



Constitutional and Legislative Affairs Committee

A Welsh Jurisdiction

Scoping Paper

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This briefing has been produced by the Research Service for use by the Constitutional and Legislative Affairs Committee.

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1. Introduction

In June 2011 the Constitutional and Legislative Affairs Committee considered a number of topics for future inquiries, including a Welsh jurisdiction. The Committee subsequently considered a paper on a Welsh jurisdiction and agreed that it would include an inquiry on this issue in its forward work programme. This paper sets out background on the issue and the terms of reference the Committee has agreed for the inquiry.

2. The Welsh Government's "public debate"

Since the Committee decided to inquire into a Welsh jurisdiction the First Minister announced that the Welsh Government would be initiating a "public debate" on this issue. He stated:

The Counsel General and I are agreed that this is not simply a matter for politicians and civil servants to discuss. The debate must be much wider than that and we need to obtain the broadest range of views possible, and not just from the legal community.

We must be clear about what we mean by a separate jurisdiction. What are the prerequisites for its existence? What flows from it? What might be the benefits for the people of Wales?

Early next year the Welsh Government will initiate a public debate on this issue. We will start by inviting the widest possible views from within and outside Wales. The responses we receive will help to inform the Welsh Government's thinking in preparation for the work of the Commission on the Welsh devolution settlement which the Secretary of State for Wales has indicated she will shortly appoint. Assembly Members' views on the issues will be particularly welcome as the debate goes forward.¹

3. The Status Quo

A jurisdiction is the territory or sphere of activity over which the legal authority of a court or other institution extends. England and Wales currently form a single jurisdiction.² In a 2010 lecture the Hon. Mr Justice Roderick Evans summed up the current position in Wales:

Although Wales appears in the name of the jurisdiction of England and Wales, the jurisdiction is centred in and dominated by London. It is a unitary jurisdiction and, except for necessary provisions relating to the use of the Welsh language in proceedings in Wales, Wales has been treated over the years as though it is part of England and no institution of the law exists in Wales which does not also exist in the regions of England.³

He also explained the wider context across the United Kingdom:

In the United Kingdom there are a number of jurisdictions which have developed for political and/or historical reasons; Scotland and Northern Ireland have their own jurisdictions and England and Wales form a further jurisdiction. None of those jurisdictions is entirely self contained or watertight and there are significant cross-overs between them one of which I have just referred to in the context of tribunals. An important feature of the Scottish and Northern Irish jurisdictions is that each has its own judicial structures.⁴

4. The History⁵

Although the Acts of Union of 1536 and 1543 made Wales subject to English laws the administration of justice in Wales has only been unified since 1831. The Laws in Wales Act 1536 did not cater for how the courts were

¹ [Written Cabinet Statement, the First Minister, the Rt. Hon. Carwyn Jones AM, Public Debate: Separate Legal Jurisdiction, 7 October 2011 \[accessed 16 November 2011\]](#)

² Oxford English Dictionary definition of jurisdiction.

³ [The Hon. Mr Justice Roderick Evans, The Lord Callaghan Memorial Lecture 2010, Devolution and the Administration of Justice, Swansea University, 19th February 2010 \[accessed 16 November 2011\]](#).

⁴ Ibid.

⁵ Thomas Glyn Watkin, *The Legal History of Wales*, University of Wales Press, 2007. P.145

to be organised in Wales. This was rectified by the 1543 Act, which created a separate system of courts for Wales (with the exception of Monmouthshire, which was incorporated, for legal purposes, into the Oxford circuit of the English courts). The new system of Welsh courts, the Courts of Great Sessions in Wales, were entirely distinct from the English courts and although they applied the same laws as those that applied in England, there were significant differences in how they did so.

The Court of Great Sessions in Wales was abolished by the *Administration of Justice Act 1830* and it was not until then that a single England and Wales jurisdiction, with a single system of courts, was finally created. The idea of a separate system of courts in Wales, taking account of Welsh circumstances, was therefore recognised by the Tudor constitutional settlement and the fusion of the courts of both countries into a single system is a relatively modern development.⁶

5. Arguments in favour

Since the YES vote in the referendum on 3 March 2011 calls for a separate Welsh jurisdiction have strengthened from some quarters.

The First Minister raised the issue of a Welsh jurisdiction in speeches in 2007 and 2008 when he was Counsel-General. He returned to this theme when he appeared before the Committee for the Scrutiny of the First Minister in March 2011.

I am not aware of any other part of the world where two primary-law-making institutions exist within the same jurisdiction, passing laws in the same areas of responsibility. However, this is not something to be rushed into. First, we have to define what we mean by a separate jurisdiction. It does not mean, for example, that every aspect of law has to be devolved. In Scotland, where there is a separate jurisdiction, there are some areas that are still reserved—employment law, for example, and some areas of the criminal law under the Misuse of Drugs Act 1971, along with firearms legislation and abortion legislation. Those are all reserved to Westminster, even though Scotland is a different jurisdiction.⁷

However, he did not see Wales emulating Scotland:

It would not be in Wales's interests for a jurisdiction to be set up along the lines of Scotland, which is so different that common lawyers from England and Wales, Northern Ireland, Australia and New Zealand are not able to practice there without re-qualifying. Northern Ireland has a separate jurisdiction, but, to all intents and purposes, it runs parallel to the system in England and Wales—it is almost identical, and it is easy for lawyers to cross between those jurisdictions.

