be heard in Wales. Given that such laws can only exist in relation to the subjects listed under the twenty headings of the National Assembly's current legislative competence, in effect hearings with regard to the devolved subjects should fall to be heard in Wales. Only courts in Wales would be competent to hear such cases so that, in effect, with the exception of the Supreme Court, only courts in Wales would have jurisdiction over that body of law.

Courts with a distinct competence

31. When one combines this with the existing rule that it is only in Wales that the Welsh language may be used in trials, the end result is the need for a rule of territorial competence ensuring that litigation relating to Wales is as a general rule, and not as a matter of administrative practice, heard only by courts in Wales. This would ensure that if any party to proceedings wishes to use the Welsh language, they will be able to do so, and also ensure that if bilingual legislation falls for consideration, both versions will be treated, as statute demands, as being of equal standing for that purpose.
32. Given that, apart from the Supreme Court, only decisions of the Court of Appeal are binding on lower courts and that contentious issues of statutory interpretation are more likely to be determined at that level, it is at that level most of all that it will be essential

for the judges to be able to deal effectively with issues arising from the interpretation of bilingual legislation. Likewise, where a case has been heard at first instance in the Welsh language, the appeal court should be able to hear the appeal also in Welsh. It follows that a distinct chamber of the Court of Appeal is needed with the capacity to hear and determine cases in Welsh and to hear and determine cases which involve the application, and therefore the possible interpretation, of bilingual legislation. Given that not all judges sitting in lower courts will have the ability to interpret bilingual legislation, it may also be appropriate to allow questions of such interpretation to be remitted to the appeal court for determination prior to judgement being given at first instance. It would be appropriate for that court to sit permanently in Wales. In other words, with regard to jurisdiction over the body of law applicable only in Wales, a Court of Appeal sitting in Cardiff would be the court of second instance, and it would also be the only court with territorial competence over appeals regarding first instance decisions in trials conducted in Welsh under the body of law which applies in both England and Wales. Arguably, it might also be the only court with territorial competence over all first instance decisions taken in Wales, and conversely it should probably not have territorial competence over first instance decisions taken in England, nor jurisdiction with regard to that body of law which applied only in England.

33. Competence regarding final review on points of law could still lie to the Supreme Court of the United Kingdom, where the issue of the interpretation of bilingual legislation and familiarity with other aspects of the law applicable only in Wales would need to be resolved and could be resolved by ensuring that the Court had amongst its members judges with the necessary knowledge and experience of the law in Wales, as currently required by statute with regard to Scotland and Northern Ireland.

Conclusions

34. The concept of Wales being ‘a separate jurisdiction’ therefore resolves itself into two basic questions:

should courts in Wales have exclusive jurisdiction (in the strict sense) over laws which apply only in Wales; and,

should courts in Wales have exclusive territorial competence (in the strict sense) over cases which relate primarily to Wales under the law which applies to England and Wales.

35. It is submitted that there are sound reasons, as outlined above, for responding affirmatively in both instances.
36. In terms therefore of the looser meaning of *jurisdiction* in English, there are good reasons for holding that only courts in Wales should have legal authority over the territory of Wales regarding those spheres of activity which are regulated by laws applying only in Wales and with regard to those regulated by laws applying in both England and Wales.

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