Leading legal figures such as the former Counsel General, Winston Roddick QC and circuit judge, His Honour Philip Richards have argued that with expanded legislative competence Wales should have control of the administration of justice.⁸ In a lecture to the Centre of Legal Affairs in Aberystwyth, Winston Roddick stated:

What are the arguments for devolving the administration of justice? It should not be thought that the re-emergence of Wales' distinct identity in matters of law and the administration of justice is to be attributed entirely to devolution. The process of change began much earlier. It has been taking place albeit very gradually for about 63 years. Some may quarrel with that figure of 63 years and therefore I should explain that I take it from the passing of the Welsh Courts Act, 1942. That Act might have been the smallest possible step forward but it began a process of change to which momentum was added by the Welsh Language Acts of 1967 and 1993 and the pace of which quickened following the passing of the Government of Wales Act 1998. Since 1942, therefore, the scope for doing it differently in the practice and the teaching of the law in Wales has increased. Once we come to understand the significance of Legal Wales and the significance of the fact that Wales is an

⁶ National Assembly for Wales Legal Service

⁷ [RoP, Committee for the Scrutiny of the First Minister, 22 March 2011.](#)

⁸ His Honour Philip Richards, "Creating a Welsh Jurisdiction", *Agenda*, Spring 2009

emerging jurisdiction, once we acknowledge these significant developments, we see immediately the case for not excepting jurisdictional devolution from the next settlement.

But these are the historical arguments. What are the constitutional arguments? 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.⁹

6. Arguments against

An article in the Law Gazette considering legal changes in Wales and the implications of Yes vote in referendum reported that “for many practitioners, the idea that a ‘yes’ vote is a step towards Wales becoming a separate jurisdiction prompts the comment ‘not in my lifetime.’¹⁰ Huw Williams of the Law Society was quoted as saying:

A lot of the features that are essential tools for a legislature to mould its own legal jurisdiction are simply not there and the powers that would be needed to create that are some way off.¹¹

Another practitioner quoted in the article argued that Welsh laws are inextricably linked with those of England and there are considerable practical implications.¹²

In 2009, the then Lord Chancellor, the Rt.Hon Jack Straw MP QC, addressed Law Society of Wales and outlined his strong reservations about a separate jurisdiction:

My strong advice is that there are overwhelming arguments against a move towards separate jurisdictions. No one should underestimate the enormous practical implications. Would decisions of the English courts become merely persuasive in Welsh cases, rather than binding, for example? Would a separate legal profession need to develop, with its own systems of professional regulation? Could Welsh judgments be enforced against English defendants, or Welsh proceedings served in England? 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.

Moreover, it does not follow that, because there are different legal texts to be applied on each side of the border, there needs to be separate jurisdictions by virtue of those differences alone. Our courts are well used to considering bespoke texts, related to specific geographical areas or circumstances, and in areas ranging from public law to contract. What underpins a common jurisdiction is a common jurisprudence, system and procedure. What this means, I suggest, is not no change, but the possibility, if there is consent for this, of an 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.¹³

The All Wales Convention found a general consensus that a separate jurisdiction is not required at this time. It concluded that while Wales needs appropriate legal institutions and systems to support the progress of devolution and the developing legislative competence of the National Assembly for Wales, a separate Welsh jurisdiction is not a precondition for the development of increased legislative competence. It concluded that

⁹ [Winston Roddick QC, *The development of devolution and Legal Wales*, Ninth Annual Lecture of the Centre for Welsh Legal Affairs, Aberystwyth University, 28 November 2008](#)

¹⁰ Law Society Gazette, *How more devolved powers in Wales could affect the law*, 20 January 2011

¹¹ Ibid.

¹² Ibid.

¹³ Rt. Hon. Jack Straw MP QC, *The Administration of Justice in Wales*, Speech to Law Society Wales, 3 December 2009.

the courts of England and Wales are fully competent to decide cases involving the laws of England and Wales, the laws. However, it did make the point that as more and more legislation is enacted in Wales over time, the case for a separate jurisdiction will strengthen.¹⁴

7. The future

Although the administration of justice is not a devolved responsibility, it too has been the subject of significant developments in Wales since 1999. These include:

- in 2007 the annexation of North Wales to Chester for the purpose of administration of justice came to an end by establishing Her Majesty's Court Services Wales (HMCS Wales). The administration of justice in Wales is now administered on an all Wales basis;
- the creation of a Mercantile Court for Wales;
- most judicial review cases involving decisions of Welsh public authorities including the National Assembly for Wales are heard in Wales;
- regular sittings of the Court of Appeal Civil Division in Cardiff;
- regular sittings in Cardiff of the Court of Appeal Criminal Division;
- establishment of the Administrative Court of Wales;
- establishment of a Chancery Court in Wales;
- appointment of a High Court Judge whose fluency in Welsh enables him to conduct trials bilingually or entirely in Welsh, according to the wishes of the parties, without translation;
- the Employment Appeals Tribunal decided it would sit regularly in Wales.¹⁵

There is broad agreement that there has been a clear trend in establishing a separate "legal personality" for Wales since devolution. The committee will wish to consider during the inquiry the extent to which the legal personality of Wales can develop further short of becoming a separate jurisdiction.

8. Terms of Reference

The Committee has no wish to pre-empt the wide-ranging public debate promised by the First Minister. The objective of the inquiry, therefore, is for the Committee to contribute to the public debate on the need for a separate Welsh jurisdiction by taking expert evidence on:

- What is meant by the term "separate Welsh jurisdiction"
- 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; and
- To report to the Assembly.

¹⁴ All Wales Convention Report, 2010

¹⁵ Op.cit, Roddick 2008 and [Click on Wales, Factfile: Legal](#). [accessed 7 July 2011]